

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISC. CIVIL APPLICATION NO. 101 OF 2021

(C/f High Court of Tanzania ta Arusha in (PC) Civil Appeal No 5 of 2018, District Court of Arusha in Civil Appeal No 45 of 2017 originating from Arusha Urban Primary Court in Probate and Administration case No 156/2009)

RITA ALEX MARO APPLICANT

VERSUS

EMMANUEL ALEX MARO 1ST RESPONDENT

BRUCE ALEX MARO 2ND RESPONDENT

EVA ALEX MARO 3RD RESPONDENT

RULING

07/06/2022 & 02/08/2022

KAMUZORA, J.

The Applicant preferred this application seeking for extension of time within which to file a notice of Appeal to the Court of Appeal of Tanzania against the decision of this court in (PC) Civil Appeal No. 5 of 2018. The application was brought under the provision of section 11 of the Appellate Jurisdiction Act Cap 141 R.E 2019 and supported by an

affidavit sworn by Gwakisa Sambo the Applicant's advocate. The application is strongly opposed through the joint counter affidavit deposed by Asubuhi John Yoyo on behalf of the Respondents.

When the matter was called for hearing the Applicant enjoyed the service of Mr. Gwakisa Sambo, learned advocate while the Respondents enjoyed the service of Mr. Asubuhi John Yoyo, learned advocate. The hearing of the application proceeded by way of written submission and both parties filed their submissions as scheduled.

The brief background leading to this application is that, the Applicant was aggrieved by the decision of this court in PC Civil Appeal No. 5 of 2018 which upheld the decision of both the 1st appellate court and the trial court which revoked the appointment of the Applicant as administratrix of the deceased's estate. The Applicant made an application for certification on point of law with intention to appeal to the court of appeal and the same was granted vide Misc. Civil Application No. 72 of 2018. The Applicant lodged an appeal to the Court of Appeal of Tanzania, Civil Appeal No. 182 of 2019 which was later withdrawn by the Applicant. The Applicant could not refile an appeal to the Court of Appeal as the time had already lapsed hence, this current application seeking for time enlargement. The main issue calling for the

determination by this court is whether the Applicant has demonstrated sufficient reasons for the delay.

Submitting on the substance of the application, Mr Sambo argued that, the circumstance which led to the delay in filing a Notice of Appeal to the Court of Appeal are well reflected under paragraph 8 of the Applicant's affidavit. That, the certificate on point of law was defective for bring not in accordance to the law.

Mr. Sambo submitted that, the law requires that the certificate on point of law must relate to the decision in the proceedings from which an appeal has been risen. That, as the certificate was defective, the Applicant was forced to withdraw the appeal from the Court of Appeal and start afresh the Appeal process. To support his argument, he cited the case of **Kheri Ramadhani Kasiba @ Ferus (Administrator of the estate of the late Ramadhani Kabisa) vs. Aziza Ramadhani Kabisa**, Civil Appeal No 236/2018 (Unreported).

It is the contention by the counsel for the Applicant that the intended appeal to the Court of Appeal has an overwhelming chance of success as demonstrated in the proposed memorandum of appeal that is annexure R-5 to the affidavit in support of the application. In supporting his argument, he cited the case of **Ahmed Mohamed Al Laamar Vs.**

Fatuma Bakari & another, Civil Appeal No 71 of 2012 CAT (unreported).

Citing the case of **Mumello Vs. Bank of Tanzania** (2006) I E.A 227 the counsel for the Applicant insisted that, it is a trite law that an application for extension of time is entirely in the discretion of the court to grant or deny but that the right of a party to appeal is guaranteed by Article 13 (6) (a) of the Constitution of the united Republic of Tanzania of 1977. Mr. Sambo insisted that, the intended appeal rise a prima facie appeal as the decision of the High Court in Civil Appeal No. 5 of 2018 contain illegalities due to the fact that both this court and the subordinate court erred in law in holding that the probate and administration proceedings at the trial court was not closed when the application for revocation of the grant was being instituted. He cemented his submission with the case of **Principal Secretary Ministry of Defence and National Service Vs. Devram Valambia** (1992) TLR 185, **The Director General LAPF Pension Fund Vs. Pascal Ngalo**, Civil Application No 76/08 of 2018 (Unreported).

Mr. Sambo added that, the Applicant ought not to be punished by the mistake done by the court in the certificate on point of law. Reference was made to the case of **Indo- African Estate Ltd and**

District Commissioner for Lindi District & three others, Civil Application No 12/07 of 2022 CAT (unreported).

The counsel for the Applicant insisted that, in considering the application for extension of time the court is to be satisfied that there are sufficient reasons for the delay. He was of the view that, the Applicant has been diligent in taking steps such that, after the Applicant lodged the appeal to the Court of Appeal and noticed that the certificate on point of law was defective, she made an application to withdraw the appeal but immediately filed this application. The counsel for the Applicant was of the view that, the delay was a technical one thus prays for this court to regard that the Applicant has disclosed sufficient reasons for the delay and good cause for extending the time within which to lodge a notice of appeal.

In opposing the application, Mr. Yoyo argued that, in this application the Applicant's counsel has demonstrated the highest level of laxity, apathy, negligence and sloppiness through his failure to take necessary steps by failure to timely rectify the certificate which was timely issued. He was of the view that, failure to take necessary step can never constitute a ground for extending time. He referred the case of **Ngao Godwin Losero Vs. Julius Mwarabu**, Civil Application No.

10 of 2015 [2016] TZCA 302, **Lyamuya Construction Company Ltd Vs. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010.

Mr. Yoyo further submitted that, the decree of prejudice on the part of the Respondent is more than it could be to the Applicant. That, as the probate matter remains unclosed, the extension of time will leave the beneficiaries in suspense for another three to four years which is likely to cause prejudice to them. To support his argument, he cited the case of **Mbogo vs. Shah** (1968) EA 93.

Regarding the merit of the intended appeal the counsel for the Respondent argued that, there is no any merit in the intended appeal as there is completely no point of law or illegality to be put in place. Regarding the cited cases by the Applicant, the counsel for the Respondent argued that, they are irrelevant given the circumstance of this case. That, in application for extension of time the Applicant must account for every single day of delay as was held in the case of **Tanzania Fish Processors Vs. Christopher Luhangula**, Civil Application No. 1616 of 1994 CAT, **Daudi Haga Vs. Jenitha Abdan Machanju**, Civil reference No. 2000.

In a brief rejoinder Mr. Sambo added that, it is not true that the Applicant has failed to take essential steps as submitted by the counsel for the Respondent. That, the Court of Appeal suo motu pointed out the legal error which leads to the collapse of the Applicant's appeal. That, soon after the withdrawal of the appeal, the Applicant started fresh process of appeal hence the Applicant was not negligence apathy or acted in sloppiness.

Regarding the case of **Ngao Godwin Losero** (Supra) cited by the counsel for the Respondent Mr. Sambo submitted that the same is distinguishable as there was no any missing procedure as all procedures were followed. He insisted that, all the procedures in the case of **Lyamuya Construction Company Ltd** (Supra) were full complied by the Applicant.

The counsel for the Applicant further added that, there is an arguable appeal as this court previously verified that there is a point of law worth consideration by the court of appeal. He invited this court to go through the decision in the case of **Benjamin Ndesario Vs. Rahisi General Merchant Ltd**, Civil Application No 9/5/2021 CAT at Arusha.

I have considered the application, the parties' affidavits and the submission in support of the application and that opposing the

application. As it was rightly held in the case of **Mbogo Vs. Shah** (Supra), the grant of extension of time is the discretion of the court which however must be exercised judiciously. In granting extension of time, the Court of Appeal of Tanzania in the case of **Lyamuya Construction Company Limited Vs. the Board of Registered Trustees of Young Women's Christian Association of Tanzania** (Supra), formulated the guidelines to be considered in the granting of extension of time where the court held that,

"On the authorities however, the following guidelines may be formulated:

- a) The Applicant must account for all the period of delay;*
- b) The delay should not be inordinate;*
- c) The Applicant must show diligence, not apathy, negligence or sloppiness in the prosecution of the action that he intends to take; and*
- d) If the court feels that there are other reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged"*

In the case at hand the Applicant's main reasons for the grant of extension of time are stated under paragraph 8, 10 of the Applicant's affidavit filed in support of the application. The Applicant pleaded technical delay and illegality as reasons for extension of time. It was

deponed that, the appeal was properly filed in time to the court of appeal but withdrawn due to the defects pointed out in the certificate on point of law issued by this court in Misc. Civil Application No. 72 of 2018.

It was contended by the counsel for the Respondent that, the intended appeal has no merit as the matter was comprehensively delt with by this court and there is completely no point of law or illegality to be put in place. The Applicant's counsel insists that this court previously certified that there is a point of law worth the determination by the Court of Appeal the same point that the Applicant is now seeking extension of time.

There is no dispute that after the decision of this court the Applicant made an application for a certificate on point of law for purpose for appealing to the Court of appeal. It is also not disputed that the Applicant timely filed her appeal to the Court of Appeal of Tanzania that is, Civil Appeal No. 182 of 2019. It is in record that on 1/12/2021 the Applicant's advocate made an application to withdraw the appeal from the court of appeal and brought the present application two days later on 03/12/2021. While I tend to agree with the submission by the counsel for the Respondents and the cited case of **Tanzania Fish Processor**(supra) that, the person seeking extension of time has to

account for each day of delay, it is in my considered view that the applicant discharged such duty as she immediately filed to present application to days after withdrawing the application from the court of appeal. To me the two days' time was reasonable time for preparing and filing this application.

With the above analysis, the delay could be regarded as technical one as the Applicant was reprocessing the appeal after the first attempt went astray. It is clear that, the Applicant at no time was relaxed in pursuing her right. The contention by the counsel for the Respondent that the Applicant failed to take necessary steps to timely rectify the certificate which was timely issued is wanting. The Applicant made it clear that the defects in the certificate was discovered by the court of appeal when the appeal was called for hearing. In my view, that cannot amount to laxity, apathy, negligence or sloppiness on the part of the Applicant.

On the issue of illegality as the reason for extension of time, this court had looked upon the pointed illegality by the counsel for the Applicant. The said illegality is centred on the fact that the High court and the subordinate court erred in law in holding that the probate and administration proceedings at the trial court was closed when the

application for revocation of grant was being instituted. This fact was in fact not countered by the Respondent who only submitted that there is no any illegality as the matter was comprehensively dealt with by this court.

I agree with the submission by the counsel for the Respondent that a point of law must be of sufficient importance and apparent in records. The proposed memorandum of appeal was attached to the Applicant's affidavit in support of application together with the judgment (annexure R1). It is also shown that this court certified to the court of appeal on the existence of point of law in Misc. Civil Application No. 72 of 2018. In my view, this court need not to determine the validity or otherwise the illegality pointed out as doing so will automatically amount in discussing the merit of the intended application.

Basing on the above argument, it is my settled mind that, the Applicant has demonstrated good reasons warranting this court to exercise its discretionary powers in extending the time within which the Applicant can file a notice of appeal to the Court of Appeal of Tanzania.

It was contended by the counsel for the Respondent that the grant of the application will prejudice the Respondents. It is my view that, the applicant had right to pursue her course as well and if not given chance,

she will also be prejudiced. For interest of justice for both parties I find that, it is prudent to grant the application for both parties to have a chance to address the court on their rights.

In the final analysis, I find the Application full of merit and it is therefore granted. The Applicant is allowed to file the Notice of Appeal to the Court of Appeal of Tanzania within fourteen (14) days from the date of this ruling. No order as to costs is made.

DATED at ARUSHA this 2nd day of August, 2022



D.C. KAMUZORA

JUDGE