

.IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA – SUB REGISTRY

AT MUSOMA

MISC. CIVIL APPLICATION NO 32 OF 2021

(Civil Revision No. 10 of 2020, in the High Court of Tanzania at Musoma)

MEGAMBA MAKONGORO 1ST APPLICANT

ADAMU MAKONGORO 2ND APPLICANT

MWASUMU MAKONGORO 3RD APPLICANT

VERSUS

SIMBA MAKONGORO RESPONDENT

RULING

27th August & 17th Sept 2021

F. H. MAHIMBALI, J.:

Aggrieved by the decision of the High Court (honourable Justice J. R. Kahyoza, dated 21st December, 2020 in Civil Revision No.10 of 2020 opened *Suo motto*), the applicants herein intend to protest it at the Court of Appeal. They have thus filed this application of extension of time for certification that point of law is involved against the said decision of the High Court.

In essence, this matter traces its genesis from probate case no. 61 of 2014 of Musoma Urban Primary Court and its appeal no. 5 of 2020 at Musoma District Court.

This current application has been filed on 25th May, 2021 after the former application was struck out for being incompetent before Hon Justice Kisanya, on 30th April, 2021.

During the hearing of the application, the applicants were represented by Mr. Werema learned counsel whereas the respondent enjoyed the legal services of Mr. Noah Mwakisile. As to why they had delayed taking the proper course of filing the said certificate application timely, Mr. Werema during the hearing of his application submitted that this court to adopt the reasons contained in the joint affidavit of the applicants and allow the application. He thus had nothing more to add. The relevant paragraphs in the joint affidavit containing the reasons for the grant of the application are reproduced as follows:

- 1. That we were respondents in civil revision no. 10 of 2020 at Musoma High Court filed in court's suo mottu after the instant respondent had written a complaint letter to this court. The same was decided in favor of the respondent.*
- 2. That in fact we were **arrested** from the very first day after the order of this court on 21st December, 2020 and we were **detained** in prison until we were bailed out.*

3. That being aggrieved with the decision of the High Court delivered on 23/12/2020, we notified Mr. Emmanuel Werema (Advocate) on our intention to appeal to the Court of Appeal who advised us to prepare a notice of appeal and application for certification on point of law.
4. That unfortunately, **Mr. Werema travelled** for Christmas vacation before he had settled with us on being engaged to assist us on the proper procedure to be followed for us to appeal to the Court of Appeal.
5. That Mr. Werema in his return, he communicated with the 3^d applicant and after conversation he filed Notice of Appeal on 19/01/2021 and the letter requesting to be supplied with **a copy of proceedings**. The Notice of Appeal was filed within the statutory time.
6. That, surely we were ordered to report to the police station severally **pending the investigation** conducted by the detective officer of police following the order issued by this court on 21/12/2020 in civil revision no. 10 of 2020 and as a result there was poor communication between us and our advocate.
7. That, **being of old age**, it was very hectic for us to attend at police station and as a result we delayed to pick up a copy of proceedings and to give our advocate who could prepare the application for certification on point of law within time.
8. That, we actually picked a certified copy of proceedings on 8th day of February 2021 and started to arrange with our advocate on the proper procedure to be followed. At the time we picked the proceedings, we were already out of the statutory time.

9. That after we had negotiated and arranged with Mr. Emmanuel Werema on the proper instruction to proceed with the preparation of the application on certificate of point of law. Mr. Emmanuel Werema **prepared Misc. Civil application no.14 of 2021** which was filed and registered before this court on 12/03/2021 and the same was scheduled for hearing on 30/04/2021.
10. That on 30th April, 2021 when the matter came for hearing, it was discovered that the application before the court was omnibus application and the first prayer in the chamber summons was not supported with sufficient facts for extension of time. Mr. Werema prayed to withdraw the matter with leave to refile, but the same was struck out, hence this application
11. That, in fact if this application will not be allowed by this honourable court, we will suffer irreparable loss as the judgment and proceedings in civil revision no.10 of 2020 are featured with multiple irregularities and injustice which require the attention of the Court of Appeal namely:
- i) That, a post humous child who was born in early 1970s was entitled to inherit the estate of the deceased who died in 1958.
 - ii) That, it could not be possible for the appellants to account for deceased estate which there were several cases before the courts of law.
 - iii) That it was not just for the High Court to determine the matter without according the applicants a hearing.
 - iv) Whether it was proper for the High Court to order arrest of applicants and charge them without a couple of evidence.

On the other hand, Mr. Noah apart from praying that the counter affidavit be adopted as part of his submission, he added that the application for extension of time for a certification on point of law is not merited as per reasons stated in their joint affidavit. Considering the fact that an application for extension of time is not automatic but purely Court's discretion, the same is exercised judiciously. He cited the case of **Tanzania Cigarette Company Ltd Vs. Hassani Marwa**, Civil Application No. 49/01/2018 (unreported but accessible in Tanzlii) at page 6 paragraph 2, the CAT which ruled that there are principles established which guide the Court in granting such application. These are *length of delay, reasons for delay, whether there is an arguable Case to be determined by the Court, the degree of prejudice to the defendant if the application is granted.*

He submitted that as per their joint affidavit, counting the days from 22nd January 2021 to 24th May 2021, there is a total delay of 95 days. Thus, it is inordinate delay. *Secondly*, there must be reason for delay. The reasons must account for each day of delay. The only reason that is availed is this application is that just after the delivery of the judgement of the High Court, they were arrested and detained at the police station. However, the same affidavit states/provides that the

applicants were released on bail. Thus, for this reason alone, it is insufficient for the grant of the application as prayed.

Mr Noah submitted further that the affidavit does not establish when they were admitted to bail and when they searched for an advocate and eventually got Mr. Werema.

In his further submission, Mr. Noah submitted that the principle of technical delay is not applicable in the circumstances of this case. The principle of technical delay is applicable where only if the original appeal/application was lodged on time but rejected for being incompetent (see **Constatine Victor John Vs Muhimbili National Hospital Civil Application No. 214/18/2020** the CAT – Dar es Salaam).

Regarding the issue of illegality, Mr Noah referred this court to the case of **TCC** (supra) that there must be a good cause for an order of extension of time to be granted. He submitted that, a mere mention of it is not sufficient. He referred this court to the case of **Chiku Haridi Kiunda v/s Getrude Nguge Mpinga (administrator of the late Yohane caude Duga) Civil Application No 509/01/2021**- CAT at Dar es Salaam page 13 where the Court of Appeal clarified how illegality is a good cause. However, when considering illegality in impugned

decision as good cause in granting extension of time, the court remains to consider circumstances and caution whether illegality is visible on the face of record as the same should not be discovered by long processes of discovery/legal chain.

On the basis of his submission, he prayed that this application be dismissed with costs for want of sufficient reasons to accord the same.

In his rejoinder, Mr Werema reiterated what he earlier submitted however, he clarified that his earlier application was filed in March, 2021 and the same was struck out on 31st April 2021 for being incompetent but with leave to refile.

The appellants being elders, they are not speedy in handling matters.

On the issue of illegality, he reiterated that there are notable illegalities arguable by the Court of Appeal. That the Respondent being not the son of the deceased, is not entitled to any inheritance.

With illegality no. 2 the same is on the face of record.

With illegality no 3, that the High Court determined the matter without according them the right to be heard. (see page no. ..paragraph

five). In essence the applicants were not accorded the right to be heard as claimed.

Lastly on illegality, Mr. Werema submitted that the High Court clearly directed the arrest of the applicants on the alleged fraud. Legally speaking, it was improper, thus ought to be considered by the Court of Appeal. He thus prayed that the same be granted with costs.

Since an extension of time is not absolute right, it's upon judicial discretion which has to be exercised judiciously. However, to do so there must accounted reasons for that. In Mbogo Vs. Shah (1968) EA the defunct Court of Appeal for Eastern Africa held:

"All relevant factors must be taken into account in deciding how to exercise the discretion to extend time....."

The only known acceptable ground for an application on extension to be granted is for the party seeking for it to establish "*good and reasonable cause*". This was held in the case of **KALUNGA AND COMPANY ADVOCATES VS NATIONAL BANK OF COMMERCE LIMITED [2006] TLR 235 at page 235** where the Court of Appeal states;

- (i) *...the court has a wide discretion to extend time where the time has already expired, but where there is inaction or delay on the part of the Applicant, there ought to be some kind of explanation or material upon which the court may exercise the*

discretion given."

It is settled that what amounts to sufficient cause is not clearly defined. However in **TANGA CEMENT COMPANY LIMITED VS MASANGA AND AMOS A. MWALWANDA**, Civil application No.6 of 2001 it was held;

"What amounts to sufficient cause had not been defined. From decided cases a number of factors have to be taken into account, including whether or not the application has been brought promptly, the absence of any valid explanation for delay, lack of diligence on the part of the applicant."

However, there are factors that are used to determine whether the applicant has shown good and reasonable cause such as the length of the delay, whether or not the delay has been explained away, diligence on the part of the applicant and whether there is an illegality in the impugned decision. The above factors were also stated in the famous case of **Lyamuya Construction Company Limited vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported). In addition, the applicant has to account for each day of delay.

In the case of **Charles Pantaleo Kingoka Vs. Abasa Musa Kitoi – Civil Application no.71/76 of 2019**, the Court of Appeal said:

"There must be an account of each day of delay. Delay even of a single day, has to be accounted for"

In Selemani Juma Massala Vs. Sylvester Paul Mosha & Japhet Matiku Lyoba – Civil Application no. 210 of/01 of 2017 –

unreported, the Court of Appeal stated at page 11.

"The settled position of the law is that, if there is a delay of any act, then each day of the delay has to be accounted for. Otherwise, there was no need of having such rules"

In the case at hand, the applicant's main reasons for extension of time are that they were detained just after the verdict in Civil Revision no.10 of 2020, they are of old age and that they first pursued another matter before this court (Hon Kisanya, J) prior to the filing of this present matter and that there is an illegality worth arguable before the Court of Appeal.

From the first limb of their reasons why they delayed filing the application for certification on point law, it is my humble view that the applicants have not sufficiently accounted for each day of delay as per law. As the judgment of the High Court was issued on 21st December, 2020 and their earlier application was filed on 12th March 2021 in law, he was first supposed to account for each day of delay from 22nd day of January, 2021 to 11th March 2021 before accounting the further added days between 12th March 2021 and 20th day of May 2021. Gathering from their joint affidavit, they have not accounted for each of those days

delayed as legally required. Considering the guidelines set out in the case **TCC Vs. Hassani Marwa**, Civil Application No. 49/01/2018, important factors to be considered are *length of delay, reasons for delay, whether there is an arguable Case to be determined by the Court, the degree of prejudice to the defendant if the application is granted*. In my considered view, I find this application lacking legal basis for its grant. This is because there has been inordinate unexplained delay by the applicants in warranting the grant of this application. As regards to an arguable case before the Court of Appeal, I find there being none. I say so because the vital question here is whether illegality as reasoned, features well in this current application. The first illegality alleged is that there is a deceased's child born in 1970 who has the right of inheritance from the deceased who died in 1958. It has been submitted that this as illegality is not reflected on the face of record, but also it is a matter of establishment whether it is true. As who are heirs of the said estate of the late Chief Makongoro, this will then be dealt during filing of the inventory and making accounting of the said Chief's estate. Thus, if true, the same will be established in a long process. Nevertheless, since revocation of letters of administration of estate by administrator does not mean side-lining him/her in the distribution of the share as heir in case he qualifies, rather making the administration of it speedy and in

compliance as per law. As the applicants are deposing that they are of old age to go speedy in discharge of their duties (though not stating their old hood) the fact that they occasioned misappropriation in the course of discharge of their duties as administrators by itself warranted their disqualification.

The 2nd illegality as submitted by the applicants is that it could not be possible to account for deceased estate when there were several cases before Courts of law. I entirely agree with Mr. Noah that the reason is legally speaking not sufficient and does not fit in as per established principle. It is not an open illegality in the eyes of law.

On the last illegality, is the fact that the matter was determined without according them a right to be heard. He submitted that as per court's record it is not true that the Revision Application was heard without according them a right to be heard. At page 7 of the typed ruling, the court clarified who were present and who was not present. As per High Court record, both the 1st and 3rd applicants were present in Court and were dully heard. Thus, the one missing is only the 2nd Applicant. This being the case, the Applicants' affidavit contains untrue statement/lies. In **Uganda Vs Commissioner of Prison exparte Matovu** (1966) Vol 1 EH 514 "*An affidavit which is tainted with untruth*

is no affidavit at all and cannot be relied to support on application. The false evidence cannot be acted upon to resolve any issue". As per court's records it is clear that the 1st and 3rd Applicants were heard by the High Court, thus for them deposing together with the 2nd Applicant who is the only one who didn't attend the hearing at the High Court offended the value of the affidavit. Equally, the illegality principle does not qualify in the circumstances of this case.

On the last illegality, whether it was proper for the High Court to order arrest of the Applicants and charge them without a couple of evidence. It is vivid that this illegality is not reflective on the face of record. What is vivid is the fact that upon discovery of such illegal misdeeds of the applicants on manufacturing of the clan meetings legalising their appointments at Musoma District Primary Court (Urban), misappropriation of the said estate and failure to abide by the court order on filing inventory of the deceased estate and giving an account of it, the High Court revoked the applicants' appointments as administrators of the said estate on account of the foregoing reasons, moreover ordered the following, I quote: -

"Secondly, I order police to arrest the administrators, investigate and charge them for misappropriation of deceased's estate for failure to account..."

Therefore, as per this order there is nowhere the Court charged them but directed the relevant authority to act as per law; to arrest, investigate and charge them. I wonder if High Court is so impotent to issue such an order to term it an illegality.

Having scrutinized the contents of the applicants' paragraphs of the affidavit, I could not find any sufficient or good reason advanced by the applicant and any illegality which is apparent on the face of the record so as to warrant the grant of extension of time. What is clear from the allegation in those paragraphs of the affidavit, is that the applicant was dissatisfied with the decision which is intended to be challenged. In the circumstances, since the alleged illegalities will require a long drawn process of hearing to be discovered, then the same do not constitute a good cause for grant of extension of time (see **Lyamuya Construction Company** (supra).

It is hereby emphasized that a point of law must be that of sufficient importance and, I would add that it must be apparent on the face of the record, such as question of jurisdiction; not one that would

be discovered by long drawn argument or process as is being submitted here.

On the basis of the foregoing reasons, I shake hands with Mr. Noah that this application is devoid of merit as per his eloquent submission. The same is thus hereby dismissed with costs

It is so ordered.

DATED at MUSOMA this 17th day of September, 2021.




F. H. Mahimbali

JUDGE

17/09/2021

Court: Ruling delivered this 17th day of September, 2021 in the Absence of the Applicant, presence of Mr. Noah learned advocate for the Respondent and Miss Neema P. Likuga – RMA.


F. H. Mahimbali

JUDGE

17/09/2021