

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA**

AT MUSOMA

MICL. CRIMINAL APPLICATION NO. 2 OF 2020

*(Arising from the judgement of the District of Tarime at Tarime
(Hon. B.C. Kubyo) dated 29/11/2019 in Criminal Appeal No. 40 of 2019)*

NELSON MARWA WEREMA APPLICANT

VERSUS

1. MANGE'ERA MSETI MANG'ERA 1ST RESPONDENT
2. PAUL MOSES BUSESE 2ND RESPONDENT

RULING

Date of Last Order: 5th May, 2020

Date of Ruling: 15th May, 2020

KISANYA, J.:

In its judgement dated 29th November, 2019, the District Court of Tarime at Tarime dismissed the applicant's appeal against the decision of the Nyamwaga Primary Court in Criminal Case No. 350/2019. Having failed to appeal in time, the applicant has moved this Court to grant him leave to appeal out of time against the said judgement.

This application is made by way of Chamber Summons under section 25 (1) (b) of the Magistrate Court Act (Cap. 11, R.E. 2002) and any enabling provision of the laws. It is also supported by affidavit sworn by Nelson Marwa Werema (the applicant) on 27/1/2020. In principle, this application is premised on the following grounds extracted from the applicant's affidavit:

“4. That before and after the judgement the applicant became serious sick and attended DF health centre treatment/medication on 10/01/2020 as the result the Applicant could not appeal in time.

5. That after getting treatment/ medication the applicant health condition did not become well on the same day 10/01/2020 as the Applicant went on taking the dose/medication as the result the Applicant could not appeal in time.

6. That the said Criminal appeal No. 40/ 2019 had illegality as the same appellate Court erred in law for failure to consider that the trial court did not record properly the evidence adduced by the Appellant.

7. That it had never been in the applicant’s contemplation that such obstacle could happen during the time which the applicant was supposed to appeal in time.”

On the other hand, the 1st respondent filed a counter affidavit to object the application.

When this matter was placed before me for hearing, the applicant was represented by Mr. Paul Obwana while Mr. Baraka Makowe appeared for the 1st respondent. The 2nd respondent failed to appear without notice. He was aware of this matter because he was present when the case was called on for hearing on 26/3/2020. Therefore, the hearing of the application proceeded in the absence of the 2nd respondent.

Submitting in support of the application, Mr. Obwana started by requesting to adopt the affidavit in support of the application as part of his submission. Thereafter, he elaborated on the reasons for the delay. The learned counsel submitted that, the applicant was sick from 10/1/2020, which was three days before the deadline specified by the District Court. He submitted further that,

the applicant was admitted at DF Health Center, Tarime and discharged on 11/1/2020. He tendered the Discharge Form from DF Health Centre, Tarime which was admitted to corroborate that fact. Mr. Obwana argued that, the applicant was diligent because he filed the present application on 20/1/2020. Citing the case of **Benedicto Mumello vs BOT**, Civil Appeal No. 12 of 2002, CAT at Dar es Salalam (unreported) and **Jamila Majjala vs Hamza Abasi and Another**, Civil Application No. 585/01 of 2018, CAT at Dar es Salaam (unreported), the learned counsel argued that, diligence on the part of the applicant is one of the factors which establish good cause for extension of time.

Upon being asked by the Court, Mr. Obwana conceded that, the time to appeal against the decision of the District Courts is 30 days from the date of impugned decision or order. However, he argued that, the District Court made the applicant to believe that the time is 45 days as that fact was stated in the judgement. For the aforesaid reasons, the learned counsel advised me to grant the application on the ground that, the applicant had advanced good cause.

In response, Mr. Makowe resisted the application. He also requested to adopt the respondent's counter affidavit to form party of his submission. The learned counsel argued that, the affidavit in support of the application does not show that, the applicant was misled by the District Court. He therefore urged me to disregard that ground. The learned counsel went on to argue that, the applicant was required to account for every day of the delay. He stated that, if the dates on which the applicant was sick are excluded, the applicant had not accounted for the days from 31/12/2019 to 9/1/2020 and

from 12/1/2020 to 30/1/2020 when the application was filed. Counsel Makowe contended further that, even if the applicant was made to believe that the time to appeal is within forty five days, he had not accounted for 14 days from 14/1/2010 to 29/1/2020. Therefore, he submitted that the applicant was not diligent to prosecute the appeal.

As to the ground of illegality, Mr. Makowe argued that, the same was raised in the District Court but dismissed. He therefore urged me not to consider that ground. The learned counsel concluded his submission by praying that this application be dismissed for want of merit.

Mr. Obwana rejoined by stating that, the Chamber Summons had indicated that other reasons would be given at the hearing of the application and this include the ground that, the applicant was misled by the District Court on the time to appeal. He submitted further that, the said fact was stated in the judgement attached to the affidavit in support of the application. The learned counsel argued further that, paragraph 5 shows that, the applicant was not feeling well after being discharged from the hospital. Therefore, he was of the considered view that, the applicant had advanced sufficient cause.

In view of the above, it is clear that this application is based on the provision of section 25 (1) (a) of the Magistrates Courts Act, Cap 11, R.E.2019 (MCA) and not 25(1)(b) of the MCA cited in the Chamber Summons. The said section 25(1) of MCA provides that;

“25.-(1) Save as hereinafter provided-

(1) Save as hereinafter provided-

(a)in proceedings of a criminal nature, any person convicted of an offence or, in any case where a district court confirms the acquittal of any person by a primary

court or substitutes an acquittal for a conviction, the complainant or the Director of Public Prosecutions; or
(b) in any other proceedings any party,
if aggrieved by the decision or order of a district court in the exercise of its appellate or revisional jurisdiction may, within thirty days after the date of the decision or order, appeal therefrom to the High Court; and the High Court may extend the time for filing an appeal either before or after such period of thirty days has expired.”

It is depicted from the above provision that, the time to appeal against decision made by the District Court in the exercise of its appellate jurisdiction is thirty (30) days from the date of the challenged decision or order. Further, this Court has discretion of extending the time to appeal. Such power can be exercised before or after lapse of the time limitation.

The above provision does not prescribe the factors to be considered by the Court in extending the time limitation. But this does not mean that every application should be granted. The Court has discretion of granting the application for extension of time to appeal. Since this is a discretionary power, it is exercised judiciously. It is settled that in extending the time limitation, the Court considers whether there is good or sufficient cause. There is no precise definition of good or sufficient cause. However, there are factors taken into account into considering whether there is good or sufficient cause. This include factors like; the length of the delay; whether the applicant has account for all the period of delay; whether the applicant was diligence and not lazy or negligent in pursuing the matter; and illegality to mention but a few.

At this juncture, the next issue is whether there is good or sufficient cause for the Court to grant the instant application. It is on record that, the judgement subject of appeal was delivered on 29/11/2019. The time prescribed by the law lapsed on 30/12/2020. However, the judgement issued by the District Court shows that the applicant was told to appeal within 45 days. The Court was duty bound to inform the parties of the proper and correct position of the law. In my opinion, failure by the Court to discharge its obligation may confuse or mislead the party on time to file appeal; and this this is a sufficient or good cause.

I agree with Mr. Makowe that, this ground was not stated in the applicant's affidavit. However, I have considered that, the copy of judgement which disclose that fact was attached to the applicant's affidavit and that, the said ground was argued at the hearing of this application. The applicant should not be punished for believing or acting on what was held by the court. Therefore, I find that the time accounted for under this ground covers the period from 29/11/2019 (date of judgment) to 14/1/2020 (when the period of 45 days lapsed).

However, the application at hand was filed fifteen (15) days later from 14/1/2020. Has the applicant accounted for these days? Counsel Makowe was of the view that, the applicant has not accounted for the period from 15/1/2020 to 30/1/2020. On my part, I have noted that the parties do not dispute that, the applicant was sick on 10/1/2020 and that, he was discharged from the hospital on 11/1/2020. It is indicated in paragraph 5 of the affidavit that, after the discharge, "the Applicant's health condition did not become well on the same day" and that he "went on taking the dose/ medication"


thereby failing to appeal in time. I am of the considered view that, the fact that the appellant was discharged from the hospital does not necessarily means that he was able to execute his duties effectively on the same date. It may take time and this fact was stated by the applicant.

Also, as indicated herein, the length of delay is one of the factors taken into account in extending the time limitation. This shows whether or not the applicant has been diligently to prosecute the matter. In the case of **Kalunga and Company Advocate Kalunga vs National Bank of Commerce** (2006) TLR 235, the Court Appeal considered the length of the delays of 17 days to grant the application. In the case at hand, the delay from 15/1/2020 to 30/1/2020 is 15 days. Having considered that the applicant was sick, and taking medication after being discharged, I am of the opinion that he was prompt to pursue this matter.

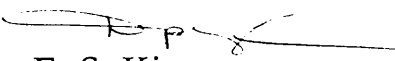
In the result, I grant the extension to file appeal as prayed. The appeal to be lodged within fifteen (15) days from the date of this ruling. I make no order as to costs because this is a criminal matter. It is so ordered.

Dated at MUSOMA this 15th day of May, 2020.




E. S. Kisanya
JUDGE
15/5/2020

Court Ruling delivered this 15th day of May, 2020 in the absence of the parties with leave of the Court. Parties to be informed to collect copy of ruling.


E. S. Kisanya
JUDGE
15/5/2020