

IN THE HIGH COURT OF TANZANIA

SONGEA DISTRICT REGISTRY

AT SONGEA

PC. CIVIL APPEAL NO. 9 OF 2022

*(Originating from Miscellaneous Probate and Administration Application No. 2 of
2020, Songea District Court)*

FATUMA ALLY HAKIMU 1ST APPELLANT
HALIMA ALLY HAKIMU 2ND APPELLANT
KAISI ALLY HAKIMU 3RD APPELLANT
ANIFA ALLY HAKIMU 4TH APPELLANT

VERSUS

**AHMAD SELEMANI (Legal Representative of
KALASI HAKIMU ALLY, Deceased) RESPONDENT**

JUDGMENT

27/02/2023 & 09/03/2023

E.B. LUVANDA, J.

The Appellants above mentioned, preferred this appeal against the decision of the district court refusing to extend time for the Appellants to challenge the decision of trial court dated 7/6/2018. In the petition of appeal, there is only one ground of appeal: that the district court erred in law when it failed to take into consideration the alleged illegalities in their totality as were well elaborated in the Appellants' affidavit which was in

support of the application and when it failed to hold and regard the said alleged illegalities as sufficient reasons for extension of time in law.

In their written submission to prosecute the above ground, the Applicants submitted that they are aggrieved by the decision of the district court denying their application for extension of time on the ground that they failed to advance sufficient cause. The Applicants submitted that they believe there are a number of illegalities which could necessitate the grant of their application, in line with the case of **Republic vs Yona Kaponda and 9 Others (1985) TLR 84 (CA); Kalunga and Company, Advocates vs National Bank of Commerce Ltd (2006) TLR 235**. The Appellants pointed the illegalities being the trial court exercised the powers of the administrator by ordering sale of the estate of the deceased through the Court Broker. They submitted that powers of the court interference of sale of estate is limited to only hearing and determining any question relating to sale, in terms of rule 8 (f) of the Probate Courts (Administration of Estate) Rules, G.N. 49 of 1971. They pointed out another illegality, that the person who moved the trial court to order sale were heirs and not the administrator of the estate of the deceased, citing rule 6 of the Fifth Schedule to the Magistrates Court Act, Cap 11 R.E. 2019.

In response, Mr. Eliseus Ndunguru learned Advocate for the Respondent submitted that illegalities raised by the Appellants did not warrant a good cause for the extension of time. He submitted that; application has been overtaken by event because the impugned estate has already been sold by the Court Broker. He cited the case of **Felix Emmanuel Mkongwa vs Andrew Kimwaga**, Civil Application No. 249/2016 C.A.T. at Dar es Salaam. He submitted that, the law provides power for the court to make any order which it has power to make in cases of civil nature, citing paragraph 2 (d) and (h) of the Fifth Schedule to Cap. 11 (supra).

In rejoinder, the Appellants submitted that there were a number of illegalities, one of which is that the trial court had no jurisdiction to sell the suit house by its own court broker which amounted to interfering with the legal duties of the administrator to the estates.

I have painstakingly gone through the affidavit in support of the application for extension of time presented before the district court, surely the Appellant failed to show sufficient cause for their delay to challenge the impugned order dated way back on 7/6/2018. In the said affidavit in support, the deponents (Appellants herein), deposed that after issuance of the order dated 7/6/2018, subject for extension, and after subsequent order for appointment of the Court Broker on 8/6/2018, and issuance of

an advertisement for sale on 23/6/2018, the First Applicant (First Appellant herein) lodged an application for Revision No. 1/2019. Although the Appellants for reasons known to themselves, did not reveal the exact date this Revision Application No. 1/2019, as to when exactly was filed, but obvious it was made after expiry of six months counting from June, 2018. The Appellants averred further that on 3/5/2019, the district court directed a request by the Respondent herein to withdraw from being an administrator, be made before the trial court, hence remitted the file to the trial court. According to the averment in the affidavit, suggest that the Respondent instead snicked and applied for to the trial court to proceed with execution of its orders dated 7/6/2018, which prayer was granted on 27/8/2019, and subsequently an order for sale was issued on 27/8/2019, but nullified on 30/4/2020 by the superior court. The Applicants confessed in the said affidavit that they were not party to the aforementioned application. That on 20/5/2020 the Applicants tried to apply for extension of time but was struck out on 30/7/2020.

In view of the above chronological of events, the argument by the Applicants that the delay was attributed to their busy schedule of prosecuting the above applications, is wanting. For one thing, a delay of six months from June, 2018 to the time of filing Revision No. 1/2019 was not accounted at all. Indeed, when the impugned order was made, the

records of the trial court reflect that the First Appellants, two widow of the deceased to wit Hawa Said and Fatu Mustapha, one of them being the mother of the Appellants herein were present, and were heard. But no reasons shown as to why they did not take action immediately after an order of sale was issued. Instead, the Appellants dwell much on the alleged illegalities.

One could ask if at all the Appellants are faulting the trial court to had interfered or usurp or assumed the power of the administrator of estate for ordering sale of the estate, now why the said administrator made a trick for withdrawal at the district court and when the file was remitted to the trial court changed mind and requested for an order of the sale to proceed. It was expected for the administrator to stay away and leave the trial court to continue dealing with the alleged Court Broker solo to sale the estate. But in the circumstances where the Applicants (Appellant herein) deposed in their affidavit indicating that the administrator was part and parcel and front line in executing the order for sale, the argument of illegality dies a natural death.

Above all, illegality cannot be pleaded and entertained where the applicant is found guilty for in action. In **Yahaya Rashid & Another vs Kassim**

Masudi & 11 Others, PC. Civil Appeal No. 18/2021, HC Kigoma, this Court had this to say.

'It has been a tendance of advocates and their clients in each application for extension of time to plead illegality against judgment upon which extension of time is ought to be challenged. It has turned to be a finishing ground in every application of such nature and any appeal there from ... since the role of an applicant in an application for extension of time is to account for each day of delay, how illegality can be used to account for such delay. Is the ground of illegality there to safeguard those who have no sufficient cause for the delay? ... it is not for the applicant to take it as his supporting weapon. His role is to account for all the period of the delay ... One should not relax without appealing on time merely because he shall at any time raise up with the ground of illegality to frustrate the findings of the lower court which other parties would have reasonable ground to believe that it has conclusively ended for no further action has been taken within reasonable time limit'

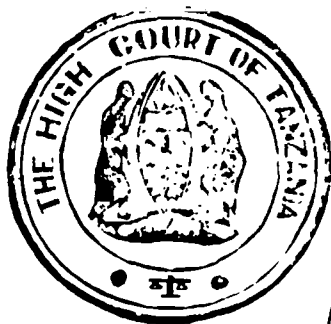
To sum up, illegality should not be invoked as a shield in apparent inaction and laxity. Rather should be used as a sword where there is a reasonable cause of delay, and illegality is pleaded to lobby the court to feel the need to extend time as a matter of compelling it. This is the import and letter in the celebrated case of **Lyamuya Construction Ltd vs Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2/2020 (unreported, at page 6, the court had this to say.

*'As a matter of general principle, it is 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 may be formulated:*

- a) The applicant must account to all the period of delay*
- b) The delay should not be inordinate*
- c) The applicant must show diligence, and not apathy, negligence or 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 to be challenged'*

Unfortunate, litigants ignore the three proceeding condition precedent for extension, instead lean or incline on a last option, which depend on the feeling of the court on whether such illegality exist and if is there, whether is worthy point of law of sufficient importance in furtherance of administration of justice.

The appeal is dismissed. No order as to costs.



E.B. LUVANDA

JUDGE

09/03/2023