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

MISC. PROBATE APPLICATION No. 2 OF 2019

(Arising from Karagwe District Court in Probate Appeal Cause No. 5 of 2018 & Original Nyaishozi Primary Court in Probate Administration Cause No. 5 of 2016)

1. Dr. MUZZAMMIL MUSSA KALOKOLA
2. MARIATH MUSSA KALOKOLA } **---- APPLICANTS**
3. Dr. SOPHIA MUSSA KALOKOLA

Versus

MZUMBE MUSSA KALOKOLA ---------- RESPONDENT

RULING

18/05/2020 & 19/05/2020

Mtulya, J.:

This is an application for leave to institute appeal against the decision of Karagwe District Court (the District Court) in Probate Appeal Cause No. 5 of 2018 emanated from the decision on Nyaishozi Primary Court (the Primary Court) in Probate Administration Cause No. 5 of 2016. The four parties in this application are Muslim blood relatives from the same father, the late Alhaj Mussa Kalokola (the deceased) who expired on 27th April 2018 at ninety three (93) years of age in Nyakato, Mwanza in the hands of the Third Applicant, Dr. Sophia Mussa Kalokola.

All parties in this Application are lay persons and have been contesting the administration of the deceased's estates since 12th June 2018 in the Primary Court to the day of hearing of this application before this court and probably, they will contest further and further. Being lay persons, they have been filing, arguing and citing legal authorities improperly. For instance, when the Applicants approached this court on 30th July 2019, and registered their application, they attached almost every document related to appeal in a huge spiral binding in a form of a book with index.

The Applicants also attached the Application supported by Affidavit, Chamber Summons, Petition of Appeal, decree and judgment of the District Court. Again, during the filing of written submission in this court, the Applicant have collected everything in their possession with regard to the present application and bound them in one huge spiral binding.

In one of their arguments for the delay depicted in their Affidavit, the Applicants claim that they were busy following up copies of decree and judgment from the decision of the District Court. Therefore, the Applicant have approached this court and praying for a leave to enlarge thirty days period of time as required by the

provisions of section 25 (1) of the Magistrates' Court Act [Cap. 11 R. E. 2019] (the Act).

However, before I begin determining this Application, three things must be noted from the practice of this court. One, this court may grant extension of time upon production of good cause or sufficient reason and two materials which support good cause are extracted from the record and finally, this court is no longer a court of technicality. It is a court of justice and it does not support court's grave diggers.

This position of the court is plain after enactment of section 3A of the Civil Procedure Code [Cap. 20 R.E. 2002] (the Code) via Written Laws (Miscellaneous Amendment) Act, No. 3 of 2018 which introduced a principle of Overriding Objective that requires courts to deal with cases justly and to consider substantive justice. The principle has already received judicial practice and it is generally accepted that parties in disputes brought before our courts to focus on substantive justice. (see: **Yakobo Magoiga Gichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, Gasper Peter v. Mtwara Urban Water Supply Authority (MTUWASA), Civil Appeal No. 35 of 2017, Mandorosi Village Council & Others v. Tuzama**

Breweries Limited & others, Civil Appeal No. 66 of 2017 and **Njoka Enterprises Limited v. Blue Rock Limited and Another, Civil Appeal No. 69 of 2017**).

After considering the position of the law, this court had a cursory glance of the record of this application. The available record show that the deceased when expired on 27th April 2018 and immediately thereafter, on 7th May 2018, the Respondent knocked the doors of the Primary Court seeking letter of administration of the deceased person. On three different dates in early June 2018, the three Applicants drafted protests, *viz*: The First Applicant drafted his protest on 12th June 2018, the Second drafted hers on 10th June 2018 and the Third Applicant on 8th June 2018. However, all Applicants approached the Primary Court and registered their protested on the same day, 12th June 2018.

All protests were well summarized by the decision of the Primary Court at page 1 and 3 of the typed judgment, and for purposes of clarity, I will quote the same inhere:

> *Ni maombi ya mirathi yaliyofunguliwa na Mzumbe Mussa Juma Kalokola kuomba kuteuliwa kuwa msimamlzi wa mirathi ya marehemu Mussa Juma Kalokola. Baada ya*

kufungua maombi haya ndipo watoto watatu wa marehemu, Dr. Muzzamil Mussa Kalokola, Mariath Mussa Kalokola na Dr. Sophia Mussa Kalokola walileta pingamizi dhidi yake. Pingamizi dhidi ya Mleta Maombi ni kama ifuatavyo: kwanza, usimamizi wa mirathi ya marehemu Alhaji Mussa Juma Kalokola utekelezwe kwa kuzingatia mila ya uislam. Kuwa marehemu na familia yake walikuwa wanaishi kwa Imani ya kiislam. Kwa hiyo sheria ya usimamizi wa miratghi hii izingatie sheria za dini ya kiislam kwa mujibu wa Quran tukufu; pili, kuwa wosia wa marehemu Mussa Juma Kalokola ni batili kutokana na upungufu wa ushahidi wa kisheria na kushuhudia uthibitisho wa wosia. Wosia haukuthibitishwa na Kamishna wa viapo, wosia haukuthibitishwa na shahidi wawili wanaokidhi vithibitisho wa kisheria, wosia unaonyesha upendeleo na ubaguzi wa wazi kwa kuruka mipaka ya sheria za Quran tukufu; na tatu, muhtasari wa kikao cha wanaukoo umepungukiwa sifa. Muhtasari huo hauwezi kukidhi

matakwa ya Mahakama ya kumuidhinisha msimamizi wa mirathi.

After hearing the parties on the objection, the Primary Court decided in favour of the Applicants. At the final page of its decision, the Primary Court stated that:

Kutokana na hivyo, naungana na mshauri wa mahakama aliyesema Mzumbe Mussa Kalokola asiwe miongoni mwa jopo la wasimamizi wa mali za mirathi ya marehemu Mussa Juma Kalokola.

The reasoning of the Primary Court is found immediately before the holding of the Application at the final page of the decision in the following words:

Mahakama hii iliendelea kujibu hoja ya mwisho iliyohoji na je Mzumbe Mussa Kalokola ana sifa za kuwa kwenye jopo la wasimamizi watatu. Nyongeza ya V MCA Cap. 11 R. E. 2002 ambayo inaipa mamiaka Mahakama hiikuteua wasimamizi wa mirathi inataka mtu mwenye uadilifu na muwazi. Kutokana na ushahidi wa waleta pingamizi pia SU7 na SU8 ambao ni wake wa marehemu walisema Mzumbe Mussa Kalokola ndiye atakayepewa fidia eneo

la marehemu litakalopitiwa na barabara. Lakini kwenye kikao cha ukoo, wakati wenzake wanataja mali za marehemu, mfano Nailath alipotaja A/C ina milioni kumi (10,000,000/=), Nasibu alitaja Tshs. 200,000/= za marehemu, yeye alikaa kimya. Hivyo, kitendo cha kutoweka wazi mali ya marehemu itakayopatikan kwenye fidia kinampunguzi sifa.

After this holding and reasoning of the Primary court pronounced, on 8th day of November 2018, the Respondent was not satisfied and immediately, on the 4th day of December 2018, preferred Probate Appeal Cause No. 5 of 2018 before the District Court and registered a total of twenty two (22) grounds of appeal and prayed before the District Court to set aside the decision of Primary Court and appoint him as an administrator of the deceased's estates. The District Court after hearing of the parties, decided in favour of the Respondent and at page 10 of the typed judgment held:

It is the view of this court Mzumbe Mussa Kalokola is eligible administrator as proposed by the clan meeting. Having those in mind I hereby quash and set aside

decision reached by the trial court, and allow this appeal.

The reasoning of the District Court is depicted at page 9 of the decision in the following text:

I noted the deceased wives testimonies in the trial court are in total agreement with the will contents and none objects the will. In the trial court, two attesting witnesses testified having seen the testator saying the will and their signature appears on the will. The trial court with probate jurisdiction had the task of carrying out the actual intent of the testator as opposed to an objective intent presumed by the law. The court is of the view that the tendered document in the trial court expresses the testator's wishes that should be honored and this court therefore prefers an interpretation of the will that leads to the testacy and not intestacy, the clan meeting set on 01/05/2018.

This holding of the District Court delivered on 10th day of May 2019, aggrieved the Applicants and on the same day applied for the copy of judgment and decree so that they can prefer an appeal in this

court. As I stated before inhere, the Applicants were lay persons and thought that the appeal cannot be preferred unless they possessed and attached the same in their petition appeal. However, the parties were not availed the same until when thirty (30) days required by the law had elapsed despite several efforts and letter writings.

The Applicants were availed the copies of proceedings on 22nd July 2019, judgment on 8th July 2019 and decree on 23rd July 2019 and in one week, that is on 30th July 2019, filed their appeal. In their Affidavit in support of the Application for enlargement of time to file an appeal, the Applicants briefly stated that they were busy following up the copies of the decree and judgment for the purposes of an appeal.

During their submission in support of the Application in this court, the Applicants have repeated the same argument as is depicted in paragraph 4, 5 and 6 of their submission. To bolster their arguments the Applicants have cited the authority in section 25 (1) (b) of the Act, Rule 4(1) of the **Civil Procedure (Appeals in Proceedings Originating in Primary Court) Rules, 1964 GN. No. 312 of 1964,** section 14 (1) and 19 (2) of the Law of Limitation Act [Cap. 89 R. E 2019] (the Law of Limitation) and precedents set in

Dr. Muzzammil Mussa Kalokola v. The Minister of Constitutional Affairs and the Attorney General, Civil Application No. 245 of 2015, Chrisostom H. Lugiko v. Ahmednoor Mohamed Ally, Civil Application No. 5 of 2013 and The Board of Trustees of National Social Security Fund (NSSF) v. Leonard Mtepa, Civil Application No. 140 of 2005, in arguing that it was impossible to draft meaningful grounds of appeal without the copies of decree and judgment.

The submission and its associated arguments were protested by the Respondent who briefly stated that the delay is not known in law. To substantiate his argument, the Respondent contended that the present application is not regulated by the provisions of the Law of Limitation and cited the decision in **Asha Saidi v. Given Manyanga and Another, Misc. Civil Case No. 28 of 2003**.

With regard to the provisions of section 25 (1) (b) of the Act, the Respondent argued that the Applicant have not appealed within thirty (30) days provided by the law and therefore they delayed for reasons unknown under the provisions of: section 25 (1) (b) of the Act, Rule 4 (1) of the GN. No. 312 of 1964, and precedents in **Gregory Raphael v. Pastory Rweabula [2005] TLR 99, Abdallah S. Mkumba v.**

Mohamedi I. Lilame [2001] TLR 326 and Sophia Mdee v. Andrew Mdee, Civil Appeal No. 3 of 2015.

Rejoining the submissions of the Respondent, the Applicants filed a bulky spiral document containing ninety two (92) pages attached with various copies of cited authorities, protesting the interpretation of the Respondent. However, my perusal found out that the Applicants are moved with three points only. One, section 25 (1) (b) of the may be invited by this court to extend time and two, the Respondent misconstrued the provisions in section 14 (1) of the Law of Limitation and three, the requirement in Rule 2 of the GN. No. 312 of 1964.

At the outset, I must put clear two issues, *viz*: the nature of this application and various objections raised by the Respondent at this stage. This is an application for enlargement of time to file an appeal, not an appeal itself. Even the Application or prayer itself does not originate from a registered appeal. The attachment of the grounds of appeal or petition of appeal in the Application for Leave is attributed to the Applicants legal knowledge, being lay persons. However, during their submissions, they only submitted on the Application, not the Appeal. Again, there are several objections registered by the

Respondent in his submissions. The objections are misplaced, and they are not, this is not a proper forum at this stage to hear and determine them.

After stating so, it is fortunate that both parties in this Application are not disputing on the invitation and application of section 25 (1) (b) of the Act. I also agree with them from the text in the provision and precedents already cited by the parties during their submissions. The wording of section 25 (1) (b) of the Act are coached in following style:

> *any party, if aggrieved by the decision or order of a district court in the exercise of its appellate or revisional jurisdiction may,* ***within thirty days after the date of the decision or order****, appeal therefrom to the High Court; and* ***the High Court may extend the time for filing an appeal either before or after such period of thirty days has expired*** (emphasis supplied).

This provision is silent on reasons for extension of time to file an appeal and uses the word *may*. Unlike section 14 (1) of the Law of Limitation which mentions, *any reasonable or sufficient cause*. The word *may* in the provision may be interpreted to mean that this court

has discretionary mandate to grant extension of time depending on reasons adduced by the Applicant to persuade this court.

It is therefore important for Applicants of extension of time to file an appeal before this court to attach materials which will persuade this court to exercise its discretion mandate in their favour. There is a large family of precedent on the subject interpreting *any reasonable or sufficient cause* (see: **Alliance Insurance Corporation Ltd v. Arusha Art Ltd, Civil Application No. 33 Of 2015; Eliah Bariki v. Republic, Criminal Appeal No. 321 Of 2016; Royal Insurance Tanzania Limited v. Kiwengwa Strand Hotel Limited, Civil Application No. 116 Of 2008 (Unreported), Sebastian Ndaula v. Grace Rwamafa, Civil Application No. 4 Of 2014, Lyamuya Construction Company Limited v. Board of Trustees of Young Women Christian Association of Tanzania, Civil Application No. 2 of 2010**).

For instance when interpreting the *word reasonable cause or good cause*, Court of Appeal in **Oswald Masatu Mwizarubi v. Tanzania Processing Ltd, Civil Application No. 13 of 2010,** stated as follows:

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.*

To my opinion the word *may* in section 25 (1) (b) of the Act gives the same discretionary mandate to the court to deciding matters of extension of time. However, as I stated that Applicants for extension of time to file their appeal must attach materials before the court to persuade it to exercise its discretion powers in their favour.

In the present Application, the Applicants have brought forward one material to justify extension of time to file their appeal, namely: delay caused by the District Court to give them copies of the decree and judgment to understand the decision and attach the same in the petition of appeal. I understand there is no such requirement in our laws, both in section 25 (1) (b) of the Act and GN. No. 312 of 1964. Even precedents are abundant on the subject (see: **Kisioki Emmanuel v. Zakaria Emmanuel, Civil Appeal No. 140 of 2016, Gregory Raphael v. Pastory Rwehabula [2005] TLR 99** and **Abdallah S. Mkumba v. Mohamedi I. Lilame [2001] TLR 326**).

However, this court, as I stated, is mandated to grant extension of time before or after the application. I also stated, from the practice of this court and our superior court, that when there is sufficient cause Applicant for an extension of time may be granted his prayers. But again, this court and our superior court have considered a situation where an Applicant is bringing an application in good faith and acted promptly in filing the same after becoming aware of the delay. That is the advice and position of our superior court in judicial hierarchy in this country.

In the decision of **Royal Insurance Tanzania Limited v. Kiwengwa Strand Hotel Limited, Civil Application No. 116 of 2008 (Unreported)**, the Court of Appeal stated that:

> *It is trite law that an applicant before the Court must satisfy the Court that since becoming aware of the fact that he is out of time,* ***act very expeditiously*** *and that the* ***application has been brought in good faith*** (emphasis supplied).

In the present Application, the Applicants are lay persons, they asked copies of the decision of the District Court on the same day when the decision was delivered, they were busy following up the

copies and writing letters and reminders in several occasions and applied for extension of time immediately after getting hold of the sought copies of decree and judgment. To my opinion the Applicants filed the present Application in good faith to contest their rights to inherit their deceased father's estate according to the law. I see no good reason why they should be denied right to be heard in substantive right.

I have already stated. This is not a court of technicalities. I also said after enactment in section 3A of the Code and cited precedents above, issues of technicalities are no longer part of this court. The thinking of this court and court superior court has changed and currently the focus is on substantive justice. It is not a new thing, anyway. Our **Constitution [Cap. 2 R.E. 2002]** has provision under article 107A (1) (e) requiring this court to dispense justice without being tied up with technicalities which may obstruct dispensation of justice.

This thinking of focusing on substantive justice and avoiding undue technicalities has long been considered by our superior court, the Court of Appeal, before enactment of section 3A in the Code in 2018. The full court of the Court of Appeal in 1992 in the judgment of

Nimrod Elireheman Mkono v. State Travel Service Ltd. & Masoo Saktay [1992] TLR 24, at page 29 stated that:

> *We would like to mention, if only in passing, that justice should always be done without undue regard to technicalities.*

It is from substantive justice where the rights of individuals are fairly heard and determined. The wording of East African Court of Appeal in **Essaji v. Sollank [1998] EA 220** at page 224 are necessary to quote. Their Lordships think that:

> *The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors and lapses should not necessary debar a litigant from the pursuit of his rights.*

To my opinion the words of the East African Court of Appeal in the decision of **Essaji's case** (supra) in 1968 and our Court of Appeal in the judgment of **Nimrod Elireheman Mkono's** case (supra) in 1992 still important today. Again, it is important for parties in dispute, especially relatives emanated from the same blood, to

consider time and costs involved in litigations. They must build confidence and trust in themselves to administer and distribute deceased's property without initiating litigations.

For the foregoing stated reasons, the Applicants in this Application have advanced and displayed reasonable or sufficient cause to justify extension of time to file their appeal out of statutory time limit. This Application is hereby granted for advancing sufficient cause which persuaded this court to do so. Therefore, the Applicants are granted ten (10) days leave within which to file appeal before this court from today, 19th May 2020, without any further delay.

Having said so and considering the parties are blood relatives and there are possibilities to seat and settle their differences in the administration and distribution of their father's estates at family level, I do not think it will be appropriate to order for costs. Each side in this Application to bear its costs.

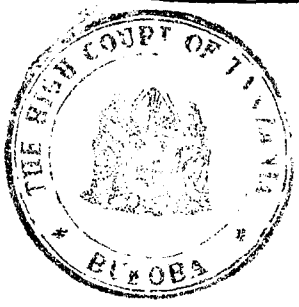
It is accordingly ordered.

F. H. Mtulya

Judge

19/05/2020

This Ruling was delivered in Chambers under the seal of this court in the presence of the Applicants, Dr. Muzzammil Mussa Kalokola, Mariath Mussa Kalokola, and Dr. Sophia Mussa Kalokola and in the presence of the Respondent Mr. Mzumbe Mussa Kalokola.



F. H. Mtulya

Judge

19/05/2020