

IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

CIVIL APPLICATION 257/05 OF 2023

MELCHIAD PETER KIMARO1ST APPLICANT

ABDUSAMAD SHARIFF ATTASSY.....2ND APPLICANT

VERSUS

RIZIKI SAMUEL (As Administratrix of the Estate of

The late Mama Rukia Attassy).....RESPONDENT

**(Application for Extension of time to file Appeal against the Judgment and
Decree of the High Court of Tanzania Moshi District Registry)**

(Hon. Mkapa, J.)

Dated 6th day of November, 2020

in

Land Case No.19 of 2014

.....

RULING

18th Sept & 3rd Oct. 2023

MAIGE J.A.:

In pursuance of rules 10 and 4(2) (a) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicants have initiated a motion for extension of time to institute an appeal against the decision of the High Court of Tanzania at Moshi in Land Case No. 19 of 2014. To account for the delay, each of the applicants has deposed an affidavit. Besides, ANNA S. MGALLA, the wife of the applicants' former advocate has also deposed an affidavit to

support the assertion. In opposition, the respondent has deposed an affidavit in reply.

At the hearing of the application, Mr. Edward Peter Chuwa assisted by Ms. Anna Lugendo, both learned advocates appeared for the applicants whereas Ms. Patricia Erick assisted by Ms. Lilian Didas Mushi, both learned advocates, appeared for the respondent. Both the counsel had, before the date of hearing, filed written submissions in support of their cases. At the hearing, therefore, each of them adopted his written submissions with some clarifications. I comment them for their well-researched submissions which have been very useful in the composition of this my ruling.

Before I consider the merit or otherwise of the application, it may be necessary to make a brief account of the facts which led to the filing of this application. It is as follows. The respondent and the second applicant are bloodily related in that, they are both the descendants of the late Mama Rukia Attassy ("the deceased"). The deceased demised in 1993 leaving behind, among others, a house on Plot No. 108 Block "A", Languo B, Kitanduchini Area near KCMC Hospital within the municipality of Moshi in Kilimanjaro area ("the suit property"). Soon before the institution of the suit, the suit property was in the name of the first applicant having purchased it

from the second applicant in 2012. At the time of the purchase, it would appear, the suit property was already registered in the name of the second applicant.

The legality of the second applicant's acquisition and subsequent transfer of the suit property to the first applicant is what drugged the parties herein into the litigation at the High Court. While the claim by the applicants was that the second applicant as the sole heir of the deceased legally acquired the suit property through succession and eventually transferred it to the first applicant, the respondent who had been in possession of letters of administration of the deceased estate since 1994 contended that, the second applicant had no title to pass to the first applicant as the same was part of the estate of the deceased which was under her administration. Upon trial, the High Court pronounced a judgment in favour of the respondent and nullified the sale in question. The applicants have been aggrieved by the decision. They have lodged a notice of appeal. For the reasons which are the subject of this application, they could not timely file the intended appeal. By this application, therefore, they are calling upon the Court to extend time therefor. They have relied on two grounds namely; sickness of their previous advocate and illegalities.

From the notice of motion, affidavits and submissions, the issue which I am bound to address is whether the applicants have demonstrated good cause for extension of time. Counsel appear not to be in dispute that sickness of an advocate in fit cases can amount to good cause. Equally so, for illegalities in the intended appeal. The debate, it would appear, is twofold. **One**, whether the sickness of the applicant's previous advocate in the circumstances of this case can justify extension of time. **Two**, whether there are elements of apparent illegalities in the intended appeal.

Mr. Chuwa started his submission on the first issue with a note that, ordinarily, the intended appeal ought to have been lodged within 60 days from the date of the notice. That is to say, on 15th February, 2020. He submitted however, that due to sickness of the advocate who was in the conduct of the matter for the applicants and to whom a copy of the proceedings was supplied, it was impossible so to do. He clarified that, the said advocate got sick in January, 2021 and the applicants were not, until on 19th January, 2023, aware of his sickness. That was after they had been informed by the wife of the said advocate on the date just referred and supplied with the relevant medical report on 25th February, 2023. In his contention, therefore, the filing of the application on 27th February, 2023

was prompt. Citing the authorities in **Hamis Macha v. Joyce Bachubila**, Civil Application No. 487/17 of 2016 and **Director Ruhonge Enterprise v. January Lichinga**, Civil Application No. 1 of 2006 (both unreported), he urged us to grant the application on that account.

In rebuttal, Ms. Erick submitted in the first place that, since the applicants collected a copy of the proceedings on 15th December, 2020, the appeal ought to have been filed, which was not, by 15th February, 2021. Much as she did not doubt the alleged sickness of the applicants' counsel and the position of law that, sickness can be a good cause for extension of time, it was her contention that, for sickness to amount as such it has to be the sole reason for the delay. To cement her view, she placed reliance on the case of **Nyanza Road Works Limited v. Giovanni Guidon**, Civil Appeal No. 75 of 2020 (unreported). In the present case, she submitted, the delay was not solely caused by the said sickness. She assigned two main reasons. **First**, while the sickness of the said advocate started in January, 2021, in July, 2021, the applicants through another advocate, instituted Land Case No. 02 of 2021 which relates to part of the suit property. In her contention, this was a signification of the applicants' lack of interest to pursue the intended appeal. **Two**, though the offices of advocate Ngole

were well known, the affidavits do not demonstrate any efforts to trace the said advocate through his offices. She submitted, therefore, that as the applicants did not make a close follow up of the progress of their case, they cannot make use of the sickness in question as an excuse for the delay. To that effect, she referred us to the case of **Elias Masija Nyang'oro & 2 Others v. Mwananchi Insurance Co. Ltd**, Civil Appeal No. 278 of 2019 (unreported).

In his brief rejoinder submission, Mr. Chuwa contended that, as a copy of certified proceedings which could be used in the institution of the appeal was availed to the said advocate, and, in so far as the whereabouts and sickness of the said advocate was not known to the applicants until February, 2023, the applicants could not use a new advocate to address the problem. That is why, he submitted, out of confusion, the applicants found themselves filing an application for extension of time to file a notice of appeal and not to institute the intended appeal.

I have carefully followed the counsel debate on the first ground of application and I shall herein after determine it in line with the affidavits, affidavit in reply and the relevant attachments. I am in the total agreement

with Ms. Erick that, for sickness to be a ground for extension of time, it has to be the sole cause for the delay. This position was clearly stated in the case of **Nyanza Road Works Limited v. Giovanni Guidon** (*supra*), cited for the respondent where it was observed:

*"We think the learned advocate for the respondent's reference to **John David Kashekya v. the Attorney General** (*supra*) can only be relevant where sickness is the sole reason for the delay and properly explained. At any rate, even assuming the respondent's illness prevented him from referring his dispute within the prescribed time, there is no explanation why he delayed in applying for condonation for as long as two months reckoned from 13/06/2014...."*

Besides, I am in agreement with the counsel for the respondent that, a client engaging an advocate to make a conduct of his or her case is obliged to make a follow up of the progress and status of the case and that, if not, the inaction of an advocate cannot be a good cause for any delay to pursue necessary steps in the advance of his or her case. Thus, of **Elias Masija Nyang'oro & 2 Others v. Mwananchi Insurance Co. Ltd** (*supra*), it was observed:-

"A party who dumps his case to an advocate and does not make any follow ups of his case, cannot be heard complaining that he did not know and was not informed by his advocate the progress and status of his case..."

The judgment at issue was pronounced on 6th October, 2020. There is no dispute that, the applicants through advocate Ngole requested for a copy of the proceedings and lodged a notice of appeal timely and in due compliance of all legal requirements. Ms. Erick submitted, which was admitted by Mr. Chuwa that; in accordance with the record of the application, the said previous advocate collected the requested proceedings on 15th December, 2020. In the circumstances, parties are in agreement, the appeal would have been lodged by 15th February, 2021. The instant application, it is common ground, was filed after expiry of more than two years. The applicants claim that it did take such a long because of the sickness of advocate Ngole. Their factual depositions in the affidavit suggest that, the said advocate got sick in January, 2021. Assuming that explanation constitutes good cause for the purpose of extension of time, yet with the silence of the applicants' affidavits on the efforts taken to track the progress and status of their case for a period between January, 2021 when the counsel became sick and January, 2023 when they were informed of his

sickness, it cannot logically be said that such an inordinate delay was entirely the direct consequence of the illness of the said counsel. In my opinion, therefore, the sickness of the applicants' advocate was not the only cause for the delay. In the light of the authority in **Nyanza Road Works Limited v. Giovanni Guidon** (*supra*), therefore, I dismiss the first ground of the application.

This now takes me to the second ground as to illegalities. In the notice of motion, the applicants have pinpointed numerous elements of what they believe to be illegalities in the intended appeal. At paragraph 3 items 7 thereof, applicants alleged the following element of illegality:

"7. That the judgment contains illegality as the trial judge wrongly took into account the evidence of PW2, the senior Land Officer for Moshi Municipal Council that the transfer of land from 1st defendant i.e. the 2nd applicant herein who was a registered owner of Plot No. 108 Block A to the 1st applicant was supposed to be done by the Administrator of the Estate, while that was not a legal requirement as the land was registered in the name of the 2nd applicant personally as the first registration".

In the judgment, it is common ground, the trial judge's determination of legality of the transfer of the suit property to the first applicant was on account that, as part of the deceased estate, it was fraudulent for the second applicant to transfer the suit property to the first applicant as he did, in his own name. Mr. Chuwa submitted in effect that, the finding was based on incorrect application of the relevant principle of law. On her part, Ms. Erick contended that, there was no any element of illegality as the prayer sought was nullification of the registration of the title in the name of the second applicant and the consequential transfer to the first applicant. Without making a comment as to who is wrong and who is right, I think, as far as the interest of the first applicant may be concerned, there is an apparent issue of illegality which deserves consideration by the Court. This is; to what extent is the purchaser affected by the defects of the vendor's title on the purchased property during the acquisition of the same? Having said that, and taking into account that, the issue of illegality has only been considered for the purpose of extension of time, I find it irrelevant to consider the other issues of illegality alleged in the notice of motion.

In the final result, I find the application merited for the reason as afore stated. Accordingly, therefore, time within which to institute the intended

appeal against the decision herein mentioned is hereby granted. The intended appeal should be instituted within the period of 30 days from the date hereof. I shall not give an order for costs in the circumstances.

DATED at **MOSHI** this 3rd day of October, 2023.

I.J. MAIGE
JUSTICE OF APPEAL

The Ruling delivered this 3rd day of October, 2023 in the presence of Mr. Baraka Tenga, learned Advocate holding brief for Mr. Edward Peter Chuwa, learned Counsel for the Applicants and also for Ms. Patricia Erick, learned Counsel for the Respondent is hereby certified as a true copy of the original.


D.R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL