IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

TEMEKE HIGH COURT SUB – REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

MISC. CIVIL APPLICATION NO. 7253 OF 2024

(Arising from decision of Temeke District Court at One Stop Judicial Centre in Probate Appeal No.04 of 2022 originated from Probate Cause No. 166 of 2012)

ASHURA MFAUME TINGISHA.....**APPLICANT**

VERSUS

FARIDA MANGALA MGENI (An Administrator of Mangala Mgeni)..**RESPONDENT**

RULING

Last Order date: 13.05.2024
Ruling Date: 21.06.2024
M. MNYUKWA, J.

The applicant Ashura Mfaume Tingisha prays that I invoke my discretionary power to grant her extension of time to file appeal to this court against the decision of the District Court at One Stop Judicial Centre (the first appellate court) in Probate Appeal No 04 of 2022 whose decision was delivered on 01/11/2022. She brought her application under section 25 (1) (b) of the Magistrates' Courts Act, Cap 11 R.E 2019. Her chamber application is supported by the affidavit deponed by herself.

The matter is briefly that, the application emanates from Kawe Primary Court (the trial court) and went up to the District Court of Kinondoni through Probate Appeal No 33 of 2021. It is on record that on 31/01/2022, the District Court of Kinondoni ordered the matter to be

heard by another magistrate in a trial court who will determine the objection raised by the applicant on the accounts of estate filed by the administrator. It is in record that at the trial court the applicant was represented by the advocate when the matter was heard by another magistrate. The available records does not show if the respondent was represented.

After hearing both parties, the trial court delivered its decision in which the applicant herein was dissatisfied with the said decision and she therefore, filed her appeal to the first appellate court on four grounds which were;

1. *That the trial court erred in law and fact to make an order to the administratix to file inventory and account so as to close the matter while there is objection on distribution of all estate of the deceased to the legal heirs.*
2. *That, trial court erred in law and fact for failure to raise legal issue for determination before the court of law hence injustice decision to the appellant named herein.*
3. *That the trial court erred in law and fact by being too emotional hence failed to act judiciously.*
4. *That the trial court erred in law and fact for failure to give sounds but not limited to good reason and justification for his decision.*

In the first appellate court both parties were given a right to be heard where the appeal was argued by way of written submissions. At the

conclusion of hearing, the first appellate court dismissed the appeal for lack of merit.

Following the decision of the first appellate court, on 14/2/2024, the applicant wrote a letter to the District Resident Magistrate in charge and Administrative officer of Kinondoni District Court to inquire on the cadre/rank of the trial magistrate as to whether he is a resident magistrate or a primary court magistrate. The said letter was replied on 19/3/2024 of which he was informed that the trial court was a primary court magistrate. Upon receiving such a reply, on 04/04/2024, the applicant filed the present application challenging the illegality of the decision based on jurisdiction for a reason that the trial magistrate was not vested with a power to hear and determine the matter since she was represented by an advocate and that according to the law, advocate are not allowed to appear in the trial court before a magistrate who is not a resident magistrate.

The applicant's reason for illegality is deponed under paragraph 6 of her affidavit that,

1. *That the reason for extension is irregularity on point of law which defeat the justice and that lead to the trial court to lack jurisdiction. The following are the factors constitute such illegality*

2. *That the matter on a primary court of Kawe the applicant was represented by advocate Elikazina Kangaru from Law Mark Attorney*

as stated on the page 1 of the typed ruling of annexture AMT-2 and that on final page of the decision the trial magistrate signed as the honourable resident magistrate who sits on the primary court.

3. *That later on the applicant wrote a letter to the district court of Kinondoni to be informed about the status of the presided magistrate who heard the matter at the first instance in which the letter was written on 14th February 2024. Copy of the letter to the district court is herewith attached and marked as collectively annexture " AMT-3"*

4. *That unfortunately the district court issued an answer on 19th March 2023 which states that the Hon. Magistrate Tamambele was not a resident magistrate. Copy of the reply to the district magistrate of Kinondoni is herein attached and marked as collectively annexture "AMT-4."*

5. *By virtue of that answer, the trial court lacked jurisdiction to entertain the matter in which advocate were not allowed to represent the client before the primary court because in primary court, advocate allowed only to appear on the matter if the preside magistrate is resident magistrate.*

6. *That the whole procedure in primary court of Kawe and Temeke District Court at One Stop Judicial Centre was null by the reason to lack jurisdiction to entertain the matter by the reason mentioned on above.*

In his reply to the applicant's affidavit, the respondent deponed that, the said ground was not raised in the first appellate court and the matter was transferred to Hon. Tamambele after re-assignment.

When the matter was scheduled for hearing, upon the prayer of the parties and with the leave of the court, the application was argued by way of written submissions.

In her brief submissions, the applicant mainly reiterates what she deponed in her affidavit particularly on paragraph 6. She submitted that the law is settled that the applicant has to account for delay which impeded her to bring application. On her part, she stated that the delay was caused by the District Court of Kinondoni where they responded her letter after the expiration of 36 days. She thus, account the delay from 12/2/2024 to 19/3/2024.

Further, she submitted that in granting extension of time there must be sufficient reason to move the court to grant the application. She submitted more that though the law does not specifically state as to what amount to sufficient cause, but the same can be deduced if the delay was not caused by the applicant taking into consideration the surrounding circumstances permissible by justice and equity which necessitated extension of time to be granted.

The applicants referred to the famous decision of **Lyamuya Construction Company Limited v Board of Trustee of Young Womens Christian Association of Tanzania,** Civil Application No. 2 of 2010, where the Court of Appeal set out the criteria for extension of time.

She retires by stating that, this court will wonder as to why she did not raise the issue of jurisdiction in the first appellate court. She said that the same came as a surprise to them and she believe that this court had supervisory power over the lower court including the primary court and the issue at hand is an issue of law and administrative which touches ethical and people's faith over the Judiciary. She finally cited the case of **Principal Secretary of Defence National Service v Derran Vallambia** (1992) TLR 185 that illegality is a ground for extension of time.

Responding, the respondent's counsel stated that, the applicant filed the present application against the decision of the first appellate court delivered on 1/11/2023. He said that, the applicant was bound to account for each day of delay where in his submissions she accounted the delay from 14/02/2024 to 19/03/2024 and that she did not account days of delay from 1/11/2023 when the decision was delivered to 14/2/2024.

The counsel went on to state that, this application is an afterthought as it seems that the applicant is scavenging for any ground that's why she came up with the ground of illegality which was not raised and determined in the first appellate court. The counsel referred the case of **Attorney General of Zanzibar v Laemthong Rice Company**

Limited and Another, Civil Application No 729/15 of 2023 on a point of illegality.

The records shows that the applicant did not file rejoinder submissions. And, having gone through the affidavit deponed by the parties herein and their respective brief submissions, the central issue for consideration and determination is whether the application is merited.

It is settled position of law that when it comes to granting an application for extension of time to do any act, the court has discretion to grant based on the circumstance of each case when it is established that the delay was with a sufficient cause or else there was a point of illegality that impedes justice. (See the case of **Tanzania Coffee Board v Rombo Millers Ltd,** Civil Application No 13 of 2015 and **Yazid Kassim Mbakileki v CRDB (1996) Ltd Bukoba Branch & Another,** Civil Application No 12/04 of 2018).

It is also the settled position of the law that for an application for extension of time to do a certain act to be granted, the applicant has to account for each day of delay. This has been said in the case of **Juma Shomari v Kabwere Mambo,** Civil Application No 330/17 of 2020 CAT at Dr es Salaam where it was held that:

> *"It is settled law that in an application for extension of time to do a certain act, the applicant should account*

for each day of delay and failure to do so would result in the dismissal of the application."

In fact it is a trite law that delay of even a single day should be accounted for as it was held by the Court of Appeal in the case of **Dar es Salaam City Council v Group Security Co. Ltd,** Civil Application No 234 of 2015 CAT at Dar es Salaam where it was stated that:-

"... The stance which this Court has consistently taken is that an application for extension of time, the applicant has to account for each day of delay."

To begin with, it is clear that the applicant did not account for each day of delay as the law requires. The decision of the first appellate court was delivered on 1/11/2023 and she filed the present application on 4/4/2024. Her 45 days to file appeal expired sometimes on 18/12/2023. By that time she had neither appeal to this court nor made an inquiry to the District Court of Kinondoni on the rank of the magistrate. She slept on her right until on 14/2/2024 where she wrote the letter, Annexture "AMT-3." This letter was written after lapse of 57 days in which the applicant did not state as to what she was doing. Again, the applicant did not account the delay from 19/3/2024 when she got response on Annexture AMT-3 to the date when she filed the present application. This is almost a period of 15 days in which no explanation was given as to what she was

doing. Indeed, it is clear that the applicant failed to account for each day of delay as the law requires.

Coming now to the point of illegality, it is in record that the applicant claimed that since she was represented by the advocate and considering that the trial court magistrate was a primary court magistrate and not the resident magistrate, the trial court lacked jurisdiction and therefore, this is an illegality. It is a settled law that for the claim of illegality to stand as a ground of extension of time, the same has to be apparent on the face of the record and the same should not be discovered through a long drawn process. In **Lyamuya Construction Company Limited v Board of Trustee of Young Womens Christian Association of Tanzania,** (supra) where 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, the applicant alleged that, there was a point of illegality on the decision of the trial court as the court lacked jurisdiction when presided by the primary court magistrate and not the resident magistrate. First of all, I must put it clear that the primary court had the jurisdiction to hear and determine probate matter as it is provided under section 18 of the Magistrates' Courts Act, Cap 11 R.E 2019. So, the applicant's assertion that the court lacked jurisdiction is unfounded.

Having found that the primary court had jurisdiction to determine the matter, and the fact that the applicant was given a right to be heard and she was duly represented unlike the respondent, it is my considered view that there was a fair trial in the primary court and she was not prejudiced in anyhow. Therefore, it was not expected for her to raise a point of illegality at this juncture.

Considering what is transpired in the record, I join hands with the counsel for respondent that applicant is scavenging for a reason to ensure that the probate cause is not closed. Her argument is an afterthought and involve a long drawn process to know that the magistrate who delivered a ruling was not a resident magistrate and the processes involved was administrative and not judicial. Based on the surrounding circumstances of the case, I am not convinced if the applicant successfully raised a point of illegality for this court to exercise its discretionary power to extend time.

Again, it is wondering as to why the applicant did not challenge the decision of the primary court on a point of illegality in the first appellate court. And, it is surprisingly, the applicant want this court to determine the issue of illegality of the primary court while the same was not raised, discussed and determined in the first appellate court. The question is, is it correct at this point to determine the point of illegality on the decision of primary court. The answer is definitely No, since if there was an issue of illegality, the applicant was supposed to address it in the first appellate court as one among the grounds of appeal. Unfortunately, she did not do so.

To my view, as I have earlier on said, considering the circumstances of our case at hand, I am still insisting that the reason of illegality alleged by the applicant is an afterthought as she resort to administrative measure to find out the alleged illegality and the same was not on the face of record. Indeed, it is a long drawn processes taken by the applicant to find illegality on a decision of the trial court. To my view, the applicant fail to prove the allegedly illegality on a face of record as a sufficient cause for this court to exercise its unfettered discretion to grant extension of time.

Additionally, from what is transpired in the available record and taking into consideration the time taken from when the probate cause was

filed in a primary court up to now where it is still pending, I think the applicant is not doing fair to herself, the administrator and other beneficiaries. This is due to the fact that, the probate cause was filed in the primary court in 2012, up to now, it is almost 12 years, and still applicant wishes for the beneficiaries and administrator to be in court's corridor.

Consequently, all said and considered, I form the view that the applicant has failed to give sufficient reason for this court to exercise its unfettered discretion to grant extension of time as prayed and she fail to account for each day of delay. I thus proceed to dismiss the application with no order as to costs considering that this is the probate matter where the parties are related.

Order accordingly.

Right of appeal explained to the parties.

M.MNYUKWA
JUDGE
21/06/2024

Court: Ruling delivered in the presence of the parties.

M.MNYUKWA
JUDGE
21/06/2024