

IN THE HIGH COURT OF TANZANIA

AT IRINGA

MISCELLANEOUS CIVIL APPLICATION NO. 2 OF 2016

JACKTAN SIGALA ----- APPLICANT

VERSUS

1. ELLY NGOLE

2. ISSACK NYIGU

3. JOSEPH SALINGWA



-----DEFENDANTS

RULING

30th June, 2016 & 15th December, 2016

KIHWILO, J.

Before me is an application under Section 14(1) of the Law of Limitation Act Cap 89 RE 2002 seeking leave of this court to enlarge time within which to file the appeal out of time prescribed by law.

The application flows from the following facts. That the instant matter has a protracted history as it traces its origin from the District Court

of Njombe in Civil Case No. 5 of 1989 that was decided in favour of the present applicant. However, by then the present respondents were not parties to the suit. As the present applicant wanted to evict the respondents herein from the suit land he filed Miscellaneous Civil Application No. 2 of 1997 in the District Court of Njombe that was decided in favour of the respondents. Later the applicant successfully filed an application for review.

Consequently the respondents herein filed an appeal against the review decision wherein this Court Hon. Justice Othman (as he then) now Chief Justice of Tanzania on 7th August 2007 nullified the proceedings of the District Court of Njombe on account that they were filed out of time. Still dissatisfied by the decision of the District Court in Miscellaneous Civil Application No. 2 of 1997 that remained undisturbed by this Court he filed an application in the District Court of Njombe seeking to stay the execution of the decision of the court that was decided in favour of the respondents. In addition to that he sought the leave of the court to file an application for review out of time. The respondents raised a point of preliminary objection to the effect that the application was time barred. The District Court

sustained the preliminary objection and the application was dismissed. Dissatisfied by that decision the applicant filed an appeal before this Court which was decided on 15th May 2014 by Hon. Justice J.C.M. Mwambegele who directed that the District Court file should be remitted back to the District Court of Njombe for continuation of the application for extension of time to file an application for review which was pending for more than six years.

The District Court of Njombe decided the application and delivered the ruling on 4th November 2014. Following that the applicant prepared a Notice of Intention to Appeal and a request for proceedings and judgment to the District Court of Njombe. Despite the fact that the notice was filed in time the applicant alleged that the same could not be admitted in the court file because the same was transmitted to the High Court to entertain the Bill of Costs No. 1 of 2014. He averred that the Bill of Costs was decided on 11th December 2016 and it was after that decision that the applicant was able to file the instant application on 6th January 2016.

Before this Court the applicant was represented by Mr. Alfred T. Kingwe, learned counsel while the respondents were under the services of Mr.

Mushokorwa, learned counsel. Upon the direction of the court this application was argued by way of written submissions that was dully complied with by the parties.

Arguing in support of the application the applicant was brief as he valiantly submitted that the main reason behind the delay to file the application was occasioned by the transfer of the court file to this Court in order to entertain the application for Bills of Costs that ended on 11th December 2015 before Massam R. B. Deputy Registrar. He strenuously argued that otherwise the application was transmitted before the District Court in time. He referred to the affidavit of Advocate John Owegi who transmitted the application before the District Court of Njombe in good time. He insisted that the decision of the District Court subject of the application involves a point of law hence making the application meritorious. He cited the case of **Letwit S/O Malika V The Republic**, Criminal Appeal No. 291 of 2010, Court of Appeal of Tanzania at Tabora (unreported) and **The Principal Secretary, Ministry of Defence and National Service V Duram P. Valambhia** [1992] TR 387.

In reply Mr. Mushokorwa, learned counsel for the respondents was equally brief. He strongly resisted the application on the grounds that the applicant did not prove that he actually presented the notice of appeal before the District Court as Annexure J2 to the Affidavit of Advocate Kingwe does not bear any stamp or signature of the registry officer of Njombe District Court and when did time for appeal started running.

Mr. Mushokorwa went on to attack the evidence of the applicant in that Annexure J3 to Mr. Kingwe's Affidavit which is the Affidavit of Advocate Owegi still have some punching holes in that it does not disclose to whom did Mr. Owegi present the papers for filing and who actually declined to accept them on the reason that the original court file was at Iringa High Court.

I have anxiously and careful considered the submissions made by both parties and the only issue for consideration is whether or not the present application is meritorious.

According to the provision of section 14 of the Law of Limitation Act, Cap 89 RE 2002 the only reason for granting an extension of time is that

the applicant must demonstrate sufficient or good cause for the delay. This has been discussed numerous times by this court and the Court of Appeal of Tanzania. In the case of **Dismas K.B Frances V James Joseph Materu and 2 others**, Civil Appeal No. 68 of 1999, Court of Appeal of Tanzania at Mwanza (unreported) the Court held thus:-

"Extension of time is not granted as a matter of course or formality. An applicant has, on balance of probability, to convince the court that the failure to take a particular step within the prescribed time was occasioned by sufficient cause".

Furthermore in the case of **R V Yona Kaponda and 9 Others** [1985] TLR 84 the Court had the following to say:-

"In deciding whether or not to allow an application to appeal out of time, the court has to consider whether or not there is "sufficient reasons" not only for the delay, but also "sufficient reasons" for extending the time during which to entertain the appeal".

It seems to me that the applicant did not disclose adequate information to make this court believe what the applicant seeks this court to believe. I must hasten to say that in the whole evidence presented by the applicant I could not find even a single piece of evidence which revealed a name of the court clerk or any court officer who declined to accept the court documents when they were presented by Mr. Owegi. In my view this was negligence on the part of the applicant's counsel.

This takes me to another point as to what is the consequence of the above anomaly? Time and again this Court and the Court of Appeal of Tanzania has said (see **Felix Tumbo Kisima V TTC Limited and Another**, Civil Application No. 1 of 1997, Court of Appeal of Tanzania (unreported) where there is some element of negligence on the part of the applicant's counsel extension of time may be granted. I am aware that every case must be decided on its own merits and that to me this is one such particular occasion where the court may use its discretion to grant the extension because of the nature of the dispute, time and energy which parties have spent in court ever since the matter started in 1989 and the amount of evidence which the applicant has produced when compared to

the element of negligence. In the case of **Kalunga and Company Advocates V National Bank of Commerce Limited** [2006] TLR 235 Nsekela JA (as he then was) held that:-

".....where there is inaction or delay on the part of the applicant, there ought to be some kind of explanation or material upon which the court may exercise the discretion given".

A cursory perusal of the records reveals that the respondents filed Taxation No. 1 of 2014 on 10th July 2014 and the decision was made on 11th December 2015 hence logic tells me that the Deputy Registrar could not be able to pursue the Taxation of Bill of Costs without perusing the original court file hence the need to have the file called to Iringa High Court Registry.

Before I finally finish composing this ruling I must remark in passing that the counsel for the applicant has demonstrated a high degree of negligence and this is evident in the factual and typographical errors referred in the documents that he has prepared and filed before this Court

some of which he has admitted others remained as they are. This is very serious for the proper dispensation of justice.

In the upshot, I am of the considered opinion that the application has merit as such leave is hereby granted to file the appeal out of time and the applicant is given 21 days from the date of ruling within which to file the appeal. No order as to costs.

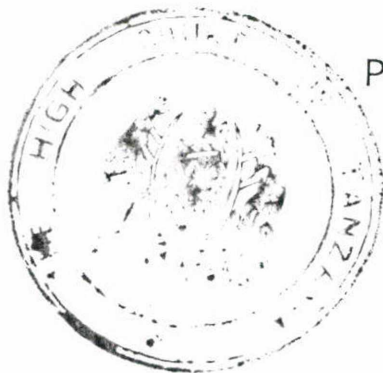


P.F. KIHWELO

JUDGE

12/12/2016

Ruling to be delivered by the Deputy Registrar on 15th December, 2016.



P. F. KIHWELO

JUDGE

12/12/2016