

TANZANIA / JUDGMENT

hyansitha malisa vs john malisa

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IN THE COURT OF APPEAL OF TANZANIA AT PAR ES SALAAM CIVIL APPLICATION NO. 167/01 OF 2021 HYASINTHA MALISA APPLICANT VERSUS JOHN MALISA..... RESPONDENT (Application for extension of time from the ruling and orders of the High Court of Tanzania at Dar es Salaam) (Kulita. J.1) Dated the 23rd day of September, 2019 in Miscellaneous Civil Application No. 219 of 2019

RULING

14th February & 10th May, 2023 SEHEL. J.A.: Before me is an application for extension of time within which to file an application for revision of the proceedings of the High Court of Tanzania at Dar es Salaam (Kulita, J.) in Miscellaneous Civil Application No. 219 of 2019. The application is preferred under Rule 10 of the Tanzania Court of Appeal Rules 2009 as amended (the Rules) and it is supported by an affidavit of Mr. Silvester Eusebi Shayo, learned advocate. i On the other hand, upon being served with the application, the respondent filed an affidavit in reply shown by John Malisa, the respondent, to resist the application. The background facts leading to the present application are very simple and straight forward. The applicant and the respondent were joint administrators of the estate of the late Elias Pauline Malisa. They were appointed in September, 2016 in Probate and Administration Cause No. 57 of 2021. However, on 30th November, 2020, the respondent filed Accounts of Estate without involving the applicant. The applicant was dissatisfied with the act done by the respondent hence she filed a motion before the High Court seeking among other orders to remove the respondent from administering the estate of the deceased on grounds that the respondent did not involve the applicant in the administration and that, the respondent allocated to himself some of the deceased's estates. The respondent denied the allegations and claimed that the applicant was not ready to cooperate with him because the applicant did not want to account for rents, she collected since the demise of his late father in 2012 and some properties of the deceased went missing while in the hands of the applicant. Having heard both parties' submissions, the High Court concurred with the respondent that the applicant was not cooperative to the respondent that led the respondent to prepare accounts of estates alone. It further found that the distribution was fairly done given the value of properties and the number of beneficiaries involved. Accordingly, the High Court dismissed the application. The applicant was dissatisfied with the decision of the High Court and wishes to challenge it by

way of revision. Since the applicant was late in filing the application for revision, she has come to this Court seeking for an extension of time to apply for revision. The grounds upon which the application is made are stated in the notice of motion and accompanied affidavit that: "1. That the applicant has suffered injustice as a result of the proceedings before the High Court of Tanzania at Dar es Salaam (Mr. Justice S. M. KULITA, J.) in Miscellaneous Civil Application No. 219 of 2019 where without jurisdiction the High Court determined that the unilateral distribution of the estate of the late Prof. ELIAS PAULSEN MALISA, the late husband of the Applicant by the Respondent was fair.

2. That in terms of Rule 65 (4) of the Tanzania Court of Appeal Rules the Applicant who is seeking the revision of the said orders of Hon. KULITA is required to lodge her application within sixty days (60) from the date of the decision sought to be revised.
3. That copies of proceedings sought to be revised are necessary in order for the applicant to lodge her application, but these were only supplied to the applicant on 8th April, 2021 when the time prescribed by Rule 65 (4) had expired. Mr. Silvester Shayo and Mrs. Benadetha Shayo, both learned advocates appeared for the applicant whereas Mr. Moses Gumba, also learned advocate appeared for the respondent. Pursuant to Rule 106 (1) of the Rules, the applicant has also filed written submissions on 26th May, 2021. Mr. Shayo adopted the notice of motion, affidavit in support of the motion and the written submission and had nothing more to add. Essentially, the applicant submitted that the ruling was delivered on 23rd September, 2019 and on 7th October, 2019, the applicant applied to be supplied with certified copies of the ruling and drawn order as evidenced by annexure SES 2 attached to the supporting affidavit. It was further submitted that the certified copy of proceedings was belatedly supplied on 8th April, 2021, after several reminder letters. Mr. Shayo contended that, it is the position of the law that, in an application for revision, the applicant ought to attach the record of proceedings, ruling and order sought to be revised failure of which renders the application incompetent. To bolster his submission that the applicant referred me to the decision of this Court in the case of Mohamed Rabii Honde (as the administrator of the estate of the late Rabii Ismail Honde, the deceased) v. Hamida Ismail Honde & 11 Others, Civil Application No. 461 of 2017 [2018] TZCA 74; [05 June, 2018, TANZLII]. Regarding the ground that the High Court had no jurisdiction, Mr. Shayo submitted that the drawn order and ruling attached by the respondent in his affidavit in reply clearly show that the ruling was delivered in absence of both parties. He added that the parties were not notified on the date of delivery of ruling. He referred me at page 30 of the proceedings where the learned judge issued a date of ruling, that is, on 19th September, 2019 but, he pointed out, it was not delivered on the fixed and there was no further record as to what transpired thereafter. He added that, the date of 23rd September, 2019, is only reflected in the ruling. It was his submission that failure to notify parties on the date of delivery of ruling contravened Order XX Rule 1 of the Civil Procedure Code, Cap. 33 R.E. 2019 (the CPC). He contended that, with that anomaly, it cannot be said that there was operative, valid and effective ruling as it was held in the case of Awadhi Idd Kajas v. Mayfair Investment Limited, Civil Application No. 281/17 of 2017 [2020] TZCA 181; [09 April, 2020, TANZLII]. At the end, Mr. Shayo urged

me to grant the application with costs. In reply, Mr. Gumba adopted the affidavit in reply and the written submissions filed on 25th June, 2021 in opposition of the application. The main centre of his objection was that the applicant was not diligent as there was unexplained delays. He pointed out that the applicant did not request for copies of proceedings in her first letter written on 7th October, 2019. In that letter, Mr. Gumba argued, the applicant applied only for copies of ruling and drawn order. He argued that, copies of proceeding were applied on 12th August, 2020 after the lapsed of eleven

- (11) months from the date the ruling was delivered. He added that the applicant failed to account the eleven months delayed as there is no single explanation why It took her such long time to request for the same. He further contended that even after requesting for copies of proceedings on 12th August, 2020, there is no account of delay from that date to the date when the proceedings were supplied on 8th April, 2021. He contended further that the requested documents were ready for 6 collection since 14th November, 2019 but the applicant did not take any efforts to collect the same from the Registrar of the High Court. All in all, Mr. Gumba submitted that the applicant has failed to advance good cause for the Court to exercise its discretion under Rule 10 of the Rules. To cement his arguments, he referred me to the cases of Daudi Haga v. Jenitha Abdon Machafu, Civil Reference No.1 of 2000, Bank of Tanzania v. Emerenciana Chryoustom, Civil Application No. 44 of 2009 (both unreported), Lyamuya Construction Co. Ltd. v. Board of Registered Trustees of Young Women Christian Association of Tanzania, Civil Application No. 2 of 2010 2010 [2011] TZCA 4; [03 October, 2011, TANZLII] and CRDB Bank Ltd. v. George Kilindu & Another, Civil Application No. 87 of 2009 (unreported). He therefore beseeched me to dismiss the application with costs. Mr. Shayo made a brief rejoinder that the applicant was not aware on the date of delivery of ruling hence she cannot be blamed on failure to account for each delay. Besides, he argued, the date when the ruling was delivered differs with the one appearing in the drawn order. He contended that such anomaly made the whole decision a nullity. When asked as to whether the error on the date appearing in the ruling could 7 not be rectified by the High Court, Mr. Shayo conceded that it could be rectified under section 96 of the CPC. He however insisted that failure to notify parties on the date of the delivery of the decision invalidated the ruling of the trial court. He concluded by reiterating his earlier prayer that the application be granted with costs. Having carefully examined the notice of motion, the supporting affidavit as well as the affidavit in reply and the submissions, both written and oral, I discern that the issue for my determination is whether the applicant has sufficiently advanced good cause for the Court to extend time to apply for revision. The power of the Court to enlarge time for the doing of any act authorized or required by the Rules is provided under Rule 10 of the Rules which provides: "The Court may, upon good cause shown , extend the time limited by these Ruies or by any decision o f the High Court or Tribunal, for the doing o f any act authorized or required by these Rules, whether before or after expiration o f that time and whether before or after the doing o f the act; any reference in these Rules to any such time shall be construed as a reference to that time so extended". [Emphasis added] 8 It follows that, in application for extension of time, the

applicant has to advance good cause for the Court to exercise its discretionary power. What is a good cause is a question of fact, depending on the facts of each case. In the instant application, the applicant has advanced two reasons. One, the copies of proceedings were belatedly supplied to the applicant, and two, the High Court had no jurisdiction as the parties were not notified on the date of ruling hence contravened Order XX Rule 1 of the CPC. I will start with the first ground that the applicant was belatedly supplied with the copies of proceedings. As correctly submitted by Mr. Shayo, in application for revision initiated by a party, the party initiating revision proceedings has to supply the Court, among others, with the copies of the proceedings. We stated this position of the law in the case of the Board of Trustees of the National Social Security Fund (NSSF) v. Leonard Mtepa, Civil Application No. 140 of 2005 [2006] TZCA 37; [02 February, 2006, TANZLII] that: "...this Court has made it plain therefore, that is a party moves the Court under section 4 (3) of the Appellate Jurisdiction Act, 1971 to revise the proceedings or decision of the High Court, he must make available to the Court copy of the proceedings of the lower court or courts as well as the ruling and, It may be added, the copy of the extracted order of the High Court. An application to the Court for revision which does not have all those documents will be incomplete and incompetent. It will be struck out" (Emphasis added) The counsel for the respondent contended, and it is on record that, the first letter dated 7th October, 2019 written by the applicant seeking to be supplied with documents did not seek for copies of proceedings. The said letter simply applied for certified copy of the ruling and drawn order with no further explanation. It did not state whether the documents were intended for appeal or revision proceedings. Had it been explained that the documents were required for making an application for revision, the Court could have implied that the applicant also sought for copies of proceedings. Since the letter dated 7th October, 2019 was silent, the Court cannot make the case for the applicant that her intention was to file revision proceedings thus the copies of proceedings necessary in the application for revision were also requested. The applicant asked for copies of proceedings in her reminder letter of 12th August, 2020. In other words, the applicant applied for copies of proceedings after the lapse of ten months counting from her first letter dated 7th October, 2019. In that regard, the applicant has not provided any explanation as to why she delayed in requesting for the copies of proceedings. In the case of Bushiri Hassan v. Latifa Lukio Mashayo, Civil Application No. 3 of 2007 (unreported), the Court emphasized the need of accounting for each day of delay within which certain steps could be taken. It stated: "Delay, of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken." As already alluded to above, the applicant did not give any explanation as to why there was such an inordinate delay of ten good months in seeking for copies of proceedings necessary for an application for revision. Given the prevailing circumstance, I am satisfied that the applicant was negligent and failed to account for delay for the Court to exercise its discretionary power. In the case of Umoja Garage v. National Bank of Commerce, [1997] T.L.R. 109, the Court stated that lack of diligence on the part of the counsel is not sufficient ground for extension of time. ii Now turning to the second ground on jurisdiction of the High Court. The learned

counsel for the applicant contended that the parties, including the applicant, were not notified on the date of ruling hence the ruling delivered in absence of the parties was invalid. I do agree and it is on record that the parties were not informed on the date of delivery of the ruling. Nonetheless, I am not persuaded by the submission of Mr. Shayo that it goes to the root of the jurisdiction of the High Court because from the submission, the counsel for the applicant failed to show how failure to notify parties on the date of the delivery of the ruling goes to the root of the jurisdiction of the trial court. Instead, Mr. Shayo contended that such failure invalidated the ruling which I am settled in my mind that such argument does not amount to illegality. Neither was it of sufficient importance worthy for consideration by the Court - see: Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania (supra). Hence, I am satisfied that this ground does not amount to good cause. In the end, taking into consideration the circumstances pertaining in the current application, it is my finding that the applicant failed to advance good cause for the Court to exercise the discretionary power to grant the sought extension of time. This application is devoid of any merit and the same is dismissed with costs. It is so ordered. DATED at DAR ES SALAAM this 5th day of May, 2023. B. M. A. SEHEL JUSTICE OF APPEAL The Ruling delivered this 10th day of May, 2023 in the presence of Mrs. Benadetha Shayo, learned counsel for the applicant and the respondent appeared in person, is hereby certified as a true copy of the original. 13

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