IN THE HIGH COURT OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

MISC. CIVIL APPLICATION NO. 01 OF 2023

(Arising from the Court of District Delegate of Mpanda District in Probate and Administration Cause No. 21 of 2022)

JONESTER TRASEAS RWABIGENDELA @JONESTER JONES.....APPLICANT

VERSUS

ELIZABETH NELSON NGAIZA.....RESPONDENT

RULING

30th October, 2023 & 11th January, 2024

MRISHA, J.

This is an application for extension of time by the applicant **Jonester Traseas Rwabigendela @Jonester Jones**, under section 14 (1) of the Law of Limitation Act, Cap 89 R.E. 2019 (the LLA). As it could be expected, the instant application was brought to this court through a chamber summons supported by the affidavit of the applicant herself.

In the said chamber summons the applicant is seeking for three orders namely:

1. That, this honourable court be pleased to extend time within which the applicant may file an appeal out of statutory time against the ex parte judgment dated 04.10.2022 of the Court of District Delegate of Mpanda District (the trial court) in Probate and Administration Cause No. 21 of 2022.
2. Costs of this application.
3. Any other relief (s) that this honourable court may deem fit and just to grant.

When the application was called on for hearing, both parties were legally represented by learned advocates. Whereas Mr. Mathias Budodi, learned advocate appeared for the applicant, the respondent had the legal services of Mr. Laurence John, also learned advocate.

Submitting orally in respect of the grounds of his client's application, Mr. Budodi stated that the applicant's application is made under section 14(1) of the LLA and he prayed to adopt the amended sworn affidavit of the applicant which was filed with this court on 17.05.2023.

According to him, the applicant's major ground of her application which is based on illegality, is indicated under paragraph 8 of her sworn affidavit. He submitted that there are three points of illegality under such paragraph.

That, the first point is on the issue of jurisdiction of the trial court. It was his submission that section 40 (2) of the Magistrates Courts Act, Cap 11 R.E. 2019 (the MCA) is clear that the pecuniary jurisdiction of the subordinate court should not exceed 200,000,000/= (two hundred million).

However, the applicant's counsel argued that in the present case, the subject matter per the inventory filed by the respondent, shows that the property listed therein, is worthing 296,300,000/= (Two Hundred, Ninety-Six Million and Three Hundred Thousand Shillings).

Mr. Budodi went on submitting that on the issue of territorial jurisdiction, Section 5 of the Probate and Administration of Estates Act, Cap 352 R.E. 2002 (the PAEA) provides for territorial jurisdiction of probate courts in determining probate causes.

He added that by virtue of the above provision of the law, it is clear that the Court of District Delegate shall have jurisdiction if at the time of his death, the deceased person had a fixed place of abode within the area in which it is established.

He further submitted that Annexure A-1 of the applicant's affidavit is the death certificate of the deceased person which reveals that the last known fixed place of abode of the said deceased person was Buza, Temeke in Dar es Salaam and that is the reason why the Probate cause in respect of the said

deceased's estate was filed with District Court of Temeke at Temeke, as shown under Annexure A-2 which is a copy of judgment of the said subordinate court.

Talking about the second point of illegality, the applicant's counsel submitted that as per Roman *"ii"* of paragraph 8 of the applicant's affidavit, it is averred that the trial court proceedings and decision are in defiant with the Ruling of the High Court of Tanzania at Temeke dated the 10th day of June, 2022; the same was attached in the applicant's affidavit as Annexure A-3.

Mr. Budodi further submitted that at page 3 of its Ruling, the High Court (**Mugeta, J**) nullified the proceedings of Temeke District Court in Probate and Administration Cause No. 134 of 2020 and ordered a trial de novo.

His concern regarding the outcome of the above decision, was that the same was against the parties to this application; similarly, the decision of the subordinate court nullified by the High Court of Tanzania at Temeke, was as well referring to the same parties. In the circumstance, the applicant's advocate argued that it was an illegality for the respondent to file a fresh probate cause in the presence of a trial de novo order of the High Court.

The last point of illegality according to Mr. Budodi, is that no consent of the beneficiaries was obtained prior to the filing of the Probate and Administration Cause No. 21 of 2022 with the trial court. He referred the court to the

landmark case of **Principal Secretary, Ministry of Defence and National Service. Devram P. Valambia** [1992] TLR 387 where the Court of Appeal held that:

> *"Where the point of law of law at issue is the illegality or otherwise of the decision being challenged, that is point of law of sufficient importance to constitute sufficient reason within rule 8 of the Court of Appeal Rules to overlook non-compliance with the requirements of the Rules and to enlarge the time for such compliance."*

The counsel construed that decision to mean that whenever there is illegality even if there are no other reasons, that per se is a sufficient reason for extension of time, the reason being to put the records clear.

Having said the above, the applicant's counsel submitted that the issue of jurisdiction, defiance of the court order and lack of beneficiaries' consent, are sufficient grounds for the court to grant the applicant extension of time to file his appeal to the highest Court against the impugned ex parte judgment of the trial court.

Apart from the above ground, Mr. Budodi submitted that there is still another ground for their application which a technical delay, because according to him, initially the applicant filed with this court a Revision Application, but the same

was struck out on technical grounds on the 19th day of January, 2023; hence he urged the court to condone such period of delay.

In the end, the applicant's counsel prayed to the court to allow the applicant's application for extension of time with costs to follow the outcome of the appeal should the same be allowed.

In response, Mr. Lawrence John submitted that for illegality to constitute as a ground for extension of time, the same must be visible on the face of record, as it was held in the case of **Ngao Godwin Loselo vs Julius Mwarabu**, Civil Application No. 10 of 2015 (unreported), at page 8.

In regard to the issue of jurisdiction, the respondent's counsel contended that first, section 40 of the MCA which was cited by his learned friend, is irrelevant provision of the law because the decision of the trial court which is the subject of the present application, emanates from the Probate Cause; hence, to him, the law applicable in such circumstance, is the PAEA and not the MCA.

Stressing on the same point, Mr. Laurence John submitted that in the course of filing the Probate Cause No. 21 of 2022 with the trial court, the applicant did not state the value of the properties to be collected and distributed to the deceased's heirs.

Secondly, the respondent's counsel contended that the deceased person had a fixed place of abode at Mpanda, Katavi Region as exhibited by Annexure E1, which is a Certificate of Marriage and Annexure E4, which is an official letter from the Katavi Regional Administrative Secretary. Based on those reasons and abovementioned documents, the respondent's counsel submitted that the trial court had requisite jurisdiction to hear and determine the said Probate Cause.

Regarding Annexure A-1 (death certificate) which was attached in the applicant's amended affidavit, Mr. Laurence John submitted that although such document depicts that the deceased person was residing at Buza, Temeke, the same only shows that the deceased person died at Buza, Temeke Dar es Salaam and that the rest of the information just came from the applicant herself.

Coming to the alleged second point of illegality, the respondent's counsel had it that the same is misconceived because it is either a Decree of the court or a Drawn Order which provides directives to be followed.

He further contended that when one appeals, he or she is supposed to attach either a decree or a drawn order. The learned counsel referred the court to the case of **Kotok Ltd vs Kovergi** (1967) 1 EA 348 of which he said that the

appeal was dismissed for failure to attach a drawn order from which the appeal was founded on.

He went on submitting that since the High Court at Temeke did not issue a drawn order, it will be difficult to determine whether the properties which were contested in Probate Cause at Temeke District Court, are the same to those contested in the Court of District Delegate at Mpanda District Court.

Apart from the above arguments, Mr. Laurence John submitted that the points of illegality pointed by the applicant's counsel cannot be the sufficient reasons for grant of extension of time because the applicant failed to explain when she discovered those illegalities. To support his argument, the learned respondent's counsel cited the case of **Mtengeti Mohamed vs Blandina Macha**, Civil Application No. 344/17 of 2022, CAT at Dar es Salaam where it was held that:

> *"Illegality cannot be used as a shield to hide against inaction on the part of the applicant."*

In the same vein, the respondent's counsel cited the case of **Augustino January Kweka vs Fatuma Clement John**, Misc. Civil Application No. 11 of 2022 HCT at Sumbawanga, where it was held that:

"The applicant has a duty to state or account for where he was before discovering the illegality complained of"

As for the third point of illegality ground, Mr. Laurence John submitted that the counsel for the applicant has overlooked the proceedings of the trial court because the same clearly show that the trial court dispensed with the requirement of obtaining beneficiaries consent, as it can be evidenced at page 2 of the trial court's typed judgement which was attached with the respondent's counter affidavit as Annexure E-5.

There was still another argument by the respondent's counsel who challenged the applicant for her failure to appeal against the impugned decision of the trial court unreasonably while she had enough time to do so.

For instance, he submitted that despite being supplied with a copy of judgment of the trial court on time, the applicant through her counsel filed a Revisional Application No. 6 of 2022, instead of an appeal against such decision.

Again, Mr. Lawrence John submitted that the issue of technical delay raised by the applicant's counsel, is irrelevant because it was not pleaded in the applicant's amended affidavit supporting her application.

The learned counsel for the respondent went on submitting that technical delay cannot form the ground for extension of time in the present application because what the applicant ought to do, was to appeal against the impugned judgment of the trial court, but instead of doing so, she filed an application for revision.

From the above submissions and reasons, it was the respondent's prayer that the present application be dismissed with costs.

In rejoinder, Mr. Budodi maintained that the Probate and Administration Cause 134 of 2020 is still pending at the District Court of Temeke because there is an order of the High Court of Tanzania at Temeke which ordered that the same be tried de novo.

Regarding the ground of technical delay, the applicant's counsel contended that it is not true that the same is not stated in the applicant's amended affidavit because paragraphs 10 and 11 of the same, shows that apart from accounting for each day of her delay, the applicant through those paragraphs has disclosed the issue of technical delay.

In addition to the above, the applicant's counsel submitted that the case of **Mtengeti Mohamed** (supra) is distinguishable in the circumstances of the case at hand on the ground that at page 2 of that decision, it is revealed that the applicant went to the court to apply for an extension of time nine (9)

years after the decision was made which conduct was interpreted by the court as an inordinate delay, but in the present application, it is on record that the applicant acted on time, but she was blocked by a technical ground.

He also submitted that the issue of filing an application for revision and later an application for extension of time is irrelevant because the application for revision was struck out without any other order preventing the applicant from filing any application.

In regards to the argument that no drawn order or decree of the court in respect of the decision of the High Court of Tanzania at Temeke was attached, the applicant's counsel submitted that the application at hand is not about executing the decision of the High Court of Tanzania at Temeke. Hence, he submitted that since there is an attachment of the Ruling of the High Court which has the effect of ordering a trial de novo, it is that decision which has to be followed.

On the issue of jurisdiction, Mr. Budodi submitted that Column 5 of the Death certificate shows the deceased's last residence, which is why the Probate and Administration Cause No. 134 of 2020 was filed at Temeke District Court.

He also submitted that the Marriage certificate submitted by the applicant does not prove that the deceased person's last place of residence was at Mpanda.

Also, the applicant's counsel submitted that the issue of filing of a Probate Cause at Temeke was addressed before the learned trial magistrate; hence he ought to have warned himself on the danger of entertaining the probate cause without having jurisdiction. Finally, he prayed to the court to grant his client's application.

From the above rival submissions and bundle of authorities which I have considered and paid much attention to; it is crystal clear that the parties in the present application are disputing on two main grounds of an application for extension of time. This is so because while the first ground is based on the issue of illegality of the impugned decision of the trial court, the second ground is on the alleged technical delay of the applicant herein.

That being the case, it is my opinion that the main issue for determination of the court is whether the applicant has assigned some good cause for extension of time within which to appeal against the decision of the trial court.

Basically, an application of this kind is normally brought to the court by the applicant who delays to lodge his appeal with the appellate court within the statutory time.

Section 14 (1) of the Law of Limitation Act, Cap 89 R.E. 2019 which is cited in the applicant's chamber summons as an enabling provision, provides that:

"14. Extension of period in certain cases

(1) 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"

From the above provision of the law, it is obvious that the High Court may extend the time of appeal in respect of decisions emanating from the subordinate courts, if the intended appellant has assigned some good or sufficient reason.

Under Part II of the LLA, it is clearly indicated that the time limit in respect of an appeal for which no period of limitation is prescribed by that Act or any other written law is forty-five (45) days. In my opinion, the essence of setting a prescribed period of time for doing a certain act, is to ensure that the court process is not abused by those clients who are sleepy, negligent and not take actions on time.

Similarly, it is the requirement of the law that a party who applies for grant of an extension of time must assign a sufficient reason of his delay. What amount to a sufficient reason has not been defined in statutes.

However, caselaw has provided the meaning of such term. For instance, in the case of **Jumanne Hassan Biling vs Republic**, Criminal Application No. 23 of 2013 (CAT-unreported) where it was stated that:

> *"...what amounts to good cause is upon the discretion of the court and it differs from case to case. But basically, various judicial pronouncements define good cause to mean, reasonable cause which prevented the applicant from pursuing his action within the prescribed time."*

Also, in the case of **HB Worldwide Limited vs Godrej Consumer Products Limited**, Civil Application No. 2/16 of 2021, it was stated that:

> *"What amounts to good cause has not been defined, but in a number of its decision, this Court has stated some factors to be considered. They include; whether or not the application has been brought promptly, the absence of any or valid explanation for the delay, the lack of diligence on the part of the applicant, the applicant's ability to account for the entire period of delay and existence of a point of law of sufficient importance..."*

Applying the above principles in the present application, I will start with the point of illegality assigned by the applicant to see whether it amounts to a good reason for grant of his application.

It is a trite law that where a point of law at issue is the illegality of the decision which is sought be appealed against, that amounts to a good reason for an extension of time; See **The Principal Secretary, Ministry of Defence and National Service vs Duram P. Valambhia** (supra) and **VIP Engineering and Marketing Limited & Three Others vs Citibank Tanzania Limited**, Consolidated Civil Reference Nos. 6,7 and 8 of 2006(unreported) which was also referred by the Court of Appeal in the case of **HB Worldwide Limited vs Gorej Consumer Products Limited** (supra).

However, it should not be forgotten that it is not acceptable for the applicant to take too long to raise a point of illegality once he/she realises that there is such point of law on face of record of the impugned decision of the court in he/she is aggrieved with.

The law requires that under such circumstances, the applicant should take quicky measures to draw the attention of the court by raising the point of illegality and should not delay to do so in order avoid un ending litigations.

The above court's position is fortified in the case of **Ramadhan Rashid Kitime vs Anna Ally Senyagwa**, Misc. Land Application No. 3 of 2023, HCT at Morogoro (unreported) where my brother Malata, J. was emphatic that:

> *"It is a trite law that, illegality being one use for extension of time must be raised timely. One cannot stay for a long period without pursuing for*

his right on the grant that so at his own time since there is illegality on the decision. Equally, illegality must also be raised timeously, otherwise there will be no end to litigation."

While I subscribe to the above position, I may also add that it is important for the applicant to raise and establish the issue of illegality on time so that the records can be put clear; otherwise, the essence of having expedient trial and justice dispensation will be minimized unreasonably.

In the present case, there are three points which appears to have influenced the applicant to draw the court's attention that the impugned decision of the trial court is tainted with illegalities; hence, she deserves extension of time so that the same can be cleared by the court.

The first point is that the trial court determined the matter before it without requisite jurisdiction. This point is indicated at paragraph 8 (ii) of the applicant's amended affidavit and disputed by the respondent through paragraph 9 of her respective counter affidavit.

According to the applicant's counsel, the trial court had no requisite pecuniary jurisdiction to try the matter before it because the value of properties listed in the inventory is over and above the limited amount of Tshs. 200,000,000/= which the subordinate court is entitled to entertain, as per section 40 (2) (b) of the MCA.

In my view, this point is misplaced because the above provision of the law applies where there is no specific provision of the law which gives the district court power to entertain a matter in which the value of the subject matter does not exceed two hundred million shillings. It provides, thus:

> *"(2) A district court when held by a civil magistrate shall, in addition to the jurisdiction set out in subsection (1), have and exercise original jurisdiction in proceedings of a civil nature,* ***other than any such proceedings in respect of which jurisdiction is conferred by written law exclusively on some other court or courts, but (subject to any express exception in any other law) such jurisdiction shall be limited-***
>
> *(a) ,,,N/A ; and*
>
> *(b) in other proceedings where the subject matter is capable of being estimated at a money value, to proceedings in which the value of the subject matter does not exceed two hundred million shillings." [Emphasis is mine]*

Back to our case, it is argument of the respondent's counsel that the provisions of section 40 (2)(b), MCA cited by the applicant's counsel is irrelevant to the present case due to the fact that being a case which stem from the Probate Cause, then the law applicable is the PAEA.

On my part, I agree with Mr. Laurence on that argumentation. This is because as I have alluded above, section 40 (2) (b) of MCA applies where there is no other law which confer jurisdiction on some other court or courts.

In the instant case, it is an undisputed fact that the applicant's application is intended to challenge the decision of the trial court which emanates from the Probate and Administration Cause No. 01 of 2023. In the circumstance, it is the PAEA which is applicable in dealing with such case, because under such situation; it is the Probate Court/ the Court of District Delegate which has to hear and determine such particular case and not otherwise.

It is also important to indicate at this point, that the pecuniary jurisdiction of the Court of District Delegate is specifically conferred on such court only in contentious matters, as indicated under section 5 (2) (b) of the PAEA which provides that:

> *"(2) A District Delegate shall have jurisdiction in all matters relating to probate and administration of estates with power to grant probate and letters of administration of estates if the deceased, at the time of his death, had his fixed place of abode within the area for which the Delegate is appointed–*
>
> *(a),,, N/A*

(b) ***in contentious cases, if the Delegate is satisfied that the gross value of the estate does not exceed fifteen thousand shillings****..." [Emphasis is mine]*

Still on the issue of jurisdiction, the counsel for the parties herein have also parted ways in relation to the deceased person's fixed place of abode which, in my considered view is also an important determining factor in regards to the jurisdiction of the probate court. While the applicant's counsel has maintained that the deceased's place of abode was at Buza, Temeke in Dar es Salaam, the one for the respondent has contended that it was at Mpanda.

Be it as it may, it is the trite law that in determining the jurisdiction of the probate court regard must be had to whether at the time of his/her death the deceased had a fixed place of abode. This is a requirement of the law which is provided under section 5(2) of the PAEA which provides that:

"(2) A District Delegate shall have jurisdiction in all matters relating to probate and administration of estates with power to grant probate and letters of administration of estates ***if the deceased, at the time of his death, had his fixed place of abode within the area for which the Delegate is appointed****" [Emphasis is mine]*

The above provisions of the law clearly indicate that the court of district delegate will be said to have been properly clothed with the requisite

territorial jurisdiction to hear and determine a petition for either probate or grant of letters of administration if and only if at the time of his/her demise, the deceased person had his/her fixed place of abode within the area for which the Delegate is appointed.

Back home, it is on record that when arguing about the last residence of the deceased, the applicant submitted that the deceased person died intestate and had his last place of residence at Temeke and she attached a death certificate as Annexure A-1 which reveals at the 5th Column that the deceased's *"Last Residence"* was at Buza, Temeke Dar es Salaam.

On her side, the respondent through paragraph 2 of her counter affidavit has partly admitted that the deceased died intestate, but has disputed the fact that the deceased person's fixed place of abode was at Buza, Temeke. In holding such view, the respondent has contended that the applicant is not a legal wife of the deceased person one Jones Josias Bagwelwa.

In my view, it is the death certificate which can help to ascertain the deceased's fixed place of abode and not the marriage certificate. As indicated above, the applicant has successfully managed to establish that the deceased's last place of residence was at Buza, Temeke Dar es Salaam and she has attached the death certificate which supports her proposition.

Conversely, the respondent has neither led sufficient documentary evidence to support her contention that at the time of his death the deceased had his fixed place of abode at Buza, Temeke Dar es Salaam, but at Mpanda, nor has she denied the fact that subsequent to the death of the deceased person, the applicant filed a Probate Cause No. 134 of 2020 with the District Court of Temeke at Temeke seeking for letters of administration.

All that indicates clearly that it was the District Court of Temeke at Temeke presided over by a District Delegate which had the requisite territorial jurisdiction to hear and determine the original Probate Cause No. 134 of 2020 in respect of the deceased's estate, and not the District Court of Mpanda at Mpanda which appears to have assumed territorial jurisdiction which it did not have.

Hence, with the foregoing reasons, the first point alleging illegality on the impugned decision of the trial court therefore, is partly found to have been established by the applicant.

I now turn to the second point of illegality in which it is alleged by the applicant that the trial court proceedings and decision was in defiant with the Ruling of the High Court of Tanzania at Temeke.

It is the submission of the applicant's counsel that the proceedings and decision of the trial court are in defiance with the Ruling of the High Court of

Tanzania at Temeke because before filing of such case with the trial court, there was a Ruling of this court (Mugeta, J.) which was delivered on 10.06.2022 which nullified the proceedings of Temeke District Court in Original Probate and Administration Cause No. 134 of 2020 and ordered for a trial de novo before another magistrate of competent jurisdiction. A copy of the said Ruling was attached to the applicant's amended application as Annexure A-3.

Both parties are not in dispute that there was such Ruling or that before filing of the Probate and Administration Cause No. 21 of 2022 with the trial court, there was existence of the Original Probate and Administration Cause No. 134 of 2020 filed by the applicant with the District Court of Temeke at Temeke.

Also, neither the applicant, nor the respondent has denied the fact that the above two probate causes involved the applicant and the respondent who are also the parties in this application. It is also undisputed between the two that even the subject matter which is a contention regarding the estate of the deceased person namely Jones Josiah Bagwelwa, is the same.

That being the case, it is my settled view that the applicant's counsel has successfully established that there is illegality on the decision of the trial court which his client intends to challenge through this court in order that the court can put the records clear through its determination.

I am of that view because of several reasons which I am going to assign shortly. First, since there is a Ruling of this court which was delivered by my brother Mugeta, J on 10.06.2022 to the effect that the Original Probate and administration Cause No. 134 of 2020 of Temeke District Court, be tried de novo by another magistrate of competent jurisdiction, then one would have expected the trial of that suit to be held at the District Court of Temeke at Temeke by another presiding District Delegate and not otherwise.

This is because under simple logic, the Ruling of the High Court of Tanzania at Temeke which was delivered through a Civil Appeal No. 8 of 2021, stemmed from the Probate and Administration Cause No. 134 of 2020 of Temeke District Court and not from the Court of the District Delegate of Mpanda at Mpanda; so by any means, it was the former probate court which was supposed to comply with the trial de novo order of the High Court at Temeke by assigning another magistrate with competent jurisdiction to preside over the fresh proceedings in respect of Probate and Administration Cause No. 134 of 2020.

Secondly, the records of the trial court do not reveal anywhere if the respondent notified the said court that she was petitioning for grant of letters of administration from such court in compliance with the order made by this court through the Ruling in Civil Appeal No. 8 of 2021.

It is not told why she decided to do so because if the issue was about complying with the said High Court order, then the respondent could have disclosed that to the trial court. I am sure that, had that been done by the respondent, the learned trial magistrate could not have continued with the hearing of such petition, but he could have advised the respondent to follow the proper forum in order to present her prayers.

In a bid to challenge the said point of illegality, the respondent's counsel contended that the counsel for the applicant has misconceived the fact that the proceedings and decision of the trial court are in defiant with the Ruling of the High Court because it is the decree of a drawn order of the court which has to be followed not the ruling. He also added that the applicant has not attached a decree or a drawn order.

On the other hand, the applicant's counsel has disputed such contention stating that this is not about executing the court's decree, rather it is about seeking for an order for extension of time within which to appeal against the decision of the trial court.

Having read the above rival submissions regarding the second point of illegality, I am persuaded to go along with the submission of the counsel for the applicant. This is because, a decree of the court or a drawn order is normally required to be attached to the memorandum of appeal at the

appellate stage. This being an application for extension of time, it was not incumbent upon the applicant to attach a decree in appeal from the trial court or a drawn order from the High Court at Temeke.

Also, it appears that the respondent's counsel has missed a point when he argued that in the absence of a drawn order, it will be difficult to ascertain whether the properties contested in a Probate Cause which was ordered to be tried de novo are the same to those contested in a probate cause before the trial court.

This is because the typed copy of ruling of the High Court of Tanzania at Temeke, shows clearly that the High Court ordered the original probate cause No. 134 of 2020 to be tried de novo. Hence, it is my considered opinion, that there was no need to have a drawn order which as I have said before, is normally required when one wants to appeal or apply for execution of the court ruling.

The last point alleging illegality according to the applicant, is that the trial court determined the petition in absence of the consent of the beneficiaries. This point has been disputed by the respondent's counsel who has contended that the trial court's typed judgment which is annexure E5 of the respondent's counter affidavit, reveals pretty well that such legal requirement was dispensed with by the trial court.

I have closely examined Annexture E5 which is the Ruling of the trial court in respect of Misc. Application No. 12 of 2022. It appears to me that upon being moved by the counsel for the respondent under Rule 72 (1) (2) of the Probate Rules, G.N No. 10 of 1963 (the Probate Rules), the trial court granted the prayer to dispense with the requirement of obtaining the beneficiaries' consent. Rule 72 (1) of the Probate Rules provides that:

> *"72 Where consent not available*
>
> *(1) Where a person whose consent is required under these Rules refuses to give such consent, or if such consent cannot be obtained without undue delay or expense, the petitioner shall, together with his petition for grant, file an affidavit giving the full name and address of the person whose consent is not available (where such name and address are known) and giving the reasons why such consent has not been produced."*

From the above provisions of the law, there are two alternative reasons which come to the fore; first, there must be evidence to show that the person (s) whose consent is required has refused to give such consent or secondly, it must be established that such consent cannot be obtained without undue delay or expense.

What I have observed from the typed ruling of the trial court, is that the reason used by the respondent (who in that application, was the applicant) in order to urge the said court to dispense with such requirement, is not featured by either of the above two reasons. This can be inferred at page 1 of the said Ruling in which it was stated that:

> *"The learned advocate adopted the affidavit and submitted that the applicant couldn't get the consent of heirs due to impracticability of siting together to convene a meeting"*

The above reason is not among the two reasons stipulated under the provisions of Rule 72 (1) of the Probate Rules. In the circumstance, it is my considered opinion that the trial court was not properly moved by the respondent in such application. The respondent was duty bound to prove before the trial court either that the deceased's heirs refused to give their consent for her to petition for letters of administration, or that their consent could not be obtained without undue delay or expense, but none of the above two reasons was assigned by the said respondent.

It is due to the above reasons that I am of the settled view that the counsel for the applicant herein was right to argue that the trial court determined the petition filed by the respondent in the absence of the consent of the

beneficiaries. This again proves that there is illegality on the impugned judgment of the trial court.

The last reason by the applicant in her application before this court, is that she delayed to challenge the trial court's decision due to technicalities. It is apparent that the applicant delayed to file her appeal against the impugned decision of the trial court which is why she came up with this application.

However, having gone through the applicant's amended affidavit, it appears to me her delay was due to technicalities. This is because it is undisputed fact that initially she filed Application for Revision No. 6 of 2022 against the decision of the trial court on time, but the same was struck out on 19.01.2023 due technical grounds.

Then on 01.02.2023 she filed a Misc. Civil Application No. 01 of 2023 seeking for an extension of time within which to file an appeal against the ex parte judgment of the trial court dated 04.10.2022, out of time. All that indicates that during all such period the applicant was busy prosecuting her cases against the impugned ex parte judgment of the trial court. This means she was diligent and her application was brought to the court promptly.

Hence, based on the above reasons, I find that hers is a technical delay which is excusable under the law. Also, even if it could be found that the applicant

failed to account for each day of her delay, yet I am of the settled view that her application for extension of time cannot be dismissed.

This is because as I have pointed hereinabove, it has been established by the applicant that the decision of the Court of District Delegate of Mpanda District in Probate and Administration Cause No. 21 of 2022 is marred by a number of illegalities in which case it becomes to duty of the court to intervene in order to put the records clear.

The above position of the court is backed up by the authority in the case of **VIP Engineering and Marketing Limited's** case (supra), where it was stated by the Court of Appeal that:

> *"It is, therefore, settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under rule 8 (now rule 10)* ***regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay."***

In the present application, it is obvious that the claim of illegality of the challenged decision of the trial court has been sufficiently proved by the applicant, thus making it a sufficient reason for extension, but another good thing with the applicant, is that she has also managed to offer a reasonable explanation for her technical delay.

It is therefore, due to the reasons which I have endeavoured to assign above, I am of the settled view that the applicant herein has assigned some good cause in her application for extension of time. Hence, I hereby grant her thirty (30) days from the date of this application within which to lodge her appeal against the impugned decision of the trial court. Costs to follow the event upon determination of the intended appeal.

It is so ordered.

A.A. MRISHA
JUDGE
11.01.2024

DATED at **SUMBAWANGA** this 11th day of January, 2024.

A.A. MRISHA
JUDGE
11.01.2024