

TANZANIA / JUDGMENT

20170322 TZHC Dar es Salaam2

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IN THE HIGH COURT OF TANZANIA (DAR ES SALAAM DISTRICT REGISTRY) AT DAR ES SALAAM
 MISC. CIVIL APPLICATION NO. 541 OF 2016 (From District Court of Ilala at Samora in Civil
 Appeal No. 36 of 2014 originating from Buguruni Primary Court in Civil Case No. 216 of 2012
 before F. Haule - RM) PILI MOHAMED CHAWA APPLICANT VERSUS
 KONDO ATHUMANI ■ II ■■■■ ■ ii ■ ■ ... ■ .RESPONDENT • I I I . I

RULING

MKASIMONGWA, J. This is an application for extension of time in which to file an appeal. The Application is by way of Chamber Summons filed - under the provisions of Section 25 (1) of the Magistrates Courts Act [Cap. 11 R.E. 2002], Rule 3 of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules, G.N. No. 312 of 1964 and any other enabling provision of the law and it is supported by the Affidavit of PILI MOHAMED CHAWA (Appellant). The Application is opposed by the Respondent one KONDO ATHUMAN MOHAMED through his counter affidavit filed in court. On 20/10/2016 the court ordered that the matter be disposed of by way of written submissions. It set a schedule for filing the submissions which schedule was complied with by the Applicant and the Respondent delayed for a day. Whereas the applicant is represented by Mr. Hezron Jimson Mwankenja, learned advocate, 1 ,.. and the latter's colleague, Mr. Mutongore, advocate, represents the Respondent. The facts of the case are as short as that, the applicant did appeal to the District Court of Ilala at Samora (Civil Appeal No. 36 of 2014) against the decision of Buguruni Primary Court in Probate and Administration of Estate Cause No. 216/2012. The Appeal was not successful and it was dismissed with costs on 26/2/2012. As she was aggrieved by the decision of the District Court, the Applicant appealed to this court (PC. Civil Appeal No. 32 of 2015). Again the Appeal was not successful. It was struck out for having been filed out of time without leave of the Court. She again came to the court with an application for extension of time in which to file an appeal. The Application (Misc. Civil Application No. 38 of 2016) was but, struck out by the Court for being improperly attested. Her latter application for the same relief was withdrawn for purposes of altering the title and the provisions of laws cited. The matter was withdrawn with leave to re-file it hence this application now at hand. In his submission Mr. Mwankenja did rightly urge the court to consider whether the Applicant has adduced a good and sufficient cause which can drive the court to use its discretionary powers to issue the order sought by the Applicant. This is derived 2 from the decisions of the courts in the cases of PATNAM VS CUMARASAMY AND ANOTHER (1964) 3 ALL ER 933 and THE REGIONAL

MANAGER TANROADS KAGERA VS. RUAHA CONCRETE COMPANY LIMITED, Civil Application No. 96 of 2007 (CAT). Mr. Mwankenja referred the court to the contents of paragraphs 10 and 11 of the applicant's affidavit which give according to him, a good and sufficient cause or material caused the Applicant to delay in filing an appeal within the prescribed time. He mentioned the reasons as being sickness and that the Applicant alleges illegality of the decision contested which according to the decision in the case of PRINCIPAL SECRETARY, MINISTRY OF DEFENCE AND NATIONAL SERVICE VS DEVRAM VALAMBHIA (1992) TLR 182 constitutes a sufficient cause that warrants the court to grant extension of time. Mr. Mwankenja also stated that in paragraphs 3, 4, 5, 6, 7, 8 and 9 of the Affidavit filed in support of the chamber summons the Applicant exhibits on how she was diligent on prosecuting the application. This saves the purpose of the guidelines given by our supreme court, the Court of Appeal of Tanzania in the Case of LYAMUYA CONSTRUCTION COMPANY LTD VS BOARD OF REGISTERED TRUSTEES OF YOUNG WOMEN CHRISTIAN 3 . ASSOCIATION OF TANZANIA, that in an application for extension of time, the Applicant must account for all the period of delay. In that premises Mr. Mwankenja, advocate, prays the court that it grants the order for extension of time in which to file appeal to this court against the decision and orders of the District Court of Ilala at Samora in Civil Appeal No. 36 of 2014. He also prays for costs and any other order that the court may deem fit and just to grant. On the other hand, Mr. Mutongore, (Advocate) does not dispute that Rule 3 of the Civil Procedure (Appeal & Proceedings Originating in Primary Court) Rules, G.N. 312 of 1964, cited by the Applicant supports this application. He added that the application is not accompanied by the grounds of the Petition of Appeal as the law requires. Mr. Mutongore submitted that, since the Applicant did not accompany the grounds of objection to the decision or order as the rule above provides, the court cannot consider this application. Mr. Mutongore also considered the so said good and sufficient cause or material which can warrant the court to exercise its discretion and submitted that the attached hospital chit does not tally with the contents of paragraph 10 of the Applicant's Affidavit that her health was drastically deteriorating. 4 The Annexure "A" is the Out Patient Prescription Card dated 13/3/2015. It was a one day event, obtained before expiry of the appeal period. It should not therefore be accorded with weight of any kind. As to the illness reason, Mr. Mutongore prays the court that it dismisses the Application with costs for want of merit. Regarding to the illegality of the decision challenged, Mr. Mutongore contended that there is no elaboration given by the applicant to show how the courts below erred in appointing an improper administrator of the estate of the deceased as alleged. The District Court did not conduct the Probate proceedings. It only upheld the decision of the Trial Primary Court He distinguished the case of VALAMBHIA (supra) with this now at hand by showing that the issue of appointing an administrator is not a pure point of law but, it is an issue of evidence depending on how the appointment of the Respondent was arrived at. The Applicant had consented to the appointment by withdrawing the objection she had raised. The contents of paragraph 11 of the affidavit of the Applicant do not have good and sufficient reasons for this court to grant extension of time to the Applicant to file an appeal out of time. Mr. Mutongore prays the court that it finds there are neither good sufficient reasons for the inordinate delay nor a point of law 5 that renders the court to grant this application. The same should therefore be dismissed with costs. In a short rejoinder Mr. Mwankenja after passing through various authorities and upon finding that there

was a delay of a day in filing the Respondents submission prayed the court to expunge from the record the written submissions of the Respondent for it was filed outside the time scheduled on 28/10/2016 and it was so done without leave of the court. Alternatively, Mr. Mwankenja maintains that the sufficient reasons warranting this court to employ its discretionary power to grant an order for extension of time to file appeal out of time have been pegged under paragraphs 10 and 11 of the Applicant's affidavit which according to the decision of the Court of Appeal of Tanzania in REGISTERED TRUSTEES ARCHDIOCESE OF DAR ES SALAAM VS THE CHAIRMAN BUNJU VILLAGE GOVERNMENT AND OTHERS, Civil Appeal No 147 of 2006 case the submissions are not evidence. Mr. Mwankenja also contended that his learned brother, Mr. Mutongore, Advocate challenges the provisions of the law cited. He does so in his own and unrecognized form for the objection ought to have been brought on the earliest stage by way of notice of the Preliminary Objection save for objections based on 6. the jurisdiction of the court. Mr. Mwankenja referred to the decisions in the cases of FORTUNATUS MASHA VS WILLIAM SHIJA AND ANOTHER (19927) TLR. 41 and ARCADO DENNIS NTAGAZWA VS BUYOGERA JULIUS BUGANDO, CIVIL APPEAL NO. 51 OF 1996 (CAT) and contended that the use of the word "shall" in the statute does not in every case make the provision mandatory. It depends on the circumstances of each case. He reiterates the prayer that the application be granted. That is all from the parties. As stated this is an application for extension of time. It is brought by way of a chamber summons supported by the Applicants own affidavit. The chamber summons is filed in terms of Section 25 (1) (b) of the Magistrates Court Act and Rule 3 of the Civil Procedure (Appeal in Proceedings Originated in Primary Court) Rules, G.N. 312 of 1964. Section 25 (1) (b) of the Magistrates Courts Act provides for 30 days period of limitation for one aggrieved by the decision or order of a District Court in the exercise of its appellate or revision jurisdiction, to appeal to the High Court. The provisions also vests powers on the High to extend the time for filing an appeal either before or after such period of 30 days has expired. Whereas this provision provides for the right of appeal and for powers of the High Court to extend time in which one may appeal to the High Court against the decision of or order of the district court in its appellate or revision jurisdiction, Rule 3 of the Civil Procedure (Appeals in Proceedings Originated in Primary Court) Rules, G.N 312 of 1964 provides for the procedure to be applied when one applies for leave to appeal out of time to a district court from a decision or order of a primary court or to the High Court from the decision or order of district court in the exercise of its appellate or revisional jurisdiction. According to this provision of the law, an application for extension of time in which to appeal shall be in writing and shall set out the reasons why a petition of appeal was not or cannot be filed within thirty days after the date of the decision or order against which it is deserved to appeal. The Application shall also be accompanied by the petition of the appeal, or shall set out the grounds of objections to the decision or order. I have attentively gone through the chamber summons and the supporting affidavit and it is clear that the application is made in wanting. According to the supporting affidavit, it sets out the reasons why the Petition of Appeal was not filed within 30 days, of the decision. Conspicuously the application has not been accompanied by the Petition of Appeal nor does it set out the grounds for objection to the decision or order. I agree with Mr. 8., Mwankenja and as it was held in the Case of ARCADO DENNIS NTAGAZWA (Supra) that:- "... The use of the word 'shall' does not in every case make the provision mandatory. Whether the case of that word

has such effect will depend on the circumstances of each case'~ I have considered the Rule, and I am not convinced that in an application for extension of time under it oral applications are acceptable. I am also not convinced that in an application for extension of time non-setting out the reasons why a petition of · appeal was not or cannot be filed within 30 day after the decision or order against which it is desired to appeal is acceptable. From that flow of legal requirement it cannot be held from the wording of the Rule that it is in the discretion of the Applicant to accompany the application for extension of time with the petition of appeal or set out the grounds of objection to the decision or order. The wording and the circumstances here lead the court in finding that the use of the word "shall" in Rule 3 of the Civil Procedure (Appeals and Proceedings Originating in Primary Court) Rules, G.N. No. 312 of 1964 makes that provision mandatory. Failure to comply with the rule, therefore, renders the application incomplete. I agree with Mr. Mwankenja that this issue ought to 9 have been raised at the early stage. He but agrees that any issue that touches the jurisdiction of _the court may be raised at any stage of the matter. The issue at hand essentially involves whether the court has been properly moved. Where the court is not properly moved, that is an issue of the jurisdiction of the court for it attracts for a question whether it has powers of or not of any kind to deal with the matter. All in all I find merit on the point and form opinion that the court was not properly moved. The Application is therefore 'j incompetent and the same is accordingly struck out with costs. Dated it Dar es Salaam this 22 nd of March, 2017. E.JQs~a JUDGE 22/03/2017 10 ll, Court: Ruling is delivered in Chambers in the presence of Mr. Mwankenja and Mr. Mutongore, advocates and their respective clients. Right of Appeal is explained. E. J. wa JUDGE 22/03/2017 11

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