

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MWANZA SUB-REGISTRY

AT MWANZA

PC PROBATE APPEAL No. 118 OF 2022

(Arising from the Misc. Probate Application No. 99 of 2020 at Nyamagana District Court)

LEILA JOHN KUNSINDAH ----- APPELLANT

VERSUS

JEREMIAH L. KUNSINDAH----- RESPONDENT

JUDGMENT

Last order: 28.05.2023

Judgment date: 29.05.2023

M. MNYUKWA, J.

Before me is an an appeal which has long history as the matter went up to the Court of Appeal which nullified the decision of the District Court and the High Court for being time barred and left only the decision of the trial court intact. The appellant then instituted an application for extension of time before Nyamagana District Court for extension of time to challenge the decision of the trial court being tainted with illegality. The illegality stated in the appellant's affidavit before Nyamagana District Court is that,



the late Leah L. Kunsindah died under Christian faith and that no primary court of whatever category and name had jurisdiction to adjudicate on the administration of her estate and that the Probate Cause No. 50 of 2007 was adjudicated by a non-existent court, namely the Urban Primary Court.

After hearing parties to the dispute, the District Court held that the applicant has shown illegalities which made her to file this application but she ought also to require to state the reasons for failure to appeal out of time to enable the court to grant the application. He also went on that, there is no evidence which indicated that, the Probate Cause No. 50 of 2001 was adjudicated by a non-existing court namely the Urban Primary Court. The Magistrate further held that, the appellant had never filed the intended petition of appeal for the court to view if the same is merited.

At the end, he ruled out that, the application is devoid of merit hence dismissed with costs.

Dissatisfied with the decision of Nyamagana District Court, the applicant who is now the appellant, appealed to this Court with three grounds of appeal which are;



- i. That, the Honourable Magistrate erred in law for failure to find that the appellant had sufficiently shown good reasons to warrant the court to grant the application for extension of time within which the appellant to lodge an appeal out of time.*
- ii. That, the honourable Magistrate erred in law for failure to find out that where illegality is raised the appellant was relieved from the mandatory duty of accounting for each day of delay*
- iii. That the honourable Magistrate erred in law for holding that the appellant did not attach to her affidavit the document to prove the allegation that the appellant did not attach to her affidavit the document to prove the allegation that the respondent was appointed by non-existent court while in fact the appellant had attached exhibit LK 5.*

During the hearing of the appeal both parties were represented. The appellant enjoyed the legal services of Venance Kiburika, learned counsel while the respondent afforded the services of James Njelwa, the learned counsel too. The appeal was argued by way of written submissions. I extend appreciation for counsel of both parties for filing their respective submissions on time.



Arguing in support of the appeal, the appellant's counsel argued each ground separately. In the first ground he argued that, the Hon. Magistrate erred in law for failure to find that, the appellant had advanced good cause for him to grant extension of time. He went on that, in his affidavit and submissions the appellant shows the point of illegality which is sufficient enough for the court to extend time to lodge an appeal out of time. He referred to the decision of the Court of Appeal in the case of **Principal Secretary Ministry of Defence and National Service v Devram Valambhia**, [1992] TLR 185 that illegality is the reason for extension of time.

He further submitted that, the decision of the primary court issued on 21/05/2007 by Hon. R. D. Kamani in which the decision of Mahakama ya Mwanzo Mjini appointed the administrator of the estate of the deceased while it is non-existing court as such it had no power to appoint the administrator of the deceased estate. He added that, as the trial court admitted that there is illegality on the face of the decision, it was wrong for him to unjufiably refuse to grant the application.



On the second ground of appeal he faulted the decision of the District Court of Nyamagana on the reason that, the Hon. Magistrate failed to appreciate that if the point of illegality is raised and proved, the applicant is not duty bound to account for each day of delay. He claimed that the Hon. Magistrate erred to require the applicant to account for each day of delay which is contrary to the position of the law as it was stated in the case of **Tropical Air (TZ) LTD v Godson Eliona Moshi**, Civil Application No 9 of 2017 and the case of **Veronica Fubile v National Insurance Corporation and Two Others**, Civil Application No 168/2008. He relies on this point that as there was point of illegality as Mahakama ya Mwanzo Mjini is non-existence court, the appellant was not now duty bound to account for each day of delay.

On the third ground of appeal, the appellant's counsel attacked the decision of Nyamagana District Court for holding that the appellant did not attach the impugned Judgment of the non-existence court that is Mahakama ya Mwanzo Mjini which appointed the administrator of the deceased estate while the same was attached through the supplementary affidavit and the same was marked as Annexure LK5. He submitted that the aim of attaching is for the court to see that the appointment of the



administrator of the deceased estate was done by the non-existence court which question its jurisdiction. He therefore prays the appeal to be allowed with costs.

Opposing the appeal, the respondent's counsel prays the Court to dismiss the appeal. He firstly observed that, although the appellant raised three grounds of appeal but all revolved on one issue which is the illegality on the impugned decision of the trial court.

He submitted that, the District Court properly refused to grant the application for the alleged illegality was not apparent on the face of the record. The counsel attacked page 2 of the appellant's submissions by averring that, the appellant ought to state the proper name of the court if at all she alleged that the court which appointed the administrator of the deceased was non-existence court. He added that, as the appellant failed to cite the establishing law which name the court, the error if any on the name of the court is the typing error which does not occasion injustice to either of the party.

The counsel for the appellant further submitted that, this being the first appellate court, it has duty to re-evaluate the evidence and make its



own findings that the alleged illegality is not apparent and uphold the decision of the lower court. He cited the case of **Hassan Mfaume v R** [1987] TLR 167 to insist that this being the first appellate court is mandated to re-evaluate the evidence on record.

He added that, our Courts in many instances takes the view that if there is alleged illegality, the same should be apparent on the face of the record and contents and should not be drawn by a long argument. He said that, the lower court properly made its finding to dismiss the application. He supported his argument that the illegality should be apparent on the face of the record and content by citing the case of **George Timothy Mwaikusa v National Micrifonance Bank PLC**, Misc. Application No 41 of 2020. He also cited the case of **Stephen B.K. Mhauke v The District Executive Dircotr Morogoro District Council and two Others**, Civil Application No 08 of 2019, **Ngao Godwin Losero v Julius Mwarabu**, Civil Application No 10 of 2015 and the case of **Lyamuya Construction Company Limited v Board of Trustee of Young Womens Christian Association of Tanzania**, Civil Application No. 2 of 2010 that illegality should be apparent on the face of the record.



He finally submitted that, the trial court properly dismissed the application because apart from the appellant's failure to account for each day of delay he failed to show sufficient cause and the alleged illegality was not apparent on the face of the record.

In a rejoinder, the appellant's counsel reiterated what he had submitted in chief and added that, it was not the duty of the appellant to struggle and tell the proper name of the court as he submitted that Mahakama ya Mwanzo Mjini is non-existence court which is not vested with the jurisdiction to appoint the administrator of the deceased estate. He finally stated that, the name of the existing court is not the typing error. He insisted the appeal to be allowed.

After the submissions of both parties and after going through the available record, the main issue for consideration and determination before me is whether the appeal is merited.

To start with, it is worthy to note that all the grounds of appeal centers on one issue only that, the Hon. Magistrate erred to dismiss the application for extension of time while there is illegality on the decision of



the Urban Primary Court in the Probate Cause No 50 of 2002 delivered on 21/05/2007 by Hon. R.D. Kamani, PCM.

It is settled that, in the application for an extension of time it is within the court's discretion to grant it. However, the discretion has to be exercised judiciously. It is upon the applicant to show good cause that the delay was with a sufficient cause. What amount to good cause differ from one case to another as there is no hard and fast rule as to what constitute a good cause. (See the case of **Osward Masatu Mwizarubi v Tanzania Fish Processing Ltd**, Civil Application No 13 of 2010)

Furthermore, depending on the circumstances of each case, the applicant also is required to account for each day of delay for the prayer to extend time to be granted or else must have shown that, there was a point of illegality that impedes justice as the illegality cannot be left to stand.

As highlighted, all the grounds of appeal advanced by the appellant challenged the illegality. The impugned decision which is challenged is the Probate Cause No. 50 of 2007 in which the applicant alleged that there is



two points of illegality. As the grounds of appeal are inter-related, I will determine all of them jointly.

As it stands in the records, In Misc. Probate Application No. 99 of 2020 originating from the decision of the Probate Cause No. 50 of 2007 the appellant's affidavit specifically on paragraph 17 clearly pointed out the two points of illegality which are

- i. That as the late Leah L. Kusindah died Christian, no primary court of whatever category and name had jurisdiction to adjudicate on the administration of her estate*
- ii. That, the Probate Cause No 50 of 2007 was adjudicated by a non-existent court, namely the urban primary court.*

In his submissions the counsel for the appellant argued that the above points of illegality are observed apparent on the face of the record, it was an error for the Hon. Magistrate to refuse to grant extension of time while he acknowledge the point of illegality and still requires the applicant to account for each day of delay and to have the view that the impugned decision which is Probate Cause No. 50 of 2007 that contains



the point of illegality is not attached in the appellant's affidavit while in fact the same has been attached in the supplementary affidavit.

On his part, the respondent's counsel supports the decision of the District Court which dismissed the application for the extension of time on the reason that, the same is not seen on the face of the record as it is required by the law and that, if at all the name of the Court was Urban Primary Court it was the typing error which does occasion injustice.

In determining this appeal, I got an opportunity to have the entire court record in relation to the legal battles between the parties. Upon perusing the available court record, I agree with the findings of the Hon. District Magistrate that, the impugned decision in which the alleged illegality is pleaded, was not attached as the purported supplementary affidavit does not feature as part of the record. Since I was supplied with the entire record concerned with the case, I have been able to see copy of the impugned judgement which is Probate Cause No 50 of 2007, and therefore I am in a better place to proceed to determine the appeal.

Having in mind that on the grounds of appeal advanced by the appellant who faults the decision of the lower court to dismiss an



application for extension of time is illegality, which when proved, is a sufficient ground for this court to allow the appeal and the issue of accounting for each day of delay will be ignored because illegality cannot be left to stand. In **Ngao Godwin Losero v Julius Mwarabu**, Civil Application No 10 of 2015. The Court of Appeal observed that:

"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 the record straight."

However, for the illegality to stand as a ground for extension of time, the applicant must successfully demonstrate the existence of the said illegality on the face of the record and the same should not be discovered through a long drawn process. In **Lyamuya Construction Company Limited v Board of Trustee of Young Womens Christian Association of Tanzania**, Civil Application No. 2 of 2010, it was held 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 demonstrate that his intended appeal raises points of law should, as of right be granted extension of time 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 appearent on the face of the record, such as the question of jurisdiction; not one that will be discovered by a long drawn argument or process."

Going to the records, it is clear that the affidavit of the appellant deposed the jurisdictional issue as she averred that the deceased was a christian and the court which appointed the administrator of the deceased is a non-existence court and therefore the issue of jurisdiction is questionable.

With due respect to the learned counsel of the appellant, from the very beginning I wish to state that, I am not convinced with the grounds of illegality raised by the appellant. The reason being that the first point of illegality which challenged that court which appointed the administrator of the deceased is a non-existent court for a mere reason that the impugned judgement was from Urban Primary Court which is not among the name of the court in our jurisdiction is not of particular importance



since that is just a slip of the pen on the name of the court and it does not prejudice the appellant in any how.

As I have said, I did not find the supplementary affidavit, but I managed to see the impugned judgment in the available court record in which the citation part reads as hereunder:

*JAMHURI YA MUUNGANO WA TANZANIA
KATIKA MAHAKAMA YA MWANZO MJINI
WILAYA YA NYAMAGANA
SHAURI LA MIRATHI NO 50 OF 2007*

To my view, the word Mahakama ya Mwanzo Mjini is not a point of illegality as this is just a slip of the pen for omitting the word "Mwanza" in the name of the court which can be rectified upon the prayer by any of the party.

The other point of illegality claimed by the appellant is not apparent on the face of the record and it is the one which will be discovered by a long drawn argument or process which and therefore does not met the settled threshold in **Lyamuya Construction Company Limited v Board of Trustee of Young Womens Christian Association of Tanzania.** (supra). I say so because I had time to go through the impugned decision in the Probate Cause No. 50 of 2007, there in no where



in that decision which show that the deceased was a christian for the primary court to lack jurisdiction to entertain the matter. For whatever circumstances, it is neither the lower court nor this court which can draw an inference from the decision in Probate Cause No 50 of 2007 that the deceased was a Christian. As the point of illegality does not require the court which exercised discretionary power to have a long drawn process to find it and therefore, the lower court was justified to dismiss the application on the point of illegality.

Before I wind up, I should briefly state that, the decision of the District Court is somehow confusing as in one point admitted the illegality without clearly indicated which point of illegality he admitted and on top of that he requires the appellant to state reasons for failure to appeal within time. Again, the appellant is not obliged to file the grounds of intended appeal for this court to see if there is chance of success since that is not among the reason for extension of time.

All said and considered, it is my finding that the appellant failed to demonstrate the points of illegality for the lower court to exercise its discretion to grant the extension of time to file appeal out of time.



Consequently, the appeal is hereby dismissed with no order as to costs as the parties are relatives.

It is so ordered.



M.MNYUKWA

JUDGE

29/05/2023

Court: Right of appeal explained to the parties.

M.MNYUKWA

JUDGE

29/05/2023

Court: Judgment delivered on 29th May 2023 in the presence of counsels for both parties.

M.MNYUKWA

JUDGE

29/05/2023