

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**CORAM: MUNUO, J.A. KAJI, J.A. AND KIMARO, J.A.)**

**CIVIL APPEAL NO. 1 OF 2002**

**1. YUSUFU SAME  
2. HAWA DADA ..... APPELLANTS  
                                    VERSUS**

**HADIJA YUSUFU ..... RESPONDENT**

**(Appeal from the Ruling and Order of the  
High Court of Tanzania at Dar es Salaam)**

**(Kalegeya, J.)**

**dated the 18<sup>th</sup> day of June, 1998**

**in**

**Civil Appeal No. 38 of 1996**

**JUDGMENT OF THE COURT**

**28 August & 20 October 2006**

**KAJI, J.A.:**

In this appeal, Yusuf A. Same and Hawa Dada, who are the first and second appellants respectively, are appealing against the decision of the High Court at Dar es Salaam (Kalegeya J.) in Civil Appeal No. 38 of 1996 in which the respondent, Hadija Yusuf, was granted extension of time within which to apply for leave to appeal to

this Court against the decision of Msumi J. (as he then was) dated 1.8.1996.

For easy appreciation of the sequence of events leading to this matter, we think it is desirable to outline briefly the historical background of the case.

The respondent was the wife of one Juma Abdallah Samanya who died interstate at Moshi on 14.1.1979. The record is not clear whether the respondent was the sole wife of the deceased at the time when the deceased died. But what is clear is that, apart from the respondent, the deceased was also survived by some children who included Haruna Juma Abdallah and Abdallah Juma Abdallah. It would appear these two were adults.

The deceased left some landed properties in Dar es Salaam which included house No. 44 situate on Plot No. 9 Block 33 Mafia Street, Kariakoo area, the subject matter in the case.

In 1981 Haruna Juma Abdallah applied at Kariakoo Primary Court to be appointed the administrator of the deceased estate. His petition was granted, and on 4.8.1981 Haruna was appointed the

administrator. But before his appointment, on 6.7.1981, jointly with Abdallah Juma Abdallah, they sold the house to Omar Mansour and Salimini Saidi. In 1986 Omar and Salimini sold the house to the appellants. It would appear the respondent was not aware of what was going on.

When she got the wind about the sale she filed in the High Court at Dar es Salaam Probate Cause No. 64 of either 1991 or 1992 praying to be appointed the administratrix of the estate. The court appointed her the administratrix, apparently unaware of the previous appointment of Haruna by Kariakoo Primary Court.

In 1993 the respondent instituted Civil Case No. 139 of 1993 in the Resident Magistrate's Court at Kisumu claiming for various claims over the house against the appellants. She was successful. The appellants successfully appealed to the High Court. The court (Msumi J.) exercising the inherent powers of the court under Section 95 of the Civil Procedure Code set aside the appointment of the respondent by the High Court as the administratrix of the estate. The learned judge was also of the view that both High Court Probate No. 64 of 1991 @ 1992 and Civil Case No. 139 of 1993 of the

Resident Magistrate's Court at Kisumu were time barred when they were instituted.

The respondent was dissatisfied. On 24.10.1996 she applied for leave to appeal to the Court. On 29.11.1996 the High Court (Bahati J.) dismissed the application for being time barred. On 3.1.1997 the respondent applied for extension of time within which to apply for leave to appeal to the Court. The High Court (Kalegeya J.) granted the application as presented, mainly on the ground that the delay was with sufficient cause, and that the intended appeal had overwhelming chances of success. The appellants were dissatisfied, hence this appeal.

Before us the appellants were represented by Mr. Kalolo, learned counsel from M/s Ismail and Company (Advocates) who preferred the following grounds of appeal.

1. That the trial judge erred in law in extending time to apply for leave to appeal.
2. That the trial judge erred in fact and in law in holding that there were sufficient reasons for granting extension of time.

3. That the trial judge erred in law in failing to consider whether there were sufficient reasons advanced by the respondent for her delay in applying for leave to appeal.
4. That the trial court erred generally in granting the application for extension of time.

Basically, all these boil down to one broad ground of appeal, that is, the grounds for delay as presented by the respondent were not sufficient to move the High Court to exercise its discretionary powers to extend time. Mr. Kalolo contended that, one ground for the delay was that the respondent's counsel, one Lyasenga, had mistakenly believed that time started running from the date when he received the necessary papers for applying for leave, instead of the date of the decision intended to be appealed against. The learned counsel pointed out that this amounted to ignorance by the counsel which is not a sufficient ground for extension.

Another ground for the delay was that the respondent was financially handicapped. This, the learned counsel observed, is not sufficient ground. The respondent had also maintained that much time was spent shuttling between Moshi and Dar es Salaam, and that a court clerk had told her she would only be able to file her application for

leave after obtaining copies of proceedings and judgment. Mr. Kalolo contended that this was not substantiated as there was no affidavit by the alleged clerk whose name was not disclosed. Mr. Kalolo further contended that, the respondent's application was dismissed by Bahati J. on 29.11.1996 and yet she did not apply for extension of time till on 3.1.1997. In his view this depicts lack of diligence by the respondent which is not sufficient ground for extending time. Another ground for extending time was that the intended appeal had overwhelming chances of success. Mr. Kalolo observed that the intended appeal has no chances of success because the matter before the trial court and the Probate Cause in the High Court were time barred as observed by Msumi J. The learned counsel concluded with a remark that the learned judge (Kalegeya J.) was probably moved by sympathy on the respondent which also is not sufficient ground for extension of time.

Responding to these submissions Mr. Kariwa, learned counsel for the respondent, conceded that ignorance by a counsel is not a sufficient ground for extending time. But he was quick to point out that in the instant case, there were many factors which the learned judge (Kalegeya J.) considered, the totality of which amount to

sufficient reasons. The learned counsel cited the relevant parts in the ruling. The learned counsel observed that the intended appeal has overwhelming chances of success because, in his view, the appointment of Haruna as the administrator of the estate of the deceased did not mean he was granted ownership of the deceased's properties to the exclusion of other heirs who included the respondent, the widow. The learned counsel contended that, time limitation is one of the issues posed to be canvassed in the intended appeal. The learned counsel denied any negligence by the respondent.

It is trite law that an application for extension of time is entirely in the discretion of the court to grant or refuse it. This discretion however has to be exercised judicially and the overriding consideration is that there must be sufficient cause for so doing. What amounts to "sufficient cause" has not been defined. From decided cases a number of factors have to be taken into account, including whether or not the application has been brought promptly; the absence of any or valid explanation for the delay; lack of diligence on the part of the applicant (See **Dar es Salaam City Council v. Jayantilal P. Rajani** – CAT Civil Application No. 27 of

1987 (unreported), and **Tanga Cement Company Limited v. Jumanne D. Masangwa and Amos A. Mwalwanda** – Civil Application NO. 6 of 2001 (unreported)

In the instant case it is common ground that the decision which is intended to be appealed against was delivered on 1.8.1996. It is also common ground that on 24.10.1996 the respondent, through her advocate on legal aid, filed an application for leave to appeal to the Court. Obviously this contravened the requirement of Rule 43 (a) of the Court of Appeal Rules, 1979 which limits the period for so doing to 14 days of the date of the decision intended to be appealed against. It was about two months out of time. This was caused by the respondent's counsel at that time who mistakenly believed that time started running from 15.10.1996 when he received the necessary documents. Generally speaking, an error made by an advocate through negligence or lack of diligence is not sufficient cause for extension of time. This has been held in numerous decisions of the Court and other similar jurisdictions. Some were cited by the appellants' advocate in his oral submission. But there are times, depending on the overall circumstances surrounding the case, where extension of time may be granted even where there is



some element of negligence by the applicant's advocate as was held by a Single Judge of the Court (Mfalila JA as he then was) in **Felix Tumbo Kisima v. TTC Limited and Another** – CAT Civil Application No. 1 of 1997 (unreported).

It should be observed that the term "sufficient cause" should not be interpreted narrowly but should be given a wide interpretation to encompass all reasons or causes which are outside the applicant's power to control or influence resulting in delay in taking any necessary step.

In the Instant case the respondent had done all that she could, leaving the matter to the hands of her advocate who had been assigned to her on legal aid. In the circumstances, while accepting that there were some elements of negligence by her counsel, in the circumstances of the case, we join hands with our learned brother Mfalila JA in the case cited supra, and hold that the learned counsel's negligence constituted sufficient reason for delaying in lodging the appeal between 1.8.1996 and 24.10.1996.

As for the period from 29.11.1996 when the application for leave was dismissed by Bahati J. up to 3.1.1997 when the application leading to this appeal was lodged, the explanation by the respondent

is based mainly on her numerous shuttles between Dar es Salaam where the court records were and Moshi where her counsel was based, coupled with poverty. We are aware that financial constraint is not sufficient ground for extension of time. See **Zabitis Kawuka v. Abdul Karim** (EACA) Civil Appeal No. 18 of 1937. But in the circumstances of this case at hand, where the respondent was a widow, depending on legal aid, her plea of financial constraint cannot be held to be insignificant.

Like the learned judge of the High Court (Kalegeya J.) we are satisfied that the delay from 29.11.1996 to 3.1.1997, about one month and five days, was with sufficient cause.

On whether the intended appeal has overwhelming chances of success, we think we are not in a position to comment at this stage with the limited information availed to us. We have seen the issues which the respondent intends to argue before the Court. They are as follows:

- (i) Whether there has been a legal disposition of Plot No. 9 Block 33 House No. 33 (sic) at Mafia Street, Kariakoo, Dar es Salaam, to the respondents (now appellants);

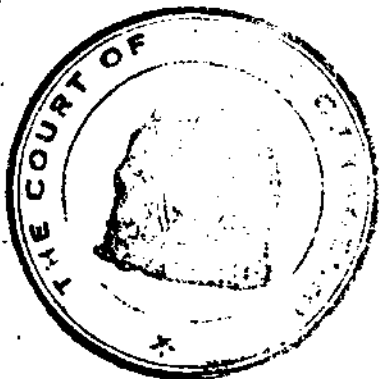
- (ii) Whether there could be any disposition of the said suit property by any person other than the holder of the Right of Occupancy, and if dead, whether any person could dispose it off in the absence of Letters of Probate and Administration granted by a court with competent jurisdiction;
- (iii) Whether there was any issue involving the law of limitation;
- (iv) Whether there was no point of misdirection and non-direction by the High Court;
- (v) Whether there was any prior application for Letters of Probate and Administration at Kariakoo Primary Court subsequent (sic) to Probate Cause No. 64/1993 (sic) by the applicant (now respondent) at the High Court in the absence of any reference of the same or record of the same during the trial of Civil Case No. 139/1993 at the Resident Magistrate's Court at Kivukoni (sic);
- (vi) Whether a revocation of consent of a purported application of transfer of a grant is not quite appropriate if based on fraud.

We cannot speculate what the Court will decide on these issues. But we can only remark in passing that the issue of time limitation is an uphill track for the respondent, in view of sections 3 (1), 9 (1) and 35 of the Law of Limitation cited by Msumi J. in his judgment.

Since we have been of the view that the delay was with sufficient cause for the reasons stated, this appeal is bound to fail.

In the event, and for the reasons stated we dismiss the appeal with costs.

DATED at DAR ES SALAAM this 19th day of October, 2006.



E.N. MUNUO  
**JUSTICE OF APPEAL**

S.N. KAJI  
**JUSTICE OF APPEAL**

N.P. KIMARO  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.

  
( S.M. RUMANYIKA )  
**DEPUTY REGISTRAR**