

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOROGORO DISTRICT REGISTRY

AT MOROGORO

MISC CIVIL APPLICATION NO. 51 OF 2023

(Arising from Civil Revision No. 2 of 2022 of Kilombero District Court; Originating from the Decision in Probate and Administration Cause No. 22 of 2020 of Ifakara Urban Primary Court, dated 15/02/2022)

WOLFGANG Z. NGALAPA APPLICANT

VERSUS

**CONRAD ZACHARIA NGALAPA (the Administrator of the Estate
of the late ZACHARIA CONRAD NGALAPA) RESPONDENT**

RULING

13/12/2023 & 21/12/2023

KINYAKA, J.:

The present application was lodged by the applicant on 01/09/2023, seeking an order for extension of time to lodge an appeal against the decision of the District Court of Kilombero in Probate and Administration Revision No. 2 of 2022 made on 27/07/2022.

The background of the application deduced from the affidavit of the Applicant is that the Applicant was the objector in the Probate and Administration Cause No. 22 of 2022. The case was decided against him by the Ifakara Urban Primary Court. Aggrieved by the decision of the Primary Court, the Applicant unsuccessful preferred Revision No. 2 of 2022 at Kilombero District Court whose decision was rendered on 27/10/2022.

Dissatisfied with the decision of Kilombero District Court, on 25/11/2022, the Applicant preferred Probate Appeal No. 15 of 2022 before this Court. The appeal was struck out on 28/6/2023 for being filed in the High Court instead of the District Court of Kilombero.

Being caught by the law of limitation to re-lodge his appeal, the Applicant preferred an application for extension of time before this Court. The application was struck out on 16/08/2023 for being preferred under a wrong provision of the law. The present application is the second attempt by the Applicant, seeking an order for extension of time to lodge his appeal.

On 13/12/2023 when the application was called on for hearing, Mr. Bartholomew Tarimo assisted by Ms. Jessephine Jackson, learned Advocates, represented the Applicant, while the Respondent was duly represented by Ms. Ester Shoo, learned Advocate.


Mr. Tarimo begun his submissions by adopting the contents of the affidavit sworn by the Applicant and annexure appended to the affidavit as forming part of his submissions. He argued that the Applicant's delay is not actual but technical. He contended that the Applicant was diligent in filing Probate Appeal No. 15 of 2022 on 25/11/2022 in this Court but it was struck out for being filed in a wrong court. He argued that the Applicant's application for extension of time to file his appeal was also struck out for being preferred under a wrong provision of the law.

The learned Counsel cited the decisions of the Court of Appeal in the cases of **Michael Lessani Kweka v. John Eliafye [1997] TLR 152**, and **Fortunatus Masha v. William Shija and Another [1997] TLR 154**,

where it was held that the Court has powers to grant extension of time if sufficient cause is shown, and when the applicant demonstrate reasonable diligence in correcting the error immediately upon discovery. He argued that, the Applicant demonstrated diligence to warrant him an enlargement of time prayed for. He prayed for the application to be granted.

Opposing the application, Ms Esther Shoo, the learned Counsel for the Respondent, adopted the contents of the counter affidavit sworn by the Respondent as forming part of her reply submissions. She submitted that for the court to grant an application for extension of time, the Applicant should demonstrate the reasons for delay, account for each day of delay, and show the degree of prejudice to the Respondent if the application is granted. She argued that those facts should be stated in the affidavit which constitute evidence. Ms. Shoo cited the case of **East Africa Cable (T) Limited v. Spencon Services Limited, Misc. Application Case No. 42 of 2016** to buttress her argument that an affidavit or counter affidavit as the case may be, is evidence.

Ms. Shoo contended that the Applicant's failure to file an appeal in the appropriate registry and his wrong citation of the applicable provision of the law, constitute negligence on part of his Counsel. Referring to the case of **Jane Chabruma v. NMB PLC, Misc. Application No. 12 of 2017**, which cited with approval the case of **William Shija v. Fortunatus Masha [TLR] 1997 page 213**, Ms. Shoo argued that negligence on the part of the Counsel who caused the delay, cannot constitute sufficient reasons for extension of time.



Ms. Shoo submitted that the Applicant failed to account for each day of delay. She argued that the Applicant failed to account for the period from the date the appeal was struck out, to the date of filing the previous application for extension of time. She argued further that the Applicant failed to state the reasons for delay of 15 days from 16/08/2023 when the previous application for extension of time was struck out, to the date of filing the present application. She cited the case of **Dr. Ally Sahbhy v. Tanga Bohora Jamaat [1997] TLR 305**, where the Court of appeal held that those who come to court must show great diligence. The learned Counsel argued that the Applicant has failed to demonstrate diligence in prosecuting his case. She prayed for dismissal of the application with costs.

In his rejoinder, the learned Counsel for the Applicant argued that Counsel for the Respondent did not deny that Probate Appeal No. 15 of 2022 was filed within 30 days from the decision of the District Court as prescribed by law. He submitted that the affidavit of the Applicant does not disclose the date when the first application for extension of time was filed, but the same is in record of the court. He urged the court to take judicial notice of the ruling of this Court (Hon. Chaba, J.), dated 16/08/2023 in Misc. Application No. 25 of 2023. He contended that the decision indicate that it was on 04/07/2023 when the Applicant filed the previous application for extension of time, after it was struck out on 28/06/2023.

The learned Counsel reiterated that, the Applicant was diligent in prosecuting his appeal and the delay was technical. He argued that the previous appeal was filed within 30 days, and accounting for the 15 days was uncalled for. He distinguished the cases cited by Counsel for the

Respondent for being inapplicable in the circumstance of the present appeal, where the Applicant has shown diligence. He reiterated his prayer for the application to be found meritorious.

I have considered the rival submissions and arguments of the parties. In determining whether to grant or refuse the application, the Court is enjoined to exercise discretionary powers under section 25(1) (b) of the Magistrates Courts Act Cap. 11 R.E. 2019 (hereinafter, the "MCA") judiciously. In doing so, the court is enjoined to determine whether the Applicant has demonstrated good or sufficient cause for delay. As observed by the Court of Appeal in the case of **Lyamuya Construction Company Ltd v. Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 [2011] TZCA 4 (3 October 2011; TANZLII), good or sufficient cause include, the accounting for all the period of delay which should not be inordinate; diligence, and not apathy, negligence or sloppiness in the prosecution of the action that the Applicant intends to take; and if there are other sufficient reasons such as the existence of a point of law of sufficient importance including illegality of the decision sought to be challenged.

It is gathered from the affidavit of the Applicant and reflected in the records of the court that the Applicant, though erroneously, lodged his appeal in the court on 25/11/2022. The appeal was lodged 29 days from the date of the ruling of the District Court of Kilombero delivered on 27/10/2022, within the time prescribed under section 25(1) (b) of the MCA. The appeal was struck out on 28/06/2023 for being lodged in the High Court instead of the District Court of Kilombero. According to the ruling of the court in Probate

Appeal No. 15 of 2022, the Applicant spent 6 days from 28/06/2023 to 04/07/2023 to file the previous application for extension of time.

From the above facts, it is clear to me that the Applicant has been diligent in prosecuting his appeal against the decision of the District Court of Kilombero. The periods of delay between the filing of Probate Appeal No. 15 of 2022, and 28/06/2023 when it was struck out for being lodged in a wrong court; and between 04/07/2023 when Miscellaneous Civil Application No. 35 of 2023 was lodged in court, to 16/08/2023 when the Application was struck out for wrong citation of the enabling provision of the law, constitute a technical delay within the meaning of the decision of the Court of Appeal in **Fortunatus Masha** (supra).

The learned Counsel for the Respondent argued that it is the negligence of the Applicant's Counsel to lodge incompetent appeal and the previous application for extension of time, which does not constitute good cause for extension of time, citing the case of **Jane Chabruma** (supra). I am not convinced with the position taken by the Counsel for the Respondent. I am of the view that the Applicant, being punished by the court by striking out his appeal and the previous application for extension of time for being incompetent, he cannot be punished again based on the wrong filing in determining the present application.

In holding as I do, I am fortified by the decision of the Court of Appeal in **Eliakim Swai and Another v. Thobias Karawa Shoo**, Civil Application No. 2 of 2016 [2017] TZCA 162 (22 February 2017; TANZLII), where on



page 11 through to 12, the Court cited with approval the case of **Fortunatus Masha** (supra) where on page 155, it observed that:

*"...a distinction should be made between cases involving real or actual delays and those like the present one which only involve what can be called technical delays in the sense that the original appeal was lodged in time but the present situation arose only because the original appeal for one reason or another has been found to be incompetent and a fresh appeal has to be instituted. In the circumstances, the negligence if any, really refers to the filing of an incompetent appeal not the delay in filing it. **The filing of an incompetent appeal having been duly penalized by striking it out, the same cannot be used yet again to determine the timeousness of applying for filing the fresh appeal.** In fact in the present case, the applicant acted immediately after the pronouncement of the ruling of this Court striking out the first appeal."*

The learned Counsel for the Respondent argued that the Applicant has failed to account for the period of delay from the date the appeal was struck out to the date of filing the previous application for extension of time, and from the date the previous application for extension of time was struck out, to the date of filing the present application. The record of the Court in Probate Appeal No. 15 of 2022 and Misc. Civil Application No 35 of 2023 reveal that, the Applicant spent 6 days to file the previous application for extension of time. I find that the Applicant managed to account for the period



of delay up to 16/08/2023 when the previous application for extension of time was struck out.

The learned Counsel for the Applicant argued that the Applicant spent 14 days from 16/08/2023 to 01/09/2023 to file present application. Contrary to his submissions, I find that the Applicant spent 15 days from 16/08/2023, when the previous application for extension of time was struck out, to 01/09/2023 to lodge the present application. I am also not in agreement with the Counsel for the Applicant that it was not necessary for the Applicant to account for delay of the 15 days because the Applicant complied with filing his Probate Appeal No. 15 of 2022 within 30 days. It is a requirement of law through various decided cases that the applicant seeking an order for extension of time, should account for all period of delay. That notwithstanding, I find that 15 days that the Applicant spent to prepare the present application culminating to its filing on 01/09/2023 to be reasonable and within the ambit of promptness. In **Eliakim Swai and Another** (supra), the Court of Appeal found two weeks spent by the Applicant to lodge the application for extension of time as reasonable.

In view of the above, I find the decision of the High Court in **Jane Chabruma** (supra), as distinguishable to the present case. In the said case, apart from the Applicant's technical delay, the Applicant delay was inordinate. He failed to file the application for extension of time for about 6 months; and 41 days from the date of the judgement of the High Court as reflected on page 6 of the judgement.

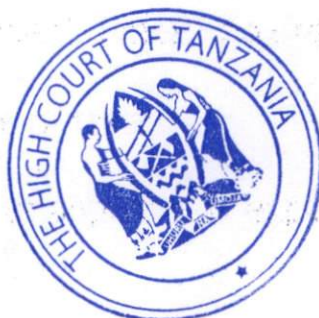


In the upshot, I find and hold that the applicant has explained away the delay for not filing the appeal in time. Consequently, this application is granted. The Applicant is given thirty (30) days reckoned from today to file his appeal. I make no order as to costs.

It is so ordered.

Right of appeal fully explained.

DATED at **MOROGORO** this 21st of December 2023



H. A. Kinyaka

H. A. KINYAKA

JUDGE

21/12/2023