

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI**

PC CIVIL APPEAL NO. 10 OF 2022

(C/F Misc. Civil Application No. 12 of 2022 before the District Court of Moshi and Shauri
la Mirathi No. 195 Of 2021)

AMINA DAUDI SOWENE.....APPELLANT

VERSUS

KESI OMARY KATAMBA.....RESPONDENT

RULING

Last Order 13/12/2022

Judgment: 23/2/2023.

MASABO, J.:

The applicant was a caveator in Shauri la Mirathi No. 195 of 2021 before Moshi Urban Primary Court in which the respondent was on 25/11/2021 granted letters of administration of the estate of the late Mwajuma Ngowa who died interstate being survived by no spouse or child but distant relatives. Aggrieved by this decision which was handed out on 14/12/2021, the Applicant did nothing until on 20th September 2022 when she resurfaced with an application for extension for extension of time before the district court of Moshi in PC Civil Application No. 10 of 2022 praying that the time within which to appeal against the ruling that disgruntled her be extended to enable her to file her appeal in the district court. The application ended futile after it was found to be seriously wanting on merit as she did not demonstrate a good cause warranting the extension of time. Disgruntled further, she has knocked the doors of this court by way of an appeal. Her appeal is based on

the following two points: **one**, the court erred in holding that she did not demonstrate a good cause. **Two**, the court erred in holding that no illegality was apparent on the face of the record of *Mirathi* No. 195 of 2021.

Hearing proceeded in writing. The appellant was represented by Mr. Victor D. Laswai, learned counsel whereas the respondent had no representation. In support of the appeal, Mr. Swai has made a lengthy submission amplifying the grounds of appeal. I have thoroughly read the submission. It is not my intention to reproduce it here. Suffice it to just summarize the key relevant points as follows: The first relevant argument made by the learned counsel is that, the delay was not occasioned by her negligence. It was due to sickness. She felt seriously sick and was throughout being treated at Siima Health Centre. She had a serious headache and difficult in breathing. She produced the medical certificate in support of her application for extension of time and it was a sufficient proof that there was a good cause warranting the extension of time. The refusal to enlarge the time was erroneous as much as the extension of time is within the purview of court's discretion, such discretion must be exercised judiciously upon a good cause being demonstrated. On the second ground of appeal, it was argued that there was an illegality in the decision of the primary court, as it contains two different case numbers, that is Shauri la Mirathi Na 195/2021 and shauri al Mirathi Na. 199/2021, Also, the ruling shows that the deceased was survived by no spouse or child but at the same time the magistrate held that the respondent was the deceased's great grand child which, in the appellant view is not possible. Moreover, the ruling states that the deceased was a

house wife while in evidence it was deponed that she did not leave a spouse, hence it is irrational that she was a house wife. Lastly, the deceased's death was uncertain as the applicant believes the deceased died on 4/6/1981 whereas the respondent produced a certificate of death showing that the deceased died on 12th August 1983. Thus, 38 years lapsed before administration cause was instituted and the respondent offered no explanation as to the delay.

The respondent replied that there was nothing to fault the district court as, much as illness may be considered a good ground for extension of time, in the present case, just as held by the district court, the applicant miserably failed to substantiate that she was prevented to file her appeal by illness as the medical certificate rendered shows that she last attended to hospital 13/12/2021, 4/1/2022, 15/3/2022 and 2/6/2022 and in all these dates there is no demonstration that she was admitted or that she was too serious such that she could not have filed the appeal. Thus, there is no sufficient ground to fault the district court's finding. On illegality, he submitted that that this ground should be disregarded as the appellant has introduced new issues not raised before the district court. The different dates, the issue whether or not the deceased was a house wife or that she did not have a great grandson were not raised in the district court. He concluded that, even if they were raised in the district court, they do not suffice as a good cause for extension of time. Hence, should be disregarded.

Rejoining, Mr. Laswai reiterated his submission that a good ground was demonstrated as the appellant ably proved that she was sick and was admitted at hospital. Thus, a good cause as per **Lyamuya Construction Company Limited v Board of Registered Trustees of Young Christian Association of Tanzania** Civil Application No. 2 of 2010, CAT, was demonstrated. He added that, as illegality of the decision was pointed out as a ground in support of the application, the application ought to have been granted. The rest of the rejoinder, contained new facts not submitted in the submission in chief, thus, I see no need to summarize them.

Having dispassionately considered the submission and the lower court record placed before me, I will now proceed to determine the application. In this endeavor, I will stand guided that the appeal emanates from an application for extension of time, which as correctly submitted by the parties falls within the discretionary powers of the courts and it is affirmatively exercised upon the applicant demonstrating a good cause. The question for determination, therefore, is whether a good cause upon which to positively exercise the discretion to enlarge the time was demonstrated and if so, whether the court properly exercised its jurisdiction when it declined to allow the application.

From the record, it is well certain that the extension of time was sought to enable the applicant to appeal out of time against the ruling of Moshi Urban Primary Court, which as per section 20(3) of the Magistrates Court Act [Cap 11 RE 2019] had to be filed within 30 days after the date of the decision a duration which may be extended under section 20(4)(a) of the same Act

upon a good cause being demonstrated. In the present case, the primary court overruled the objection/caveat on 25/11/2021 and on 14/12/2021 it appointed the respondent as administrator of the estate. Thus, the appeal ought to have been filed after 30 days of this decision which lapsed on 13/1/2022. As the appellant lodged his application for extension of time on 2/6/2022, it is obvious that the delay was for six months.

In the view of the above, I have no hesitation to state that in terms of section 20(4)(a) of the Magistrate Court Act, the district court has discretion to grant the applicant an extension of time for lodging an appeal either before or after the expiration of thirty days from the date of the of the judgment. As correctly argued by the applicant, the discretion must be exercised judiciously upon sufficient reasons being demonstrated by the applicant. The factors to be considered in assessing the good cause are as articulated in **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania** (supra) and numerous other decisions of the Court of Appeal and this court. They include, but not limited to, the reason (s) for delay, length of delay, the degree of prejudice the respondent stands to suffer if the time is not enlarged, whether the applicant was diligent in pursuit of the legal action and whether there is a point of law of sufficient importance such as the illegality of the decision sought to be challenged. The duty to demonstrate the existence of a good course rests on no other than the applicant. She has to provide the court with the materials upon showing that she was prevented by a good cause from filing the appeal. Aware of this task, the applicant

through paragraph 7, 8, 9, and 10 of the affidavits accompanying her application in the district court the applicant demonstrated that she was prevented by illness. In substantiation she produced medical certificates showing that she was treated at Siima Health Centre on 27/11/2021, 13/12/2021, 4/1/2022 and 15/3/2022.

In a finding which I entirely subscribe to, the district court having considered the reason above held that it did not suffice as a good cause as all what the averments in the above paragraphs and the certificates presented demonstrate is that, the appellant had an ailment and on diverse dates she attended at Siima Health Centre for treatment as an outpatient. Nothing on these certificates shows that she was admitted in hospital or that she was exempted from duty which would justify the averment that she was unable to file the appeal as a result of an ailment. Needless to add, much as it is true that sickness suffices as a good cause as it is beyond human control, it is not sufficient for the applicant to just aver that she was sick and treated in hospital. She must tender materials showing that indeed the sickness prevented her from filing the appeal. The applicant herein miserably failed this test and, contrary to the law that the delay of even a single day must be accounted for (see **Kyalamali Mathayo v R** Criminal Appeal No. 15 of 2013 (CAT at Dar es Salaam) **Zahara Kavindi and Another v Juma Swalehe & Others**, Civil Application NO. 4/5 OF 2017 (CAT at Mwanza), she failed to account for the days of delay such that, even if the district court was to agree with her that for the period between 27/11/2021 and 18/3/2022, she was seriously sick, it would not affirmatively exercise its

discretion in favour of the application as the duration between this date and 18/3/2022, when she filed the application was uncounted for.

As for the second point on illegality, it is indeed trite that illegality of the decision sought to be challenged if the leave is granted suffices as good cause for enlargement of time. However, to be considered as a good cause, the illegality averred must be apparent on record and not one that need a long argument to derive. As held in ***Ngao Godwin Losero Vs Julius Mwarabu***, Civil Application No. 10 of 2015 where it was held that:

“ But, it is noteworthy that in Vallambya (supra), the illegality of the impugned decision was clearly visible on the face of the record in that the High Court had issued a garnishee order against the Government without affording it a hearing which was contrary to the rules of natural; justice. Incidentally, the court in the case of **Lyamuya Construction Company Limited vs Board of Registered Trustees of Young Women’s Christian Association of Tanzania** (attached for ease of reference) made the following observations:-

“ Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in vallambya’s case, the court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one. The court there emphasized that such point of law must

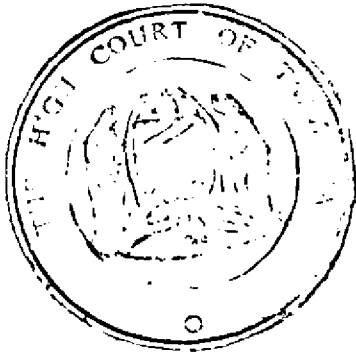
be that of sufficient importance and, I would add that it must also be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process”.

In the present case, the appellant has pointed to several illegalities. I will respectfully consider none of those raised in the appeal in support of the instant appeal but were not deliberated upon in the district court as the parties are not at liberty to raise new issues at appeal stage. I will thus confine myself to the illegality canvased in the district court’s ruling, that is the absence of the court assessors. From the ruling, it is crystal clear that the district court having observed non participation of the assessors in the proceedings went ahead to determine that the validity or otherwise of the same and having canvased it he concluded that there was no illegality as the assessors are no longer compulsorily required in primary court decision. This finding was, certainly, erroneous as it prematurely determined the appeal and in so doing it usurped the powers of the appellate court. It is trite that, in an application for extension of time predicated on a point of illegality of the decision sought to be challenged, all what the court is required to do is to establish whether the alleged illegality is apparent on the record. Having determined this issue affirmatively, it is supposed to stop there to the merit of the illegality as that would be tantamount to assumring the powers of the appellate court. In the foregoing, I find merit in the second ground of appeal.

Based on this last ground, I find the appeal meritorious and I allow it. Subsequently, I invoke the revisional powers of this court over the district

court, step in its shoes and do what it ought to have done. The appellant is allowed 14 days within which to file her appeal.

DATED and **DELIVERED** at **MOSHI** this 23st day of February 2023.



X

A handwritten signature in black ink, appearing to be "J.L. MASABO", written over a horizontal line.

Signed by: J.L.MASABO

J.L. MASABO

JUDGE