

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO.597 OF 2022**

***(Originating from ruling in Probate Appeal No.6 of 2022 Kibaha District Court, dated 14<sup>th</sup> September, 2022 Hon. Ng'hwelo, RM)***

**MARIAM HAMISI ABRAHAMANI.....APPLICANT**

**VERSUS**

**ANDREW MICHAEL MCHOME.....RESPONDENT**

**RULING**

*1/03/2023 & 28/4/2023*

**POMO, J**

The Applicant, Mariam Hamisi Abrahamani, is seeking extension of time to appeal out of time against the ruling of the appellate District Court upholding the Respondent's Preliminary Objection raised against her appeal, Probate Appeal No. 6 of 2022 before Kibaha District Court, that she was not a party in Probate Cause No.20/2021 Mkuza Primary Court

She is moving the court by using inapplicable Provisions of the laws, section 14 of the Law of Limitation Act, [Cap.89 R.E.2019] and section 95 of the Civil Procedure Code, [Cap.33 R.E.2019]. The provisions of law giving

power the high court to extend time to file an appeal before it in matters originating from Primary Court is **section 25(1)(b) of the Magistrates' Courts Act, [Cap 11 R.E.2019] (the MCA) and Rule 3 of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules, GN No.312 of 1964 (the Rules)**. The said section 25(1) of the MCA provides as follows: -

***"S.25.-(1) Save as hereinafter provided -***

***(a) in any other proceedings any party, if aggrieved by the decision or order of a district court in the exercise of its appellate or revisional jurisdiction may, within thirty days after the date of the decision or order, appeal there from to the High Court; and the High Court may extend the time for filing an appeal either before or after such period of thirty days has expired. End of quote***

And the said **Rule 3 of the Rules** provides thus: -

***"Rule 3 – An application for leave to appeal out of time to the High Court from a decision or order of a district court in the exercise of its appellate or revisional jurisdiction shall be in writing, shall set out the reasons why a petition of appeal was not or cannot be filed within thirty days after the date of the decision or order against which it is desired to appeal, and shall be accompanied by the petition of***

**appeal or shall set out the grounds of objection to the decision or order**". End of quote

That being the position, there is no gainsaying that the Applicant has wrongly moved this court for the prayer sought. Nevertheless, I will take inspiration from the proviso to Rule 48(1) of the Court of Appeal Rule, 2009 GN No. 344 of 2019 which allows the court to ignore omission or wrong citation as long as the court has jurisdiction to grant the order sought. The proviso from which I am taking inspiration reads provide as follows: -

*"48(1) .... Provided that **where an application omits to cite any specific provision of the law or cites a wrong provision, but the jurisdiction to grant the order sought exists, the irregularities or omission can be ignored** and the court may order that the correct law be inserted".*

Therefore, basing on the above, I ignore the wrong citation made by the Applicant as long, under **section 25(1)(b) of MCA** and **Rule 3 of the Rules**, this court is vested with power to grant the order sought.

Now, back to the Application. Briefly stated, the facts obtaining from the affidavit in support of the application is that, the respondent having been

appointed by Mkuza Primary Court in Probate Cause No. 20/2021, the Applicant filed an appeal, Probate Appeal No.3/2021 before Kibaha District Court and subsequently PC Civil Appeal No.122 of 2021 in this court the appeal which ended up directing the objection raised by the Applicant against the appointment of the Respondent in Probate Cause No.20/2021 be heard by affording the Applicant her right to be heard [See paragraphs 5 and 6 of the affidavit and annexure thereto].

The trial court having heard the parties, decided in favour of the Respondent and, aggrieved with the decision, the Applicant lodged Probate Appeal No.6 of 2022 before Kibaha District Court which faced the objection from the Respondent now upheld by the district court on 14<sup>th</sup> September,2022 Hon. F.E. Ng'hwelo, RM. [see paragraph 12 of the affidavit].

Aggrieved, the Applicant filed Civil Revision No.27/2022 before this court which on 6/12/2022 was struck out for being incompetent before the court on the ground that the impugned ruling of Kibaha District Court is appealable thus not tenable to prefer revision against it while there is room for appeal. [see paragraphs 12; 13; 14; 15 and 16 of the affidavit]. She has then filed the herein application seeking for extension of time to file an

appeal out of time. The respondent filed the counter affidavit contesting the application

When the application was called for hearing on 1/3/2023 both the Applicant and Respondent were present represented by Jacob Fabian Mwalego, and Tumaini Mgonja, learned advocates respectively. I ordered hearing of the Application be by way of written submission, the order which is complied with by the parties.

The issue I am faced with for determination is whether the Applicant has shown sufficient cause to warrant this court grant her the extension of time sought

As alluded above, from the facts obtaining in the affidavit supporting the application, the Applicant's grounds for extension are two. Technical delay and allegations of existence of illegalities

As to technical delay, the existing fact is that the Applicant was in the high court corridor pursuing in a wrong forum her dissatisfaction against the impugned ruling of the District Court of Kibaha in Probate Appeal No. 6 of 2022, that is to say, pursuing Civil Revision No. 22 of 2022 (see paragraph 13; 14; 15 and 16 of the affidavit). The said Civil Revision was struck out on

8/12/2022 and subsequently filed the instant Application for extension of time on 29/12/2022. The Respondent's response in the Counter affidavit in respect of the above paragraphs concerning technical delay is just the word "noted" (see paragraph 13; 14; 15 and 16 of the counter affidavit). In other words, no facts stand adduced by him in countering the Applicant's assertion and thus his response remains to be evasive one

In the reply submission, the Respondent argued that the Applicant has failed to account for the delay from 8<sup>th</sup> December, 2022 when her Civil Revision No.6/2022 was struck out up to 29<sup>th</sup> December,2022 when this application was filed. In support, he cited the case of **Elius Mwakalinga Vs Dimina Kagaruki and 5 Others, Civil Application No. 120/12 of 2018** and that of **Lyamula Construction Company Limited Vs Board of Registered Trustees of Young women's Christian Association of Tanzania, Civil Application No. 2 of 2010** both being unreported decision of the Court of Appeal which held that each day of delay has to be accounted for whenever one seeks extension of time

As said before, the assertion that the Applicant failed to account for the days from 8<sup>th</sup> December,2022 to 29<sup>th</sup> December,2022 when she filed the

application herein, do feature in the Respondent's submission and not his sworn counter affidavit. In my view, submission from the bar can not complements what was supposed to be given under oath in the counter affidavit. See The **Government of Vietnam Vs Mohamed Enterprise (T) Ltd, Civil Appeal No. 122 of 2005** (unreported) and **Sophia Amiri Mrisho (Administratrix of the estate of the late Amiri Mrisho) Vs New Sudan Building Materials Cooperative Society Ltd, Civil Application No. 235 of 2014** (unreported) both of the Court of Appeal. Since nothing is reflected in the counter affidavit, then I will not consider that piece of submission by the Respondent which is not backed up by any evidence in the counter affidavit

Technical delay as good ground for extension of time to the Applicant has been held time without number by the Court of Appeal in many decisions, among them, is the case of **Jonathan Harald Christer Abrahsson Vs Exim Bank (T) Limited and 3 Other, Civil Application No.224/16 of 2018 CAT at Dar es Salaam (Unreported)**, where the Court of Appeal held at page 8 that: -

*"...and that upon being struck out on that technical delay the applicant acted promptly within two weeks in bringing this*

*present application. **Since the Applicant was not idle but all along have been in this court pursuing an incompetent application, that by itself constitutes good cause. See Robert Schelten V, Balden Norataram and 2 Others, Civil Application No.112 of 2016 (Unreported)***".

Yet in **Samwel Kobelo Vs National Housing Corporation, Civil Application No.302/17 of 2017 CAT at Dar es Salaam (unreported)** held at page 8 that: -

*"In addition, I have taken into account that **it has not been suggest that the respondent would suffer any prejudice if time is extended***".

Guided by **Jonathan Harald** case and **Samwel Kobelo** case (supra) I find delay to appeal by the Applicant was not in ordinary one as largely was due to technical delay and no prejudice on the side of the respondent is suggested by the Respondent on his side if time is extended to the Applicant.

That said, I hereby grant the Application. Time to appeal is hereby extended for fifteen (15) days. No order as to costs.

It is so ordered.



Right of Appeal explained.

Dated at **DAR ES SALAAM** this 28<sup>th</sup> day of April, 2023.



**MUSA K. POMO**

**JUDGE**

**28.04.2023**

Ruling delivered in presence of the Applicant without her advocate and in presence of the Respondent and his advocate Mr. Tumaini Mgonja.



**MUSA K. POMO**

**JUDGE**

**28.04.2023**

