

THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

CIVIL APPLICATION No. 3 OF 2019

(Arising from the District Court of Bukoba at Bukoba in Probate Appeal No. 11 of 2014 & Original Karabagaine Primary Court in Application for Execution No. 2 of 2014)

SWEETBERT NDEBEA ----- APPLICANT

Versus

NESTORY TIGWERA ----- RESPONDENT

RULING

23/11/2020 & 27/11/2020

Mtulya, J.:

This is an application in which Mr. Sweetbert Ndebea (the Applicant) seeks an order of this court for enlargement of time within which to file an appeal in this court to contest the decision of the District Court of Bukoba at Bukoba (the District Court) in Probate Appeal No. 11 of 2014 (the Judgment). In order to register relevant materials to persuade this court to decide in his favour for extension of time and put this court into motion, the Applicant hired the legal services of learned counsel Mr. Ali Chamani to draft and register the present application.

In order to move the court, Mr. Chamani preferred the authority in section 25 (1) (b) of the **Magistrates' Court Act** [Cap. 11 R.E 2002] (the Act) and Rule 3 of the **Civil Procedure (Appeals in**

Proceedings Originating in Primary Court) Rules, of 1964, GN No. 312 of 1964 (the Rules) in his Chamber Summons supported by an Affidavit duly sworn by him in Bukoba on 18th January 2019.

In order to persuade this court to decide in favour of his client, Mr. Chamani registered four reasons in his Affidavit and during the hearing of this application on 23rd November 2020, viz: first, sickness of the Applicant; second, imprisonment of the Applicant; third, delay was beyond Applicant's control; and fourth, illegality of the Judgment of the District Court.

Mr. Chamani being fully aware of the precedent in **Principal Secretary, Ministry of Defence & National Service v. Devram Valambhia** [1992] TLR 185, prayed all other reasons be adopted as they are displayed in his Affidavit save for point of illegality. In order to substantiate the point of illegality, Mr. Chamani submitted that the Will which was registered and relied by the District Court in the Judgment was invalid for want of appropriate members and consent of testator's wife as per requirement of the law.

The submission of Mr. Chamani was protested by Mr. Nestory Tigwera (the Respondent) who briefly replied on two reasons of the Applicant, namely: reason of Applicant's sickness and point of illegality. With Applicant's sickness, the Respondent submitted that

Mr. Chamani did not register any evidence to substantiate the claim on sickness and in any case the NHIF Confidential Form attached in the Application was not certified by a medical doctor in paragraph F. To the Respondent, it is impossible for the Applicant to be granted referral letter to Dar Es Salaam Hospital from BRRH for only a day attendance as an outpatient. The Respondent also inquired on pictures related to heart diseases to justify the Applicant's claim on sickness and attendance in hospital.

The Respondent stated further that the reason of illegality registered by Mr. Chamani has no any merit as the District Court in the Judgment did not commit any error in law. To his opinion, all decisions from Karabagine Primary Court to the District Court are proper without any defects.

Rejoining the submission of the Respondent, Mr. Chamani submitted that the NHIF Confidential Form annexed as an attachment C justifies that the Applicant attended the hospital and was issued medicines of heart diseases. In the opinion of Mr. Chamani, the Respondent is not aware of management of the NHIF Confidential Form and in any case the Respondent is not an expert in medical issues hence cannot state on NHIF Confidential Form or pictures to justify the Applicant's sickness.

On the claimed illegality, Mr. Chamani submitted that the Respondent is fully aware that the Will was prepared under customary law, but did not abide with customary law which require certain numbers of witnesses, including a wife and relatives of the testator. According to Mr. Chamani, it is important that the enlargement of time be granted to the Applicant to contest the Will for sake of proper and straight record of the court.

On my part I think, the law in section 25 (1) (b) of the Act empowers this to enlarge time period for applicants who apply for extension of time to file their appeals in this court. However, the law is silent on reasons for consideration in granting leave for such enlargement of time. Unlike section 14 (1) of the **Law of Limitation Act** [Cap. 89 R.E. 2019] (the Law of Limitation), which provides for enlargement of time where an applicant displays *reasonable* or *sufficient* cause.

From the practice of this court and Court of Appeal, the position has been that applicants for extension of time must provide relevant materials to persuade courts in exercising their discretionary powers to decide in their favour (see: **Alliance Insurance Corporation Ltd v. Arusha Art Ltd**, Civil Application No. 33 of 2015; **Royal Insurance Tanzania Limited v. Kiwengwa Strand Hotel Limited**,

Civil Application No. 116 of 2008; **Sebastian Ndaula v. Grace Rwamafa**, Civil Application No. 4 of 2014; and **NBC Limited & Another v. Bruno Vitus Swalo**, Civil Application No. 139 of 2009).

However, there are no presently pigeon holes on sufficient causes or relevant materials established by our courts of record, High Court and Court of Appeal. That would have been easier for the courts to pinpoint the specific pigeon holes and determine applications brought before them. Our superior court in this country has already confirmed on the difficulties involved in determining the relevant materials (see: **Dar Es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987 and **Oswald Masatu Mwizarubi v. Tanzania Processing Ltd**, Civil Application No. 13 of 2010). In the precedent of **Oswald Masatu Mwizarubi v. Tanzania Processing Ltd** (supra), the Court of Appeal stated the following words:

*What constitutes **good cause cannot be laid down by any hard and fast rules**. The term good cause is a relative one and is dependent upon party seeking extension of time to provide the **relevant material** in order to move the court to exercise its discretion*

(Emphasis supplied).

The advice from our superior court in identifying relevant materials in an application for extension of time is to invite the general principle that every case has to be decided on its own peculiar facts. For instance, in the precedent of **NBC Limited & Another v. Bruno Vitus Swalo** (supra), it was stated at page 7 of the typed Ruling that:

*It is now settled that **in its discretionary powers, apart from a point of illegality where raised**, the court has to also consider such factors as the length of delay, the reason for delay, the degree of prejudice and whether or not the applicant was diligent. In applying those principles [the court must bear in mind]...the general principle that **every case is decided upon its peculiar facts***

(Emphasis supplied).

From the above text, it is vividly displayed that: **apart from a point of illegality where it is raised**, court may not necessarily consider any other reasons of delay. In other words, other factors of delay may only be invited and considered when there is no point of illegality raised. In the precedent of **Attorney General v. Tanzania**

Ports Authority & Another, Civil Application No. 87 of 2016, the Court of Appeal made it clear that:

*It is a settled law that **a claim of illegality of the challenged decision constitutes sufficient reason for extension of time** regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay.*

(Emphasis supplied).

The reasons for such explanations are available in the precedent in **Diamond Trust Bank Tanzania Bank Ltd v. Idrisa Shehe Mohamed**, Civil Appeal No. 262 of 2017 in the following texts available at page 11 & 12 of the typed decision:

*We wish to point out that, the Court cannot normally justifiably close its eyes on glaring illegality in any particular case because it has a duty of ensuring proper application of the laws by the subordinates courts (see: **Marwa Mahende v. Republic** [1998] TLR 249)...we think, the superior courts have the additional duty of ensuring proper application of the laws by the courts below... for the interest of justice, the Court has a duty*

to address a vivid illegality and that cannot justifiably close its eyes thereof.

(Emphasis supplied)

All these developments were part of the footsteps following the precedent of the full court of the Court of Appeal in **Principal Secretary, Ministry of Defence & National Service v. Devram Valambhia** (supra). In this decision, our superior court stated that:

*Indeed the refusal by the Court to extend time amounted to allowing the decision being challenged to remain on record and to be enforced. That was perfectly in order, for, the decision was itself valid in law, while the issue whether or not the opinion expressed therein is erroneous should, in the Court's own discretion, await decision in other proceedings. Such is not the position in the present case where the point at issue is the illegality of the decision being challenged. **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 right.

(Emphasis supplied)

I understand when a point of illegality is raised by applicants of extension of time, it must fulfill two important conditions, *viz*: first, existence of special circumstance (a point of law) that of sufficient importance (see: **The Bishop of the Roman Catholic Diocese of Tanga v. Casmir Richard Shemkai**, Civil Application No. 507/12 of 2017, **Lyamuya Construction Company Ltd v. The Board of Trustees of Young Women's Christian Association of Tanzania**, Civil Application No.2 of 2010, **Samwel Munsuro v. Chacha Mwikwabe**, Civil Application No. 539/08 of 2019); and second, such point of law must be of sufficient importance or the illegally complained must be obvious at a glance (see. **The Principal Secretary, Ministry of Defense & National Service v. Devram Valambia** [1992] TLR 387, **The Bishop of the Roman Catholic Diocese of Tanga v. Casmir Richard Shemkai**, Civil Application No. 507/12 of 2017 and **Hanspaul Automechs Limited v. RSA Limited**, Civil Application No. 126/02 of 2018).

In the present application, the Respondent spotted a defect which may lead to illegality of the decision in **District Court of**

Bukoba at Bukoba in Probate Appeal No. 11 of 2014 & original case at **Karabagaine Primary Court in Application for Execution No. 2 of 2014**. The Applicant complained of the existence of the Will without involvement of family members or relatives and wife of the testator. To my opinion that is obvious at glance and special circumstance (a point of law) of sufficient importance to invite intervention of this court to test the claim of complained illegality.

I also understand in the present application, the applicant registered other reasons to persuade this court in his favour, namely: first, sickness of the Applicant; second, imprisonment of the Applicant; and third, delay was beyond Applicant's control. As part of identifying pigeon holes traditionally established by our courts of record, the reasons may constitute relevant materials or sufficient cause. On sickness, there are decisions in **Kapapa Kumpindi v. The Plant Manager, Tanzania Breweries Limited**, Civil Application No. 6 of 2010, **Benezeth Mwebesi & Two Others v. Baraka Peter**, Misc. Civil Application No. 46 of 2019 and **Safina Amri v. George Ruhinda**, Misc. Land Application No. 66 of 2018.

On imprisonment there are precedents in **Yusuph Hassan v. Republic**, Criminal Application No. 56/12 of 2017, **Amudy Kabwishukuru v. Republic**, Misc. Criminal Application No. 2 of 2020

and **Iman Gregory v. Rose Charles**, Misc. Criminal Application No. 15 of 2020 and with regard to situations beyond applicant's control, there are standards set in **Eksteen v. Kutosi** [1951] 24 (2) K.L.R. 90, **Foreign Mission Board of Southern Baptist Convention v. Alexander Panomaritis** [1984] T.L.R 146) and **Benezeth Mwebesi & Two Others V. Baraka Peter**, Misc. Civil Application No. 46 of 2019.

However, as I have stated, when there is allegation or claim of illegality on the decisions complained of, this court may not be bound by any other considerations. I have formed an opinion to ignore any other reasons in favour of the claim on illegality, which I have already stated it is obvious and sufficient to invite this court.

Glancing the nature of this application, and considering the interest of justice, provision of article 13 (6) (a) of the **Constitution of the United Republic of Tanzania** [Cap. 2 R. E 2002], enactment of section 3A & 3B in the **Civil Procedure Code** [Cap. 33 R.E 2019] and precedents in **Yakobo Magoiga Gichele v. Peninah Yusuph**, Civil Appeal No. 55 of 2017 and **Gasper Peter v. Mtwara Urban Water Supply Authority (MTUWASA)**, Civil Appeal No. 35 of 2017, I think, the laws and precedents require me to grant this application, and I will not hesitate to do so.

In the final event, I think Mr. Chamani has registered relevant materials and persuaded this court to determine this application in favour of the Applicant. The Applicant is granted ten (10) days leave to register his appeal out of statutory time before this court in accordance to the laws regulating appeals from subordinate courts to this court in cases originated at primary courts. As the dispute is not yet to be determined to the finality to identify the rightful party, this court orders costs in due course.

Ordered accordingly.



F. H. Mtulya

Judge

27/11/2020

This Ruling was delivered in Chambers under the seal of this court in the presence of the Applicant Mr. Sweetbert Ndebea and in presence of the Respondent Mr. Nestory Tigwera.



F. H. Mtulya

Judge

27/11/2020