

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA**

MISCELLANEOUS CIVIL APPLICATION NO. 1 OF 2018

(Arising from Civil Case No. 05 of 2016 District Court of Kiteto at Kibaya)

LEMOMO MORINGE.....APPLICANT

VERSUS

ADAM HUSSEIN.....RESPONDENT

RULING

23RD OCTOBER, 2018

T. MWENEMPAZI, J.

The applicant is seeking leave of the court to enlarge time to file an appeal of time against the Civil Case No. 05 of 2016 whose decision was delivered on the 20th October, 2017. He is also praying for cost and any other relief the court may deem fit to grant. The applicant has brought the application under the provisions of section 14(1) of the Law of Limitation Act, Cap. 89 R.E.2002; the application is supported by an affidavit of the applicant LEMOMO MORINGE.

The applicant according to the contents of the affidavit was the plaintiff in the Civil Case No. 05 of 2016 where he lost the case. He was aggrieved by the decision. He therefore applied for the copies of

judgement, decree and proceedings. He was supplied with a copy of judgement on the 25th October, 2017 and the copy of the decree on the 27th November, 2017. The applicant has averred further that time to file an appeal starts to be counted from 27th November, 2017 but he has applied for extension of time since some case law have held that exclusion of time is not automatic but application must be made. The other factor he has been working to look for money to engage an advocate. He thus travelled to Arusha on 20th December, 2017 and filed this application on the 3rd January, 2018.

The Respondent is opposing the application, he has therefore filed a counter-affidavit where he has almost disputed 4-10 and demanded strict proof thereof of all the fact deposed in them as summarized above. In disputing paragraph 6 of the affidavit the respondent has averred that looking for money to pay an advocate does not constitute a sufficient ground for delay.

This matter was earlier being Presided Over by Honourable Justice Maghimbi who is currently transferred to another station. By the order dated 12th July, 2018, the Honourable Judge granted leave to the parties to

dispose an appeal by way of written submission. Parties faithfully complied to the order of the court and filed their appeal in time.

The applicant is being represented by Daudi Haraka, advocate at Haraka Law Associates & Co. Ltd and the Respondent is represented by Philip P. Mushi, Advocate of Vigilance attorneys. In their written submission the applicant has made an attempt to account for delay by submitting on an appeal commencing with the statement of the reasons which has made this application necessary. He has mentioned them as first, the applicant was aggrieved by the findings of the trial court which raises serious issues of law, irregularities and fact to be determined by the High Court. Secondly, the applicant account for the reasons for the delay being beyond his own control which in the outset will not cause any injustice or prejudice to the respondent when the application is heard on merit. The account of event is almost the same as what has been summarized from the content of the affidavit above. The applicant in the submission in chief has emphasized that fact that he was in financial difficulties is crucial, and it is a situation facing all pastoralist s during the dry season. He has submitted further the delay to file an appeal in time is not due to negligence but it is due to the real situation facing him. He understands that his application is

governed by elementary principles of law that demand the applicant to show sufficient reasons for the delay to file an appeal with the prescribed time. And that the application is granted at the discretion of the court which discretion must be exercised judicially.

The applicant therefore prays that the court enlarges time for him to file an appeal as he has been able to fulfilled conditions placed by the law for his application to be considered.

The Respondent in the written submission strongly oppose the application by stating that the he finds no iota of cogent reasons advanced by the applicant for the court to extend time, based on the reasons stated. At the very start he prayed for the court to adopt counter affidavit as part of the submission. Then joined hands with the applicant on the point that application for the extension of time is purely based on the discretion of the court, however, the same has to be exercised judicially and the overriding consideration is that there must be sufficient reasons for doing so. The respondent has cited the case of Benedict Mumello Vs Bank Of Tanzania, Civil Appeal No. 12 Of 2002, court of Appeal of Tanzania at Dar es salaam.

The respondent has raised the important question to be answered by the court; that whether the applicant has been able to show sufficient reasons for this court to exercise its discretion. In the opinion of the respondent the answer is negative. The reasons are clear. One, in his affidavit, the applicant has failed to give evidence to prove that he acted swiftly to apply for copies of judgement, decree and proceedings. Though he has submitted that he received a copy of judgement on 25th October, 2017 and a copy of decree on the 27th November, 2017; he has failed to prove that and also account for not utilizing the time left for him to file an appeal within time by 7th December, 2017 counting from the date he claims to have received the judgement. There is no letter to show the applicant applied for the decree and also there is no other tangible evidence that shows the applicant had once bothered to file an appeal on time.

That respondent has submitted that the applicant had intentionally opted to sleepover his rights and now he wants to benefit out of his inaction the thing which is impossible in our laws. The counsel for the respondent referred the court to the decision of Alison Xerox Sila Vs Tanzania Harbours Authority, Misc. Civil Reference No 14 Of 1998 Where It Was Held

"lapses, inaction or negligence on the part of the applicant seeking extension of time, does not constitute sufficient cause to warrant extension of time.

In regard to the point on financial hardship the Respondent's counsel has submitted that, that has never been a sufficient reason to enlarge time for an appeal. The applicant ought to have accounted for each day of delay in taking necessary steps for lodging his appeal on time and since the application has been preferred under section 14(1) of the Law of Limitation Act, then the court is invited to consider the holding in the case of Al-Imran Investment Limited versus Printpark Tanzania Limited and Another, Misc. Civil Cause No. 128 of 1997 which quoted with approval the decision in the case of Andrew Wiston Kalela Ndimbo & Another versus Suleman Mohamed Khamis and 2 others, Misc. Commercial cause No. 70 of 2013 that:-

"in order for the applicant to have benefit of section 14(1) the applicant ought to explain the delay of every day passes beyond the described period of limitation."

In this case, the applicant has explained the reasons which made him delay to file an appeal in time. His account is to the effect that he collected a copy of judgment on the 25th October, 2017 which is five days after a judgement had been delivered. An appeal to the High court must be filed within 45 days after the decision of the District court or Resident magistrate court in that matter. The applicant felt aggrieved when the judgment was delivered. He had an ample time now to confirm by reading a judgment in his hand. So, the circumstance obtaining in this case is that the applicant ought to have been preparing himself for filing appeal immediately he had a copy of judgement in his possession. He has not accounted for days from 25th October, 2017 up to the date he received a copy of the decree. Then there are additional days within which to file an appeal. The account for delay must feature in the affidavit.

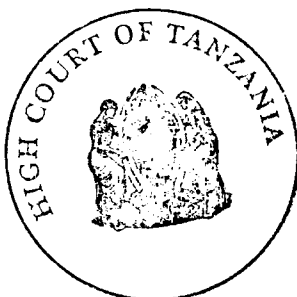
In the applicant's submission in chief, he has alleged that he is seeking leave to file an appeal out of time because the appeal raises serious issues of law, irregularities and facts to be determined by the court. It is unfortunate that almost all the allegations which are the reasons relied upon by the applicant are not substantiated in the affidavit as evidence. It was held in the case of The Registered Trustees of the Archdiocese of Dar

es salaam versus The Chairman Bunju village Government and 4 others,
Civil Appeal No. 147 of 2006, Court of Appeal of Tanzania at Dar es
salaam(unreported) that:

"Since as correctly submitted by Mr. Mhango, an affidavit is evidence we think it was expected that reasons for the delay would be reflected in the affidavit. In absence of reasons, it occurs to us that there was no material evidence upon which the judge could determine on merit the application before him."

In my view, the applicant has not been able to convince this court that he had cogent reasons to delay filing an appeal in time and those he has been able to advance, are explanation made during the hearing; at the time, he was supposed to clarify his evidence as deposed in the affidavit. Under the circumstances the application for extension of time to file an appeal out of time is dismissed with costs.

It is so ordered.




T. M. MWENEMPAZI

JUDGE

24th October, 2018