

IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL REVISION NO 145 OF 2000

MOSES MASANJA.....APPLICANT

VERSUS

ELIZABETH JULIUS CHANZI )  
VERONICA K. MAHIGA ) .....RESPONDENTS

RULING

MASSATI, J

In Civil Case No 158 of 1998 at the Kisutu Resident Magistrate Court one Moses Masanja obtained an ex parte judgment ~~against~~ Elizabeth J Chanzi and Veronica T. Mahiga the Respondents in the current application. That ex parte judgment was set aside by Chipeta J, in a revisional Order which was delivered to the parties on 17/5/2001.

On 23/5/2003 the Administrator of the Estate of Moses Massanja filed on application for leave to appeal to the Court of Appeal out of time. He is represented by Mr Herbert Nyange, learned counsel, who also took out an affidavit in support of the application. The application is opposed by the Respondents through the services of Mr Maira learned Counsel who also filed on affidavit to oppose the application. Mr Maira also objected to the conduct of the proceedings without joining the proper administratrix of the estate of Moses Masanja. whereupon Mr Nyange applied and was granted leave to file an amended affidavit. On 22/7/2003. Mr Nyange, learned counsel again filed an application for extension of time within which to join Miss Agnes <sup>Ndagala</sup> ~~Ndagala~~ Masanja, the administratrix of the estate of Moses Masanja in the proceedings. This followed the withdrawal of the <sup>earlier</sup> application on 22/7/2003. The last pleading in respect of this application was to be filed by Mr Nyange, by 10/10/2003. On 13/10/2003 the application could not be heard as Mr Nyange learned Counsel informed the court that he had some pressing engagements in criminal sessions before Mwaikugile J. It was therefore agreed that this application be argued by written submissions in the following order.

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- (i) Applicant: by 21/11/2003
- (ii) Respondent by 10/12/2003
- (iii) Rejoinder (if any) 19/12/2003.

Both the counsels have filed their respective submissions in chief but Mr Nyange has not filed a rejoinder, which I take it to mean that he does not wish to file one.

Mr Nyange learned counsel for applicant submitted that (upon) the demise of Moses Masanja the registered owner of the suit premises, John William Nzile Masanja was appointed by Kawe Primary Court in probate case no 27/97 to be the administrator of the estate by which time the Applicant Agnes Ndagala Masanja was 14. The said John William Nzila Masanja also expired. It is not however indicated when did he die. He submitted that after the death of John William Nzile Masanja the wife of Moses Masanja Evelyn Tumpele Masanja the Applicant's mother took over the administration of the estate of Moses Masanja on behalf of her minor children. Mr Nyange however does not mention which court appointed Mrs Evelyn Masanja to be the administratrix. I therefore find and hold that Mrs Evelyn Masanja was not appointed by any court of law as such administratrix.

Be that as it may, Mr Nyange went on to submit that Mrs Evelyn Masanja expired in August 2002. Upon her death the Applicant Agnes Ndagala Massanja applied for letters of administration at Kawe Primary Court who granted the same on 16/7/2003. He therefore submitted that since the present application was filed on 21/7/2003 the application was timeous. According to him time began to run <sup>Uniform</sup> the date of the appointment of the administrator and that according to item 16 part iii of the 1st Schedule to the Law of Limitation Act 1971 the prescribed period is 90 days. In the alternative Mr Nyange submitted that the provision only applies to suits and appeals and not to applications as in the present matter. On the question whether or not it was proper to join the current administratrix of the estate to the proceedings as the title to the suit property had already passed over to one Vastity Burge albeit fraudulently, Mr Nyange submitted that the allegations of fraud were serious that had to be proved strictly. and that <sup>since</sup> Vastly Burge was not a party a case has been made out for the joinder of an administratrix of the estate to represent the estate against these accusations.

He therefore prayed that the application be granted.

On the other hand Mr Maira learned Counsel for the Respondent strenuously opposed the application; He described the process as an abuse of Court process. He submitted that since the <sup>administratrix</sup> of the estate of Moses Masanja was placed in the hands of John William Nzila Masanja he should be ~~answerable~~ to the estate as far as the suit premises are Concerned notwithstanding his death. He therefore submitted that the death of Mrs Evelyn Masanja was of <sup>no</sup> consequence in law. upon the suit property as all the <sup>transactions</sup> she carried in respect of the suit property were of no effect. He further submitted that the title of Moses Masanja to the suit property was lawfully revoked and so it is no longer part of the estate of Moses Masanja. After the said revocation the Respondents were granted the right of occupancy. By extension according to Mr Maira since the suit property is no longer part of the estate it was no good to join the <sup>administratrix</sup> of the estate in the proceedings. <sup>Furthermore</sup> Mr Maira submitted that the application was time barred and no reason has been advanced for enlargement of time. By virtue of S 3 of the Law of Limitation Act the application ought therefore to be dismissed with costs.

From the pleadings and submissions of parties four issues have to be resolved in this matter.

- (i) When does time begin to run against an administrator of the estate who wishes to be joined in the proceedings already in Court?
- (ii) What is the prescribed period of <sup>limitation</sup> for an application to be joined in a proceeding such as the current one, <sup>id est</sup> an application for revision?
- (iii) Whether it is proper to join the administratrix in the proceedings where the suit property has already passed hands out of the estate?
- (iv) Whether the Court has jurisdiction to extend time?

There is no doubt that the original plaintiff Moses Masanja died on 11/3/97. By which time, he had already obtained a decree against the Respondents which was granted by the Kisumu RM'S Court on 18/5/94. There is also no dispute that John William Nzila Masanja was appointed administrator of the estate of Moses Masanja in 1997 and that there is also no dispute that Mrs Evelyn Massanja, herself deceased, was not appointed officially to administer the estate of Moses Masanja

Lastly there is on record that the Applicant Agnes Ndagula Masanja was appointed to administer the estate of Moses Masanja on 16/7/2003. This was more than 6 years from the date of the death of Moses Masanja. She now wants this court to permit her to be substituted as a party in the present proceedings. The application is made under Order XXII rule 3(i) and Section 95 of the Civil Procedure Code and item 16 part iii of the 1st schedule to and section 14(1) of the law of limitation Act 1971.

It is true that in terms of item 16 part 111 of the 1st Schedule to the law of limitation Act the prescribed period for an application to join a legal representative as a party is 90 days. However there is neither a suit nor an appeal in the present case. The applicant seeks to be joined as a party in the present revision proceedings. In my view item 16 of party III to the 1st Schedule to the law of limitation Act 1971 does not apply. Instead, in my view the period of limitation in such an application is 60 days.

The next question is when does time begin to run? Mr Maira learned Counsel did not specifically address the Court on this issue but Mr Nyange learned counsel seems to be of the view that time begins to run from the date of obtaining letters of administration. In DHAVESVAR V. MEHTA M. SHAH (1965) E.A. 321 the Eastern Court of Appeal sitting in an appeal from the supreme court of Kenya was of the view that an application by legal representative of a sole plaintiff should be made within 6 months from the date of the death of the deceased. I think this is sound law and I adopt it. This means that time within which to apply for letters of administration began to run from the 11/3/97 when Moses Masanja expired. On the face of it therefore the Applicant who filed this application on 21/7/2003 is more than 6 months and is therefore out of time.

Can this court extend time within which to file the application. This is what Mr Nyange learned counsel has applied for under S 14 of the law of limitation Act 1971. Mr Maira learned counsel simply reiterated that the application was time barred and as such this court had no jurisdiction to entertain it.

As I pointed out above, It is true that the application has been filed 6 years after the death of Moses Masanja instead of the 60 days which I held above, as the period of limitation.

I have no doubt in my mind that under section 14 of the law of limitation Act and Section 93 of the Civil procedure Code 1966 this court has jurisdiction to enlarge time for the institution of an application or appeal given any reasonable or sufficient cause. However in OSMAN V THE UNITED INDIA FIRE AND GENERAL INSURANCE COMPANY LTD (1968)E.A. 102 the Eastern African Court of Appeal in a case from Tanganyika interpreting sections 3 and 5 of the Indian Limitation Act 1908 and Order 22 rule 4 of the Civil procedure Code held.

"It was not open to the court to extend the period of limitation.

But in that case the court was <sup>interpreting</sup> section 5 of the Indian law of limitation Act 1908 which reads.

5: Any appeal or application for review of judgment or for leave to appeal or any other application to which this section may be made applicable by or under <sup>any enactment</sup> ~~any enactment~~ for the time being in force may be <sup>admitted</sup> ~~admitted~~ after the period of limitation prescribed therefore when the appellant or applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

This section is the equivalent of section 14(1) of the law of Limitation Act 1971 which governs the current situation. That section reads.

14(1) Notwithstanding the provisions of this Act the court may from any reasonable or <sup>sufficient cause</sup> ~~sufficient cause~~ extend the period of <sup>institution of appeal or an application other than</sup> ~~institution of appeal or an application~~ for the institution of 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 <sup>prescribed</sup> ~~prescribed~~ for such appeal or application.

The term application is defined in section 2 of the Act as. "..... an application made to a court which is of or in relation to any proceeding of a civil nature.

At a glance it will therefore be noted that section 14(1) of the Tanzania Law of Limitation Act 1971 is wider in scope whereas section 5 of the Indian Limitation Act 15/restrictive. Where as section 5 of the Indian Act could only be invoked in respect of applications specifically applied by the section or any other enactment, section 14(1) of the Tanzania law of Limitation Act applies to all or any application of a Civil nature. On the premises I am of the opinion that the OSMAN'S decision is not directly relevant to the facts of the present case. I therefore find and hold that in the present case, this court has jurisdiction to grant extension of time under section 14(1) of the Law of limitation Act.

Is there any sufficient or reasonable Cause for the delay by the Applicant in filing the application for substitution? It has been alleged by the Respondent that at the time of the death of her father Moses Masanja on 11/3/97 the Applicant was only 14. She reached the age of majority in 2001. In terms of Sections 15 and 16 of the Limitation Act, this period in which the Applicant is deemed to have been under legal disability should be excluded. It should also be borne in mind that up to March 1998, the estate was being administered by John William Nzile Masanja. However there is a gap between 2001 when the Applicant became of age and July 2003 when the Applicant obtained letters of administration of the estate. There is no explanation for this delay, except Mr Nyabge's belief that "I had reason to believe that Mrs Masanja was the administratrix of the estate until June 2003."

It is the duty of the Applicant for extension of time to account for every day of delay. (See ALUMINIUM AFRICA LTD v ADIL ABDALLAH DHIYEBI (Civil No 6 of 1990 (CA) (Unreported))

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While the period between the death of Moses Masanja the Applicant's father in 1997 up to 2001 when the Applicant obtained the age of majority is legally excusable the Applicant attempted to fill in the gap between 2001 and 2003 when she obtained the letters of administration by explaining through her counsel's belief that she honestly believed that her mother Mrs Evelyn Masanja was the administratrix of the estate until her demise in June 2003. This may not be a very convincing explanation because as counsel well knows administration of estate is not a matter of inference, or presumption but is always proved by documentary evidence of appointment.

However the power to extend time under section 14(1) of the law of limitation Act 1971 is a matter of judicial discretion and no hard and fast rules can be set in deciding all cases. Each case is to be decided on its own peculiar facts. In the present case, the deceased Moses Masanja had already obtained a decree in his favour when he met his demise in March 1997. These revisional proceedings were opened in 2000, some three years after his death. The administrator of his estate died in 1998. So really there was no representative of the estate even to instruct Counsel for Mrs Masanja, until 2003 when the Applicant was forced to apply for letters of administration so that the gap can be filled in the proceedings particularly so after this Court had ordered that the Applicant's estate be administered for determination on the merits.

I am also satisfied that the counsel's handling of this matter since taking over the brief on 29/1/2001 when he appeared before Mutungi DR/HC leaves a lot to be desired. He does not appear to have advised his clients properly on the procedure obtaining to the joining of legal personal representatives in the proceedings hence the delay in filing the present application. Generally, Counsel's negligence or mistake has not been accepted as an excuse for the delay under section 14(1) of the law of limitation Act 1971, but it has not been suggested that it is totally shut out from consideration by the Courts. In some cases it has been held to constitute a sufficient cause (See VENCNAL MARGRETH BRAY RAYMOND JACK BRAY (1957) E.A 302.

On the totality of the facts of this case I am satisfied that counsel's mistake is not so <sup>gross</sup> as to deprive his client of this Court's Consideration. All Considered therefore, on the peculiar circumstances of this case, the existence of third party interests, the serious allegations of fraud, the fact that those proceedings were instituted more than 6 years after the deceased had obtained a decree and 3 years after his demise, and the suit now pending at the trial court following this court's order, I am of the considered view that the estate <sup>should</sup> be represented in the proceedings and this is only possible by allowing this application.

In the result this application is allowed. The applicant is granted leave to file an application to be joined as a party in these proceedings, and she is so joined. Costs shall follow the event in the remaining proceedings.

It is so ordered.

S.A. MASSATI

JUDGE

10/2/2004.

Ruling delivered in chambers this 10th day of February 2004 in the presence of Mr Ringia for the Applicant and Maira for the Respondents.

S.A. MASSATI

JUDGE

10/2/2004.

S.A. MASSATI

JUDGE

10/2/2004.