THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA
AT MPANDA

MISC CIVIL APPLICATION NO. 4/2006.
(Original Matr.Cause No. 35/2004 from Sumbawanga D/C from Urban P/C no.14/2005)

ELIGIUS ANORD ..... APPLICANT
VS
LAELI SINYANGWE..... RESPONDENT

(dated 19/12/2007
And
14/12/2007)

RULING

Before B.M.Mmilla, J.:

The applicant, Eligius Anord is applying for leave to institute an appeal after lapse of time allowed by law. As is the usual case in applications of this kind, his application is supported by an affidavit sworn by himself. He has stated in paragraph 3 of his affidavit that he failed to institute the appeal in time because he was outside the country. He has said that during that time around, his Regional Police Commander assigned him duty to send refugees back to their homeland in the Democratic Republic of Congo. He also stated in paragraph 4 of that affidavit that he was not there on the day on which the decision which is the subject of this appeal was given because he was again

executing another of his Regional Police Commander's assignments which he did not disclose.

This application is being resisted by the respondent's former wife one Laeli Sinyangwe. She filed a counter affidavit in which she has alleged that the applicant was negligent, particularly so when it is evident that he failed to produce evidence to show that he was outside the country. She has asked this court to find that he has not advanced sufficient reason for the delay to attract this court to grant the request sought.

Let me begin by making one observation that the applicant has cited no provision of law under which his application is founded. This, in the opinion of this court, is a defect for he was duty bound to have indicated the enabling provision of his application. The immediate issue however, is whether this is an incurably fatal defect.

The court encountered such a situation in the case of **Ramadhani Nyoni v. M/S Haule & Company, Advocates (1996) T.L.R. 71.** In that case, the respondent had obtained judgment against the applicant in the Resident Magistrate's Court at Kisutu on 30th May, 1990. The applicant, who file his notice of appeal outside the permissible period applied for leave to appeal against the Magistrates' Court's decision and a stay of execution pending the intended appeal. The respondent took the point, broadly, that the applicant's affidavit in

support of the application did not state under which provision of the law his application was brought. It was held in that case that:-

(i) The application, being one for leave to appeal out of time and for stay of execution pending the outcome of the appeal, it should reasonably be treated as an application brought in terms of section 14 (1) of the Law of Limitation Act, 1971, and order 39rule 5(4) of the (Civil Procedure Code), respectively.

(ii) In a case where a layman, unaware of the process of the machinery of justice, tries to get relief before the courts, procedural rules should not be used to defeat justice and the irregularity in an affidavit is curable in terms of section 95 of the Civil Procedure Code."

In that the appeal to the District Court as regards our instant case originated in the Primary Court, it should reasonably be treated as an application brought under the provisions of section 25 (1) (b) of the Magistrates Courts Act Cap 11 of the Revised Edition, 2002. May I also hasten to point out here that the second holding in the above cited case is now reflected in **Article 107 A (2) (e) of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time.** This Article provides that:-

"Katika kutoa uamuzi wa mashauri ya madai na jinai kwa kuzingatia sheria Mahakama zitafuata kanuni zifuatazo, yaani:

(e) kutenda haki bila kufungwa kupita kiasi na masharti ya kiufundi yanayoweza kukwamisha haki kutendeka."

In order to dispense substantial justice between the parties, this is indeed what should be avoided in the present case. Thus, I find that failure to cite the law under which his application is founded is not fatal because the irregularity is not one of substance. That paves way for this court to consider the merits or demerits of the application on the grounds raised.

It is a settled principle of law that in order for a party to succeed in an application for extension of time in which to file an appeal, the applicant must advance sufficient cause. This has been stated in a number of cases, including those of **Republic v. Yona Kaponda and 9 others (1985) T.L.R. 84 and Salum Sururu Nabhani v. Zahor Abdulla Zahor (1988) T.L.R. 41.** The burning issue becomes whether the applicant in the present case has assigned sufficient reasons for the delay to attract this court to grant the request he has advanced.

As already stated, the applicant says he did not file his appeal in time because he was executing his employer's assignment outside the country. He has submitted that he was assigned to send refugees back to their homeland in the Democratic Republic of Congo. However, the applicant did not annex the

movement order, nor did he ask any of his superiors at their office, say the Regional Police Commander, or the administrative officer, or even their accountant to file affidavits in support of his assertion. Unsupported as it is, his reason lacks the necessary strength such that this court cannot take him seriously. The court is of the view therefore that this ground is not meritorious.

This court however, did not end there; in its quest to do justice to the parties in the matter it has explored other avenues. It is again a settled principle that in applications of this kind, reason for the delay is not the sole ground for granting leave. It was held in the case of **Samson Kishosha Gabba v. Charles Kingongo Gabba (1990) T.L.R. 133** that:-

> "In determining whether or not to allow an application for leave to appeal out of time the court has to consider reasons for the delay as well as the likelihood of success of the intended appeal"

In another case of **Republic v. Yona Kaponda and 9 others (1985) T.L.R. 84,** the court expressed the view that:-

> "In deciding whether or not to extend time I have to consider whether or not there is 'sufficient reasons'. As I understand it, 'sufficient reasons' here does not refer only, and is not confined, to delay. Rather, it is 'sufficient reason' for

extending time ... for this I have to take into account also the decision intended to be appealed against, the surrounding circumstances, and the weight and implications of the issue or issues involved."

With all due respect, the above propositions are very sound. There is great sense that for the interests of justice, the court should satisfy itself on this aspect too.

On perusing the trial court's proceedings and ruling, I note that the decision to dismiss the applicant's application for restoration of his appeal after having previously been dismissed for want of appearance was done without giving the parties the right to be heard. In this court's opinion, this is a sufficient reason for allowing the application. For that reason, this application succeeds. The appeal to be filed within 14 days' period from the date of this ruling that is, it should be filed on or by 2.1.2008.

Sgd: B. M. Mmilla

Judge

19.12.2007.

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

District Registrar
High Court of Tanzania
SUMBAWANGA.
20.12.2007.