

IN THE HIGH COURT OF TANZANIA

TEMEKE SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

MISC.CIVIL APPLICATION NO. 39 OF 2023

(Arising from the decision of Civil Appeal No. 10 of 2021 at the Temeke District Court)

KULTHUMU JIWADI KOMO.....
APPLICANT

VERSUS

ZUHURA SAID ATHUMANI1ST
RESPONDENT

LAYA SAID ATHUMANI.....2ND
RESPONDENT

RULING

Date of last order: 08/03/2024

Date of Ruling: 27/03/2024

OMARI, J.

The Applicant herein moved this court by way of chamber summons supported by an Affidavit under section 20(4)(a) of The Magistrate Courts Act, Cap 11 RE 2019 and section 14 (1) of the Law of Limitation Act, Cap 89 RE 2019 (the LLA). In her chamber summons she prayed for this court to grant her leave to appeal out of time and any other reliefs this court deems fit and just to grant.

In her Affidavit, she, among other things affirmed that the decision of Civil Appeal No. 10 of 2021 was reached after a deed of settlement. The deed was prepared by the advocate for the Respondents and filed in the District Court of Temeke. And, after judgment, she tried her level best to wait for the Respondent's cooperation so that she could commence proceedings to file execution of the decision at the Mbagala Primary Court, which she never got. The Applicant further deposed that, sometime in early 2023, she started procedures for execution of the consent decree concluded at the District Court of Temeke on Civil Appeal No.10 of 2021 and it was during the execution process that she discovered the illegality the during hearing of the appeal. She disclosed the said illegality as the denial of her right to inherit, the right she got at Primary Court Mbagala in the Probate Cause No. 268 of 2020. It is her averment that at the time of signing the said deed of settlement at the District Court of Temeke, the deed being written in English which she does not understand, the advocate for the Respondents misrepresented the same by making her believe that she had rights as a result of the settlement deed filed at the District Court. Furthermore, it is after much delay and discovering

such illegality that she was advised to seek an advocate who advised her to make an application for an extension of time to appeal since she was out of time, having delayed for 748 days, hence this Application. The reasons for the said delay are due to having no legal knowledge, and economic hardship in a way that she was not able to pay for legal consultation. In her affidavit she also insists that the District Court decision is tinted with significant illegality, as the same is denying her right to inherit while such right was granted at the Primary Court. And, that this Application shall not prejudice the rights of the Respondents. At the end of her Affidavit the Applicant predicted her overwhelming chances of winning this case thus, should this court find it inappropriate to grant the order sought, the Applicant is likely to suffer irreparable loss over and above the loss already suffered and her rights shall be highly prejudiced.

In the Counter Affidavit, the Respondents disputed the whole facts deposed by the Applicant. The Application was heard by way of a written submission. The Applicant enjoyed the service of Peter Philemon Shaba while the Respondents enjoyed the services of Tukelage Frank Kimbita both being learned advocates.

During the submission in chief the Applicant's counsel reiterated what is in her Affidavit, without much clarification. Moreover, she conceded to delay of 748 days for the reason that she was in the process of executing and that there was a technical delay such as prosecuting the execution of Civil Appeal No. 10 of 2021 at the trial court. In addition to that, she submitted, that another reason for this application is for illegality as she was made aware by the trial court, that she was denied her right to inherit. Lastly, she convinced this court to extend time upon good cause she has submitted, has referred it to the decision of the Court of Appeal in the case of **Wambele Mtumwa Shahame v. Mohamed Hamis**, Civil Reference No. 8 of 2016 to substantiate her submission.

The Respondents' counsel submitted that the Applicant has not accounted for each day of delay where she was, and has further mentioned the 30 mandatory days for appeal of which this Applicant is in contravention. She buttressed her submission with the case of **The Board of Trustees of The Free Pentecostal Church of Tanzania v. Asha Selemani Chambanda and Rashidi Selemani Chambanda**, (Civil Application 63 of 2023)

[2023] TZCA 147 where the Court of Appeal stated that a delay for even a single day must be accounted for to enable the court to exercise its discretionary power.

Counsel concluded her submission by referring to the case of **Lyamuya Construction Company Ltd v. Board of Registered Trustee of Young Women's and Christian Association of Tanzania** (Civil Application 2 of 2010) [2011] TZCA 4 to elucidate her submission and argued that all parties are still beneficiaries and all of them will inherit the property.

Upon going through the rival submissions, this court has concluded that the question to be determined is whether this Application has merit and the ensuing steps.

To begin with, it is on the record that the ruling which the Applicant is in a quest to appeal, thus, seeking an extension of time was delivered on 24 March 2021 and this Application was filed on 31, 2023 hence, it is not disputed that it was filed after the 30 days of limitation that expired on 23 April, 2021.

The Applicant has raised the point of illegality, that the settlement at the district court deprived the right of the Applicant as an heir to the property. On the settlement at the first appellate court, the

Applicant is among other things complaining that the Respondent's advocate made her believe she would get her rights as the same was written in English which she does not understand, only to discover this was not the case when she tried to execute the settlement.

On accounting for each day, the Applicant is saying she never slept over her right, instead, she was busy following the procedure of executing the consent decree passed at the District Court when she was told by the trial court that her rights were denied as she has deposed in paragraph 6 to 9 of the Applicant's Affidavit.

It is from this misapprehension that this court thinks there is an illegality in depriving a beneficiary of the estate of her parent. She is praying for this court to grant an extension of time to file an appeal out of time, to challenge what transpired in the lower court. While I agree with the Respondent's counsel that this Application is filed out of time, it is precisely for that reason that the Applicant has made this Application.

Section 14(1) of the LLA provides for the extension of time upon sufficient cause. The provision states:

*“Notwithstanding the provisions of this Act, **the court may, for any reasonable or sufficient cause, extend the period of limitation for the institution of an appeal or an application**, other than an application for the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application.”* (Emphasis supplied)

It is from the foregoing section where the question to be determined would be, whether the Applicant has shown sufficient cause. In **Tanga Cement Company v. Jumanne D. Masangwa and Another**, Civil Application no. 6 of 2001, the Court of Appeal held that:

“An application for extension of time is entirety in the discretion of the Court to grant or refuse it. This unfettered discretion of the Court however has to be exercised judicially, and overriding consideration is that there must be sufficient cause for doing so. What amount to sufficient cause has not been defined. From decided cases a number of factors has been taken into account, including whether or not the application was brought promptly; the absence of any valid explanation for the delay; lack of diligence on the part of the applicant.”

The Applicant herein explained the delay of 748 days and also beseeched this court to take heed on there being an illegality. I shall determine the Application on that basis as it is a settled principle of law that, an extension of time can be granted on the sole ground of illegality as held in the case of **Transport Equipment Ltd. v. D.P. Valambhia** [1993] TLR 91 the Court of Appeal made reference to its earlier case of **Permanent Secretary, Ministry of Defence and National Service v. D.P. Valambhia** [1992] TLR 185 where it held:

“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 purposes to ascertain the point and, if the alleged illegality be established, to take appropriate measures and put the matter and record right.”

In a later case of **Lyamuya Construction Company Limited v. the Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), the Court of Appeal expounded on its holding in **Permanent Secretary, Ministry of Defence and National Service v. D.P. Valambhia** (supra) and held that for illegality to

amount to sufficient cause it must be apparent on the face of record. The court stated:

“The Court there emphasized that such point of law must be that 'of sufficient importance' and, I would add that it must be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by long drawn argument or process.”

From the explanation above it is clear that what the Applicant is starting to be their reason for seeking the Application for enlargement of time is illegality. The said illegality is occasioned by there being a deed of settlement that she claims is a misrepresentation of what had transpired in Probate Cause No. 268 of 2020. This can also be seen in the fact that she was unable to execute the settlement which to begin with, she claims she did not understand. I think this is a good cause because it was not her deed. This is clear and apparent in the record. It is for the foregoing reasons that I shall, as I hereby do, grant the Application. As a result, extension of time within which to lodge an appeal against the decision of the District Court in Civil Appeal No. 10 of 2021 on 24 March, 2021 is hereby granted. The appeal should be lodged within 30 days from the date hereof. As this

Application originates from a probate matter, I make no orders as to costs.

Order accordingly.

A.A. OMARI
JUDGE
27/03/2024

Ruling delivered and dated 27th day of March 2024.

A.A. OMARI
JUDGE
27/03/2023