

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MWANZA

AT MWANZA

MISC. CIVIL APPLICATION NO. 148 OF 2022

(Arising from the ruling of this court in probate and administration cause number 6 of 2017)

SHANTILAL KANJI KOTECHA APPLICANT

VISHAL RESIKLAL KOTECHA RESPONDENT

RULING

28th April & 2nd May, 2023

ITEMBA, J

Before me is an application for extension of time to lodge an appeal against the decision of this court, in probate and administration cause no. 6 of 2017. The application has been preferred under section 11(1) of the Appellate Jurisdiction Act (CAP 141 R.E 2019) and any other enabling law and it is premised on the affidavit of the applicant Shantilal Kanji Kotecha. Mr. Sekundi B. Sekundi deposed a counter affidavit on behalf of the respondent.

At the hearing, both parties were present in person and they were represented by learned counsels Messr. James Njelwa and Sekundi B. Sekundi for the applicant and respondent respectively.

The facts giving background of the application can be narrated as follows:-

That, the applicant was the objector in probate and administration cause number 6 of 2017. The Respondent instituted the above mentioned probate and administration cause number 6 of 2017 claiming to be appointed as an administrator of the estate of the late RASIKLAL KANJI KOTTECHA. That, after hearing of the objection raised by the applicant, this court through a ruling dated 10th April,2019, dismissed the said objection and appointed the respondent as an administrator of the estate of the late RASIKLAL KANJI KOTTECHA.

That, the applicant was aggrieved with the above mentioned, ruling and decided to lodge notice of appeal to the court of appeal within time required by the law on 6th May, 2019.

That, after the notice of appeal was lodged within time, the applicant processed his appeal and lodged the same to the Court of Appeal, Mwanza Registry. That, when the appeal was called on for hearing, on 6/12/2022 the respondent stated that there are some documents which were not served to them. That, on the same day, in the cause of

hearing it was discovered by the court that the notice of appeal was not served to another party who was directly affected by this appeal, consequently the appeal was found to be incompetent for failure to comply such a requirement. That, upon findings that the appeal was incompetent as explained above, there was no other option than to struck out his appeal.

That, after that ruling the applicant immediately started to prepare this application by searching for new advocate, as following an order to strike out the appeal, automatically the applicant's notice of appeal filed on 6th May, 2019 as well suffered natural death thus, became of no essence, which could not support any appeal, hence necessitates filing a fresh Notice of Appeal.

That, the applicant is highly aggrieved by the said decision in **Land Case No. 23 of 2009** and still intends to appeal to the Court of Appeal of Tanzania which appeal can only be instituted upon filing a Notice of Appeal. And, that the decision to be challenged by the applicant has serious legal issues to be determined by Court of Appeal on the issue of validity of the will.

That, upon realizing that he is out of time, he filed this application for extension time to file the notice of appeal. That, the delay was not due to negligence or dilatory conduct on his party rather it occasioned on technical reasons.

The respondent objected the application stating that the applicant affidavit is full of lies and that the application before the Court of Appeal was already out of time.

Section 11(1) of The Appellate Jurisdiction Act (CAP 141 R.E 2019) provides as follows:

'(11) Subject to subsection (2), the High Court or, where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned, may extend the time for giving notice of intention to appeal from a judgment of the High Court or of the subordinate court concerned, for making an application for leave to appeal or for a certificate that the case is a fit case for appeal, notwithstanding that the time for giving the notice or making the application has already expired.'

Having duly considered the submissions in line with the relevant affidavit and counter affidavit and the provision of section 11(1) the Act, the question which I have to answer is whether a good cause has been demonstrated to justify the grant of extension of time. As I understand, good cause relates to the events beyond the applicants' control and which prevent them from filing the appeal within prescribed time. And, it is important that the applicant account for each day of delay. See for example **VIP Engineering and Marketing Limited and another v Citibank Tanzania Limited**, Consolidated Civil Reference no. 6,7 and 8 of 2006 (unreported).

Gathering from the parties, while the respondent opposes the application for the reasons that the appeal by the applicant filed before the Court of Appeal was out of time, the applicant insist that the appeal was struck out because the respondent was not served.

I have gone through the applicant's affidavit and the annexures thereof and they reveal that the impugned ruling was issued by Hon. Judge Rumanyika on 10th of April 2019, **(KTC1)**. The applicant filed his notice of appeal to the Court of Appeal on 6th of May 2019, **(KTC 2)**. The

respondent raised a notice of preliminary objection for want of service of notice and application letter for proceedings to the respondent and that these omissions render the appeal time barred. **(KTC3)**. There is also an order of the Court of Appeal dated 6th December 2022, **(KTC4)** to the effect that the applicants' appeal is struck out following his concession. The reasons for striking out are as quoted hereunder;

'On our part, we accede to the uncontested prayer taking into account consideration that for failure to serve the other party the notice of appeal and the letter applying for the proceedings render the matter time barred. The only remedy is to struck it out, as we accordingly do with no order as to costs.'

Therefore, the grounds for application raised by the applicant are true as opposed to what the respondent is stating. It is in record that the applicant filed this application on 22/12/2022. This was 16 days after the Court of Appeal decision was issued. The applicant, in his submission states that he was seeking legal advice and preparing the application during this

time. Therefore, the delay is only 16 days and it is well accounted for. I do not find it inordinate. Whether the former appeal was filed out of time or not, so long as it was struck out, its effect is that the said appeal does not exist and this court cannot refer to it in making its decision. The important aspect is for the applicant to show the good cause and account for the delay. As explained above the applicant has clearly demonstrated that this is a technical delay because between 6/5/2019 when the notice was filed and 6/12/2022 when the appeal was struck out, the appeal was before the Court of Appeal pending hearing. This time has to be omitted from counting the period for delay. Between 6/12/2022 and 22/12/2022 when this appeal was filed there are 16 days which are accounted for.

I will now consider the application in relation to the ground of illegality. It is a settled principle of law that an extension of time can be granted on the sole ground of illegality. This is according to the celebrated case of the **Principal Secretary, Ministry of Defence and national Service v Dervan Valambia** (1992) TLR 185 where it was held:

"We think that where, as here, the point of law at issue is the illegality or otherwise of the decision being challenged, that is of sufficient importance

to constitute 'sufficient reason' within the meaning of the Rules for extending time. To hold otherwise would amount to permitting a decision, which in law might not exist, to stand. In the context of the present case this would amount to allowing the garnishee order to remain on record and to be enforced even though it might very well turn out that order is, in fact a nullity and does not exist in law. That would not be in keeping with the role of this Court whose primary duty is to uphold the rule of law".

The principle of illegality demonstrated in the applicant's submission is that the application to appoint the respondent as an administrator filed before the High Court, was defective because it was not supported with the consent of heirs, an omission which contravenes rules 71 and 72 of the Probate and Administration of Estate Rules. The respondent's counsel opposed this ground by stating that the heirs actually consented and that is supported by the court records at page 20. Respectfully, I am unable to agree to his view. I could not trace the said court records and the respondent's counsel was not clear on the case number of the said court record it was not easy for the court to know whether the said consent

exists or not. It is apt to give the benefit of doubt to the applicant that there was no consent so that both parties will have a day before the court to substantiate on that matter. This ground, on the face of it demonstrate an issue of illegality in respect of **Valambya's** case and it justifies an extension of time so that the said illegality is not left on court records.

In the premises, I hereby do, grant the application. As, a result, extension of time within which to lodge an appeal against the decision of this court in Probate and administration cause no. 6 of 2017 is hereby granted. The appeal should be lodged within thirty (30) days from the date of the issuance of this ruling. Cost to follow the events.

Order accordingly.

DATED at MWANZA this 2nd day of May 2023.


L. J. ITEMBA
JUDGE



Ruling delivered in chamber in the presence of both parties in persons, Advocate James Njelwa for Applicant, Advocate Sekundi B. Sekundi for Respondent and Mnjari, G. (RMA)

A handwritten signature in blue ink, appearing to read 'L. J. Itemba', is centered on the page. The signature is written in a cursive style with a vertical line through the middle.

**L. J ITEMBA
JUDGE
2/5/2023**