

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

MISC. CIVIL APPLICATION NO.10 OF 2020

*(Originating from Misc. Civil Application No.17/2019, original Civil Case No.99/2019
Nyashimo Primary Court)*

HAPPINES ELIAS WAMBURA.....APPLICANT

VERSUS

MAYENGA SHENYE@SHILUNGU }

JOSEPH PELEKA@KABULU }

.....RESPONDENTS

RULING

25th September & 23rd October, 2020

Mdemu,J.;

Under the provisions of section 25(1)(b) of the Magistrate's Court Act, Cap.11 R.E 2019, the Applicant Happiness Elias Wambura moved this court by way of chamber summons for orders that, she be allowed to appeal out of time so as to challenge the decision of Bariadi District Court, in Misc. Application No. 17/2019. The application is supported by an affidavit of Happiness Elias Wambura sworn on 10th of August, 2020.

Briefly, at Nyashimo Primary Court, Mayenga Shenye @Shilungu, the 1st Respondent sued Joseph Peleka@Kabulu on what he termed as *kusitisha Mkataba wa mauziano ya nyumba*. The trial Primary Court decided in favour of the 1st Respondent Mayenga Shenye @Shilungu. The Applicant herein, who was a wife of the 2nd Respondent, moved the District Court of Bariadi for appealing out of time, in Misc. Civil Application No.22 of 2019 and also an application for Revision in Misc. Civil Application No.17 of 2019. She was unsuccessful in both,

thus chose this application for extending time to appeal in respect of Civil Application No.17 of 2019.

On 25th of September, 2020, appeared before me Mr. Majura Kiboga, learned Advocate representing the Applicant. The two Respondents appeared unrepresented. In support of the application, the learned Counsel first sought leave of the Court to have the affidavit of the Applicant be adopted as part of his submission. It was so. He then submitted as follows:

One, as the application to the District Court was for revision, it was wrong for the Magistrate who determined the application to treat it as an application for stay of execution. **Two**, the suit filed in the Primary Court was a land dispute thus, the Primary Court had no jurisdiction, and instead, the matter should have been referred to the Ward Tribunal in terms of section 18(1) (i) of Cap.11. His view therefore was that, these two illegalities suffices to extend time to appeal. He thus cited the case of **Hassan Abdulhamad v. Erasto Eliphase, Civil Application No.402 of 2019** (unreported) insisting that illegality has been a sufficient cause for extending time.

He added another point, **three**, that, the delay to appeal in time occasioned by an act of the Applicant looking for legal assistance in which, after securing one, time to appeal had already lapsed. The learned Counsel thus asked me to allow the application so that this court on appeal puts the record right.

In reply, the 1st Respondent briefly submitted that the Applicant is challenging decision of the Court dated 5th of November, 2019, but she also preferred another application No.22/2019 which on 11th of February, 2020, the

application was dismissed. She was therefore supposed to challenge the recent decision.

He submitted also that, it is not correct that the Applicant delayed because she was looking for legal assistance. The record shows that, she was represented in the District Court. He again submitted that, the Applicant was not a part both to the case and the transaction leading to the case and that the matter was at Mkula Primary Court and not Nyashimo. He thus stated to be a typing error to insert Nyashimo. The 2nd Respondent simply submitted that, appealing out of time is a legal requirement. He added nothing, meaning that he left the matter to court.

In rejoinder, the learned counsel stated that, the Applicant did not engage an advocate. As to Application No.22 of 2019 which the Respondent thought the one to be challenged, the learned counsel rejoined that the Application was dismissed on the ground that, the Applicant may not appeal as he was not a part in the suit at the trial Primary Court. He thus prayed the court to apply the provisions of Article 107(1)(e) of the Constitution of United Republic of Tanzania, 1977 and the principles of overriding objectives to have the matter in place.

That being the position of the parties, my turn now is to determine whether there are sufficient cause in the affidavit to warrant this court to extend time. In extending time, the court has all along deployed two principles. One is that the Applicant must account for the days of the delay and that the delay was with sufficient cause. See **TRA v. Dawson Ishengoma, Civil Appeal No.126 of 2011** (unreported). **Two**, is the illegality constituted in the impugned decision of the court. This has also been considered a sufficient cause

within which the court may exercise its discretion to enlarge time to appeal. See **Tanzania Breweries Limited vs. Herman Bildad Minja, Civil Application No.11/18 of 2019**(unreported)

Having that legal position, the Applicant in paragraph 9 of the affidavit deposed that, the decisions of the two courts below are tainted with irregularities and illegalities. In the submissions the said illegalities were named as want of jurisdiction on the side of Primary Court to entertain land matters and two the District Court treated the application of the Applicant as stay of execution while the same was for revisions.


In my view, the two illegalities need the attention of the higher courts so as to put the record right, I am aware that, not every illegality constitutes sufficient cause to extend time [see **Omary Ally Nyamalege (As the Administrator of the Estate of the late Seleman Ally Nyamalege) & Two Others vs. Mwanza Engineering Works, Civil Application No.94/08 of 2017** (unreported)]. However, illegality on matters of jurisdiction pleaded in the instant application; that is, a Primary Court adjudicating land matters and also the District Court determining an application for stay of execution while what was placed before it was an application for revision, may not be left unguided.

I have taken the concern of the 1st Respondent that, the Applicant was to challenge the recent decision of the District Court which refused him to appeal out of time. As correctly submitted by the 1st Respondent, the Applicant was not a part in Civil Case No. 99 of 2019. On that stance, the decision of the District Court of Bariadi (Mrio SRM) refusing to enlarge time on the ground that, the Applicant herein was not a part, may not be faulted. The other one subject to

this application, the Applicant, being not a part, sought for revision proceedings.

In my considered view, this ground alone indicates that there is sufficient and reasonable cause shown by the Applicant such that this court is hereby compelled to grant the application. That said, time to appeal to this court is extended for a period of thirty (30) days from the date of this ruling.

It is so ordered.


Gerson J. Mdemu
JUDGE
23/10/2020

DATED at SHINYANGA this 23rd day of October, 2020.



Gerson J. Mdemu
JUDGE
23/10/2020