

IN THE HIGH COURT OF TANZANIA

TEMEKE SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO. 18 OF 2023

*(Arising from Miscellaneous Civil Application No. 120 of 2022 of Temeke District Court at One Stop
Judicial Centre)*

MARRY DONAT MASHIKUAPPELANT

VERSUS

MARTHA DONAT MASHIKU.....RESPONDENT

JUDGMENT

Date of last order: 21/08/2023

Date of Judgment: 10/10/2023

OMARI, J.

The Appellant herein filed Miscellaneous Civil Application No. 120 of 2022 at the District Court of Temeke at the One Stop Judicial Centre seeking the district court to extend time for her to file an appeal against the decision of Administration Cause No. 230 of 2014 by the Kinondoni Primary Court rendered on 06 July, 2022.

In its decision, the district court cited section 20(3) of the Magistrate's Courts Act CAP 11 R.E 2019 (the MCA) which provides for appeals from the primary court to the district court to be within 30 days of the decision. The learned district magistrate then went on to state that the main reason for the



Appellant's delay in appealing is that she was waiting for a copy of the primary court's judgment and a reply to a complaint letter she had written. The learned magistrate then went on to state that these reasons are unmeritorious for it is not a legal requirement to attach a judgment to a petition of appeal or application for revision. He then went to state that the district court has not been convinced to extend time and dismissed the application. Aggrieved by this decision the Appellant has brought this appeal on four grounds to wit:

1. That the honourable magistrate erred in law and fact by declining to grant extension of time to appeal against the impugned decision without according weight to the ground of serious illegality raised by the Appellant.
2. That the honourable magistrate erred in law and fact by failing to consider the Appellant's delay was not a normal delay but rather a technical delay.
3. That the honourable magistrate erred in law and in fact by holding that the main reason for the Appellant seeking extension of time was that she was waiting to be availed a copy of the judgment.



4. That the honourable magistrate erred in law and fact by considering irrationally the duration the matter has been in court in reaching into a wrong conclusion.

It is on the basis of the above grounds that the Appellant is seeking for this appeal to be allowed and for the court to make any other order that it deems fit.

At the hearing of this appeal the Appellant had the services of Ndanu Emmanuel while the Respondent had the services of Laurean Mussa, both being learned advocates.

In his submission in support of the appeal Mr. Emmanuel stated that his client was seeking to challenge the decision of the district court on four grounds. Submitting on the first ground of appeal Mr. Emmanuel averred that the magistrate erred by not extending time and failing to accord weight to the serious grounds that were raised by the Appellant.

Counsel went on to state that in paragraph 6 of the Appellant's Affidavit in support of the Application she raised two points of law. These, according to counsel are that her properties are listed as the deceased's and that as a widow of the deceased she was not given her rightful share. He cited the case of **Permanent Secretary, Ministry of Defense and National**



Service v. D.P. Valambhia [1992] TLR 185 to buttress his argument as regards the legal issues being illegalities therefore sufficient grounds for extension of time.

On the second ground of appeal, counsel submitted that the Ruling of the primary court was delivered on 06 July, 2022 the Appellant then filed a complaint after she received the Ruling on 03 August, 2022. He argued that since section 20(3) of the MCA requires an appeal to be filed within 30 days and between 06 July, 2022 and 03 August, 2022 when the complaint was filed 30 days had not lapsed. He went on to state that she was on time albeit at the wrong forum and upon realizing that time had lapsed she applied for extension of time. Counsel went on to submit that the delay should be treated as a technical delay as held in the case of **Fortunatus Masha v. William Shija and Another** (1997) TLR 154, where the court distinguished technical delays from actual delays. Counsel concluded on this ground of appeal by stating that the district court ought to have considered the technical delay and extend time.

Submitting on the third ground of appeal Mr. Emmanuel stated that the reason for extension of time stated on page 4 of the district court's Ruling is not the only reason postulated by the Appellant for extension of time as the



reasons are stated in paragraph 6 and 7 of the Appellant's Affidavit in support of the Application. He argued that the magistrate did not consider the said reasons in the decision that ended up denying the extension of time. Counsel went on to state that it was wrong for the Ruling of the district court to state that the only reason was that the Appellant was waiting to be availed with a copy of the primary court judgment, when it was not the case. He went on to state that the district court denied the Appellant extension of time although there is an illegality. Counsel referred to the case of **VIP Engineering and Marketing Ltd. and two Others v. Citibank (T) Ltd**, Consolidated Civil Reference No. 6 of 2006 in which the Court of Appeal of Tanzania held that where there is an illegality there is no need to account for each day of the delay, that is an illegality in itself is sufficient reason to grant extension of time.

As regards to the fourth and last ground of appeal the Appellant's counsel averred that the Ruling states that the matter is in court since 2014 and this is one of the reasons the district court magistrate denied the Application for extension of time. Counsel submitted that neither the Appellant nor the Respondent complained of this, making it improper for the district court to decide based on the issue.



When it was his turn, Mr. Mussa submitted on the first ground of appeal by beginning with a reference to the case of **Petro Robert Myavilwa v. Zera Myavilwa and Erika Myavilwa**, Probate Appeal No. 01 of 2019 wherein this court stated what amounts to an illegality warranting extension of time. Which according to counsel, needs the illegality to be apparent on the face of the record and not one that needs long drawn arguments. He also cited the case of **George Timothy Mwaikusa v. National Microfinance Bank PLC**, Misc. Application No. 41 of 2020 wherein it was held that if the illegality being complained of relates to the reasoning of the decision then the same is a ground of appeal and not a reason for extension of time.

Mr. Mussa argued that what the Appellant stated in paragraph 6 of her Affidavit in support of the application is a ground of appeal for she is not satisfied with the share accorded to her. Counsel further submitted that apart from failing to show the illegality in the impugned decision this cannot supersede the negligence exhibited by the Appellant in pursuing this appeal as held in the case of **Tanzania Harbour's Authority v. Mohamed R. Mohamed** (2003) TLR 76. Counsel further submitted on the contention that the Appellant was delayed to file the appeal because she was waiting for the reply to her complaint cannot stand, for the filing of a complaint is irregular



procedurally as decisions of the primary court are not challenged by complaints.

The Respondent's counsel went on to add that even if one were to assume that the delay is technical; then Appellant still failed to account for the days between the reply and the filing of the Application for extension of time. He buttressed his argument with the case of **Philimon Simwandete Mbanga v. Permanent Secretary, Ministry of Defence and The Attorney General**, Civil Application No. 168/01 of 2018 as well as the case of **Dawi Akko v. Petro Ingi and two others**, Misc. Civil Application No. 31 of 2018. He concluded his submission on the first ground by stating that it lacks merit.

Submitting on the second ground of appeal counsel stated that the contention that the delay is technical cannot stand because the fact that the Appellant lodged a complaint instead of appealing is irregular as per section 20 (3) of the MCA which is clear on what should be done when one is not satisfied with a decision of the primary court. Counsel reiterated his argument that even if the delay is technical the Appellant has not accounted for the 20 days after she received the reply. He concluded on this ground stating that the Appellant was not diligent in pursuing her appeal.



On the third ground of appeal Mr. Mussa stated that what counsel for the Appellant submitted is not true, that the magistrate only considered that the Appellant was waiting for a copy of the judgment. This was one of the reasons and it is on paragraph 8 of the Affidavit in support of the Application. As regards the last ground of appeal counsel for the Respondent submitted that it is not true that the magistrate irrationally considered the time the matter had been in court. Counsel pointed out that the decision clearly states the reasons as to the extension of time then the magistrate mentioned as a by the way the nine years the matter has been in court. He also pointed out that the Appellant's Affidavit states she was waiting for a copy of the decision which the Appellant got on 19 July, 2022 however, appealing from the primary court the district court does not require one to have a copy of the decision as was held in the case of **Kisioki Emmanuel v. Zakaria Emmanuel**, Civil Appeal No. 140 of 2016. He then concluded on his submission stating that the Appellant chose to sleep on her rights, and, for this reason the Respondent should not be unfairly treated, then prayed for the appeal to be dismissed.

By way of rejoinder Mr. Emmanuel submitted that for a matter to be called an illegality there has to be a serious violation of law. He disputed the



Respondent counsel's allegations that what is in paragraph 6 of the Affidavit is not a serious violation of the law. Stating that the issue of properties not being the deceased's and the share accorded to the Appellant should have been accorded weight as they are illegalities and the same do not require long drawn arguments since they are clear in paragraph 6 of the Affidavit.

Counsel also submitted that contrary to what the counsel for the Respondent stated, the Appellant has not been negligent, she was representing herself when she filed the complaint and was never informed she has to file an appeal. This is what led to the Application for extension of time. He argued that there are many authorities where the Court of Appeal held that filing an incompetent application is not negligence and cited the case of **Stephen Ngalambe v. Onesmo Ezekia Chaula and Songea Municipal Council**, Civil Appeal No. 27 of 2020 to buttress his argument.

On the argument that the Appellant had not accounted for the 20 days delay in filing the application, counsel submitted that there is no hard and fast rule on how to account for delay stating that because the Appellant accounted for the steps she had taken in paragraph 7 and paragraph 8 of her Affidavit it suffices as an account for the delay. He went on to state that the Appellant



having done this the district court should have considered the technical delay.

As for the last ground of appeal counsel argued that the nine years was not a by the way remark, the court considered it in its decision, He went on to argue that the issue of the Appellant waiting for a copy of the decision was not a reason nor implied reason that she gave when seeking for extension of time. Counsel concluded that this court should grant the appeal and set aside the decision of the district court.

Having considered the counsels' submissions for and against the appeal the only issue for this court's determination is whether this appeal is meritorious and if so what then is the way forward. In doing so I will look at two questions; the Appellant counsel's argument that the district court failed to appreciate that the delay is not a normal delay rather it is technical one and the assertion that the district court failed to consider there being an illegality. I begin with the fourth ground of appeal so that it is out of the way then segue to the second and third grounds for they relate and then finish with the first ground of appeal.

The fourth ground of appeal hinged on the averment made by the learned magistrate in the Ruling stating that the matter has been in court for a long



time, nine years, which the Appellant's counsel is calling an irrational consideration as it was not at issue for either of the parties. What they were seeking is their rights, so the nine years should not be a consideration in the extension of time. The Respondent's counsel is disputing this stating that the nine years is not a reason rather it was a by the way remark that the magistrate made.

In the impugned Ruling the learned magistrate spelled out the main reasons "hoja kuu" for seeking the extension of time are that the Appellant was awaiting the judgment and the reply to her complaint and went on to state that the reasons are unmeritorious for they are not legal requirements for one to file an appeal. The learned magistrate then went on to state:

'Nazingatia zaidi kuwa shauri hili limekuwa mahakamani tangu mwaka 2014 na sasa ni takriban miaka tisa. Muda wote huu wadaawa wamekuwa wakivutana mahakamani kwa hasara ya haki.'

The above statement unofficially translates to I am mindful of the fact that the matter has been pending in court since 2014, a period of almost nine years. In all this time the parties have been in court at the expense of justice. After these remarks, the learned magistrate went on to state:



'Hadi hapa mahakama haijaridhishwa na sababu zilizo tolewa kwenye kiapo na mawasilisho yaliyosajiliwa mahakamani.'

This also unofficially translates to up to this point the court is not satisfied with the reasons (for extension of time) articulated in the Affidavit and in the submission. This means in considering the application and arriving at the decision the learned magistrate considered what was in the Appellant's Affidavit and the parties' submissions.

I am inclined to agree with the Respondent's counsel that mention of the nine years was an incidental remark that the magistrate made in the course of determining the application. The said remarks were not the reasons considered by the magistrate in denying the extension of time therefore, I find the fourth ground of appeal unmeritorious.

I now turn to the question as to whether the Appellant had accounted for the delay and related to this is whether the delay is actually a technical delay as suggested by the Appellant's counsel and the reason considered by the district court to determine the Application. This covers the second and third grounds of appeal. It is the Appellant counsel's contention that the district court should have taken into consideration that the delay is technical and not dismiss the application.



The Court of Appeal in the celebrated case of **Lyamuya Construction Company Ltd vs Board Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 formulated the guidelines for exercising the discretion to extend time judiciously. For the sake of clarity, I will reproduce the guidelines as follows:

- 'a. The Applicant to account for the delay.*
- b. The delay not be inordinate.*
- c. The Applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action he intends to take.*
- d. If the court feels there are other sufficient reasons such as the existence of a point of law of sufficient importance; such as illegality of the decision sought to be challenged. '*

As to what consists of a technical delay, in **Zuberi Mussa vs. Shyinyanga Town Council**, Civil Appeal No. 3 of 2007 the Court of Appeal described what a technical delay is. See also this courts holding in **Fwanda Limited vs. Marmo E. Granito Mines (T) LTD**, Misc. Land Application No. 01 of 2019, High Court of Tanzania.

The Appellant should have met the stipulated benchmarks before the court could proceed to grant extension of time for even where it is a technical



delay one still needs to give an account of the time for a court to arrive at the conclusion that it's a technical delay.

In her Affidavit in support of her application for extension of time the Appellant has in paragraph 4 stated that the decision (she was seeking to appeal against) was rendered on the 06 July, 2022 stating that she made immediate follow up to get a copy of the said decision, which in paragraph 5 she states was availed to her on 19 July, 2022. Then in paragraph 6 the Appellant deponed that she is the wife of the late Donat Mashiku and she was not satisfied with the administrator's act of including her properties as part of her deceased husband's estate and that she, as the widow is not satisfied with the share she got. She further states in paragraph 7 that she wrote a complaint to the Kinondoni Primary Court on 03 August, 2022 and received a reply on 16 August, 2022 which informed her to lodge an appeal. In paragraph 8 of the said Affidavit she stated that she was unable to file the appeal because she was waiting for a reply to the complaint she had sent to the primary court. And, by the time she had obtained the same, the time to file an appeal had lapsed.

The Appellant's counsel was adamant that this is not the reason that the Appellant advanced, rather he stated the reasons for the delay are in paragraph 6 and 7 of the said Affidavit. The Respondent's counsel disputed



this and stated that the learned magistrate was correct in finding that the reasons were not sufficient.

Having gone through the Appellant's Affidavit I am inclined to agree with the learned trial magistrate that the reason for the delay is what is stated in paragraph 8 of the Affidavit the preceding paragraphs are merely recounting the series of events that led to the delay.

In that respect the said reason is not sufficient to convince this court that there is good cause to grant extension of time, and, this is why the Appellant wanted the district court to treat it as a technical delay since the Appellant was in fact waiting for the said reply to her complaint.

However, the Respondent counsel contends that the Appellant has not accounted for the time between getting the reply of the complaint letter and making the Application that was found to be unmeritorious in the district court. The Appellant's counsel disputed this stating that what the Appellant had stated in her Affidavit is the account for the delay for there is no hard and fast rule of doing so.

In addition, the Appellant's counsel also stated if the district court was not convinced that the delay is technical it should have considered that there is an illegality that is stated in paragraph 6 of the Affidavit which in itself is sufficient reason for extension of time, this I shall deal with later in this



judgment. The Appellant's counsel also stated that there being no hard and fast rule on how to account for the delay what the Appellant has stated in paragraph 6 and 7 of the Affidavit is an account for the delay.

Accounting for delay is a requirement as already seen in **Lyamuya Construction Company Ltd vs Board Registered Trustee of Young Women's Christian Association of Tanzania** (supra). Each day of delay needs to be accounted for as stipulated by the Court of Appeal in **Okech Akomo v. Konsilata Adoyo**, Civil Application 625 of 2022 and **Elias Kahimba Tibanderana v. Inspector General of Police and A.G**, Civil Application No. 388/01 of 2020.

Nonetheless, the Appellant's counsel lamented that the trial court should have granted the extension of time to file the appeal on the basis of there being an illegality. He stated that the illegalities are what is stated in paragraph 6 of the Affidavit.

It is a settled principle of law that, an extension of time can be granted on the sole ground of illegality as held in the case of **Transport Equipment Ltd. v. D.P. Valambhia** [1993] TLR 91 where the Court of Appeal referred to its earlier case of **Permanent Secretary, Ministry of Defence and National Service v. D.P. Valambhia** (supra) where it held:



'In our view 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 purposes to ascertain the point and, if the alleged illegality be established, to take appropriate measures and put the matter and record right.'

From what I have already explained above it is clear that what the Appellant's counsel is stating to be their reason for this appeal is *inter alia* the trial court ignoring the illegality as it is stated in the Appellant's Affidavit. The said illegality is occasioned by the administrator allegedly including the Appellant's properties in the deceased's estate and that she is not satisfied with the share of the estate accorded to her as the deceased's widow.

While extension of time can be granted on the ground of illegality alone, the Court of Appeal in **Lyamuya Construction Company Limited v. the Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), expounded on its holding in **Permanent Secretary, Ministry of Defence and National Service v. D.P. Valambhia** (supra) and held that for an illegality to amount to sufficient cause it must be apparent on the face of record. The court stated:



*'The Court there emphasized that such point of law must be that 'of sufficient importance' and, **I would add that it must be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by long drawn argument or process.**'(emphasis supplied)*

The question is whether in this case the illegality is clear on the face of the record. Counsel for the Appellant is of the view it is since the same has been stated in paragraph 6 of the Affidavit then it is clear and does not need long drawn arguments.

In my considered view, the fact that the Appellant is contending that her properties were included in the list of the deceased's properties, that is the estate and that she is not satisfied with the distribution are not questions that would not require long drawn arguments to establish. On this one, I am also in agreement that the Respondent's counsel that as held in **George Timothy Mwaikusa v. National Microfinance Bank PLC** (supra) the said points illegalities are normal grounds of appeal which would be subject to long and drawn argument or process. In that respect, I find the first ground of appeal as unmeritorious.



Consequently, the grounds of appeal are all unmeritorious and the prayers by the Appellant cumulatively untenable. The Appeal is dismissed. Being that this appeal arises from a matter that originates from a probate matter no order as to costs.




A.A. OMARI

JUDGE

10/10/2023

Judgment delivered and dated 10th day of October, 2023.


A.A. OMARI

JUDGE

10/10/2023