

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MWANZA SUB-REGISTRY)**

AT MWANZA

PC. CIVIL APPEAL. NO. 04 OF 2022

(Arising from the decision of the District Court of Ilemela in Misc. Civil Application No. 16 of 2021 originating from civil revision no. 03 of 2021 which arose from Probate & Admin. Cause No. 61/2020 at Ilemela Primary Court)

SADIKI OBADIA MAKAUAPPELLANT

VERSUS

TUNU ALEX SAMWENDA.....RESPONDENT

JUDGMENT

8th April, & 18th May, 2022

DYANSOBERA, J.:

By a petition of appeal filed on 18th day of November, 2021, the appellant seeks to impugn the ruling of the District Court in Misc. Civil Application No. 16 of 2021 on the following grounds of appeal, namely:

1. That the court erred to reach its decision without taking into consideration that the appellant was diligent enough in pursuing his matter before the court.
2. The court erred when reaching to its decision by punishing the appellant for the mistake he didn't occasion himself.
3. That the court erred in law in deciding existence of points of illegality in the decision intended to be appealed against prematurely.

4. That the court erred by not deciding some of the matters which constitute illegality notwithstanding the fact that they were not properly controverted by the respondent considering that the matter concern the estate of the deceased who profess Islamic faith.
5. That the whole decision was against the law and evidence on record.

The historical background of the matter can be summarised thus. The respondent is the administratrix of the estate of the late Alex Samwenda Makau. The deceased died intestate on 3rd April, 2020 at Bugando Hospital. The respondent was appointed by the Primary Court of Ilemela District at Ilemela Urban on 10th day of November, 2020 in Probate and Administration Cause No. 61 of 2020. The respondent was appointed after the appellant's objection was dismissed for want of merit. The appellant's application for revision (Civil Revision No.03 of 2021) filed before the trial court was struck out for being incompetent. The appellant then filed an application for extension of time in which to appeal alleging serious illegalities and irregularities.

In his ruling dated the 29th day of October, 2021, the learned Resident Magistrate, after considering the lower court record and the submissions,

was satisfied that the appellant had failed to account for each day of delay and that the alleged illegalities and irregularities did not touch on the jurisdiction and limitation. He, consequently, dismissed the application with costs for want of merit. The appellant was aggrieved by the decision of the District Court hence this appeal.

The hearing of this appeal was conducted by way of written submissions and the parties complied with the time frame. Mr. M.S. Mwanaupanga, learned Counsel, filed written submission in chief in support of the appeal and a rejoinder while respondent's written submission in reply was filed by Mr. Silas John, learned Advocate.

Supporting the appeal, Mr. M.S. Mwanaupanga made the following submission. Respecting the first ground of appeal, it was submitted that the appellant was diligent in pursuing the matter before the court. The appellant decided to file Revision No. 03 of 2021 seeking to challenge the trial court's decision on his objection being overruled but the revision was struck out on the ground that the proper remedy for the appellant was for him to file an appeal. Having found that he was time barred, the appellant decided to apply for extension of time. It was insisted that the appellant was diligent as he was prosecuting the matter in the District Court. This court was referred to the cases of **CRDB Bank PLC v. Victoria General Supply Co.**

Ltd, Civil Application No. 319/08 of 2019 (CAT) and **Fortunatus Masha v. William Shija** [1997] TLR 154.

With respect to the 2nd ground, it was submitted that the appellant was punished for the mistake he did not occasion. Counsel explained that the mistake was occasioned by the advocate and not himself and the error is condoned. Reliance was made on the case of **Judith Emmanuel Lusohoka v. Pastory Binyula Mlekule and 2 others**, Misc. Land Case No. 74 of 2018 (HC-Tabora).

Arguing on the 3rd ground, Counsel for the appellant contended that it was wrong for the District Court to engage in the merits of the appeal by determining the issues of illegality and irregularity as those issues were supposed to be determined at an appeal stage. Counsel for the appellant relied on the case of **Mary Rwabizi t/a Amuga Enterprises v. National Microfinance PLC**, Civil Application No. 378/01 of 2019 on the authority that it was inappropriate at that stage to go further and determine the substance of the claim of illegality and irregularity.

The 4th issue was abandoned. On the 5th issue, it was submitted for the appellant that the ruling of the District Court went against the law in view of what was stated in the **Bahati Mussa Hamis Mtopa v. Salum Rashid**, Civil Application No. 112/07 of 2018 on the spirit that calls for

achievement of substantive justice which requires the parties to be given opportunity to litigate their rights to a conclusive end.

Responding, Mr. Silas John urged the court to find this appeal baseless. With respect to the 1st ground, learned Counsel for the respondent contended that the appellant did not show diligence in pursuing his matter as in approaching the District Court, the appellant was out of time for 116 days. Counsel for the respondent explained that the Probate and Administration Cause No. 61 of 2020 was determined by the court on 11. 11. 2020 but the first step taken by the appellant was on 6th April, 2021 hence a delay of 116 for which there was no explanation and the delay was inordinate. He argued that the case of **CRDB Bank PLC** (supra) is distinguishable and inapplicable in this case in that the applicant in the cited case had filed his previous application promptly, had acted swiftly in lodging the application and the delay was of three days only. He pointed out that in this case, the appellant did not file his revision to the District Court promptly and did not act swiftly and there was inordinate delay of 116 days which had not been explained.

With respect to the second ground, Counsel for the respondent informed the court that this was a new fact as it was not raised during the hearing of the application for extension of time. He contended that the court

cannot condemn the trial court for the point it did not try. This court was referred to the case of **Kipara Hamis Misagaa@ Bigi v. R.**, Criminal Appeal No. 441 of 2007 [2018] TZCA 88. He was of the view that this court has no jurisdiction to determine on that matter. Besides, Counsel for the respondent pointed out that the advocate acted under the instructions of his client, the applicant.

As to the 3rd ground of appeal, it was submitted for the respondent that the court did not decide an illegality but found that the allegation that there was illegality not backed up by evidence on part of the applicant. The court was referred to paragraphs 7 and 9 of the affidavit in Misc. Application No. 16 of 2021.

Replying to the 5th ground of appeal, Mr. Silas John submitted in main that the issue of limitation of time is not technical but jurisdictional and cannot be overridden.

The rejoinder by Counsel for the applicant was mainly a reiteration of what he had submitted in chief in support of the application and urged the court to grant the application.

It trite that what amounts to sufficient cause has not, to date, been established. It all depends on the circumstances of a particular matter. This position was also echoed by the Court of Appeal in the case of **Abdallah**

Salanga and Others v. Tanzania Harbours Authority, Civil Application

No. 4 of 2001 when it observed:-

“No particular reason have been set out as standard sufficient reasons.

It all depends on the particular circumstances of each application”

However, as parties would agree with me, the Court of Appeal in the case of **Lyamuya Construction Company Ltd versus Board of Registered Trustee of Young Women’s Christian Association of Tanzania** Civil Application No. 2 of 2010 (supra), setting out some guidelines on this aspect had this to say at pages 6-7:-

‘As a matter of general principle, it is in the discretion of the Court to grant extension of time. But that discretion is judicial, and so it must be exercised according to the rules of reason and justice and not according to private opinion or arbitrary. On the authorities however, the following guidelines may be formulated (a) the applicant must account for all period of delay (b) the delay should not be inordinate (c) the applicant should show diligence, and not apathy, negligence, sloppiness in the prosecution of the action that he intends to take (d) If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged.’

The first issue to be determined is whether the appellant has managed to meet these salutary principles.

On the second issue I undertake to determine, is the fact that the grant of the extension is discretionary and this Court would not normally interfere with the exercise of that discretion. The circumstances in which an appellate court can disturb the exercise of a discretion of a trial court were stated by the Court of Appeal for East Africa in the case of **Mbogo versus Shah** [1968] EA 93 where in his judgment Sir Clement de Lestang VP said at 94:

"I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion".

So, in determining this appeal, I undertake to be guided by the principles from the two cases cited above.

As far as the 1st issue is concerned, the record is clear that the judgment of the Primary Court in Probate and Administration Cause No. 61 of 2020 was determined on 10th day of November, 2020. It is not until on 6th day of April, 2021 that is when the appellant filed his application for

revision to the District Court vide Civil Revision No. 03 of 2021. The appellant, as rightly argued by Mr. Silas John, did not explain a delay of 116 days. On the contrary, in the case of **CRDB Bank PLC v. Victoria General Supply Co. Ltd**, Civil Application No. 319/08 of 2019 (CAT) cited by learned Counsel for the appellant, the applicant therein had promptly filed his first application and had acted swiftly in lodging the application and was in delay for only three days. In this present case, the delay by the appellant of 116 in making his first application for revision was inordinate and without any explanation. The **CRDB Bank PLC's** case is distinguishable and inapplicable in the circumstances obtaining in this case as the appellant was not diligent but showed apathy, negligence and sloppiness in the prosecution of the action that he intended to take.

On the appellant's complaint in his second ground of appeal that he was punished for the mistakes he did not occasion but which was occasioned by his advocate, a careful perusal of the applicant's affidavit that was filed before the District Court on 29th day of July, 2021 in support of the application for extension of time does not show that this point was ever raised. Besides, the appellant did not raise this argument during the hearing of the application before the District Court and the said court did not try it. In principle, this court cannot condemn the trial court for the point it did not

try. Furthermore, in view of the decision of the Court of Appeal in the case of **Kipara Hamis Masagaa @ Bigi v. R** (supra) referred to me by learned Counsel for the respondent, this court lacks jurisdiction to determine this ground. After all, the advocate, in filing the revision before the District Court which later turned out to be misconceived, was, certainly, acting upon the instructions of the appellant and furthermore, usually, an error of an advocate cannot be a sufficient reason for extending time.

In his 3rd ground of appeal, the appellant is faulting the learned Resident Magistrate for engaging on the merits of appeal by determining the substance of the illegality and irregularity, the exercise which was supposed to be in the realm of the appellate court at an appellate stage. Rebutting this argument, Counsel for the respondent clarified that the trial court did not decide an illegality but it found that the allegation that there was illegality was not backed up by the evidence on part of the appellant.

With respect, I agree with counsel for the respondent. On the existence of illegality and irregularity, the learned Resident Magistrate was trying to show how the trial court dealt with the alleged minutes of the clan meeting and found that it was not bound by them in appointing the administrator of the deceased's estate. This is clear from the record as

shown in the ruling of the District Court where at p. 6 it was observed as follows:

*'I acknowledge the argument that the trial court was not bound by the minutes of the clan meeting as held in the case of **ECKSON MTAFYA VS MAIKO MTAFYA** (supra). Let alone, the applicant having had filed an objection over the same in trial court and the being determined it is thus the court's decision that the minutes found no favour in the eyes of the law, but it cannot be argued that the minutes it never considered or disregarded. It is up to the courts of law to determine issues contested by parties just like how the trial court did in the issue of the minutes of the clan meeting. This cannot anyhow be considered to be as an illegality or irregularity.'*

Indeed, this finding was in response to the reasons the appellant had advanced in support of the application for extension of time replied to by the respondent as reflected at p.3 of the typed ruling. There is nowhere, as Counsel for the appellant argues, the trial court divulged itself to discuss on the alleged point of illegality, which points ought to be discussed at an appellate stage. I am satisfied that the District Court did not go further and

determine the substance of the claim of illegality or irregularity. This means that the case of **Mary Rwabizi t/a Amuga Enterprises v. National Microfinance PLC** (supra) cited by Mr. Mwanaupanga is inapplicable and distinguishable.

There is no dispute that the 4th ground was abandoned and I find no reason to make any comment thereon.

With regard to the 5th ground that the decision was against the law and the evidence on record as the court was to be guided by the spirit that calls for achieving substantive justice which requires the parties to be given opportunity to litigate their rights to a conclusive end, Counsel for the respondent argued that the issue of limitation is not technical but jurisdictional and cannot be overridden.

The legal position on this aspect is settled. In **Edwards v. Edwards** (1968) 1 W.L.R. 149, at page 151 the Court said:-

"So far as procedural delays are concerned, Parliament has left a discretion in the courts to dispense with the time requirements in certain respects. That does not mean however, that the rules are to be regarded as, so to speak, and antique timepieces of an ornamental value but of no chronometric, so that lip service only need to be paid to them. On the contrary, the stipulations which

Parliament has laid down or sanctioned as to time are to be observed unless justice clearly indicates that they should be relaxed."

This Court adopted that view in **Dr. Ally Shabhay v. Tanga Bohora Jamaat**, Civil Application No. 48 of 1997 (unreported).

Besides, the law prescribing time limits provide a time table for the conduct of litigation so that the very purpose of judicial process is not defeated.

To that end, I am satisfied and hereby find that the applicant had failed to meet the principles enunciated by the Court of Appeal in the case of **Lyamuya Construction Company Ltd versus Board of Registered Trustee of Young Women's Christian Association of Tanzania** (supra). Likewise, I am satisfied that the factors stipulated in the case of **Mbogo versus Shah** were not met to warrant this court to interfere with the trial court's exercise of its jurisdiction. In other words, the trial magistrate properly exercised his discretion in dismissing the application for lack of sufficient cause for the delay.

This appeal lacks merit and is, accordingly, dismissed with costs.

It is so ordered.



W.P. Dyansobera
Judge
18.5.2022

This judgment is delivered at Mwanza under my hand and the seal of this Court on this 18th day of May, 2022 in the presence of the appellant and his learned Advocate and in the presence of Mr. Silas John, learned Counsel for the respondent.

Rights of appeal explained.



W.P. Dyansobera
Judge