

**IN THE HIGH COURT OF TANZANIA
TEMEKE SUB – REGISTRY
(ONE STOP JUDICIAL CENTRE)
AT TEMEKE**

MISC. CIVIL APPLICATION NO. 28 OF 2023

(Arising from Civil Appeal No. 41 of 2021 of Temeke District Court before Hon. Kihawa – SRM, Original, Shauri la Mirathi No. 304 of 2020 of Temeke Primary Court before Hon. Maira – RM)

YASSIN SALUM GEA.....1st APPLICANT

FADHILI ABDALLAH GEA.....2nd APPLICANT

VERSUS

ESTER KIBONA.....RESPONDENT

RULING

7/08/2023 & 11/08/2023

M.MNYUKWA, J.

This is an application for extension of time which was preferred under the provision of section 25(1)(b) of the Magistrate’s Court, Act, [Cap 11 R.E 2019]. This application is made by chamber summons and supported by the affidavits of the applicants, stating reasons for which this application is grounded. Applicants are seeking for the following orders;

- i. This honourable court be pleased to extend time for the applicants to apply for extension of time to file an appeal out of time against*



the decision made in Civil Appeal No. 41 of 2021 between Ester Kibona and Yasin Salum Gea and Another.

ii. Any other reliefs the court deem fit

In the affidavits, the applicants averred that they were delayed to be supplied with the copies of the judgment and decree. Applicants stated that, the impugned judgement was delivered on 7th December 2021 and the copies of judgement and decree were supplied to them on 25th February, 2022. They averred further that their advocate was sick which resulted them to engage another advocate. The applicants also deposed under par 14 of their affidavit that the impugned judgment is tainted with illegality.

At the hearing, both parties were represented. The applicants were represented by Amina Nyahori, learned advocate while the respondent enjoyed the legal services of Rehema Mrangu assisted by Pasensa Kurobone, learned advocates The application was argued orally.

Supporting the application, the learned advocate for the applicants adopted the contents of the applicants' affidavits and the affidavit of Amina Nyahori to form part of her submissions. She argued that they delayed to file an appeal on time due to sickness of the applicants' advocate. The learned advocate stated that due to her sickness she was under bed rest and failed to file appeal in the prescribed time provided by



law. She added that, due to sickness she has even failed to advise her clients on time as she was already out of time. She further argued that, the applicants were unable to know the time for filing the appeal. Then, she said sickness is sufficient cause for court to extend time. She cited the cases of **Murtaza Mohamed Raza Viran and Another vs Mehboob Hassanali Versi**, Civil Application No.448/01 of 2020.

On the point of illegality, she referred at page 10 of Annexure GE5 and said that, the district court considered submissions of the respondent which raise the issue of jurisdiction. She submitted further that, that submission contained statements which were neither in the primary court record nor district court record. According to the learned advocate the same is illegality which occasioned miscarriage of justice. She cited the case of **Charles Richard Kombe vs Kinondoni Municipal Council**, Civil Reference No. 13 of 2019 to support her argument.

Contesting the application, the learned advocate for the respondent adopted the respondent's counter affidavit and argued that, the applicants failed to show sufficient cause, she stated that applicants ought to have accounted for each day of delay and should show diligence not negligence. it was the learned advocate's submission that applicants did not account for 78 days of delay to which they were late to file an appeal.



To support his argument that delay should not be inordinate and tainted with negligence, he cited the case of **Gasper Fabian Temu and Another vs Segera Village Council and 3 Others**, Miscellaneous Land Application No. 47 of 2021.

The counsel further submitted that, on paragraph 6 of the applicants' affidavit, it is clearly shown that the Judgement was ready for collection on 11/02/2022 but still they did not go to collect it. The counsel also claimed that, the applicants went to visit their advocate on 10/03/2022 after they have collected the copy of judgement on 25/02/2022 in which they spent almost three weeks.

On the point of illegality, he contended that there is no illegality on the face of the record, he stated further that illegality has to be seen on the impugned judgment. The learned advocate submitted that the case of **Charles Richard Kombe** (supra) and **Murtaza Mohammed Raza** (supra) are distinguishable with the application at hand. He therefore prayed for an application to be dismissed.

When re-joining, the learned advocate reiterates what she submitted in chief.

Having considered the rival submissions of the parties, it is undisputed that section 25(2) (b) of Cap 11 R.E 2019 provides for 30 days to appeal



to the high court against the decision of the district court when exercising its appellate jurisdiction. It is also undisputed that applicants were aggrieved by the decision of the district court which was delivered on 7/12/2021 and this application was filed on 9/6/2023 after expiry of 18 months.

It is trite that granting or refusing to grant extension of time is in absolute discretion of the court, however the same has to be exercised judiciously. For the application of this kind to be granted, one must show sufficient cause and account for each day of delay. To hold so, I am fortified with the case of **Murtaza Mohamed Raza Virani (supra)** when the Court of Appeal at page 7 held that;

"It follows then that it is upon the party seeking extension of time to advance good cause for the court to exercise its discretionary powers."

In our present application, the applicants argued that they were late to be supplied with the requisite documents which they have applied for them on 13/12/2021 and collected the same on 25/2/2022. However, in their submission, the learned advocate argued that applicants failed to file appeal within time due to their advocate's sickness. It is on record that the impugned judgment was certified on 11/2/2022 but applicant collected the same on 25/2/2022. It is also in record that according to



affidavit of Amina Nyahori, applicants went to engage her on 10/3/2022. Considering the time when the impugned judgment was certified applicants were within time to file their appeal.

The issue for determination is whether their advocate's sickness is sufficient cause for this court to grant an application to extend time. With respect, this issue is answered in negative due to the fact that, sickness is a sufficient cause for extension of time if the applicants were the ones who were suffered from such condition and not their advocate. I say so because, I believe applicants were at liberty to engage another advocate as they did, since their affidavits shows that they engaged Mashaka Ngole, an advocate who drafted and filed this application. Thus, the applicants failed to show justifiable reason as to why they failed to appeal within time.

I therefore join hands with the advocate for the respondent that the case of **Murtaza Mohamed Raza Virani (supra)** as far as the issue of sickness is concerned is distinguishable with our case at hand. It follows therefore that, applicants showed negligence and sloppiness in filing this application based on the reason of sickness and therefore the delay is inordinate. [see the case of **Lyamuya Construction Company Limited**



vs Board of Registered Trustee of Young Women Christian Association of Tanzania, Civil Application No. 2 of 2010 (unreported)].

As for the point of illegality, the learned advocate is faulting the decision of the district court for considering the statement which she called them "unfounded statements" found in the submission that according to her raised the issue of jurisdiction. The learned advocate claimed that the same were neither in the primary court record nor district court record.

I have to say that, if I understood the learned counsel of the applicant well, she complained about the respondent's submissions in the first appellate court in which a point of jurisdiction was raised. Admittedly, jurisdiction can be raised at any stage of the case as it was stated in the case of **Romward s/o Michael vs The Republic**, Criminal Appeal No. 38 of 2009 when the Court of Appeal at Tabora held at page 6 that;

Even if the courts below did not examine the said issue of competency and jurisdiction to entertain the case involving economic offence, but we are of the view that a point of jurisdiction may be raised at any stage even at the appeal stage.

However, It follows therefore that as far as the available record is concerned, annexure GE-7 is the submission in dispute whereby at page

10 the respondent (appellant then) was submitting on ground number 7 about jurisdiction of the trial court in relation to the mode of life of the deceased

Having in mind that one of the reason for extension of time advanced by the applicants is that of illegality, it is the claim of the applicants that the issue of the mode of life of the deceased which determined the jurisdiction of the court does not form part of evidence of the trial court, and therefore the same cannot be raised in the appeal and considered by the 1st appellate court in its decision. If I understand them well, is like the applicants claimed that they were not afforded the right to be heard before the decision of determining the jurisdiction of the trial court was reached.

It is settled position of the law that illegality on the impugned decision if proved, the issue of accounting for each day of delay is immaterial because illegality cannot be left to stand. In **Ngao Godwin Losero v Julius Mwarabu**, Civil Application No 10 of 2015, The Court of Appeal observed that:

"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 the purpose, to ascertain the point and if the alleged illegality be established, to take



appropriate measures to put the matter and the record straight."

However, for the illegality to stand as a ground for extension of time, the applicant must successfully demonstrate the existence of the said illegality on the face of the record and the same should not be discovered though a long drawn process. In **Lyamuya Construction Company Limited v Board of Trustee of Young Womens Christian Association of Tanzania**, Civil Application No. 2 of 2010, it was held that:

"Since every party intending to appeal seeks to challenge a decision either on points of law or facts it cannot in my view be said that in valambia'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 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 will be discovered by a long drawn argument or process."

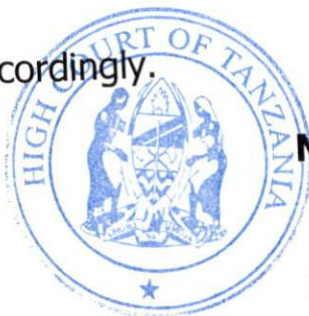
Going to the records, it is clear that the impugned decision dismissed the appeal because the trial court had no jurisdiction to entertain the probate matter for a reason that the deceased did not live



in a customary way of life or in accordance to Islamic way of life. However, upon going into the available court accordance, as it was rightly submitted by the counsel for applicants, there is no evidence which adduced by the parties on the mode of life of the deceased. For that reason, I am satisfied that there is a point of illegality worth to be determined when the appeal is filed and ultimately decided by this court. Therefore I grant the application. The applicants are given 21 days to file their intended appeal to this Court from the date of this Ruling.

In the event, the application is merited. Since it arises from probate case, I make no orders as to costs.

Ordered accordingly.




M.MNYUKWA

JUDGE

11/08/2023

Court: Ruling delivered in the presence of the applicants in person and the respondent's counsel.


M.MNYUKWA

JUDGE

11/08/2023