

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

MISC. CIVIL APPLICATION NO. 35 OF 2023

(Arising from Civil Revision No. 1 of 2022 District Court of Karagwe and Originating from Probate Cause No. 7 of 2021 at Kaisho Primary Court)

RENATUS J. KAKURU..... 1ST APPLICANT

NOVATUS J. KAKURU..... 2ND APPLICANT

VERSUS

FORTUNATUS J. KAKURU..... 1ST RESPONDENT

FRIDA J. KAKURU..... 2ND RESPONDENT

RULING

20th November & 1st December, 2023

BANZI, J.:

The applicants and the respondents are siblings battling for the estate of their deceased father, Joseph Kakuru who died intestate on 2nd July, 2021 survived by six children. On 23rd August, 2021, the first respondent petitioned before Kaisho Primary Court (trial court) seeking to be appointed as administrator of the estate of the deceased. After general citation, the applicants emerged and raised an objection against the petitioner contending that, he was not a suitable person to administer the estate of their father. Their objection did not sail through and eventually, the respondents were appointed as co-administrators of the estate and were

ordered to file statement of account by 23rd March, 2022. After filing the same, the applicants appeared before the trial court challenging distribution of deceased's estate. The trial court ordered the estate to be redistributed on the ground that, the distribution was unfair to the applicants.

The order of the trial court did not impress the respondents who complained to the District Court. Such complaint letter moved the District Court to institute revisional proceedings *suo motto*. According to the records, after hearing the respondents and applicants, on 28th April, 2022 the District Court made its decision by blessing the initial distribution after finding it to be fair. On 15th August, 2022, the trial court closed the probate after satisfying itself that, distribution report was duly filed and there was no pending appeal against the revision of the District Court.

Three months later, the applicants approached this Court with application for extension of time to file the appeal against the revision of the District Court. However, on 2nd May, 2023 for the reasons known to themselves, the applicants prayed to withdraw their application and the same was withdrawn. Thirteen days later, on 15th May, 2023, the applicants returned before this Court with this application. It was made pursuant to section 25 (1) (b) of the Magistrates' Courts Act [Cap. 11 R.E. 2019] (the

MCA) and it is supported by the affidavit deposed by both applicants. The respondents through their joint affidavit, resisted the application.

At the hearing, all parties appeared in person, unrepresented. The first applicant adopted their affidavit and submitted that, there were irregularities committed by the respondents who included and distributed their properties which were not part of the deceased's estate; they were not given the deceased's properties regardless being heirs; the respondents filed revision while they had a right of appeal and he was denied right to be heard on Revision No. 1 of 2022. He added that, the reason for the delay was that, he was not aware of the revision in question and thus, he had no knowledge of the decision subject of appeal. On his part, the second applicant submitted that he was not given right to heard despite being summoned to attend for such revision. Also, he was not aware of the decision of the District Court until 15th August, 2022 as the same was not read over to them.

In reply, the first respondent prayed to adopt their counter affidavit and stated that the first applicant received his shares; the farm tree and domestic utensils. They did not give to them the coffee and banana farms because they were already given their share by the deceased before his demise. Regarding the complaint concerning right to be heard, he responded that, the applicants were summoned and attended on every date of hearing

save for the date of ruling which they did not appear. When the file was remitted back to the trial court, they all appeared and on 18/08/2022 the trial magistrate asked them if they intended to appeal, they said that they were satisfied. He blamed them to be negligent, otherwise, they would have appealed as they had ample time to do so. He insisted that, this application is an afterthought after they had sold their shares. He concluded that, the applicants have not advanced sufficient reasons for this court to grant them extension of time. He prayed for this application be dismissed.

The second respondent on her side, apart from adopting their counter affidavit, she claimed that, the applicants were heard by the District Court in the said revision. After that they refused to appear on the date of ruling and after waiting for them until 2:00 PM, the magistrate delivered the ruling. When they went back to the trial court, the applicants were asked and they said that they were satisfied, they had no intention to appeal. Therefore, this application is an afterthought.

In his rejoinder, the first applicant insisted that, he was never summoned before the District Court at the hearing of the said revision and it was the second applicant who was summoned. The second applicant on his side, he briefly stated that, on 08/04/2022 they were told that the file

would be remitted back to the trial court because the respondents were not competent to file revision.

I have thoroughly examined the affidavits and the submissions of both parties. Section 25 (1) (b) of the MCA gives this court the discretion to extend time to appeal after or before expiration of period of thirty days from the date of order or decision. However, it is a settled principle that, such discretion is exercised when the applicant has established sufficient cause for the delay. In the case of **Benedict Mumello v. Bank of Tanzania** [2006] 1 EA 227 it was stated that:

"It is trite law that an application for extension of time is entirely in the discretion of the court to grant or refuse it, and that extension of time may only be granted where it has been sufficiently established that the delay was with sufficient cause."

Nonetheless, there is no hard and fast rule on what amounts to sufficient cause but through case law, there are established factors to be taken into account before granting or refusing to grant extension of time. These factors include the length of delay; the reasons for the delay; the degree of prejudice that the respondent may suffer if the application is granted; whether or not the application has been brought promptly; lack of diligence on the part of the applicant; the applicant must account for each

day for the whole period of the delay; the delay should not be inordinate and existence of point of law such as illegality of the decision sought to be challenged just to mention a few. See the cases of **Tanga Cement Company Limited v. Jumanne D. Masangwa and Another**, Civil Application No. 6 of 2001 CAT (unreported), **Omary Shabani Nyambu v. Dodoma Water and Sewerage Authority** [2016] TZCA 2024 TanzLII, **Lyamuya Construction Co. Ltd v. Board of Registered of Young Women's Christian Association of Tanzania** [2011] TZCA 4 TanzLII, **Wambele Mtumwa Shahame v. Mohamed Hamis** [2016] TZCA 898 TanzLII, **The Registered Trustees of Kanisa la Pentekoste Mbeya v. Lamson Sikazwe and Others** [2019] TZCA 516 TanzLII and **Ngao Godwin Losero v. Julius Mwarabu** [2016] TZCA 302 TanzLII.

Reverting to the matter at hand, looking closely at the affidavit of the applicants, the reasons for the delay are found at paragraphs 5, 6 and 9 *i.e.*, one, they were not aware of the application for revision before the District Court; two, they were not heard and the said revision and three, the impugned decision was tainted with illegality on the face of record. On the other hand, the respondents in their counter affidavit disputed the three grounds by stating that, the applicants were duly served, hence, aware of

the revision; they both appeared and duly heard and the decision in question is not tainted with illegalities on the face of record.

Starting with the first two grounds, it is undisputed that, the revision before the District Court was instituted *suo motto* after the respondents wrote the complaint letter. The record show that, on 8th April, 2022 the applicants who were the respondents in that matter appeared after being summoned. Likewise on 12th April, 2022 when the matter was scheduled for hearing, both applicants and the respondents appeared and were duly heard. The proceedings of the District Court contained the oral submissions of both respondents/applicants and both applicants/respondents. The hearing continued on 14th April, 2022 following a request from the applicants/respondents to bring letters as evidence proving how the deceased gave them piece of land. After receiving the letters, the District Court set the date of ruling (28/04/2022) in their presence. However, despite being aware, for the reasons known to themselves, they failed to appear on the date of ruling. Thus, their allegation that, they were not aware of the revision and they were not heard is not only a blatant lie but also an afterthought. Such blatant lie cannot save them by convincing this Court to exercise its discretion.

Reverting to the issue of illegality, in the case of **Lyamuya Construction Co. Ltd v. Board of Registered of Young Women's Christian Association of Tanzania** (supra) it was stated that:

*"Since every party intending to appeal seeks to challenge a decision either on points of law or fact, **it cannot in my view, be said that in VALAMBHIA's case, the Court meant to draw a general rule that every applicant who demonstrate that his intended appeal raises points of law should as of right, be granted extension of time if he applies for one.** The Court there emphasized that such point of law, must be that "of sufficient importance" and I would add that **it must also be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process.**"*
(Emphasis supplied).

Likewise, in the case of **Ngao Godwin Losero v. Julius Mwarabu** (supra), it was emphasised that, the alleged illegality must be clearly apparent on the face of the impugned decision and it should not take a long-drawn process to decipher from the impugned decision. In the matter at hand, the applicants in their affidavit alleged the impugned decision to be tainted with illegalities. However, they did not state the kind of illegality contained in the decision in question. In their submissions, both applicants

claimed to be denied with the right to be heard. In addition, the first applicant claimed that, the respondents filed revision while they had the right of appeal. As already ruled, their complaint about not being given their right to be heard, is a blatant lie as the record shows to the contrary. Moreover, the issue of revision to be filed instead of appeal will take the long-drawn process or arguments to get to the bottom of the alleged illegality. This will be against the established principle as stated in the two decisions above.

Apart from that, assuming that, the applicants were not aware of the decision on revision until 15th August, 2022, yet still they would be caught up with the principle of failure to account for each day of the delay because it took them three months to file the first application for extension of time before this Court without accounting for each day of the delay. Likewise, they did not account for almost 13 days when their first application was withdrawn until they filed this application. It should be noted that, a delay even for a single day must be accounted for. See the case of **Wambele Mtumwa Shahame v. Mohamed Hamis** (supra).

That being said, it is the finding of this Court that, the applicants have not demonstrated any good cause that would convince me to exercise my discretion to grant them extension of time. In the result, this application fails.

and is, accordingly, dismissed. Since parties are siblings and considering that, the matter arises from probate cause, I make no order as to costs.



I. K. BANZI
JUDGE
01/12/2023

Delivered this 1st day of December, 2023 in the presence of both applicants, the first respondent and in the absence of the second respondent with notice. Right of appeal duly explained.



I. K. BANZI
JUDGE
01/12/2023