

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 59 OF 2021

*(Arising from the Ruling of Kinondoni District Court delivered on 20th January 2021
before Hon. Kikoga, RM in Misc. Application No.156 of 2020)*

HAMZA RASHIDI ----- APPELLANT

Versus

OMARY MOHAMED ----- RESPONDENT

J U D G M E N T

Date of last order: 24/02/2022

Date of Judgment: 05/05/2023

MGONYA, J.

The Appellant herein **HAMZA RASHID** being aggrieved by the Kinondoni District Court decision in **Miscellaneous Application No. 156/2020** delivered on the 20th day of January 2021; appealed to this Honorable Court. In the Memorandum of Appeal, the Appellant presented two grounds of Appeal as they appear herein below:-

- 1. That the trial Magistrate erred in law and in fact for not granting an extension of time to***

file the appeal without considering reasons adduced by the Appellant;

2. The trial Court erred in law and in facts by dealing with a different issue apart from the reasons adduced by the appellant for the delay to file his appeal on time.

When the matter came before this Honourable Court for hearing, the Respondent prayed the Appeal be heard by way of written submissions. The Appellant had no objection hence the Court granted the prayer and the Appeal proceeded as prayed. The Appellant was unrepresented whereas, the Respondent was represented by **Pendo Charles Ngowi, Learned Counsel.**

The written submission for the Appellant, on the **1st ground** of Appeal revealed that, the Court failed to make an analysis of the application for an extension of time to file an appeal out of time; his main reasons were to seek legal assistance from the lawyers and family problems.

On the **2nd ground** of Appeal, that the trial Court erred in law and in facts by dealing with an illegality that was not adduced by the Appellant herein; the court instead of dealing with the reasons that have been adduced by the appellant for his delay, the

Kinondoni District court deals with the illegality which was not his reasons for extension of time.

In reply on 1st ground of the Appeal, the Counsel for the Respondent submitted that the law is settled on applications of extension of time, the Applicant has to show sufficient reason and good cause to warrant the Court to exercise its discretionary power to extend time. The counsel cited the case of **NGAO GODWIN LOZERO VS JULIAS MWARABU OF CAT. CIVIL APPLICATION NO. 10 OF 2015 (UNREPORTED)** in which the Court of Appeal of Tanzania quoted with approval the Case of **LYAMUYA CONSTRUCTION LTD VS BOARD OF REGISTERED TRUSTEES OF YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF TANZANIA COURT OF APPEAL OF TANZANIA, CIVIL APPLICATION NO. 2 OF 2010**, in which the principle as to what constitutes sufficient and good cause was explained as follows:

- a) The applicant must account for all the periods 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;
and***

d) If the Court feels that there are other sufficient reasons such as the existence of a point of law, sufficient importance such as the illegality of the decision sought to be challenged.

The Counsel for the Respondent further submitted that, in the lower Court's record, the Appellant's Affidavit, there are no sufficient reasons adduced by the Applicant for his delay. The Appellant explain much about the history of his appointment than expounded the reasons for the delay. Insisted that each day of delay must be accounted for, as it was elaborated in the case of ***SEBASTIAN NDAULA VS GRACE RWAMAFAY - CIVIL APPLICATION 4 OF 2014 (UNREPORTED)*** where the Court of Appeal had this to say:

"Even a single day has to be accounted for otherwise there would be no point of having rules prescribing period within which certain steps have to be taken."

Submitting on the **Second Ground** of the Appeal the Respondents' Counsel averred that, the trial Court Magistrate was required by Law to consider the issue of illegality of the decision

sought to be appealed. The Court had to digest all the facts and issues raised in the Primary Court of **Magomeni** in the decision intended to be appealed against. Evidenced on page 6 paragraph (2) of the typed ruling the Counsel for the Respondent referred to the case of **LYAMUYA (SUPRA)**.

Counsel for the Respondent referred to another case of **FINCA (T) LIMITED AND ANOTHER VS BONIFACE MWALUKISA. COURT OF APPEAL OF TANZANIA, CIVIL APPLICATION NUMBER 589/12 OF 2018 (UNREPORTED)** the Court at pgs. 9-10 laid the position that:

*"It is, however, significant to note that the issue of consideration of illegality when determining whether or not to extend time is well settled and it should be borne in mind that, in those cases where extension of time was granted upon being satisfied that there was illegality, the illegalities were explained. For instance, in **Principal Secretary, Ministry of Defence and National Service vs Devram Valambhia [1999] TLR 182** the illegality alleged related to the applicant being denied an opportunity to be heard contrary to the rules of natural justice."*

The Counsel for the Respondent prays before this Honourable Court that, as the Appeal is devoid of merits, the same be dismissed with costs.

In **rejoinder**, the Appellant emphasized that the court can extend time without considering the reason are well elaborated in the case of ***MOBRAMA GOLD CORPORATION LTD MINISTER FOR ENERGY AND MINERALS AND THE ATTORNEY GENERAL AND EAST AFRICA GOLD MINES LTD AS INTERVENOR TRL1998 AT PG. 425*** where it was held that

"It is generally in appropriated to deny a party an extension of time where such denial will stifle his case, as the respondents' delay does not constitute a case of procedural abuse of contemptuous default and because the applicant will not suffer any prejudice, an extension of time they should be granted".

Having carefully gone through the grounds of Appeal as well as the submission from both parties, I have observed that the main issue to be determined is whether the denial of the Kinondoni District Court to extend time to the Appellant by its own motion dealing with the Illegality without the parties rise it was proper.

Upon perusal of the Kinondoni District Court records in **Misc. Application No. 156 of 2020**, the Kinondoni District Court failed to grant the extension of time to appeal out of time on the reason that the Appellant has failed to give sufficient reasons and good cause to his delay.

On the **1st Ground** of Appeal, it is the discretionary power on granting the extension of time that lies within the powers of the Court and the same has to be judiciously exercised. The same is also granted upon the Applicant presenting sufficient reasons thereto. In the case of ***PARADISE HOLIDAY RESORT LIMITED VS THEODORE N. LYIMO, CIVIL APPLICATION NO. 435/01 OF 2018*** it was stated that:

"...but the Court consistently considers factors such as the length of the delay, the reasons for the delay, the degree of prejudice the Respondent stands to suffer if time is extended, whether the Applicant was diligent, whether there is a point of law sufficient importance such as the illegality of the decision sought to be challenged".

Another case is that of ***LYAMUYA CONSTRUCTION COMPANY LTD (SUPRA)*** which outlined the criteria for an extension of time to be granted.

Under Section 20 (4) of the Magistrates Court Act, CAP. 11 [R. E. 2002] the MCA, an Appeal to the District Court shall be filed in the District court within thirty days after the date of the decision or order against which the appeal is brought. In terms of **Section 20 (4) (a)** of the MCA, the District Court may extend the time for filing an Appeal either before or after such period has expired. As it was rightly stated by the District Court, it is in the discretion of the court to grant an extension of time. At least, with a view to exercising such discretion, the court must be satisfied that there has been shown by the Applicant a reasonable or sufficient cause why he could not timely lodge the Appeal.

In the case at hand, Probate Cause No. 260/2018 was instituted in Kawe Primary Court whereby the decision was delivered in **27/3/2020**. The Appellant herein on **20th May, 2020** instituted the Appeal at Kinondoni District Court via **Probate Appeal No. 14/2020** which was dismissed for filing out of time. Upon his Application to file on the extension of time, the Appellant did inform the court that his delay was caused by seeking legal assistance and that the decision was based on illegality and unfair. The Appellant submitted further that, his delay was caused by seeking legal assistance and a family problem which is difficult to account on each day. Therefore, the Appellant's failure to account

periodically for his delay and stating that his delay was caused by seeking legal assistance is not a good cause. Also family problem is a large term which should be explained in detail which family problem exactly meant. Therefore, the 1st ground of Appeal is dismissed for lack of merit.

On the 2nd ground that, the Kinondoni District Court intervened the point of illegality which was not pointed out by the parties. It is common that the court cannot deal with the issue which was not pointed out by the parties. The court is duty bound to call for the parties so as to address it on the new issue. However, in this matter the issue of illegality of the decision subject to Appeal was pointed by the Applicant in his Application. As it appears in the first ground of Appeal, the Applicant complained that the decision was based on illegality and unfair. That being the case the issue of illegality was complained by the Applicant himself and it was not raised by the court. Therefore, the 2nd ground of Appeal is destitute of merit.

In this Appeal, I find nothing that leads the court to find otherwise. Henceforth, the Appeal is hereby dismissed. This being the Administration of Estate and Probate Cause, I make no order as to costs.

It is so ordered.



A handwritten signature in blue ink, appearing to read "Mgonya".

L. E. MGONYA

JUDGE

05/05/2023