

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM SUB REGISTRY

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO 26154 OF 2023

MRS RHOBI KERARYO (Administratrix of the Estate of
the late Alpius Keraryo..... **APPLICANT**

VERSUS

**THE CHIEF OF THE DEFENCE FORCES, MINISTRY OF DEFENCE AND
NATIONAL SERVICE** **1st RESPONDENT**
THE ATTORNEY GENERAL.....**2nd RESPONDENT**

Date of Last Order: 16/02/2024.

Date of Ruling: 08/03/2024.

RULING

NGUNYALE, J.

The Applicant herein moved the court under certificate of ultimate urgency and a chamber summons supported by affidavits sworn by MRS. RHOBI KERARYO and PASCAL LIVIN MSHANGA praying this honourable court to be pleased to extend time within which the applicant may file an application for reference against the computations and or findings made by this Court (before Hon. Kahozya, Deputy Registrar) in respect of

execution of the Court's judgment in Civil Case No. 8 of 2003. The application was preferred under section 14 (1) of **Law of Limitation Act**, Chapter 89, Section 2 (2) of the **Judicature and Application of Laws Act**, Chapter 358, and Section 95 of the **Civil Procedure Code**, Chapter 33, (both R.E 2019).

The applicant was represented by Mr. Pascal Mshanga and Mr. Godwill Kyegeko both learned advocates while the 1st and 2nd respondents were represented by Ms. Mcharo Senior State Attorney.

Upon being served with the application the respondents filed their joint counter affidavit and on consensus the matter was heard viva voce.

At the hearing Mr. Mshanga prayed to adopt the contents of the affidavits attached to the application to form part of his submissions. From the affidavits and submissions, it is found that this application is grounded on two reasons. One is technical delay and the other is illegality. On the ground of technical delay, it was submitted that from para 2 throughout to paragraph 8 of the applicant's affidavit that from 2003 to 2023 the applicant has been in the court corridors pursuing her rights in this case. That the case (Civil Case No. 8 of 2003) was firstly filed on 2003 which

was determined in 2007 in favour of the applicant, the 2nd respondent appealed through Civil Appeal No. 46 of 2008 which was partly decided in favour of the applicant. She then filed execution of the court of appeal decision which retained the same civil case No. 08 of 2003. The application for execution was concluded on 19th August 2016. She was aggrieved by the decision of the Registrar. She filed revision application to challenge the decision of the Registrar through Misc Application No. 311 of 2017 which was struck out on 28th December 2017. Again, she filed an application for review (Review No. 7 of 2018) which was also struck out on 11th September 2018. Dissatisfied filed Civil Application no. 622/01 of 2022 for extension of time to file reference to the court of appeal. The application was set for hearing on 6th November 2023 it was noticed that the proper forum for the reference was the High Court, so the application was withdrawn hence the present application which was filed on 07th November 2023. The applicant relied on the cases of **Victoria Rweikiza versus Benedicto R. Ijumba and 2 others**, Misc Land Application No. 753 of 2021 HC Land Division and the case of **National Housing Corporation & 3 Others versus Jing Lang Li** Civil Application No. 432/17 of 2017 to cement the principle of technical delay.

On the ground of illegality, he submitted that illegality itself is sufficient cause to grant extension of time. He relied on the cases of **Modestus Daudi Kangalawe vs Dominicus Utenga** Civil Reference No. 01 of 2022 and the case of **Principal Secretary Ministry of Defence vs Devram Valambhia**. Regarding the application at hand, he stated that the decision of Kahyoza Deputy Registrar in his ruling dated 19th August 2016 contains illegality as deponed under paragraph 12 of the applicant affidavit and paragraph 5 of Pascal Mshanga, that the Honourable Deputy Registrar did not take into account the deceased's due employment benefits and entitlements which were awarded by the Court of Appeal in Civil Appeal No. 46 of 2008. According to him non consideration of crucial aspects amounts to illegality which suggests a good cause for the grant of extension of time.

On her reply **Ms. Mcharo SSA**; adopted her counter affidavit to form part of her submission and strongly objected the application. She submitted that extension of time is a matter of discretion of the court and it is upon demonstration of good cause for the court to rely. On the reasons submitted by the applicant, she submitted that no technical delay was established since the applicant did not account for each day of delay and

that the applicant advocate has failed to differentiate between technical delay and actual delay. He was to establish that, he acted on time according to law and that proper applications were filed in proper forum. According to her this case does not meet the criteria of technical delay and what happened in this case was actual delay. She cited the case of **Mohamed Hussein vs Lucian Daud Mnyangatwa** Civil Application No. 285/17 of 2020 Court of Appeal at Dar es Salaam page 6 where the court refused extension of time because of repetition of mistaken applications. Series of mistakes amounts to negligence or ignorant of law, the court cannot allow extension of time. She distinguished the case of **NHC** (supra) submitted by the applicant that the circumstances are different and she prayed the court to disregard the decisions cited by the applicant and continue to struck out the ground of technical delay.

On the 2nd ground of illegality, she conceded that illegality is sufficient ground to extend time once established. In the present case nowhere in his affidavit he pleaded illegality which can enable the court to consider and rule in her favour and that nothing under paragraph 12 suggests illegality on the face of records. What has been pleaded there is all about complaints that she was not satisfied with the decision of the Registrar

which goes to the merit of the case and not apparent on the face of the records. She prayed this court to dismiss the point of illegality.

On his rejoinder Mr. Godwill Kyegeko, advocate; submitted that they had accounted for each and every day of delay as the applicant had demonstrated the sequence of events from 2003 to the time she filed the present application. And that the series of applications which were filed in court were not all defective and there was no delaying in all the applications showing diligence of the applicant. He added that illegality was pleaded under para 12 of the affidavit though not direct but the facts suggest illegality and that the application indicates that it was supported by affidavits and other reasons. The learned State Attorney confused between irregularity and illegality.

Appreciating the rival submissions from, I am in a position to determine this application basing on the two reasons submitted by the parties.

It is settled law that, an application for extension of time to be granted the applicant has to demonstrate good cause enjoining the Court to exercise its discretionary power judiciously so as to either grant the application or not. In the case of Rev. **Wilson Kyakajumba versus**

Elias Ichwkeleza, Misc. land application no. 17 of 2021 this court had said:

*"It is settled that an application for extension of time can only be granted upon the applicant adducing **good cause or sufficient reason(s)** for delay." [emphasis added].*

What amounts to "good cause" is not defined. It is based on the discretion of the Court which in most cases depends on the circumstances of the case which are to be determined judiciously. Referring in **Tanga Cement Company Limited Vs. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001 the court of appeal said:

"What amounts to sufficient cause has not been defined. From decided cases a number of factors have been 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."

Also, in the **Lyamuya Construction Company Limited v. Board of Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), the Court expounded the following principles to be taken into consideration when considering extending time; -

- 1. That, 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 illegality of the decision sought to be challenged."

Taking into consideration the grounds raised for the delay i.e technical delay and illegality. I find it necessary to start with the ground of illegality.

There is no doubt that the ground of illegality itself suffice to be a good cause for the court to grant the application of extension of time when the illegality is on the face of records. This principle has been expounded in a number of cases. See **Modestus Daudi Kangalawe** [supra], **Valambhia** [supra], and **Said Nassor Zahor & 3 Others v. 7 Nassor Zahor Abdallah El Nabahany**, Civil Application No. 278/15 of 2016.

Reverting to the submissions made by the applicant it was averred that the decision by the honourable Registrar contains illegality as he did not take into account the deceased's due employment benefits and entitlements which were awarded by the Court of Appeal in Civil Appeal No. 46 of 2008. On that view I agree with Ms. Mcharo that what the applicant pleaded under paragraph 12 of her affidavit together with the submissions by her advocate on the issue of illegality goes to the merit of the application and not apparent on the face of records. The applicant

failed to ascertain which points of law were disregarded by the deputy Registrar in his decision. In Lyamuya's case (supra) it was held:

"Certainly, the two paragraphs, cannot be reconciled, and it would take a long-drawn-out process to get to the bottom of this, and decipher "the point of law" or "illegality" in the decision that is sought to be challenged. I must therefore conclude that the applicant has also failed to convince me that there is a point of law of sufficient importance, involved in the intended appeal, to warrant an extension of time."

That being the case, I find no any illegality done by deputy Registrar hence, the point of illegality falls short and it is hereby dismissed.

On the 2nd point of technical delay. The applicant had submitted that since 2003 had been in court corridors looking for the rights of her late husband. The series of events were elaborated from when the case was filed in 2003 to the day when this application was filed in court. As per Lyamuya's case (supra) the applicant should **one**, *account for all the period of delay*, **two** *the delay should not be inordinate and three must show diligence, and not apathy' negligence or sloppiness in the prosecution of the action that he intends to take.* Relying on the applicant submissions there is no issue with accounting for the days of delay. The question is on the diligence on part of the applicant. The court of appeal in **Ngao Godwin**

Losero versus Julius Mwarabu, Civil application no. 10 of 2010 held that:

"To say the least, a diligent and prudent party who is not properly seized of the applicable procedure will always ask to be apprised of it for otherwise he/she will have nothing to offer as an excuse for sloppiness"

According to the applicant's affidavit under paragraph 5 it was stated that, after being dissatisfied with the decision of the Deputy Registrar they filed reference through Misc. Application no. 311 of 2017 before this court, on 28th December 2017 the application was struck out and the ruling directed the applicant to file revision application instead. It is for the reasons best known to the applicant preferred to file an application for review, Misc. Application no. 7 of 2018 which was again stuck out. The applicant again in year 2022 decided to go to the court of appeal praying for extension of time to appeal against the decision in Misc. Civil application 311 of 2017 which directed her to file revision instead of reference but the application was withdrawn hence this application.

From that sequence of events, I find the applicant lacking diligence and acting negligently in prosecuting her case as she failed to follow the courts

directives in Misc. Civil application 311 of 2017. Needless to say, there must be an end to litigation.

In the result, I find the application want in merit which I hereby dismiss. It is so ordered.

Dated at Dar es Salaam this 08th March 2024.



D. P. NGUNYALE

JUDGE

08/3/2024

The Ruling has been delivered this 8th day of March 2024 in the presence of Mr. Godwill Kyegeko, advocate for the applicant in the absence of the respondents.



D. P. NGUNYALE

JUDGE

08/03/2024

