

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 200 OF 2021

(Arising from the order of the High Court, Dar es salaam Registry in PC
Civil Case No. 13 of 1996 dated 14/03/2005 before Ihema, J)

JOYCE NICODEMUS CHUMA APPLICANT

VERSUS

SAMANTHA CHUMA
(The appointed Administrator of the
estate of the late Veronica Chuma.....1ST RESPONDENT

MWANSIU MADENGE.....2ND RESPONDENT

RULING

30th June 2021 & 30th July, 2021.

E. E. KAKOLAKI J

By way of chamber summons supported by affidavit of **Crescencia Rwechungura**, applicant's advocate, this Court has been moved by the Applicant to extend time to her within which to file an application to this court for grant of a certificate on point of law to appeal to the Court of Appeal against the decision of this Court, Ihema, J (as he then was) dated 06/08/1999, in PC Civil Appeal No. 13 of 1996. The application that met resistance of both respondents who filed a joint counter affidavit for that

purpose through their advocate one **Thomas Brash**, has been preferred under section 11(1) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2019] hereinto referred as AJA.

Briefly the background story of the matter as discerned from the applicant's affidavit goes thus. The application originates from the judgment of this court in PC Civil Appeal No. 13 of 1996 dated 06/08/1996, before Ihema, J (as he then was) that dismissed the applicant's appeal and confirmed the two preceding courts' decision in Probate and Administration matter to the effect that six (6) illegitimate children out of eight (8) children of the late **Joseph Phanuel Chuma** have the right to inherit their father's estate. Prior to filing of this application the applicant being aggrieved with the decision of this court in the said in PC Civil Appeal No. 13 of 1996, unsuccessfully appealed to the Court of Appeal vide Civil Appeal No. 55 of 2001, after obtaining leave to so do from this court as the appeal was struck out for want of certificate on point of law since what was obtained was the leave to appeal to the Court in lieu of Certificate on point of law. Following that order, the applicant reverted back to this court with an omnibus application in Misc. Civil Application No. 796 of 2018, seeking for two orders of extension of time within which to file a Notice to the Court of Appeal and Certification on point of law. Only one prayer for extension of time to file a Notice of Appeal was granted by the court in its ruling handed down on 27/10/2020. Following that grant applicant's Notice of Appeal to the Court of appeal was issued and filed in the Court of Appeal on 10/11/2020. Having issued the Notice of Appeal and being out of prescribed time to file the application for issue of certificate on point of law, the applicant has preferred the present application

seeking extension of time within which to file against the decision of this court in PC Civil Appeal No. 13 of 1996.

When the matter was called for hearing both parties appeared represented. Whereas the applicant hired the services of Ms. Crescencia Rwechungura learned advocate, the respondents enjoyed the services of Mr. Thomas Brash learned advocate. With leave of the court parties agreed to dispose of the matter by way of written submissions in which the affidavit and reply to counter affidavit as well as the counter affidavit were adopted by both of them respectively to form part of their submissions. Having gone through the affidavital evidence together with the submissions and authorities relied on by both parties, it is apparent to me that under section 11(1) of AJA, this court has unfettered discretion to extend time to the applicant upon good cause or sufficient reasons shown. What amount to good cause or sufficient reasons, there is no hard and fast rules as it depends on the reasons advanced by the applicant to account for the delay or convince the Court to grant him/her that extension depending on the circumstances of each case. This position of the law was well stated in the case of **Osward Masatu Mwizarubi Vs. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010, (CAT-unreported) where the Court of Appeal had this to say:

"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 the party seeking extension of time to provide the relevant material in order to move the court to exercise its discretion."

It is however worth noting that, when discharging the duty of assigning good cause, the applicant has to account for each and every day of his/her delay as it was well spelt in the case of **Alman Investment Ltd Vs. Printpack Tanzania and Others**; Civil Application No. 3 of 2003 (Unreported) unless the issue of illegality of the decision sought to be challenged is raised as it was held in the cases of **The Principal Secretary, Ministry of Defence and National Service Vs. Dervan P. Valambia** (1992) TLR 387 (CAT) relied on by the applicant and **Transport Equipment Vs. Valambia and Attorney General** (1993) TLR 91 (CAT).

It was held by the Court in the case of **Alman Investment Ltd** (supra) that:

"Applicant ought to explain the delay of every day that passed beyond the prescribed period of limitation."

In the case of **The Principal Secretary, Ministry of Defence and National Service** (supra) when the point of illegality was pleaded the Court of Appeal held that:

"When the point at issue is the illegality or otherwise of the decision being challenged, that is a point of law sufficient importance to constitute reason within rule 8 of the Court of Appeal Rules to overlook compliance with the requirement of rules and to enlarge time for such compliance."

Similarly in the case of **Transport Equipment** (supra) on the point of illegality the Court said:

"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 record straight."

In this matter, the grounds advanced by the applicant for grant of extension of time as per paragraphs 6,8 and 9 of the affidavit are in two folds. **One**, misplacement of the case file(s) by the applicant after grant of extension of time to file a Notice of Appeal on the 27/10/2020 due to movement of her office to another location until 20/02/2021 when the same was retrieved hence delay in filing this application which was filed on 01/03/2021. And **two**, is illegality of the decision sought to be challenged, premised on dismissal of her appeal and confirmation of the two lower courts' decision to the effect that, six (6) illegitimate children of the late Joseph Phaniel Chuma have the right to inherit their father's estate. To start with the first ground Mr. Brash for the respondent resists the reason advanced by the applicant on the first ground that, since applicant's advocate is the custodian of all case files concerning this matter from the beginning, he does not see how change of office by the applicant could have affected the timely filing of this application. It was his submission therefore that the applicant has failed to account for the delay in filing this application. In her reply submission Ms. Rwechugura remained mute on Mr. Brash's submission instead turned the vehicle to the other direction when cited the case of **The Principal Secretary, Ministry of Defence and National Service** (supra) and

argued that, even where the days delayed are not accounted for, the point of illegality established by the applicant is sufficient enough to warrant this court extend time to her. I agree with Mr. Brash's argument that the applicant has failed to account for the delay of days from 27/10/2020 when the omnibus application was determined by granting one prayer only on extension of time within which to file Notice of Appeal to the Court of Appeal against the decision of this Court in PC Civil Appeal No. 13 of 1996, to the date when this application was filed in Court on 01/03/2021, as the change of her office could not in any way cause misplacement of the files which were in the custody of her advocate. Be it as it even if this fact is believed to be true which is not the case, still I would hold the assertion was not proved by the advocate's affidavit for want of disclosure of the source of that information as that fact in my considered opinion was in the applicant's own knowledge who sworn no affidavit to that effect. It is from those reasons I find the reason advanced by the applicant is insufficient to account for the delay of each day as per the dictates of the case of **Alman Investment Ltd** (supra). As to whether the point of illegality has been sufficiently established to warrant the grant of extension of time by this court that is the point of discussion in the second ground as I shall shortly demonstrate.

Now coming to the second ground of illegality of the decision sought to be challenged in the Court of Appeal, Ms. Rwechungura says, the decision by this court that confirmed the two preceding courts' decision to the effect that, illegitimate children can inherit the estate of their late father is against the law as no single evidence was ever adduced in court to establish that the same underwent legalization ceremony during deceased's life as per the customary law of the coast region communities . Contrary view were aired

by Mr. Brash in riposte that, no illegality is traced in the decision sought to be challenged for merely being alleged by the applicant instead of being apparent on the face of record, as all three courts' decisions were correctly decided in accordance with the law and in the favour of the respondents. He argued in the advent of the Law of Child Act which totally abolished the long existing stand of illegitimate child in Tanzania court's decisions, the applicant's attempt to appeal against the decision of this court on the right of illegitimate child to inherit which is now settled law is to go against the existing law. On that premise he argued this court to dismiss the ground. It is the law as rightly submitted by Mr. Brash that, mere claim of ground of illegality by the applicant is not enough to establish its existence as the said illegality must be apparent on the face of record and not the one far-fetched by long drawn arguments or process as it was adumbrated in the case of **Lyamuya Construction Company Ltd Vs. Board of Registered Trustees of Yong Women's Christian Association of Tanzania, Civil Application No. 2 of 2010** when the Court of Appeal was considering the issue of illegality, and observed 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 demonstrates 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 record, such as the question***

of jurisdiction; not one would be discovered by a long drawn argument or process.”[Emphasis supplied]

Applying the above authority to the facts of this case, I am of the profound view, the alleged illegality by the applicant is not apparent on the face of record or at all as I will soon demonstrate. The claim by Ms. Rwechungura on absence of evidence to prove that the said six (6) illegitimate children underwent legitimization ceremony as per the coastal region communities without mentioning the infringed provision of law that so requires, in my opinion does not constitute illegality of the decision. The issue of illegitimate child’s right to inherit their father’s estate is no longer an issue in this jurisdiction as it is settled by this court in a number of cases. Therefore I find it as a point that requires long drawn arguments or discussions and evidence like what Ms. Rwechungura is trying to do so to establish it as a point of illegality contrary to the dictates of the case of **Lyamuya Construction Company Ltd** (supra). I say so because in the case of **Elizabeth Mohamed Vs. Adolf Magesa** (2016) TLS LR, the issue of illegitimate child was deliberated on by this court through my brother Mruma J, and the Court observed that:

“I think it is utterly wrong that a child be denied his right to inherit from his father on the reason he was born out of wedlock, the act which he had no control of whatsoever.”

The above position of the law was cited with approval and expounded by this court in the case **Judith Patrick Kyamba Vs. Tusime Mwimbe and 3 Others**, Probate and administration Cause No. 50 of 2016 (HC-unreported) where it was held that:

"With Profound respect, I don't agree with the argument of the petitioner that children born out of wedlock are illegitimate and have no right to inherit the deceased estate. I find the petitioner's arguments to be far away and out of touch of justice and realities. In fact, such argument is barbaric and discriminative in nature...Children born out of wedlock are biological children just like those born within the matrimonial home. They are entitled to equal shares of their common father with fellow siblings..."
(Emphasis supplied).

On whether a claim of illegality can be premised on illegitimate child's right to inherit his/her father's estate for the purposes of securing extension of time to file an application for leave to appeal to the Court of Appeal out of time, my brother Mlyambina, J in the case of **Wibard Mathew Senga Vs. Mkwega George Mathew Senga & Another**, Misc. Civil Application No. 394 of 2019 (HC-unreported), had this to say the decision which I subscribe to:

"Indeed, the alleged illegality has no room in today's civilized world where all human being should be treated with equality and equal value. I don't mean and I should not be misunderstood that the current trend aims at encouraging fornication. No servant of this temple of justice would dare to do so. The point that should be over emphasized and kept in mind in all Godly mind is on the innocence of children born out of wedlock. Let one not be punished because of the immorality of his/her father... In the circumstances of

the above, the Application is dismissed for lack of merits."

[Emphasis supplied]

Like my brother Mlyambina, J, in the above cited case though a decision on leave to appeal, I hold, much as the Law of the Child which provisions I need not discuss at this stage, preserves rights of the child born out of wedlock to inherit his/her father's estate, I have justifiably failed to appreciate and therefore endorse Ms. Rwechungura's submission that the decision of this court on illegitimate child's right to inherit his/her father's estate constitutes illegality of the decision which is apparent on face of record to warrant this court extend time to the applicant within which to file an application for certification that a point of law is involved in its decision in PC Civil Appeal No. 13 of 1996. In light of the above position of the law, facts and arguments made, I hold the second ground also fails.

Before I pen off I wish to address Mr. Brash's raised issue during submission that, this application contravenes the provisions of section 9 of the CPC for being *res judicata* as the prayer for extension of time within which to apply for certificate on point of law against the decision of this court in PC Civil Appeal No. 13 of 1996, was determined conclusively in Misc. Civil Application No. 796 of 2018, in which the applicant had filed an omnibus application. In riposte Ms. Rwechungura argued, the said omnibus application was struck out by my brother Mlyambina, J in the same application, thus this application is properly instituted as it was not determined conclusively. To resolve this dispute, though not attached, this court had opportunity to make reference to its own ruling in the said Misc. Civil Application No. 796 of 2018, handed down by my sister Ebrahim, J on 25/09/2020 and not by Mlyambina, J as claimed by Ms. Rwechungura. What is gleaned therefrom is the fact that

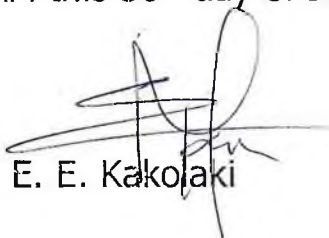
after considering the preliminary point of objection raised by the respondent on the tenability of the omnibus application it was held that, the prayer for extension of time to apply for certificate on point of law was premature for being preceded by a prayer for extension of time within which to file a Notice of Appeal to the Court of Appeal, thus the court proceeded to strike it off and entertain the remaining prayer. I therefore hold the matter under discussion is not res judicata.

In view of the fore reasons, law and authorities referred, it is my conviction the reasons assigned by the applicant to warrant extension of time by this court are wanting. The application is therefore without merits and is hereby dismissed.

Considering the nature of the application and the fact that the applicant has been in court for a long of time without success, I order each party to bear its costs.

It is so ordered.

DATED at DAR ES SALAAM this 30th day of July, 2021.


E. E. Kakolaki

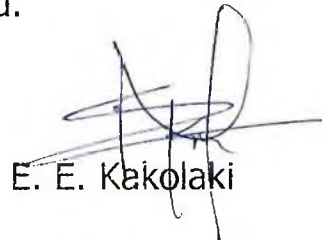
JUDGE

30/07/2021



Delivered at Dar es Salaam in chambers this 30th day of July, 2021 in the presence of the Applicant in person, Ms. Ida Lugakingila advocate for both Respondents and Ms. Asha Livanga, court clerk.

Right of appeal explained.



E. E. Kakolaki

JUDGE

30/07/2021

