

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

**(IN THE SUB - REGISTRY OF MWANZA)**

**AT MWANZA**

**CRIMINAL APPLICATION NO. 3 OF 2023**

**BENJAMIN MERICK NJIGA -----APPELLANT**

**VERSUS**

**FRANCIS MAHUSHI-----RESPONDENT**

**RULING**

*April 28<sup>th</sup> & May 5<sup>th</sup>, 2023*

**Morris, J**

The applicant above, by way of chamber application, moves this court to extend time to enable him to appeal against the ruling of the District Court of Magu District in Criminal Revision No. 06 of 2021 dated November 8<sup>th</sup>, 2021. The application is supported by an affidavit of Benjamin Merick Njiga. The respondent did not file his affidavit in opposition. When the matter came for hearing, the applicant was represented by Advocate Bahati Kessy while the respondent enjoyed representation from Advocate Arsein Molland.

From the record, this matter bears a genesis from two probate causes (No. 29/2021 and 31/2021) and criminal case no. 319/2021; all of Magu Urban Primary Court. Initially, the respondent was appointed the administrator of estate of the late Lugunya Mayala Busalubune vide probate cause No. 29/2021. Later, the applicant petitioned, under probate cause no. 31 of 2021, for administration of the estate of late Sabina Mahusi Masalu. Both causes included a residential house situated at Kisamba Village Lubugu Ward of Magu District in the list of properties to be administered. That is, each party claimed the property to form part of his respective deceased person's estate. Incidentally, vide criminal case no. 319 of 2021 the applicant was charged and sentenced for trespass of that same property.

Upon the three cases coming to the attention of the District Court of Magu, the magistrate in-charge initiated *suo-motto* criminal revision proceedings under no.06 of 2021. He quashed conviction and set aside the sentence of Tshs. 400,000/= fine or four months imprisonment in lieu thereof. He went ahead and declared proceedings of probate cause no. 31 of 2021 to be a nullity. Further, he ordered the applicant to file objection in probate cause No. 31 of 2021, if he was still interested in protecting the



subject property. Because of pursuing other court recourses, the applicant was caught up with time within which to challenge the outcome of the District Court's revisional proceedings; hence, this application.

The applicant's major ground in support of his application is illegality apparent on the ruling of District Court. He asserts that it was wrong for the said court to nullify probate proceedings vide criminal revision, on the one hand; and that parties were not afforded right to be heard, on the other. As pointed above, the respondent does not object the application. He readily conceded that the averred illegality is apparent on face of record.

Although this application is not objected, it is the duty of this court to evaluate the application. The aim is to establish whether or not the ground advanced by the applicant suffices to warrant this court to allow the application. See, ***Denis T. Mkasa v Farida Hamza & Others***, Civil Application No. 407 of 2020 (unreported). Further, powers to extend the time is discretionary which must be exercised judiciously as opposed to personal whims, sympathy, empathy or sentiment. I am guided by the holdings in ***Bakari Abdallah Masudi v Republic***, CoA Criminal Application



No. 123/07 of 2018; and ***Bank of Tanzania v Lucas Masiga***, Civil Appeal No. 323/02 of 2017 (both unreported).

The overriding principle, however, is that the applicant must demonstrate sufficient reason(s) as to why he/she did not take the necessary step(s) in time. In so doing, he/she should prove how each day of delay justifiably passed by at no applicant's fault. This is the principle recapitulated in ***Hamis Babu Bally v The Judicial Officers Ethics Committee and 3 Others***, CoA-Dar es Salaam, Civil Application No. 130/01 of 2020 (unreported).

I should also be quick to point out that, the essence of setting the time limits in law is, among other objectives, to promote the expeditious dispatch of litigation [***Costellow v Somerset County Council*** (1993) IWLR 256]; and to provide certainty of time tables for the conduct of litigation [***Ratman v Cumara Samy*** (1965) IWLR 8]. Consequently, it works in the advantage of proper management of resources; most important of which are time and finance.

Apart from the onus of applicant accounting for the day(s) of delay, it is a cardinal principle of law that, where illegality is raised as a ground for



seeking extension of time, it amounts to a sufficient cause. Repeatedly, this position has been stated by the Court of Appeal. Among other pronouncements in this regard, are cases of ***the Principal Secretary, Ministry of Defence and National Service v Devram Valambia*** [1991] T.L.R. 387; ***Ngao Godwin Losero vs Julius Mwarabu***, Civil Application No. 10 of 2015; ***VIP Engineering and Marketing Limited and Three Others v Citibank Tanzania Limited***, Consolidated Civil Reference No. 6, 7 and 8 of 2006; ***Sabena Technics Dar Limited v Michael J. Luwunzu***, Civil Application No. 451/18 of 2021; ***Iron and Steel Limited v Martin Kumaliya and 117 Others***, Civil Application No. 292/18 of 2020; and ***Lyamuya Construction Company Limited vs Board of Registered Trustee of Young Women's Christian Association of Tanzania***, Civil Application No. 2 of 2010 (all unreported).

I have serenely read the records before me. It is evident from the affidavital depositions that the applicant intends to invite the court to test and adjudicate on the legality associated with the magistrate's approach of mixing probate causes in revising the criminal proceedings. Further, he deposes that the court will, as well, make a pronouncement as to whether

or not it was proper for the District Court to initiate revisionary proceedings *suo-motto* and determine fates of the parties without according them an opportunity to address the court.

Am of the settled mind that, the two tenets of illegality advanced by the applicant, merit the application. The right to be heard, for instance, is a fundamental rule of natural justice. See the cases of ***Alisum Properties Limited v Salum Selenda Msangi (administrator of the estate of the late Selenda Ramadhani Msangi)***, Civil Appeal No. 39 of 2018; ***the Registered Trustees of Arusha Muslim Union v the Registered Trustees of National Muslim of Tanzania @ BAKWATA***, Civil Appeal No. 300 of 2017; and ***Kumbwandumi Ndemfoo Ndossi v Mtei Bus Services Limited***, Civil Appeal No. 257 of 2018 (all unreported).

Illegality is not a matter to be simply condoned. In the case of ***Principal Secretary, Ministry of Defence and National Service vs. Devram Valambia*** (*supra*), it was held that:

*"... when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty even if it means extending the time for the purposes to ascertain the point and, if the alleged illegality be established, to take*

*appropriate measures to put the matter and the record right..."*

Further, the court in ***VIP Engineering and Marketing Limited and Three Others v Citibank Tanzania Limited***, (*supra*), records, in no ambiguous terms, that;

*"it is, therefore, settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under rule 8 regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay."*

The justification of treating illegality as a sufficient cause to support the application for enlargement of time is obvious. It enables the court to correct legal errors from the books of law; facilitates parties to benefit from legitimate court decisions; creates inevitability, consistency and reliability of law; develops jurisprudence on lawful and sound legal foundations; and promotes public policy through which public trust is engraved.

In upshot, the present application having its base on illegality, it is merited and accordingly allowed. The applicant is given 14 days to file the

intended appeal. I make no order as to costs. It is so ordered and the right of appeal is fully explained to the parties.



**C.K.K. Morris**

**Judge**

**May 5<sup>th</sup>, 2022**

Ruling delivered this 5<sup>th</sup> day of May 2023 in the presence of Advocate Bahati Kessy for the applicant and also holding brief of Advocate Arsein Molland for the respeondent.

**C.K.K. Morris**

**Judge**

**May 5<sup>th</sup>, 2022**