

**IN THE UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**HIGH COURT OF TANZANIA**  
**MOSHI SUB-REGISTRY**  
**AT MOSHI**

**MISCELLANEOUS CIVIL APPLICATION NO. 36 OF 2023**

*(C/F Civil Case No. 19 of 2020 in the District Court of Moshi at Moshi)*

**FELISTA KINANA CHUWA.....1<sup>ST</sup> APPLICANT**

**DISMAS RAPHAEL MMASY .....2<sup>ND</sup> APPLICANT**

**VERSUS**

**OSCAR LUCAS KIMARO**

**DIDAS RAPHAEL KARIA**

**THE HERITAGE INSURANCE CO (T) LTD**

} .....**RESPONDENTS**

**RULING**

Date of Last Order: 07.05.2024

Date of Ruling : 29.05.2024

**MONGELLA, J.**

The applicants herein have preferred this application under **Section 14(1) of the Law of Limitation Act** [Cap 89 R.E 2019] seeking for enlargement of time in which to file their appeal against the decision of the District Court of Moshi at Moshi (henceforth, the trial court) in Civil Case No. 19 of 2020. Their application was supported by the affidavit of Mr. Benedict Bahati Bagiliye, learned advocate who represented them at the trial court.

It is on record that the 1<sup>st</sup> and 2<sup>nd</sup> respondents never entered appearance before this court. The 3<sup>rd</sup> respondent opposed the application vide a sworn affidavit by one Ms. Gemma Simon Moshy, her principal officer.

The brief background of the application is to the effect that: the applicants were plaintiffs in Civil Case No. 19 of 2020 while the respondents stood as defendants in the same matter. The case was determined on 22.04.2022 in favour of the defendants. Now aggrieved by said decision, the applicants intend to file an appeal before this court. Being time barred to lodge the appeal, they are seeking for enlargement of time.

The application was argued by written submissions whereby the applicants were represented by Mr. Benedict Bahati Bagiliye while the 3<sup>rd</sup> respondent was represented by Mr. Karoli Valerian Tarimo, both learned advocates.

Explaining the reasons for seeking enlargement of time, Mr. Bagiliye had one major reason, to wit, illegality in the impugned decision. He contended that the trial court was wrong to dismiss the applicants' claims on the reason that they had not legitimized their status through attaining letters of administration. He alleged that there was enough proof of the applicants being related to the late Dilema Raphael Mmasy. That, they had burial permit admitted as Exhibit P1 and the names of the 2<sup>nd</sup> applicant served as clear proof that he was related to the deceased. In that regard, he held the view that there was no need for them to legitimize their status

through seeking a probate and administration cause. That the law allows relatives of the deceased to file such claims for compensation.

The counsel further claimed that immediately after finding out that the Court of Appeal supported their position, they did not waste time and hastily filed this application. In that regard, he considered the applicants to have acted reasonably diligently, which should be considered in this application. He cemented his argument with the case of **Michael Lesani Kweka vs. John Eliafye** [1997] TLR 152.

Mr. Bagilye in addition that it is within this court's discretion to grant extension of time where the applicant demonstrates sufficient reasons. He maintained that illegality was one of sufficient reasons that warrant the court to grant extension of time so that the illegality could be rectified by the court. He cemented his stance with the case of **Principal Secretary, Ministry of Defence and National Service vs. Devram P. Valambhia** [1992] T. L.R. 387

The counsel concluded by summarising the points of illegalities in challenging the decision by the lower court and which ought to be addressed by this court. First, the trial court dismissing the applicant's suit for reason that they should legitimize their status through a probate cause. He supported his averment on this point being an illegality, with the case of **Benitho Thadei Chengula vs. Abdulahi Mohamed Ismail** (Civil Appeal No.183 of 2020) [2023] TZCA 17519 (23 August 2023) TANZLII. Second, that the trial court extracted from its judgement, a drawn order instead of decree

which is contrary to the law. He finalized his submission by praying for the application to be allowed with costs.

In reply, Mr. Tarimo first prayed to adopt the 3<sup>rd</sup> respondent's counter affidavit as part of his submission. He contended that the court is with discretion to grant this application pursuant to the wording of **Section 14(1) of the Law of Limitation Act** [Cap 89 R.E 2019]. He added that in granting extension of time, the court ought to consider factors being; length of delay, reason for delay and degree of prejudice the respondent may suffer if the application is granted. The counsel emphasized his assertion in consideration of the case of **Moto Matiko Mabanga vs. Ophir Energy Plc & Others** (Civil Appeal No.199 of 2021) [2021] TZCA 599 (22 October 2021) and **Ngao Godwin Losero vs. Julius Mwarabu** (Civil Application 10 of 2015) [2016] TZCA 302 (13 October 2016), both from TANZLII.

Mr. Tarimo averred that in the latter case, the Court of Appeal referring to **Lyamuya Construction Co. Ltd vs. Board of Registered of Young Women's Christian Association of Tanzania** (Civil Application 2 of 2010) [2011] TZCA 4 TANZLII provided guidelines for extension of time which are that; the applicant must account for all the period of delay; the delay should not be inordinate; the applicant must show diligence and not apathy, negligence or sloppiness in prosecution of the action that he intends to take and if the court feels that there are other sufficient reasons, such as, the existence of a point of law of sufficient importance, such as, the illegality of the decision sought to be challenged.

Mr. Tarimo then applied the said guidelines in his submissions. On the 1<sup>st</sup> requirement he averred that the applicants disclosed in their affidavit that the decision they seek to challenge was pronounced on 22.04.2022 and this matter was instituted on 18.10.2023, a year and 7 months later. He said that the applicants however did not account for each day of delay but only stated that they filed the application following the decision of the Court of Appeal which is an authority in support of their intended appeal. He believed that the applicants ought to have accounted for all the period of delay as held in **Moto Matiko Mabanga** (supra). He considered the delay inordinate and denoting existence of apathy, negligence and sloppiness in prosecuting the appeal which they now seek extension of time to file. That, their failure to do so renders the 1<sup>st</sup> requirement unmet.

On the 2<sup>nd</sup> requirement, Mr. Tarimo averred that the reason for delay stated by the applicants was not valid. He argued so on the ground that the applicants intend to challenge the trial court's decision based on a decision by the Court of Appeal that they believe could advance their appeal. He alleged that this means that the applicants were never aggrieved by the decision of the trial court until they were informed of a decision that might support their case. In his view, this was an afterthought, thus not a valid reason for this court to grant extension. The learned counsel further contended that the decision in **Benitho Thadei Chengula** (supra) was not applicable in this application though may be relevant in the appeal if the same is preferred.

The counsel further pointed out that the grounds of appeal ought to have arisen from the judgement and not to be searched from elsewhere. That, the applicants were required by the law, if aggrieved, to lodge their appeal within ninety days and not otherwise. He considered the applicants negligent in instituting their appeal within time as they waited for an authority to exist to file their appeal. He believed this was evidence of apathy, negligence and sloppiness in prosecuting their appeal. Mr. Tarimo denied the claim that the applicants discovered the illegality in October 2023. He considered that untrue as the alleged error existed in the judgement from its pronouncement, but the applicants only waited a year and seven months to address the same.

The counsel further contended that the alleged illegality pleaded by the applicants was not the reason for dismissal of the applicants' suit, but the applicants failed to prove their relationship with the deceased. In his view, this was a factual issue not an illegality, thus cannot be a ground of extension of time. He fortified his averment with the case of **Joseph Paul Kyauka Njau & Another vs. Emmanuel Paul Kyauka Njau & Another** (Civil Application No. 07/ 05 of 2016) [2017] TZCA 318 (23 May 2017) TANZLII.

Mr. Tarimo further averred that extension of time is not to be granted at any time but where the illegality is on point of law of sufficient importance and apparent on the face of record. He fortified his argument with the case of **Ngai Godwin Losero** (supra). He added that the said illegality does not exist anywhere in the judgement of the trial court nor being apparent on the face of

record. He believed that the applicants ought to have even supplied the memorandum of appeal showing the alleged illegality they intend to challenge, but they did not.

As to the trial court having extracted a drawn order instead of decree, he argued that the same is not an illegality but an administrative error which could be fixed by writing a letter to the court requiring correction of the same. He finalized his submission by praying for the application to be dismissed with costs.

Rejoining, Mr. Bagaliye challenged Mr. Tarimo arguing that he did not pay regard to the illegalities he raised, but instead labelled them as mere errors that could be resolved administratively and not judiciously. He averred that even clerical or arithmetical mistakes found in judgements, decrees or orders cannot be dealt with administratively, but rather have to be rectified by the court. He referred to **Section 96 of the Civil Procedure Code** [Cap 33 R. 2019] in support of his assertion. He added that there was nowhere indicated that the mistakes could be fixed administratively.

The counsel reiterated his submission in chief that the trial magistrate erred in law to dismiss the applicants' claims on the ground that they are required to legitimize their status through a probate and administration cause. He maintained his position that it was not disputed that the applicants were deceased's relatives.

He further alleged that even if the applicants had failed to account for each day of delay, the presence of illegality obliges the court

to grant extension of time so as to remedy the same and set the record right. To buttress his averment, he referred the case of **Hamis Babu Bally vs. Judicial Officers Ethics Committee and Others**, Civil Application 130/01 of 2020 (unreported).

Emphasizing on the court's duty to allow extension of time where the decision sought to be challenged contains illegalities, he averred that the apex court went as far as to allow extension of time *suo motu* in **Ngolo s/o Mgagaja vs. Republic** (Criminal Appeal No. 331 of 2017) [2021] TZCA 624 (1 November 2021) TANZLII.

Mr. Bagiliye reiterated that it is well clear under paragraph 5 and 6 of the applicants' affidavit that the decision sought to be challenged is full of illegalities on the ground that the applicants' claim was dismissed on the reason that the applicants were to legitimize their status through probate and administration channel. He reiterated his prayer for the application to be allowed so that the applicants may file their appeal out of time and be heard on the raised illegalities.

I have considered the rival submissions of the parties and the affidavits in support and opposition of the application. As appreciated by both parties, granting of extension of time is well within the court's discretion upon the applicant(s) establishing sufficient reason. This discretion ought to be exercised judiciously. In that regard, courts have established several factors that ought to be taken into consideration in granting extension of time. These factors were well expounded in **Lyamuya Construction Co. Ltd vs.**

**Board of Registered of Young Women's Christian Association of Tanzania** (Civil Application 2 of 2010) [2011] TZCA 4 TANZLII whereby the Court stated:

“As a matter of general principle, it is in the discretion of the Court to grant extension of time. But that discretion is judicial, and so it must be exercised according to the rules of reason and justice, and not according to private opinion or arbitrarily. On the authorities however, the following guidelines may be formulated:

- (a) The applicant must account for all the period of delay
- (b) The delay should not be inordinate
- (c) The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.
- (d) If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged.”

See also; **Moto Matiko Mabanga** (supra) and **Ngao Godwin Losero** (supra)

In this matter, the applicants did not provide an account for the entire period of delay, that is, from 22.04.2022 when the Judgement of the trial court was issued to 11.10.2023 when this application was filed as rightly argued by Mr. Tarimo.

As apparent on Mr. Bagiliye's affidavit, the applicants have only advanced one ground on which they seek extension of time, which is illegality. It is well settled that illegality of the decision sought to be challenged serves as reason for which the court may enlarge time. This was well elaborated in **Mashaka Juma Shabani & Others vs. The Attorney General** (Civil Reference No. 30 of 2019) [2023] TZCA 17615 Whereby the Court of Appeal reasoned:

"It is trite that, where the decision sought to be challenged is tainted with an illegality, extension of time may be granted so that such illegality may be addressed. See for instance, the case of **The Principal Secretary, Ministry of Defence and National Service v. Devram P. Valambhia** [1992] T. L. R. 185. In that case, the Court held that:

"Where...the point of law at issue is the illegality or otherwise of the decision challenged, that is of sufficient importance to constitute sufficient reason within the meaning of rule 8 [now rule 10] of the Rules for extending time."

However, the illegality alleged must be apparent on the face of record and not one that can only be drawn from long argument or process. This position was well emphasized in **Principal Secretary, Ministry of Defence and National Service vs. Devram P. Valambhia** [1992] T. L. R. 185 in which the Court stated:

"However, as observed by the learned single Justice, it is not sufficient to allege that the decision sought to be challenged is tainted

with illegality. The illegality must be apparent on the face of the record.”

In **Lyamuya Construction Co. Ltd** (supra) the Court of Appeal further explained:

“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.”

See also; **Power & Network Backup Ltd vs. Olafsson Sequeira** (Civil Application No. 307 of 2021) [2023] TZCA 80; **Winjuka Godson Mangare vs. John J. Ottaru** (Civil Application No. 657/01 of 2022) [2024] TZCA 243 (26 March 2024) and; **Cornel Naiman Materu vs. Cordian Matei Akaro** (Civil Appeal No. 115 of 2021) [2024] TZCA 162 (5 March 2024), all from TANZLII.

Mr. Bagaliye raised two issues of illegality on the judgement of the trial court. One, that the trial court dismissed the applicant's claims because they had not legitimized their status vide probate and administration channel and; two, that the trial court extracted a drawn order instead of a decree.

I will first address the 2<sup>nd</sup> point of illegality. It is apparent and not denied by the respondent that the trial court did in fact extract a drawn order instead of a decree. In fact, the alleged drawn order is well annexed on the applicants' affidavit. However, this minor error does not require an appeal to be filed to fix it. I find that such error could well be fixed by an application for review or by the court in its own motion as provided under **Section 96 of the Civil Procedure Code** as cited by Mr. Bagiliye. This is thus not an illegality warranting enlargement of time to file an appeal.

As to the 1<sup>st</sup> point of illegality, it is apparent on their claims that the applicants believe that their claims were dismissed as they failed to obtain letters of administration of the late Dilema Raphael Mmasy. Mr. Tarimo alleged that the trial court's decision was not that the applicants had failed to seek probate or letters of administration but rather that they were found to have failed to prove their relationship with the deceased.

I have observed the trial court Judgement. At first, referring to **Section 2 and 4 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act** [Cap 310 R.E 2002], the trial magistrate reasoned that dependants include mother and brother. This is seen on page 11 to 12 of the Judgement. The Court stated:

*"This court to some degree agrees with the arguments by Mr. Benedict that under section 4 of Cap 310 (supra) the dependents as defined under section 2 of the same Act can bring the action. The definition of the dependent includes the mother as well as the brother. However, to have such findings*

*there must be evidence to prove the same by vividly exhibits. Mere words any person can do so and victimize justice.” (sic)*

The trial court further stated that any interest of the deceased should be contested by a legal person. That, a person should first acquire legal status as representative of the deceased. At page 12 of the Judgement, the trial court stated:

*“Further, it is observation of this court that any interest of the deceased should be contested by legal person. The person must first acquire legal status out of his natural persons. That is why the provision of section 4 of Cap 310 insisted on executor or and administrator of the estate of the deceased to bring the claims. But such claims shall be brought in the names of dependents. (sic)*

*...Though the provision goes on to mention the names of dependents there must be legal evidence which in this case is lacking. But where the executor or administrator of the estate stands for dependents forms legitimacy of the claims.” (sic)*

The trial court eventually determining the issue of locus, held that unless the applicants found a way in probate, they cannot succeed to litigate against the defendants. This is seen at page 13 of the trial court Judgement where it is stated:

*“In this case at hand therefore, unless the plaintiffs find way in the probate and administration of estate of late Dilema Raphael Massy cannot succeed to litigate as against the defendants. Only the probate and*

*administration of estate channel can legitimize their way to other benefits accrued from the death of the deceased. It suffices at this juncture to state that the locus stand of the plaintiffs in this case is not legitimized. This suit therefore is not maintainable."*

Whether the trial court was right or not in its findings is not for this court to deliberate at this stage. However, in my considered view, it is apparent that the applicants were denied the right to have their course determined on the apparent ground that they had not sought legitimacy to do so vide a probate and administration cause. This ground is of sufficient importance and worthy of being deliberated upon in an appeal.

On whether the applicants had been diligent to pursue this application after discovering the alleged illegality; I find the details lacking. Nowhere was it indicated by Mr. Bagiliye in his affidavit as to when the applicants became aware of the mentioned illegality. In that regard, there are no sufficient details on whether they acted diligently to pursue the matter at hand. However, having deliberated on the issue of illegality in the affirmative, I am of the settled view that same suffices to move this court to extend the time regardless of whether the delayed days have been accounted for or not. This stance was well stated in **Cornel Naiman Materu vs. Cordian Matei Akaro** (supra) whereby the Court held:

"Numerous decisions of this Court have settled the position that claims of illegality of a challenged decision are sufficient reasons to extend time regardless of whether or not a

reasonable explanation has been given by the applicant under the rule to account for the delay."

In the foregoing, I find this appeal well with merit and allow the same accordingly. The applicants are hereby granted 21 days, from the date of this Ruling, to file their appeal before this court.

Dated and delivered at Moshi on this 29<sup>th</sup> day of May, 2024.



X *L.M. Mongella*

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L. M. MONGELLA  
JUDGE  
Signed by: L. M. MONGELLA