

**IN THE HIGH COURT OF TANZANIA  
(IN THE SUB-REGISTRY OF MWANZA)**

**AT MWANZA**

**CIVIL APPEAL NO.114 OF 2022**

*(Arising from the Ruling of Nyamagana District Court at Nyamagana in Misc.  
Application No. 38 of 2022)*

**MAGRETH MINJA.....APPELLANT**

**VERSUS**

**RITHA ROBERT MEELA (Administratrix**

**of the Estate of the Late Robert Thomas Meela.....RESPONDENT**

**JUDGMENT**

*Date of Last Order: 07/03/2023*

*Date of Judgment: 03/07/2023*

**Kamana, J:**

Magreth Minja, the Appellant was aggrieved by the Ruling of the District Court of Nyamagana in Misc. Application No.38 of 2022 which was in favour of Ritha Robert Meela in the capacity of an Administrator of the Estate of the Late Robert Thomas Meela. In challenging the said Ruling, the Appellant is equipped with four grounds of appeal as follows:

1. That, the Court erred in law and fact by not considering the fact that the delay was a technical delay and not an actual delay.

2. That, the Court erred both in law and fact by not considering the prospects of success of the intended appeal.
3. That, the Court erred in law and fact by not abiding with the principle of justice.
4. That, the Court erred in law and fact by dismissing the suit which was not determined on its merits.

Armed with those grounds, the Appellant beseeched this Court to allow the appeal with costs and quash the Ruling of the District Court of Nyamagana in Misc. Application No.38 of 2022.

When the appeal was called on for hearing, the Appellant had the services of Ms. Beatrice Paul, learned Counsel whilst Mr. Raphael Lukindi, learned Counsel appeared for the Respondent. The appeal was argued for and against *viva voce*.

When Ms. Paul took the floor, she started by abandoning the fourth ground of appeal. On the first ground, the learned Counsel contended that the delay was technical and not actual. She submitted that the appeal against the decision of Mwanza Urban Primary Court in Probate Cause No.15 of 2008 was filed within the time. However, on 28<sup>th</sup> June, 2022, the said appeal was withdrawn to amend the same. In that case, the learned Counsel submitted that following such withdrawal,

the Appellant could not file the appeal as she was time-barred. It is on that account, the Appellant preferred Misc. Application No. 38 of 2022 for an extension of time to file an appeal.

Ms. Paul argued that the District Court misdirected itself by not considering that the twelve days between the withdrawal of the appeal and the institution of the application for an extension of time were spent for preparing the said application. She submitted that when the appeal was withdrawn, the court did not specify the time within which to refile the appeal. Given that, the learned Counsel contended that the twelve days were accounted for as they submitted in the District Court that the same was used for the preparations of an application for an extension of time and hence make the delay a technical one. She referred this Court to the case of **Damari Watson Bijinja v. Innocent Sangano**, Misc. Civil Application No. 30 of 2021.

As regards the second ground, it was her observation that the District Court was supposed to consider the prospects of the appeal since the Appellant had already started to discharge her duties as the administrator of the estate in question. On the third ground, Ms. Paul submitted briefly that the District Court like any other Court was supposed to focus on substantive justice rather than technicalities.

In his reposte, Mr. Lukindi, learned Counsel submitted on the first ground that appeals originating from primary courts are governed by section 20(3) of the Magistrates' Courts Act, Cap. 11 [RE.2019] which stipulates that appeals from such courts to the District Courts are to be filed within thirty days from the date of the impugned decisions. In that case, he contended that since the decision of the Primary Court in Probate Cause No. 15 of 2008 was delivered on 7<sup>th</sup> December, 2021, the appeal was supposed to be filed within thirty days from such date. The learned Counsel reasoned that since the appeal was filed on 17/01/2022, that marks forty-two days whereby thirty days lapsed on 5<sup>th</sup> January, 2022. In that regard, the learned counsel contended that the delay was actual and that Probate Appeal No. 1 of 2022 itself was filed beyond the time prescribed by the law.

As regards the second ground, Mr. Lukindi was brief as he contended that whether an appeal stands a chance of success is no longer a ground for an extension of time. He invited the Court to consider the case of **Airtel Tanzania Limited v. KMJ Telecommunications Ltd**, Civil Appeal No. 393/16 of 2021.

Concerning the third ground, the learned counsel submitted that the appellant was given the right to be heard in the Primary Court. Mr.

Lukindi went on to submit that on 3 December, 2021, the appellant was in court as the Administrator of the Estate of the Late Robert Thomas Meela. The learned counsel referred the Court to page 10 of the Primary Court proceedings where the appellant was given a right to be heard and refused to use such right for reasons which were not acceptable to the court.

He went on to submit that the applicant's affidavit in Miscellaneous Application No. 38 of 2022 is silent as to whether he was not given the right to be heard. The legal mind contended further that the respondent's counter-affidavit stated clearly that the right to be heard was observed. He summed up his submission by contending that the decision of the District Court was right as the appellant failed to account for each day of delay.

Rejoining, Ms. Paul contended that the delay was a technical one and that the appeal was timely filed on 4<sup>th</sup> January, 2022. The learned counsel contended further that her counterpart confused the date of filing and the date of receiving the hard copies of the petition of the appeal. The legal mind reasoned that if her client was out of time, the respondent had the opportunity to raise the issue before the withdrawal of the appeal. She went on to submit that after the withdrawal of the

appeal, the appellant applied for an extension of time whereby the court required her client to account for twelve days of delay since the date of withdrawal.

On the second ground, Ms. Paul was brief as she argued that the denial of the extension of time denies her client a right to be heard in the appeal. She did not rejoin the third ground of the appeal.

Having gone through the submission for and against the application and the records of the trial Court, the issue for my determination is whether the appeal has merits. In determining this appeal, I am going to be guided by the case of **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No.2 of 2010. In that case, the Court of Appeal laid down essential factors to be judiciously considered in the exercise of the discretion vested in courts of extending time beyond the limits stated in the legislation. The Court of Appeal stated:

*'As a matter of general principle, it is in the discretion of the Court to grant extension of time. But that discretion is judicial, and so it must be exercised according to the rules of reason and justice, and not according to private opinion*

*or arbitrarily. 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, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take;*
- (d) If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged.'*

On whether the Appellant has accounted for the whole period of delay as per the first ground of the appeal, the affidavit in support of the application in Miscellaneous Application No. 38 of 2022 was silent. To be precise, none of the eight paragraphs of the affidavit stated why the Appellant failed to file a petition of the appeal within the time. In that case, I agree with Mr. Lukindi that the Appellant failed to account for each day of delay. It has been held in numerous decisions that a delay of even a day must be accounted for. Otherwise, if the Courts condone delays without them being accounted for, there is no reason to have

rules of limitation of actions relating to litigation. **See: Adrofu Fulgence Mfunya v. Juma Hereye and Two Others**, Civil Application No. 33 of 2021.

The argument that the twelve days were used to prepare the application for an extension of time did not feature in the affidavit. The same featured during the hearing at the time when Ms. Paul was rejoining. It is an established principle that submission from the bar is not an alternative to the evidence adduced under oath or affirmation. In the case of **Rosemary Stella Chamba Jairo v. David Kitundu Jairo**, Civil Reference No. 6 of 2018, the Court of Appeal cited with approval its remarks in the case of **Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman, Bunju Village Government & 11 Others**, Civil Appeal No. 147 of 2006 where it was stated:

*'submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence.'*



That being the case, I find the first ground of the appeal devoid of merits as it did not feature during the trial as the ground for an extension of time. While I hold so, I am mindful of the persuasive case of **Damari Watson Bijinja v. Innocent Sangano** (Supra) as cited by Ms. Paul. Without much ado, the case is distinguishable from the instant case as in the cited case, the applicant for an extension of time in her affidavit accounted for the twelve days which she used to prepare the application. In the instant case, neither the applicant nor her learned counsel accounted for the delay of twelve days.

Coming to the second ground, Ms. Paul contended that the trial court did not consider the chances of the appeal to succeed as the appellant was already discharging the duties of the administrator of the estate of the late Robert Thomas Meela. The argument was countered by Mr. Lukindi on the ground that the chances of the appeal to succeed are no longer a ground for enlargement of time to file an appeal. In the case of **Airtel Tanzania Limited v. KMJ Telecommunications Ltd** (Supra), the Court of Appeal observed:

*For more clarity, it is no wonder that, whether "an appeal stands chances of success is no longer a requirement and ground for granting an extension of time to appeal or, as*

*here, leave to appeal.* See: **Marco M.S. Katabi v. Habibi**

**Africa Bank (T) Ltd**, Civil Application No. 570/17 of 2020.

Fortified by that position, the second ground of appeal crumbles.

Coming to the third ground of the appeal, I have failed to understand the arguments advanced by the learned counsel for the appellant as she asserted that the appellate court ought to focus on the merits of the application and not on the technicalities. Responding, Mr. Lukindi, learned counsel for the respondent contended that the appellant during the hearing of the case at the Primary Court was given the right to be heard though she refused to use it.

If Ms. Paul meant the appellate court to mean the Nyamagana District Court when hearing the application for an extension of time, that is a misconception. The District Court heard the application in its original jurisdiction and for that purpose, this Court is the appellate one. Assuming that the learned counsel meant the District Court, still her arguments are vague. Likewise, if he meant that the appellate court was Nyamagana District Court exercising the appellate jurisdiction over the suit that arose in Mwanza Urban Primary Court in Probate Cause No. 15 of 2008, still there is a misconception as the appeal was never heard on

merits after being withdrawn at her instance. Again, I find the ground devoid of merits.

In the final analysis, I dismiss the appeal. Given the nature of the appeal, I order no costs. Order accordingly. Right To Appeal Explained.

**DATED** at **MWANZA** this 3<sup>rd</sup> day of July, 2023.



**KS KAMANA**

**JUDGE**