

IN THE HIGH COURT OF TANZANIA
AT DODOMA

MISC CIVIL APPLICATION NO. 37 OF 2008
(THE DECISION OF THE DISTRICT COURT OF DODOMA
CIVIL APPEAL NO. 14 OF 2007 –
ORIGINAL CIVIL CASE NO. 9 OF 2007
IN CHAMWINO PRIMARY COURT)

JOINA CHISEWOAPPLICANT

1. ZABRON CHIMYA 2. LAMECK CHIMYA	}	VERSUS	RESPONDENT
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24/09/2009 & 16/10/2009

RULING

HON. MADAM, SHANGALI, J.

On 30th April, 2007, the applicant **JOINA CHISEWO** won her Civil Case No. 9 of 2007 before Chamwino Primary Court. The respondents **ZABRON CHIMYA** and **LAMECK CHIMYA** appealed to the Dodoma District Court vide Civil Appeal No. 14 of 2007. Their appeal was a success. The decision of the APPELLATE District Court was delivered on 25th October, 2007.

The appellant was aggrieved and decided to appeal to this court. She filed her appeal on 25th October, 2007. She, thereafter

decided to engage an advocate to represent her. The learned advocate, Mr. Kidumage discovered that the filed (PC) civil Appeal No. 1 of 2008 was actually filed out of time. He advised his client, the appellant/applicant, to request the court to allow her to withdraw the appeal with a leave to re-institute it. On 17th June, 2006, this court before my learned sister, Hon. Kwariko, Judge, granted the request and struck out the appeal.

Now, the applicant/appellant, duly represented by Mr. Kidumage, learned advocate, has filed this application seeking for extension of time within which to lodge an appeal out of time. The respondents appeared in person and unrepresented.

The stance of the law is that an appeal to the High Court in proceedings originating from the Primary Court must be filed within thirty days (30) in the District Court. That is provided under section 25(1) (3) of the magistrate Court Act, 1984. Under that provision of the law there is a proviso which gives the High Court discretion to extend the time for filing such an appeal where there are good and sufficient reasons to do so. Procedure for filing such an application is provided under section 3 of the Civil Procedure (Appeals in Proceedings Originating in the Primary Courts) Rules, GN 312 of 1964 – Cap 358, R.E. 2002.

Mr. Kidumage, learned advocate for the applicant has strongly submitted that his client who is a lay old woman and unrepresented before the lower courts was not aware of the provisions of section 25

(1) (3) of the Magistrate Court Act, 1984 which required her to file her appeal from the decision of the first appellate District Court within thirty days from the date of that decision. As a result, he maintained, the applicant decided to wait for a copy of the judgement of the appellate District Court in order to file her appeal, hence out of time.

Therefore the main reason advanced by Mr. Kidumage which was also elaborated in the applicants affidavit is the ignorance of the law imbedded with illiteracy of the applicant.

Mr. Kidumage submitted that, there is ample evidence to show that all along the applicant had acted with diligence in filing her struck out appeal although out of time. She received her copy of judgement on 13th October, 2007 and filed her struck out appeal immediately on 25th October, 2007 within a period of 12 days. The counsel argued that, such a quick action indicate that the applicant was serious with her appeal and till today she is still fighting for her appeal to be determined on merits.

The second ground for extension of time narrated in the applicants affidavit and expounded by Mr. Kidumage is that, the intended appeal stands a chance of success. They contended that the first appellate District Court was not justified to overrule the decision of the trial primary Court without giving sufficient reasons for departing with that decision of the trial Primary Court which heard the witnesses and ascertain their credibility.

The respondents, who, as I have said were not represented had no much to say other than asking the court to dismiss the application because the applicant failed to file her appeal within the prescribed period of thirty days.

Having carefully considered this application, I am convinced that where a lay person, unrepresented, like the applicant, has been acting with due diligence but yet mistaken, that would constitute sufficient cause. The alleged mistake in this matter relates to the laid down procedures but in real fact there is no negligence or want of diligence on the part of the applicant. In deciding this application, I have been persuaded by the decisions in the cases of **ELIBARIKI ASSERI NNKO vs. SHIFAYA MUSHI & LEWANGA KINANDO (1998) TLR NO. 81** and **MARTHA DANIEL vs. PETER T. NKO (1992) TLR 359**. In the later case it was held that;

"A plea by a lay person that he be allowed to file an appeal out of time in an appropriate Court an appeal which was struck out or is voluntarily withdrawn from the High Court because it had been wrongly filed, but timely, constitutes a sufficient reason."

In this present application, the applicant, a lay woman is creating to file her appeal out of time, having been advised by her counsel that her earlier and voluntarily withdrawn appeal was filed out of time due

to procedural mistakes of her own. The prevailing circumstances and facts of this application are not far from the above said case. Also, I am convinced by the decision in the case of **RAMADHANI NYONI VS. M/S HAULE & COMPANY ADVOCATES (1996) TLR No. 71** where it was held that;

"It has been emphasized that in case where a layman, unaware of the process of the machinery of Justice, tries to get relief before the court, procedural rules should not be used to defeat justice - -"

On the second ground of whether the intended appeal stands a good chance of success or not, I would observe once again, that, I have always been reluctant to deliberate on this point because it means to venture on the mandate of the appellate Judge who will determine the intended appeal. In my considered opinion chances of success of an appeal cannot by itself amount to a sufficient reason to grant extension of time to file an appeal out of time especially where negligence or want of diligence is obvious.

Therefore, having examined the circumstances of this application with a broad mind and realistic approach, I am convinced that justice would be better served if I exercise my discretion in favour of the applicant and allow her to file her appeal out of time.

The application is therefore granted and the applicant is given fifteen (15) days from the date of this decision to file her intended appeal.

Costs in the cause.


M.S. SHANGALI
JUDGE

16/10/2009

Ruling delivered in the presence of the applicant in person, in the company of Mr. Ben Kiungu, Legal officer from Mr. Kidumage/Njulumu Advocates Company; and in the presence of the respondents in person.




M.S. SHANGALI
JUDGE

16/10/2009