

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

MISC. CIVIL APPLICATION NO. 11 OF 2023

*(Originating from Probate and Administration Cause No. 149 of 2021 in the District
Court of Dodoma at Dodoma)*

KELVIN WILLIAM OLENASHA..... 1ST APPLICANT

LANANA WILLIAM OLENASHA..... 2ND APPLICANT

VERSUS

ASHA MLEKWA..... RESPONDENT

RULING

24/05/2023 & 5/6/2023

KHALFAN, J

The applicants are before this Court applying for extension of time to lodge an application for revision of the proceedings and the decision of the District Court of Dodoma at Dodoma (trial court) in Probate and Administration Cause No. 149 of 2021. The applicants have filed a chamber summons under section 14 of the Law of Limitation Act, [CAP 89 R.E 2019] and is supported by the joint affidavit of the applicants whereas they also pray for costs of the application and any other order that this Honourable Court may deem just and fit to grant.



The applicants' affidavit states that they are the sons and the beneficiaries of the estate the late WILLIAM TATE OLENASHA where the respondent was appointed by the trial court as administratrix of the estate vide Probate and Administration Cause No. 149 of 2021 before Honourable Katemana, PRM.

They added that vide Probate and Administration Cause No. 58 of 2022 in the trial court they applied for revocation of the respondent as administratrix but their application was unsuccessful and they decided to appeal to this court which also did not succeed.

The applicants went further to state that their application in first place was assigned to Honourable Katemana, PRM but upon their request for recusal, he recused himself and the matter was reassigned to Honourable Tungaraja, SRM. They added that while the matter was pending, in court the administratrix never informed them on the filing of inventory which later, on 14th March, 2023, they discovered that the inventory was already filed and the matter was already closed as per annexure KL 1 which is the copy of

The applicants stated further that the matter was closed in their absence and without completing the collection and distribution of some of the deceased's properties which amount to material errors/illegalities. Also, they have stated that they consulted their lawyer regarding this matter and they were advised that the appropriate remedy is revision which however they discovered that the time to lodge such an application for revision had elapsed.

The applicants have stated that their delay to file the application for revision was caused by the fact that they were at schools waiting for their exams as for the 1st applicant he started his exams on 17/02/2023 to 02/03/2023 and the 2nd applicant was preparing for form six exams. They added that they all depended on the respondent as administratrix to get all the information on the administration of the deceased's estate but they obtained no response from her. They have attached the copy of WhatsApp chat between the 1st applicant and the respondent as annexure KL 2.

The respondent disputed the applicants' averment through counter affidavit sworn by herself. She stated that the applicants were both involved at all stages of preparing inventory and account of the deceased's estate whereas the distribution was clear to them as they took their shares including



cows, goats and rent from the house which was distributed to them. She produced annexure P 1 being copies of the handing over of cows' document and the rent payment deposit slip.

She added that in all processes of administration of properties, she was communicating with the applicants. The WhatsApp and sms chats between the 1st applicant and the respondent were produced as annexure P 2 to prove this averment.

Further, she has stated that the applicants for reason known to themselves, they decided to tarnish their image by publishing the family affairs in the newspapers while they knew everything on the estate. The copy of the newspaper is attached as annexure P 3.

For that regard, this application was scheduled for hearing and both parties were represented by advocates whereas Mr. Majura Magafu appeared for the applicants and Mr. Fred Kalonga appeared for the respondent.

In moving the court to grant the prayers sought in the chamber summons, Mr. Magafu firstly adopted the affidavit of the applicants. And he submitted that the law under section 14 (1) of the **Law of Limitation Act**,



[CAP 89 R.E 2019] requires the applicant to show sufficient cause for the delay for the court to grant an application for extension of time. He said, the court, in making its finding therefore, shall consider the length of the delay, the reasons of the delay, the decree of prejudice that the respondent will suffer if the application is granted and whether there is point of law with sufficient importance such as the illegality of the impugned decision.

Turning to the application at hand, he contended that paragraph 6 to paragraph 16 of the applicants' affidavit raises a number of issues which ought to be determined by this court if the application is granted. To be specific, he mentioned the issues of failure by the trial court to observe the rules of natural justice. He said Hon. Katemana, PRM was not supposed to close the matter after the filing of inventory by the respondent since he was not the Magistrate handling the matter as he previously disqualified himself from handling the matter.

Mr. Magafu also countered the decision of Hon. Katemana, PRM to close the matter in absence of any of the beneficiaries. He said it was important to summon the beneficiaries to the court at the stage of filing inventory and account to enable them to assess the distribution of the estate



of the deceased by the respondent before granting the respondent's prayer to close the probate.

It is his further submission that Hon. Katemana, PRM was supposed to consider the fact that the respondent did not finish the process of collecting the deceased's estate including the cash funds from the government of the United Republic of Tanzania as it appears in the item 'X' of the accounts of estate attached in annexure KL 1 in which the respondent as administratrix has not disclosed the amount distributed to the beneficiaries. Therefore, Mr. Magafu sees such omission as a serious illegality which ought to be considered as a sufficient ground for this court to grant this application.

Mr. Magafu additionally submitted that the respondent was not giving the applicants clear information on the administration processes pending in the trial court including the filing of inventory as a result they became aware of the filed inventory on 14/03/2023 while the same was filed on 16/12/2022 and trial court never summoned them.

The case of **Mobrama Gold Corporation vs Minister Of Energy And Minerals and Two Others** [1998] TLR 425 was referred to by Mr. Magafu to support his submission where the court found it inappropriate to

deny a party extension of time. He also insisted that if the application is not granted, the applicants will be denied the right to be heard as enshrined in our **Constitution under Article 13(a)**.

Conclusively, Mr. Magafu submitted that the reasons adduced by the applicants suffice this court to grant their application for extension of time to enable them to file application for revision in this out.

Mr. Kalonga on reply, adopted the respondent's counter affidavit and contended that the applicants have not advanced genuine reasons to allow their application.

He started by submitting on the powers of Hon. Katemana, PRM to close the administration and probate cause as per the prayers of the respondent saying the Honourable Magistrate had powers to grant the same being the Magistrate who appointed the respondent to be the administratrix of the deceased's estate. He added that, the application for revocation of the respondent as administratrix was truly heard by Hon. Tungaraja which does not take away the power of Hon. Katemana, PRM as the Magistrate who appointed the respondent taking into consideration that the application for revocation was not successful. Hence the order of Hon. Katemana, PRM to close the matter was properly made.

Regarding the issue of failure of the trial court to summon the beneficiaries including the applicants before closing the matter and in event inventory and accounts were filed in the court, Mr. Kalonga replied that the processes of administration was smoothly made hence the trial court was right to discharge the respondent as administratrix and no any law of probate was infringed.

On the issue that some estates were yet to be distributed referring item 'X' of the accounts of estate, he replied that the item 'X' being funds from the government, their distributions appear in percentage form and they shall reach the beneficiaries after having filled and submitted vendor form and the 1st applicant was well informed of the procedure as per the chats appearing in annexure P2.

Mr. Kalonga added that the applicants' contention that they became aware of the filing of inventory and that the matter was already closed on 14/3/2023, is unsubstantiated as they did not produce in court a receipt of the file perusal for their averment to be believed. He went further to refer to WhatsApp chats on annexure P2 where the 1st applicant seems to

understand what was going on and they in fact did receive cattle and rent from the house which was distributed to them.

He also submitted that the applicants' averment that they became aware of the filing of inventory of this matter on 14/3/2023 is contravening annexure P3 which is the newspaper dated 28th February, 2023 where they published the matter which is almost 14 days before. Also, if they are students as they have contended as such, they had no time to come to the court. How come they had time to go to the newspaper?

Mr. Kalonga wound up his reply by praying the court to use the same stance in the **Broma case** (supra), in dismissing the applicant's application as granting of the same will amount to procedural abuse as nothing has breached the laws of probate and administration. He thus prayed the applicants' application to be dismissed with costs.

On rejoinder, Mr. Magafu insisted that Hon. Katemana, PRM having disqualified himself from handling this matter was not supposed to deal with it at the stage of filing inventory. He also insisted on the rules of natural justice pursuant to Article 13(6)(a) of the Constitution of the United Republic of Tanzania.



On the issue that there was communication between the applicants and the respondent, he rejoined that there was no proof of that averment since annexure P2 of the counter affidavit is an electronic transaction derived from a cellular phone and its admission must comply with section 18 of the Electronic Transaction Act [CAP 442 R.E 2022]. He argued that a service provider was supposed to state its authenticity by producing the certificate to prove the alleged communication between the parties.

Mr. Magafu also challenged the averment that the applicants were aware of the distribution made by the respondent as they were given cattle from the estates of the deceased because annexure P1 which the respondent has relied on to prove her averment, is unknown document as it is not certain on who is the author and to whom it was intended.

He also rejoined that there is no any proof produced by the respondent to prove that the applicants were aware of the existence of the order of trial court dated 16/11//2022 made by Hon. Katemana, PRM because the annexure P3 which the respondent contends that the applicants are the ones who published to a Jamhuri newspaper on 28/2/2023 about the estates of the deceased, is not proved by either way as there is no affidavit from Jamhuri Newspaper to prove the same. For that case, annexure P 3 cannot

be relied to prove that the applicants were aware of the said order of the trial court.

Mr. Magafu on the contention that the respondent had completed her administrative duties, he rejoined that there is nothing stated to prove the same and therefore maintained his submission with regard to item 'X' of the accounts of the estate. He concluded his rejoinder by urging the court to consider the irregularities which they have pointed out to grant this application.

It is a trite law that in applications for extension of time, the applicant has to adduce reasonable or sufficient cause for the court to extend the period of limitation as required under section 14(1) of **the Law of Limitation Act**, [CAP 89 R.E 2019]. Therefore, this court has to if the determine if the applicants have adduced reasonable or sufficient cause for the court to extend the period of limitation for filing application for revision to this court.

First of all, I find it prudent to state the period of limitation that the applicants were to observe in order to file their application for revision which is sixty (60) days from the date of the impugned order/ruling/judgment. See item 21 of Part III to the Schedule of the Law of Limitation Act, [CAP 89 R.E

2019]. For our case, the impugned order was made on 16/12/2022 to mean the applicants were to file their application on or before 13/02/2023 whereas this application for extension of time, is made on 29/03/2023. This means there is a delay of 44 days.

Before going into the merit of this application, it is desirable to appreciate factors to be taken into account in determining the application for extension of time as stated by the learned counsel for the respondent. These factors include; the cause of the delay, length of the delay, the applicant to account for each day of the delay, and existence of illegality or any point of law in the impugned decision.

These factors are enshrined by the Court of Appeal of Tanzania in several occasions when controverted with matters of this nature, to mention the few; the case of **Principal Secretary, Ministry of Defence and National Service vs. Devram Valambhia** (1992) TLR 182; **Lyamuya Construction Co. Limited vs. Boards of Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 CAT, Arusha; **Mpoki Lutengano Mwakabuta & Another v. Jane Jonathan** (As Legal Representative of the late Simon Mperasoka, deceased), Civil Application No. 566/01 of 2018, CAT, Dar es salaam and **TANESCO vs.**



Mufungo Leonard Majura & 15 Others, Civil Application No.94 of 2016,
CAT, Dar es Salaam.

In **Lyamuya Construction Company Ltd** (supra) for instance, the following factors were listed:

1. The applicant must account for all the period of delay.
2. The delay should not be inordinate.
3. The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.
4. 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 circumstance of this matter, I will start by examining the reason for the delay as contended by the applicants. It is the applicants' contention that their delay is caused by the fact that they were in school waiting for their exams as for the 1st applicant started his exams on 17/02/2023 to 02/03/2023 and the 2nd applicant was preparing for form six exams. As such, they failed to take proper action within time. They added that by them being in school, they depended on the respondent as administratrix to be informed



of all the matters pertaining to the administration of the deceased's estate but she was not cooperative.

I understand that being in school may constitute a good cause for failure to make follow-up of rules of procedure of the court but such averment to be believed by this court it should be substantiated by the applicants to account for their delay from 13/02/2023 to 29/03/2023 when this application for extension of time was lodged. Undoubtedly, affidavit is the evidence so the applicants were not supposed to make a general statement to state the reason for their delay to lodge the application for revision.

It is trite law under Section 110 of the Evidence Act, [CAP 6 R.E 2022] that any person who alleges existence of certain fact has to prove the same. See the case of **Wambura N. J. Waryuba vs. The Principal Secretary Ministry of Finance & Another**, Civil Application No. 320/01 of 2020, CAT, Dar es Salaam; the Court held that:

'It is elementary law that, he who alleges must prove as provided for under section 110 of the Evidence Act [CAP 6 R.E. 2002; now R.E. 2019]. In this case, the applicant has alleged that he had travelled to Musoma to attend to family matters However, he has not presented any proof to that effect.'



From the applicants' affidavit, it is unproven if the applicants were students and even if this court believes that they are students, the question comes as to what dates they were prevented by their schools to make a follow up of the conduct of the respondent in the administration of the estate of their late father; and which measure they took to get permission from their schools to make such follow up as there is an apparent variation on the dates when the 1st applicant alleged to be in exams and the time for filing the application for revision which had already elapsed.

Moreover, the WhatsApp chats which is annexure KL 2 cannot be relied upon as there is nothing to prove its authenticity in terms of the **Electronic Transaction Act**, [CAP 442 R.E 2022] in particular, an affidavit authenticating electronic communication between the 1st applicant and the respondent. Basically, this contention is lacking as there is no any tangible evidence to prove the same. In the circumstance, the applicants have failed to account for the delay and the delay is clearly inordinate. Besides, they have failed to show diligence in the prosecution of the action that they intended to take.

Now determining the issue of illegality, it is a trite law that where the issue of illegality has been raised in the application for extension of time, the



court shall grant the same even if the applicant has failed to account for each day of the delay. See **TANESCO vs. Mufungo Leonard Majura & 15 Others** (supra) the Court of Appeal, stated:

'Notwithstanding the fact that, the applicant in the instant application has failed to sufficiently account for the delay in lodging the application, the fact that, there is a complaint of illegality in the decision intended to be impugned, in line with what was held in the above quoted decisions, it suffices to move the Court to grant the extension of time so that, the alleged illegality can be addressed by this Court.'

The rationale of granting extension of time on the ground of illegality was illustrated in the case of **Principal Secretary Ministry of Defence and National Services v. Devram Valambhia** (supra), being, to enable the court to identify the alleged illegality and rectify the same if so established. The Court of Appeal stated the following:

'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 right.'

In the instant case, the applicants' allegation of illegality is based on the illegality of the order made by Hon. Katemana, PRM to close the probate



and Administration Cause No. 149 of 2021 and discharge the applicant while he was not a trial Magistrate as he in the first place recused himself from handling the same hence infringement of the rules of natural justice. The applicants further alleged that the matter was closed without the beneficiaries of the late WILLIAM TATE OLENASHA including them being summoned to appear to the court on such date when the respondent filed the inventory to assess the distribution but subsequently the trial magistrate closed the matter hence denial of right to be heard.

In analysing the points of illegality as alleged by the applicants, I firmly find that they require to be ascertained by this court if so established. This is because, it is this court vide the intended revision that it shall be able to identify if it was a misdirection or non-direction for Hon. Katemana, PRM to close the matter and discharge the respondent as administratrix. Considering that this matter is arising from two matters that is the Probate and Administration Cause No. 149 of 2021 and Probate and Administration Cause No. 58 of 2022 where Hon. Katemana, PRM in first place, handled both despite that he later recused himself from handling the Probate and Administration Cause No. 58 of 2022.



Additionally, the applicants have alleged that it was not proper in law for the trial court to discharge the respondent as administratrix while some properties were not distributed by referring to item 'X' of the accounts of estates where the distribution is shown in percentage and no exact amount shown. This also requires to be ascertained by this court because it is a trite law that the administratrix of estates shall be discharged once he or she has completed his administration duties so that if it was established that it was not completed, this court shall get an opportunity to make it right.

Similarly, the applicants have alleged that they were denied the right to be heard by Hon. Katemana, PRM for not summoning them as beneficiaries of the late WILLIAM TATE OLENASHA on the date when the respondent was required to exhibit inventory. It is a trite law that an allegation for right to be heard is a serious allegation which once raised, there is a need to be examined, (see the case of **Laurent Simon Assenga vs Joseph Magoso and 2 Others**, Civil Application No. 250 of 2016 where the Court of Appeal at Dar es Salaam when contravened with the matter of similar nature, had the following to say:

'In the present case, the Applicant has averred that, a decision has been passed by the lower courts against his interests without him being heard. This is a serious allegation of illegality



in the impugned decision. It needs to be investigated by this court.'

All being said as above, I am settled that, the point of illegality raised by the applicants suffices to extend the period of limitation to file an application for revision to this court. In this respect, the applicants' application is granted and the applicants are given thirty (30) days to file their application for revision. No order as to costs.

It is so ordered.

Dated at Dodoma this 5th day of June, 2023.




F. R. KHALFAN

JUDGE