

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

**AT SHINYANGA**

**MSC CIVIL APPLICATION NO. 2 OF 2020**

*(Arising from the judgment of Civil Case No. 9 of 2011 of Shinyanga District Court dated  
10<sup>th</sup> November, 2014)*

**DANIEL ZENGO.....APPLICANT**

**VERSUS**

**SHINYANGA URBAN WATER SUPPLY**

**AND SANITATION AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**ZAKARIA MAPYA.....2<sup>ND</sup> RESPONDENT**

**RULING**

*Date of last order: 30<sup>th</sup> June, 2020*

*Date of Ruling: 28<sup>th</sup> August, 2020*

**MKWIZU, J.:**

The applicant Daniel Zengo filed an application under section 14 (1) of the law of Limitation Act Cap 89 R: E 2002 for the following prayers:

- a) That may the Honourable Court be pleased to extend the time for  
filing an application against the judgment and decree of the Civil*

*Case No. 9 of 2011 of Shinyanga District Court dated the 10<sup>th</sup>  
November 2014*

*b) Costs.*

*c) Any other and further relief (s) as the honourable Court may  
deemed just.*

The application was supported by an affidavit sworn by the Applicant Daniel Zengo. Flaviana Kifizi for the respondents filed a counter affidavit opposing the application.

When the application came for hearing on 15<sup>th</sup> June 2020, the applicant was represented by Mr. Frank Samwel advocate while the respondents were represented by Mr. Paulo Kaunda learned advocate.

In support of the application, Mr. Frank first prayed the court to adopted the affidavit in support of the application. On the merit of the application Mr. Frank stated that, before filing this application, applicant had engaged senior Advocate M.B.M Mgero to file an appeal against the decision of the

Shinyanga District Court in Civil case No. 9 of 2011. Applicant made several follow ups to see whether his advocate has filed the appeal fruitlessly. He discovered that his advocate had health problems and later passed away. After the death of his advocate, applicant was already out of time and had no document on which he would file an application for extension of time. Mr. Frank Samwel elaborated more that, applicant had to collect all necessary documents from the court and filed an application for extension of time, Misc. Application No. 23/2017 which was dismissed on 20/9/2019. He was not informed on the reason why his application was dismissed until when he received a letter dated on 20/1/2020 informing him that his application was dismissed for want of prosecution. From there, he prepared documents and filed the present application on 31/1/2020.

On another ground for the application, Mr. Frank submitted that, the decision sought to be challenged has an element of illegality itemized under paragraph 12 of the affidavit that the matter was heard out of the scheduled speed track and without first framing of issues. He clarified that,

the case at the trial court, was for malicious prosecution and issues framed at the composition of the judgment were not enough to dispose of the matter. He cited the case of **Festo Mwakavana** [1971] HCD 417 where ingredients of malicious prosecutions were enumerated and which according to Mr. Frank should have formed part of the case in this matter. He mentioned the said issues to include whether defendant prosecuted the plaintiff, proceedings terminated in plaintiffs favor; defendant acted without reasonable or probable cause; the defendant acted maliciously; and that plaintiff have suffered serious damage known by law. In this aspect, contended Mr. Frank, the framed issues did not align with the law. He lastly prayed the court to allow the application with costs.

In rebuttal Mr. Kaunda submitted that, it is a practice and jurisprudence of this court that in an application for extension of time, the applicant has to account for each day of the delay and that account must be reflected in the affidavit and not the submission from the bar.



Mr. Kaunda said, in his affidavit, Mr. Zengo explained that the trial court gave its judgment on 10/11/2014. Law of Limitation Act provides that Appeal from a Civil Case must be filed within 90 days from the date of the judgment. The intended appeal in this matter ought to be filed not later than 10/2/2015. Mr. Kaunda was of the view that from 10/2/2015 when the appealing time expired to 31/1/2020, is about 5 years. In Law, applicant had to account for each day of the delay - 1820 days (5 years). He referred this court to the case of **Yazid Kassim Mbakiuki Vs. CRDB Bukoba Branch**, Civil Application No. 412 of 2018 – CAT (Unreported)

He argued that applicant's advocate told the court that the first applicant's advocate was sick and he later passed away. The said submission is not reflected in the applicant's affidavit. It is a submission from the bar which is not evidence in the court of law.

On the raised point of illegality, Mr. Kaunda submitted that it is not every illegality is a sufficient reason for extension of time. It is only where the court decides a matter without jurisdiction or a decision given without

affording parties a right to be heard. On this point, he cited the case of **John Tirito Kisoka Vs. Aloyce Abdul Minja**, Civil Application No. 3 of 2018 – CAT Arusha (unreported).

Mr. Kaunda prayed for the dismissal of the application with costs on the grounds that, applicant has failed to account for each day of the delay and that the illegality stated is not so special to warrant the court to grant extension of time.

In rejoinder, Mr. Frank insisted that they have accounted for each day of the delay and that respondent counsel has admitted that there is illegality which is a ground for the grant of an application for extension of time.

Having heard parties' submissions in this matter, and having considered the chamber summons and the affidavit for and against the application, the only issue for my determination is whether the applicant has adduced sufficient reasons for this court to exercise its discretion in extending time to appeal.

Going by the affidavit in support of the application and the applicant's counsel oral submissions before this court, two reasons for the delay are for consideration. One is that the applicant's former advocate felt sick and ultimately passed away without taking the necessary steps towards filing the appeal or an application for extension of time. Secondly that, the decision sought to be impugned is tainted with illegalities.

It is evident from the records that, the District Court delivered its judgement on 10/11/2014 in that case, applicant had the services of Ngero advocate. No action was taken until 2017 when the applicant filed his first application for extension of time in this court , that is , Civil application No. 23 of 2017. The reasons behind being that his advocate whom he had instructed to act on his behalf felt sick and died without filing an appeal .I find no merit in this application on the following reasons.

One, the affidavit in support of the application does not disclosed the date the applicant engaged his former counsel and when exactly he felt sick and the time he passed away. This would have enabled the court to see the role played by the applicant in pursuit of his rights from the date of the

decision in 10/11/2014 to date. The court is not availed with these crucial facts.

Yet again, the issue of the death of the applicant's former counsel was a submission from the bar, it was not averred to in the affidavit in support of the application. What was stated in the affidavit is that the former counsel failed to file appeal in time, the fact which was reported to the registrar. See paragraph 5,6,7,8 and 9 of the applicant's affidavit. This reason is an afterthought. Had it been a genuine reason, it would have featured in the applicant's affidavit in support of the application.

Thirdly, the applicant through an averment in his affidavit alleged that he was served with a copy of judgement in October 2016 for appealing purposes. However, it was not until the year 2017 the dismissed application for extension of time No 23 of 2017 was filed. No explanation as to why he stayed from October 2016 to the undisclosed date in the year 2017 to file an application for extension of time to file appeal. Generally, applicant as failed to account for each day of the delay



Fourthly, in paragraph 12 of the applicant's affidavit, illegality is advanced as a ground for extension of time. Applicant stated that the matter at the trial court was determined without first framing the issues, and that the hearing was done outside the scheduled speed truck. In addition to the above, during the hearing of this application, Mr. Frank counsel for the applicant contrary to what was averred to in the affidavit, said, the framed issues before the commencement of the trial were not in alignment of what the law required. He clarified that the case being for malicious prosecutions, guidelines of the issues as decided in the case of **Festo Mwakavana (supra)** ought to have been followed. I have perused the records. Trial court's proceedings show that issues were framed as follows:

***Plaintiff:*** Your Honour the proposed issues are:-

- i) Whether the plaintiff was arrested at the instance of the defendant and prosecuted maliciously without reasonable and probable cause for suspicious.*
- ii) Whether at the time of arrest the plaintiff's irrigation equipment were seized.*

*iii) Whether the plaintiff suffered any loss from the acts of the defendants.*

*iv) To what reliefs are the parties entitled.*

The above in mind, I find the applicant's complaints baseless. This is more so with the guidance of the decision by Musa Ja (As he then was) in **Ngao Godwin Losera V, Julius Mwarabu**, Civil application No. 10 of 2015 when dealing with the issue of illegality as a ground for extending time, said:

*"But it is noteworthy that in **Valambia** (supra), the illegality of the impugned decision was clearly visible on the face of the record in that the High Court had issued a garnishee order against the Government without affording it a hearing which was contrary to the rules of natural justice. Incidentally, the Court in the case of **Lyamuya** (supra) made the following observations: -*

*"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in **VALAMBIA'S** case, the court meant*

*to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one. The Court there emphasised that such point of law must be that of sufficient importance and, I would add that it must also be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by a long-drawn argument or process. "*

*Applying the foregoing statement of principle to the case at hand, I am not persuaded that the alleged illegality is clearly apparent on the face of the impugned decision. Certainly, it will take a long-drawn process to decipher from the impugned decision the alleged misdirection or non-directions on points of law."*

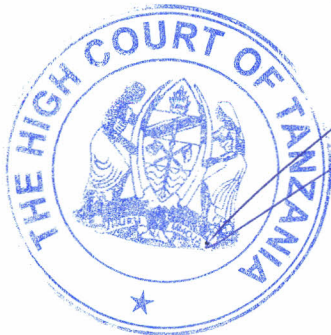
As rightly submitted by Mr Kaunda for the respondent, not every illegality in the records is a ground for extension of time. It must be the one falling

under the criterial explained in the cited case above. The pointed ones in this application fall short the test.

The only issue that would have served the applicant's application was to account for the delay which he has failed. For that reason, I proceed to dismiss this application with costs.

Order accordingly.

**DATED** at **SHINYANGA** this 28<sup>TH</sup> day of August 2020.



  
**E.Y. MKWIZU**  
**JUDGE**  
**28/8/2020**