

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

AT TEMEKE

MISC. CIVIL APPLICATION NO. 26831 OF 2023

(Originating from Civil Appeal No 02 of 2023 at Temeke District Court One Stop Centre)

**PRISCA MBELWA (the administrator of the estate of
the late Mercy Hillary) APPLICANT**

VERSUS

FRANCE LEONS MALISAWARESPONDENT

RULING

Last Order date: 22.03.2024
Ruling Date: 25. 03.2024

M. MNYUKWA, J.

Before me is an application for extension of time brought under the provision of section 14 (1) of the Law of Limitation Act, Cap 89 R.E 2019 within which the applicant prays for this court to extend time to file appeal to this court against the decision of the District Court of Temeke, One stop Judicial Centre (the first appellate court). The application is supported by the affidavit sworn by the applicant

The respondent disputed the applicant's affidavit by filing a counter affidavit sworn in by him. It is on record that the main reasons advanced by the applicant in her affidavit as deposed under paragraph 4.3 and 5

are that, there was illegality in the decision of the first appellate court for it upheld the decision of the trial court which assumed the power of the administrator when determining that respondent is the rightful heir of the deceased's estate while the said power is vested to the administrator of the deceased's estate. The other reason deponed by the applicant for extension of time is under paragraph 5 of the applicant's affidavit that, her advocate was sick.

In brief, the legal battle in this case started at Kinondoni Primary Court (the trial court) after the applicant was appointed as the administrator of the deceased estate. It is on record that respondent who is alleged to be the husband of the deceased, got information through a telephone call made to him by the National Social Security Fund (NSSF) about the deceased's pension funds as she was named as a husband of the deceased's in her personal particulars form. Upon receiving that information, the respondent filed a complaint in the trial court claimed to be left out by the administrator in the distribution of the estate while he is a rightful heir.

It was the concern of the administrator that the deceased and the respondent were separated for a long time. To ensure justice is done to the parties, the trial court heard the respondent's complaint and ruled out that there was a living marriage between the deceased and the

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respondent and recognize the respondent as a rightful heir of the deceased and that he is entitled a share to the deceased's properties including pension funds from NSSF. This decision aggrieved the applicant who filed Civil Appeal No 02 of 2023 before the District Court of Tembeke One Stop Judicial Centre.

The applicant was not happy with the decision of the first appellate court which upheld the decision of the trial court. The applicant did not file her appeal to this court within the statutory period of time provided by the law. Since she delayed to file her appeal to this court for the reasons she stated in her affidavit, she brought the present application for this court to exercise its discretionary power to grant extension of time to file appeal out of time.

During the hearing of the application both parties were represented. It was Ms. Faudhia Abdulkadir for applicant and Mr. Hussein Swedi for respondent. The application was argued by way of oral submissions.

Arguing in support of the application, the applicant's counsel submitted her grounds of appeal as they were presented in the applicant's affidavit as they are reflected on paragraph 4 and 5.

On the first ground, the applicant's counsel contended that, there was illegality on the decision of the trial court and first appellate court



since the said courts assumed powers of administrator of determining who is the beneficiary. She argued that, the two courts below held that there was a living marriage between the respondent and the deceased and ultimately declare the respondent as a heir of the deceased and ordered the administrator to give him a share in the deceased's estate.

Ms. Radhia strongly contended that the lower courts wrongly assumed the duties of the administrator of determining who is the lawful heir which is contrary to the law. To bolster her argument, she referred this court to section 108 of the Probate and Administration Act, **Cap 352 R.E 2019** and the case of **Mariam Juma Tabea v Labea Robert Makange**, Civil Appeal No 38 of 2019. She thus prayed this court to allow the application since there is illegality in the decision of the lower courts.

On the second ground for extension of time which is all about sickness, Ms. Faudhia submitted that the applicant was seriously sick and that the sickness prevented her to do anything including to file appeal within time as it is required under the law. To prove applicant's sickness, the counsel stated that, they have attached medical chit.. She thus prayed the court to grant the application as prayed.

Contesting, the respondent's counsel argued that, granting extension of time to applicant is within the discretionary power of the

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court. However, she contended that the said discretion should be exercised judiciously.

Disputing the grounds for extension of time, Mr. Hussein Swedi opted to start with the second ground for extension of time which is sickness. He contended that the impugned decision sought to be challenged was delivered on 31/5/2023 where the applicant was supposed to file her intended appeal within 45 days from the date of the decision. He contended that the applicant filed the present application on 5/12/2023 which is almost 6 months from the date of the decision while the medical chit shows that she was treated on 14/12/2023. Mr. Hussein Swedi was of the opinion that, the said medical chit does not show that the applicant was sick within those days where she was supposed to file her appeal and that the medical chit was prepared after the case was filed. He thus remarked that, the applicant failed to prove sickness as a sufficient cause for this court to grant the application.

On the first ground of alleged illegality on the impugned decision, Mr. Hussein Swedi submitted that, for illegality to stand as a ground for extension of time, the same must be apparent on the face of the record and the particular act complained of must be illegal. The counsel referred to the case of **Charles Richard Kombe v Kinondoni Municipal**



Council Civil Reference No 13 of 2019 which defines as to what amount to illegality.

The counsel for respondent went on that, the issue which is complained of by the applicant is the issue of fact and not of law for it to be considered as illegality on the decision of the first appellate court. He was of the view that, for illegality to stand as per the decision of **Charles Richard Kombe v Kinondoni Municipal Council** (supra) there must be an issue of jurisdiction, the issue of infringement of the right to be heard or the matter is time barred which is not the case in our case at hand.

Mr. Hussein Swedi argued that, the case of **Mariam Juma Tabea v Labea Robert Makange**, (supra) was not supplied to the court and to him and therefore the court should not rely on it. He concludes by praying this court not to grant the application,

Rejoining, Ms. Faudhia Abdulkadir was very brief. She submitted that, it is not the duty of the counsel to supply case law to the court and to the counsel of the other party. On the argument that a medical chit was prepared after the case have been filed she submitted that the medical chit shows that the applicant was regularly attended therapy in the hospital.



After hearing the submissions of both parties and consider the record supplied to me, the main issue for consideration and determination is whether the application is merited.

To begin with, as it was rightly submitted by the counsel for respondent that granting an application for extension of time is within court's discretion. However, the discretion has to be exercised judiciously based on the logical and sound reasons to be advanced by the applicant. Thus, it is upon the applicant to show good cause that the delay was with a sufficient cause. (See the case of **Osward Masatu Mwizarubi v Tanzania Fish Processing Ltd**, Civil Application No 13 of 2010)

Furthermore, depending on the circumstances of each case, the applicant is required to account for each day of delay for the prayer to extend time to be granted or else must have shown that, there was a point of illegality or irregularity that impedes justice as the illegality cannot be left to stand.

In our case at hand, the applicant advanced two reasons for this court to consider her prayer for extension of time, sickness and illegality. For a purpose of convenience, I will start with the ground of sickness.

I am alive that sickness when proved, is a sufficient ground for extension of time since sickness is an act of God and it is beyond human



control. (See the case of **Nyanza Road Works Limited vs Giovanni Guidon**, Civil Appeal No. 75 Of 2020).

Coming now to our case at hand, in her affidavit supporting the application which was filed on 5/12/2023, the applicant deponed that her advocate was serious sick that's why she failed to file appeal within time. However, during the submissions her counsel contended that the applicant was seriously sick and therefore she was incapable to do anything including processing her appeal. This two averement shows that there is contradiction of what is deponed and what is submitted.

I have keenly revisited the applicant's affidavit only to find that what is deponed by the applicant under oath is different from what was submitted by her counsel during the hearing of the case as far as sickness is concerned. For easy of reference, let me reproduce paragraph 5 of the applicant's affidavit which reads as:

*5. That the reasons of the applicant delaying to file the appeal on time is that, my advocate was serious sick.
(Copy of the said medical certificate and marked as annexure P3. The applicant crave leave of the court to refer and form part of this affidavit).*

As I have earlier on said, the present application was filed on 5/12/2023. In her affidavit filed on that date, the applicant did not attach any document. By the order of the court dated 14/02/2024 the applicant

was granted leave and ordered to attach only copies of the Judgment of the lower courts for this court to know what is complained of. The said copies of Judgment was uploaded in the case management system on 16/02/2024. To my surprise, on that date, the applicant uploaded new application with annexures including copies of Judgment and the medical chit which was not attached before.

When the matter was coming for hearing on 22/3/2024, this court gave an order that it will specifically consider the Judgment of the lower courts since the applicant was not granted leave to file new application in the subsequent document as she did. Therefore, this court will ignore the new application filed in the subsequent document on 16/02/2024.

Now, of a more surprise, even the medical report which is attached, shows that it is the medical report of Prisca Mbelwa who is the applicant in this application and not the medical report of the applicant's counsel as the affidavit suggests. For that reason, it is my humble view that the applicant failed to prove sickness of her advocate as a sufficient cause for this court to grant extension of time. For that reason, this reason falls short and the same is disallowed as a sufficient cause for this court to grant the application.

Reverting now to the first reason for extension of time, it is the applicant's assertion that there is illegality on the impugned decision

sought to be challenged. In her affidavit as deposed on paragraph 4, the applicant averred that:

4.1 The appellate court erred in law and facts to order that there was a living marriage between the respondent and the deceased. If the appellate court would have directed its mind to the law and evidence, it should hold that there was no existing marriage between the respondent and the deceased.

4.2. N/A

4.3 The appellate court erred in law and facts to bless the decision of the trial court by directing the administrator of the estate to distribute proceeds therefrom to the 1st respondent."

It is the applicant's counsel submissions that the first appellate court acted illegally to uphold the decision of the trial court which determined that respondent is a rightful heir of the deceased while that is not the duty of the court rather a mandate of the administrator. Contesting, the counsel for respondent said that the above reason cannot be issue of law rather than the issue of fact.

From the above competing argument, it is suffice to say that, parties are in agreement that illegality is a sufficient reason for extension of time. However, parties locked horn on whether the act of the lower courts to



determine that respondent is a rightful heir and therefore entitled a share to the deceased's estate amount to illegality or not.

I join hands with the submissions of the counsel for respondent that the Court of Appeal in **Charles Richard Kombe v Kinondoni Municipal Council** Civil Reference No 13 of 2019 defines what is illegality. In that case the Court had this to say:

"The term illegality as defined in the Black's Law Dictionary 11th Edition. Page 815 means:

- 1. An Act that is not authorized by law*
- 2. The state of not being legally authorised;*

The above definition is consistent with Mulla's Code of Civil Procedure where the learned authors write at page 1381 that:

It is settled that where a court has jurisdiction to determine a question and determines that question, it cannot be said that it has acted illegally or with material irregularity, merely because it has come to an erroneous decision on a question of fact or even of law."

Guided by the above decision, an act which is not authorised by the law is illegality. Having in mind that my duty here is only to see whether there is illegality on the face of the record, I will not go further to determine as to whether it was proper for the lower courts to determine that respondent is a rightful heir of the deceased's estate or not based on the circumstances of the case and the manner the case was conducted,

since that question will be determined when this application succeed. Suffice here to state that when illegality is raised as a ground for extension of time, determination of its existence or not is done by the court when the intended appeal is heard when the application is granted.

Thus, it is my humble view that the illegality complained of by the applicant as deponed on paragraph 4.3 of her affidavit is a matter which is supposed to be decided during the hearing of the appeal since it is apparent on the face of the record. 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". (emphasis is mine on the bolded words).*




Guided by the above principle of law and having considered the matter at hand, it is my considered view that whether or not it was illegal for the lower courts to determine that respondent is a rightful heirs will not require a long drawn argument and to me, the issue is of sufficient importance to constitute a ground for this court to exercise its discretionary power to grant the application.

Since illegality when proved, is a sufficient ground for this court to grant the application, the issue of accounting for each day of delay will be ignored in order to put the matter and the record straight. I am fortifying my position with the decision of Court of Appeal in **Ngao Godwin Losero v Julius Mwarabu**, Civil Application No 10 of 2015 where it was 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."


In the circumstances, I am satisfied that the applicant has demonstrated that there is a point of illegality for this court to exercise its discretionary power to grant the application. I therefore grant applicant's application and ordered her to file her intended appeal within 14 days from the date of this decision.



In the event, the application is granted with no order as to costs since parties are related.

It is so ordered.




M.MNYUKWA
JUDGE
25/03/2024

Court: Ruling delivered on 25th March 2024 in the presence of the counsel for both parties and the applicant in person.


M.MNYUKWA
JUDGE
11/03/2024