

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
CIVIL APPLICATION NO. 576/01 OF 2021
MWANAHERI MRISHO APPLICANT
VERSUS
SAAD KHAMIS 1ST RESPONDENT
FUAD ALLI 2ND RESPONDENT
(Application for extension of time in which to lodge an application
for certification of point of law requiring consideration
by the Court of Tanzania at Dar es Salaam)

(Mlyambina, J.)

dated the 3rd day of September, 2021

in

Misc. Civil Application No. 682 of 2020

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RULING

10th & 14th July, 2023

MGONYA, J.A.:

This is an application for enlargement of time to lodge an application for certification of point of law by way of second bite made under rule 10 of the Court of Appeal Rules, 2009 as amended (the Rules). This follows refusal of the initial application for leave sought before the High Court (Mlyambina, J.) via Miscellaneous Civil Application No. 682 of 2020.

As the requirement of the rules, the application is made by way of notice of motion which was supported by two affidavits; the first affirmed

by the applicant, and the second sworn by Mr. Ambrose Malamsha learned counsel for the applicant respectively. It is from the filed affidavits where the applicant and his counsel stated the reasons for failure to lodge the application within the time prescribed by the law. However, the application has been strenuously resisted by the respondents.

In the instant matter, the founding affidavit discloses facts showing that; following the death of one Mrisho Abdallah in 1955, in 1966 the parties instituted a Probate and Administration of Estate Cause before Kariakoo Primary Court. Two administrators to wit; Said Rajabu Mrisho and Saad Hamisi were appointed. In the course of administration, family members experienced misunderstanding on whether or not to sell the house in issue (herein also to be referred as the property).

When the matter was sent to the District Court for reference, all parties were summoned for necessary orders. On 25/03/2003 before the District Court the administrator one Mrisho Abdallah prayed for an order that the property be sold. The court ordered the family members intending to remain with the house to compensate others who wants the property to be sold on equal shares before the end of July, 2003. Then the house was sold to the 2nd respondent herein.

It is from 2003 up to 2019 almost 16 years the parties are moving from one court to another. The matter subject to the intended appeal was decided on 25/04/2019 where the applicant filed an appeal which was dismissed by the High Court for being meritless. The instant application was filed before this Court on 15th November, 2021.

At the hearing of the application before me, the applicant was represented by Mr. Ambrose Malamsha, learned counsel whereas the Respondents were represented by Mr. Majura Magafu.

It was counsel Malamsha who took the floor first after being invited by this Court to expound the application. Mr. Malamsha commenced by elevating his prayer to the Court to adopt the filed affidavits to form part of his submission, and he went on to ask for a leave to add the provision of rule 45A (1) (c) of the Rules as the application was filed as a second bite. The prayer was granted by this court as there was no objection from the respondents' counsel.

In expounding the reason for the delay as they appear in the affidavits, the learned counsel submitted that, when the decision was out, the applicant was bereaved, hence she was not around. Also, since the case is in the court since 1993, there was a problem of retrieving some documents. Apart from that, the learned counsel submitted that, there was illegality in the course of this matter. Therefore, they want the

said illegality be challenged in Court. It was Mr. Malamsha's further submission that, it is trite law that once illegality is established, then the extension of time is inevitable. To support his stance, he cited the case of **Principle Secretary Ministry of Defence Vs Divram Valambia**, 1992 TLR 192.

While explaining on the alleged illegality, Mr. Malamsha submitted that, it was not proper for Magistrate Kabuta to direct that the house be sold as the court had no any power to order the sale of the house and he was to inform both administrators and not only one. He further stated, the Primary Court at Kariakoo referred the file to the District Magistrate for direction instead the Magistrate revise the matter. Further, the Magistrate gave his judgment only to the single administrator while there were two administrators. That the act of the administrator to proceed without involvement of the heirs constitute illegality as there was no right to be heard. To fortify his stance, the case of **Andrew Athuman Ntandu & Another Versus Dustan Peter Rima (As Legal Administrator of the Estates of the late Peter Joseph Rima)**, Civil Application No.551/01 of 2019 (unreported) was referred.

When it was his turn, Mr. Magafu, learned counsel for the respondents, eloquently submitted that, the application is meritless as rule 10 and 45A insists that there must be a very good cause for delay.

Responding to the ground that the applicant was bereaved Mr. Magafu stated that, the applicant's counsel in support of the application, attached the minutes of the family meeting (MR1) in which among the listed participants the applicant's name does not appear. Also, he contended that there is no any affidavit filed to prove that the applicant was not around.

Arguing on the reason that, there was technical ground as there was hardship to get the required documents, he stated that there is no any document in that effect and there is no any evidence to prove the same. Submitting on the High Court decision it was Mr. Magafu's further submission that, there is a reason for the applicant being denied the application, because there was no good cause for delay. He contended that, the decision of Kibuta Magistrate was proper as there was a family disagreement. Further, the Magistrate did not sell the property but only directed that, the house to be sold to end the controversy between the heirs. He went further to state that, the other administrator was summoned but never appeared.

Mr. Magafu insisted that there was no good cause and in view of the referred illegalities, there must be material illegalities of which he argued that there was no any illegality. On the premise of what he

submitted, the counsel urged the Court to dismiss the application with costs.

In his rejoinder Mr. Malamsha kept on insisting that the applicant was not idle as there was other application which was filed on 2020 and decided in 2021 before Mlyambina, J. He went on to state that the property was supposed to be sold by both administrators, hence illegality which is the sufficient ground without even accounting for delayed days.

On the strength of what he submitted, Mr. Malamsha implored this court to grant the application insisting that there was illegality on the face of record.

Having carefully examined the record and considered the arguments by both parties, the issue for determination is whether there is a good reason to warrant this Court to extend the time.

I am aware that the rule 10 of the Court of Appeal Rules allows extension of time upon good cause shown. For easy orientation, I find beneficial to reproduce rule 10 as hereunder;

"The Court may, upon good cause shown, extend the time limited by these Rules or by any decision of the High Court or tribunal, for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the

act; and any reference in these Rules to any such time shall be construed as a reference to that time as so extended."

As to what amounts to good cause this Court several times stated that, what constitutes good cause cannot be laid down by any hard and fast rules. The term "**good cause**" is relative one and is dependent upon the party seeking extension of time. See; **Osward Masatu Mwizarubi v. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010.

Before embarking on determining the above issue, I find it imperative to address on the principle maxim "*interest reipublicae ut sit finis litium*" which means, the interest of the state requires that there should be the end of litigation. It is obvious that the aim of the Parliament to enact the Law of Limitation was not only to make sure that litigation comes to an end but also to ensures Justice. That being the position therefore, a party who wants the court to deviate from the law of limitation must not only show good reasons but the alleged reasons must be proved to the extent, not only the Court but even when heard by any other person he could find that, for interest of Justice the Court has to deviate from the law of limitation be extending the time.

The following is my analysis on the reasons for the delay as they have been indicated in the applicant and counsel Malamsha's affidavits as well as the arguments for and against the application.

To start with the reason that the time when the decision was out, the applicant was bereaved hence she travelled to Tabora, it is from paragraph 20 to 22 of the applicant's affidavit where she deposed that she was bereaved on 5/05/2019 by one Ashura Waziri Kubewa, hence travelled to Tabora to attend burial services and family meeting for appointment of administrator of estates of the deceased Ashura. In a bid to prove that, the applicant attached a copy of death certificate and a copy of minutes of the family meeting to form part of his affidavit. Going through the annexures, I find that as far as there is a copy of death certificate, it is without dispute that one Ashura Waziri Kubewa a resident of Mapambano Tabora passed on 5/5/2019.

I also traversed through the attached minutes of the meeting which was also held on 5/5/2019, in my surprise the name of the applicant is not in a list of participants of the said family meeting. Apart to that, it is neither in the applicant's affidavit nor the submission made it is revealed as to when the applicant travelled to Tabora and when she was back in order to have a number of accounted days. To me, I find there is a lot to be done for this Court to believe what is stated by the applicant in her

affidavit as well as the submission of the counsel. The attached document did not support what is stated by the applicant to persuade this court to find that there is sufficient reason to enlarge the time.

Turning to the second ground that, since the matter started way back in 1993, there is technical delay as the applicant faced hardship to retrieve some documents. With due respect, I disagree with this reason as the same is not backed up by any evidence. Any person is able to state like what is stated by the applicant and her counsel, therefore in order to make sure what is stated is real for the Court to act upon, there must be a proof of it. In this application, neither the alleged documents have been mentioned nor even a single letter to indicate that the applicant have ever struggled to request a certain document from the court or any office but the same was not easily availed to her. In my view this reason also has no any proof, hence meritless.

Another stated reason for the delay is that, after her arrival from Tabora the applicant has to consult the counsel in order to prepare the application. I also find the reason very weak for the Court to act upon. It is not stated as to when the applicant was back, when she consulted the counsel and for how long the application was prepared. It has been stated by this Court several times that, as to what constitute sufficient cause, various factors have to be considered including to account for all

the period of delay which should not be inordinate and the applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take. See; **Tanga Cement Company Limited vs. Jumanne Masangwa & Another**, Civil Application No. 6 of 2001 and **Lyamuya Construction Company Ltd vs. Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No, 2 of 2010 (Both unreported).

Turning to illegality alleged by the applicant's counsel in his affidavit, it is admittedly that this Court in many decisions found illegality as a sufficient reason to enlarge time. See; **VIP Engineering and Marketing Limited, Tanzania Revenue Authority and Liquidator of TRI-Telecommunications (T) Ltd v. Citibank (T) Ltd**, Consolidated Civil References No. 6, 7 and 8 of 2006 (unreported). However, as it has been submitted by Mr. Magafu learned counsel for the respondents, the position which I subscribe to, there must be material illegalities. It should be noted that not every alleged illegality can warrant extension of time. See; **Omary Ally Nyamalege, Administrator of the Estate of the Late Seleman Ally Nyamalege & Others vs Mwanza Engineering Works**, Civil Application No.94 of 2017 and **Lyamuya Construction Co. Ltd** (supra). In his submission

Mr. Malamsha stated that there was illegality as the house was sold by the court. The magistrate ordered the sale of the property and also the order was made when another administrator was not before the court.

Going through the record of this application, I have noted that all along in his affidavit and submission, Mr. Malamsha is addressing on what happened in a District Court and the Primary Court. Nothing has been submitted in relation to the judgment intended to be challenged. It is well known that, once a party alleges illegality, the said illegality should be from the impugned judgment. That being a case, it is the illegality found in judgment in PC. Civil Appeal No. 46 of 2018 if any which is supposed to be considered by this Court. Be it as it may, being the appellate Court I found no harm to address on the alleged illegality as submitted by counsel Malamsha.

Going through the alleged illegality by the counsel Malamsha, the same may sound like material illegality but the circumstance of this matter does not support the same. In paragraph 5 of the applicant's affidavit which I beg to reproduce as I do hereunder it reads;

"That in the course of administration, family members experienced a misunderstanding on whether to sell the property or keep and register the property under the name of heirs."

The above words come from the applicant herself after being affirmed. It is from her words it is revealed that after the death of the owner of the property at Plot No.47 Amani/Kongo street Kariakoo the heirs were not at one on how they can benefit from the estate.

Again, under paragraph 6 of the applicant's affidavit it has been deponed that:

"That the primary court ordered that the family members intending to remain with the house should compensate others who intends the property to be sold equally to their shares before the end of July, 2003."

The quoted paragraph revels that since 1996 when the administrators were appointed, nothing was done as there was a family misunderstanding. Nothing has been stated by the applicant in her affidavit as to whether those who intends to remain with the property compensated their opponents. This reveals that, the heirs who wanted to remain with the property did not compensate their fellow.

In my understanding, I believe that once it comes to the estate all heirs have equal rights unless there is a will on which the owner of the property distributed his property as he wishes. Therefore, all heirs were supposed to get their rights. That is why the trial magistrate ordered compensation to those who were demanding their rights. As it has never

been stated that the order of compensation was complied with, and also since the record reveals that the order of sale occasioned by the prayer from the administrator, I find no any material illegality as alleged by counsel Malamsha.

Likewise, responding on the point that one administrator was not around when the order of sale was made, as much as it is undisputed that the matter was pending before the court for a long time, all that time the heirs were in a battle which automatically divided them. It was not easy as the counsel Malamsha wants this Court to believe that, the other administrator who there is a reason to believe he was on the side of those who wanted to remain with a property undistributed, was not aware of what was going on before the court. The circumstance of the case reveals that, he opted not to attend before the court. Therefore, the court to proceed making the orders cannot be termed as illegality, as the other administrator opted to sleep on his right for his personal interest. It was the court which had the duty to end their dispute. Therefore, with that analysis, I find no material illegality to warrant this court to enlarge the time.

All in all, in line with the decision made in **Lyamuya Construction Co. Ltd (supra), Saidi Ambunda vs. Tanzania Harbours Authority**, Civil Application No. 177 of 2004 and **Abood Soap**

Industries Ltd v. Soda Arabian Alkali Limited, Civil Application No. 154 of 2008 (all unreported), this Court cannot exercise its discretion to enlarge the time in favour of a party who fails to show diligence in pursuing her rights as it was in this case.

In the upshot, it is my finding that the applicant has failed to disclose good cause for the Court to exercise its powers under rule 10 of the Rules.

Accordingly, I dismiss this application in its entirety with costs.


It is so ordered.

DATED at DAR ES SALAAM this 13th day of July, 2023.

L. E. MGONYA
JUSTICE OF APPEAL

The Ruling delivered this 14th day of July, 2023 in the presence of Mr. Mathew Bernard Kabunga, learned counsel of the Respondents, who also took brief for Mr. Ambrose Malamsha learned counsel for the applicant, is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL