

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB REGISTRY

AT MBEYA

MISC. CIVIL APPLICATION NO. 10 OF 2023

(Originating from Misc. Civil Application No. 23 of 2021 of the High Court of Tanzania at Mbeya in original Probate Appeal No. 6 of 2019 of the High Court of Tanzania at Mbeya)

MARRY ANDREW MASUBAAPPLICANT

VERSUS

CHRISTANTUS MSIGWARESPONDENT

RULING

Date of hearing: 9/11/2023

Date of ruling: 6/2/2024

NONGWA, J.

The applicant is seeking extension of time to file notice of appeal to the court of appeal out of time in Misc. Probate Application No. 23 of 2021. The application is made under section 11(1) of the Appellant Jurisdiction Act (Cap 141 R.E 2019) and supported by an affidavit of Applicant. The application is opposed by the respondent who dully lodged counter affidavit.

It is alleged that the applicant unsuccessfully filed Probate and Administration Appeal No. 6 of 2019 by this court before Ndunguru, J. Aggrieved the applicant filed notice of appeal and requested to be supplied with all necessary document. Further as the matter originated from primary court the applicant applied for certificate on point of law in Misc. Civil Application No. 23 of 2021 which was dismissed by Hon. Ebrahim, J.

Resentful of the decision, the applicant lodged notice of motion to the Court of Appeal presumably for certificate of point of law for second bite through Civil Application No. 390/6 of 2022. The same was withdrawn on 21st February 2023 after noting that was pursuing a wrong forum. The applicant then filed the present application seeking extension of time to challenge the decision in Misc. Civil Application No. 23 of 2021.

When the matter come on for hearing, parties were represented by William Mashoke and Mr. Mathayo Mbilinyi, both learned advocates for the applicant and respondent respectively. The journey to dispose the application took the form of written submission.

In his submission, Mr. Mashoke stated that after ruling in Misc. Civil Application No. 23 of 2021 timely lodged notice of appeal and filed letter to be supplied with necessary copies of document for processing the appeal. That they also filed notice of motion vides Civil Application No.

390/06 of 2022 which was withdrawn on 21st February 2023 after learning that they were pursuing a wrong root.

This, Mr. Mashoke said was technical delay, the time taken in prosecuting Civil Application No. 390/06 of 2022 should be excluded. He cited the case of **Bank M (Tanzania) limited vs Enock Mwakyusa**, civil Application No. 520/18 of 2018 to support the argument.

It was further submitted that ruling in probate and administrator appeal No. 6 of 2019 had many illegalities which constitutes good reason for extension of time. The case of **VIP engineering and marketing Ltd & 2 others vs. Citi Bank Tanzania Ltd**, Civil reference No. 6,7 & 8 of 2006 (unreported) was cited to cement the point. Resting his submission Mr. Mashoke prayed the application to be granted.

In reply the respondent stated that in extension of time the applicant has to account every day of delay. It was submitted that filing of Civil Application No. 390/6 of 2022 and its withdrawal was for reason known to the applicant and cannot come today and plead technical delay. He associated this with negligence in pursuing the proper remedy.

The respondent stated that after the withdrawal of Civil Application No. 390/6 of 2022 on 21/02/2023 it took four months to file the present application, thus each day of delay was not accounted. The case of

Mtengeti Mohamed vs Blandina Macha, Civil Application No. 344/17 of 2022 was cited.

On the alleged illegalities the respondent submitted that, they were not illegalities so to speak and was not on the face of record. The case of **Lyamuya Construction Co. Ltd vs Board of Registered of Young Women's Christian Association of Tanzania**, Civil Application 2 of 2010 [2011] TZCA 4 (Unreported) was cited in support.

Counsel added that the alleged illegality even if granted cannot be corrected in notice of appeal. The case of **Subena Technics Dar Limited vs Michael J. Luwinzi**, Civil Application No. 451/18 of 2020 was referred in support of the argument.

In rejoinder, it was submitted that the present application was filed in 9th March 2023 and not 5/6/2023 as supposed by the respondent. He emphasized that there was technical delay in this application. On illegality the application's counsel insisted that it exists and was not considered by the court.

Having examined chamber summons, the affidavits for and against the application and rival submissions made by the counsel for the party's, the only issue for my determination is whether good cause has been

shown by the applicants warranting extension of time as sought in the chamber summons.

I find it apposite to begin my determination of the above posed issue by emphasizing that the mandate given to the Court under section 11 of the Appellate Court Act, is not only discretionary and broad but must be exercised judiciously in accordance with the rules of reason and justice not according to private opinion or arbitrary.

It is also settled that the Court can only exercise the powers under section 11 of the AJA, if good cause is shown. Though there is no universal definition of what constitutes good cause, in exercising such powers, the Court is required to consider the prevailing circumstances of the particular case and should also be guided by a number of 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 and whether there is a point of law of sufficient importance such as illegality of the decision sought to be challenged. See **Lyamuya Construction Company Ltd** (supra).

In the present application the reason for delay is associated with what is termed as technical delay and illegalities in the impugned decision. On technical delay counsel for the applicant submitted that from 10th December 2021 when ruling in Misc. Civil Application No. 23 of 2021 was

delivered was pursuing Civil application No. 390/6 of 2022 in the Court of Appeal which was withdrawn on 21st February 2023. The respondent replied that it was lack of diligence to pursue wrong root.

Technical delay operates in that where an applicant has been in court's corridors in pursuit of his rights in good faith and consequently delays to take appropriate steps, that pursuit may constitute good cause for the purposes of extension of time. In **Tanzania Rent a Car Limited vs Peter Kimuhu**, Civil Reference No. 28 of 2019 [2023] TZCA 94 (TANZLII) the court stated;

'... many times without number, it has been pronounced by the Court that, times spent in court corridors by the applicant, like here, in further pursuit of his rights and resulting into delay, that delay is technical constitutes good cause for extension of time.'

Applying the principle to the present application, there is not dispute that after judgment in Misc. Civil Application No 23 of 2021 the applicant filed Civil application No. 390/06 of 2022 to the court of appeal which was withdrawn on 21st February 2023. Whether it was negligence or otherwise it does not matter, in fact the respondent has not demonstrated to the court that it was not in good faith as required by the law. Thus, find that the period from 10th December 2021 to 21st February 2023 has been accounted by the applicant.

Another segment is from 21st February 2023 to 9th March 2023 when this application was filed. The respondent submitted that it was after four months. My perusal of the application has discovered that it was failed on 9th March 2023 eighteen days after withdrawal of Civil application No. 390/6 of 2022 and not four months as alleged by the respondent.

The applicant's affidavit is silence on what was taking place between 21st February 2023 to 9th March 2023 when the present application was filed. Ms. Mashoke submitted that the said period has not been accounted.

It is trite law that, in an application for extension of time to do a certain act, the applicant is supposed to account for each day of delay. In the case of **Elias Mwakalinga vs Domina Kagaruki & Others**, Civil Application 120 of 2018 [2019] TZCA 231 (TANZLII) the court stated;

'Delay, of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken.'

As hinted earlier, the applicant has failed to explain what was going from 21st February 2023 when Civil Application No. 390/06 of 2022 was withdrawn until on 9th March 2023, this application was filed, there is almost lapse of eighteen days. After withdrawal of Civil Application No. 390/18 of 2022 nothing seemed to have occurred between 21st February 2023 to 9th March 2023 when this application was preferred. In absence

of explanation as to what the applicant was doing in that period, I note it to be sloppiness and lack of diligence in the prosecution of the action the applicant intended to take. The applicant has failed to account every day of delay in pursuing this matter.

Another reason advanced by the applicant is presence of illegality in the impugned decision, the same is illustrated under paragraph 10 of the affidavit of which I have taken trouble to quote

'10. that I have discovered a number of illegalities in the decision of Hon. Ndunguru, J. and the ruling of Hon. Rose Ebrahim namely

(a) an issue of whether CHRISTANTUS MSIGWA the respondent and two others to be legal children of the late PATRICK MASUBA in absence of conducting DNA and absence of evidence of the late father PATRICK MASUBA'

(b) the issue of reconciling names of CHRISTANTUS MSIGWA and CHHRISTANTUS MASUBA to be the same person without deed pool

(c) the issue of locus of the said CHRITANTUS MSIGWA to be interested to the estate of the late PATRICK MASUBA without proof of being a legal son of the late PATRICK MASUBA.'

In his submission counsel for the applicant stated that cause of delay was due to illegality in the ruling of Hon. Rose Ebrahim, J. and is a

good reason even without account each day of delay. In reply it was submitted that the mentioned illegalities were errors on fact or law.

In our jurisdiction the law is settled that where illegality is an issue in relation to the decision being challenged, the Court has a duty to extend time so that the matter can be looked into. One of the celebrated decisions of the Court on this aspect is the case of **Principal Secretary, Ministry of Defence & National Service vs Devram Valambhia** [1992] TLR 185.

In the present application the illegalities pointed is found in the judgment of Hon. Ndunguru, J. and Hon. Ebrahim, J., this contradicts with the relief sought in the chamber summons in which the applicant wants only to challenge ruling of Hon. Ebrahim, J. in Misc. Civil Application No. 23 of 2021. It is not clear from which judgment between the two, the pointed illegalities stems. Further the alleged illegalities seem not to be on face of record as rightly pointed by counsel for the respondent. It requires arguments and process to discover them. In the case of **Lyamuya Construction Company Ltd** (supra).

!... 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 in Valambhia's case, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal

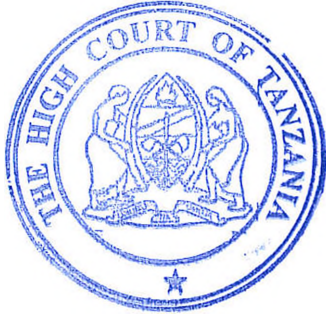
*raises points of law should of right, be granted extension of time if he applies for one. The Court emphasized that such point of law, must be that of "sufficient importance" **and I would add it must also be apparent on the face of the record such as the question of jurisdiction; not one that would be discovered by a long-drawn argument or process**.*
Emphasis added.'

Applying the above law to the case at hand, issue of requiring DNA test to know if the said Christantus Msigwa is the son of Patrick Masuba, reconciling names and locus standi and beneficial interest of Christantus Msigwa in estates of Patrick Msigwa as listed under paragraph 10 of the affidavit are not illegality on the face of record, they are to be discovered and resolved after long-drawn argument or process.

It is the finding of this court that the applicant has failed to account for each day of delay and has failed to establish that in the impugned decision, exist illegalities for this court to grant extension of time to file notice of appeal out of time. Consequently, the application is dismissed with costs.


V.M. NONGWA
JUDGE
6/2/2024

DATED and DELIVERED at MBEYA this 6th day of February 2024 in presence of Mr. Simon Mwakolo for the applicant.




V.M. NONGWA
JUDGE