IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

MISCELLANEOUS CIVIL APPLICATION NO 31 OF 2019

(Originating from Civil Case No 6 of 2011 in the District Court of Serengeti at Mugumu)

MAGIGE GIBOMA .....APPLICANT

Versus

MANG'ANG'A MAHONO ..... RESPONDENT

RULING

1st & 22nd April, 2020

Kahyoza, J.

Magige Giboma sued Mang'ang'a Mahono claiming damages for defamation before the District Court of Serengeti at Mugumu. Magige Giboma lost his claim.

A brief background of the matter is that sometimes in 2011, the applicant sued the respondent before the district court of Serengeti claiming for damages for defamation and compensation for failure to cultivate his farm, which was a result of the respondent act of seizing his cattle. The trial court delivered its judgment on the **11th March, 3014** in the presence of both parties.

Aggrieved by the decision of the trial court, Magige Giboma failed to appeal on time as a result he instituted the current application for extension of time to lodge his appeal out of time.

The respondent vehemently opposed the application by filling counter affidavit.

The issue for determination is whether the applicant adduced sufficient reasons for this court to extend time to institute his appeal.

It is trite law that an application for extension of time is entirely in the discretion of the court to grant or refuse. This discretion, however, has to be exercised judicially and **the overriding consideration is that there must be sufficient cause for so doing**. What amounts to "sufficient cause" has not been defined. From decided cases a number of factors have to be taken into account, including whether or not the application has been brought promptly; the absence of any or valid explanation for the delay; lack of diligence on the part of the applicant (See *Dar es Salaam City Council v. Jayantilal P. Rajani* - CAT Civil Application No. 27 of 1987 (unreported), and *Tanga Cement Company Limited v. Jumanne D. Masangwa and Amos A. Mwalwanda* – Civil Application NO. 6 of 2001 (unreported)

It is apposite for the applicant to adduce reasons for his delay for a period of almost six years.

The applicant was represented at the hearing by Ms. Mary Joachim advocate and the respondent enjoyed the services of Mr. Leonard Elias Magwayega.

The Applicant's advocate submitted that the applicant and respondent had a **civil case No 6/2011** before the District Court of Serengeti, which was decided on the 11th March, 2014. A few days after the decision, the applicant was arrested and charged with Economic Case No 24/2014 which was instituted before the same court on 26/03/2014. The applicant was convicted and sentenced to ten years' imprisonment on 28/04/2017. He successfully appealed to the High Court of Mwanza and was released on 24/07/2017. She contended that her client could not appeal from the time he was arrested, charged and later convicted as he was held in custody and in

imprisonment respectively.

She added that after the applicant was released, he attended informal treatment of the skin disease he contracted while serving his sentence. The applicant pursued this matter after he recovered. She submitted that her client obtained a copy of the judgment on the 20th November, 2019 and later on the 26th November 2019 he filed this application.

On his reply, the learned Counsel for the respondent prayed his counter affidavit to be adopted. He pointed out defects in the applicant's affidavit. He stated that the *jurat* did not indicate the full name of the commissioner for oaths. He added that the word "deponents" was used to connote that there were many deponents while the deponent was only one, the applicant.

The respondent's learned advocate submitted further that the application has no merit and he prayed the same to be dismissed. He contended that the fact that the applicant was charged and later convicted with an economic offence, hence unable to appeal on time was not a good ground. The applicant did not show efforts he deployed to lodge his appeal while in custody or in prison, which did materialize. He added that the applicant's advocate did not adduce evidence to show when her client was arrested and when the original civil case was decided in the affidavit. It was the applicant's advocate who provided evidence during her submission. He submitted that the advocate's submission is not evidence. He referred this Court to *Finca (T) Limited and Kipondogoro Auction Mart Vs. Boniface Mwaiukisa* **Civil Application No 589/12/2018** in support of his submission.

He averred further, that the applicant alleged that he was imprisoned for ten years but failed to attach a copy of judgment to prove his allegation.

He added that the applicant deponed that he was convicted in 2017 but his appeal baptized Criminal Appeal No. 344/2016. Thus, the appeal was lodged in 2016 before the applicant was convicted and sentenced. He submitted that for that reason, the applicant's affidavit contains false information. He submitted that the remedy for an affidavit containing false information is provided for under Order XIX R 2(1) of the Civil Procedure Code Cap. 33 R.E 2019. And therefore, the order sought by the defective affidavit cannot be granted.

It was also argued that the applicant did not state categorically in the affidavit the date when he was released before he filed the application on 26th November 2019. It was her advocate who told the Court during her submission that the applicant was released on the 24th July, 2017. He prayed to refer to the case of *Famal Investment (T) Limited Vs Drs Antony A. Nsojo And Another* **598/6 OF 2018** where the Court (before a Single Justice of Appeal Ndika J.A) held that

> *"Every aspect must be explained vividly in the affidavit and not by submission"*

The respondent's advocate submitted that the applicant did not state in his affidavit when he was released from prison and that he was unable to get a copy of the judgment immediately after his release.

It was submitted on behalf of the respondent that the applicant was released in 2017 but he filed the current application in November 2019, that is after two years. The applicant did not account for two years. Lastly, the respondent's advocate argued that there was no evidence to show that the applicant was attending treatment before an herbalist or informal treatment. He beseeched the Court to be dismisses with cost.

In her rejoinder, the learned advocate for the applicant refuted the

contention that the affidavit was defective. She submitted that *jurat* was proper, the name of Commissioner for Oaths was indicated and the word "deponents" was mistakenly written in plural form instead of singular. She contended that was a typing error.

She conceded that civil case was wrongly cited as civil case No. 4 of 2014 instead of civil case 6/2011. She reiterated her submission in chief and prayed the application to be granted with costs.

Before I determine the application on merit, I am compelled to determine the preliminary points of objections raised during the hearing by the respondent's advocate. He submitted that the application was defective on account of being supported by a defective affidavit. The *jurat* of attestation did not disclose clearly if the Commissioner for Oaths personally knew the person who introduced the deponent to him. Also, that the *jurat* indicated that there were many deponents while there was only one deponent.

The law on this subject is settled that the Commissioner for oaths has to indicate in the *jurat* of attestation **when, where and before what authority (whom) the affidavit was made.** See, section 8 of the **Notaries Public and Commissioner for Oaths Act**, Cap 12 R.E. 2002. Such authority usually, a Notary Public or Commissioner for Oaths, has to certify three matters, namely:-

> (i) that the person signing the document did so in his presence,
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> (ii) that the signer appeared before him on the date and at the place indicated thereon, and
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> (iii) that he administered an oath or affirmation to the signer, who swore to or affirmed the contents of the document. See also *DPP v Dodoli Kapufi and another* Cr. Appl. No. 11 2008.

There is also another principle governing *jurat* of attestation which states that the Commissioner for Oaths must indicate if the deponent is known to him personally or that the deponent was introduced to him by a person known to him. The Commissioner for oaths' failure to indicate how he knew the deponent is fatal. See **Jamal Msitiri @ Chanjaba V. R.** Cr. Appl. No. 1/2012 CAT (unreported) where the Court of Appeal had the following to state: -

> *"We would also wish to underscore that the section 10 of the Oaths and Statutory Declaration Act, [Cap. 34 R.E 2002], is relevant in attestation of an affidavit. It provides, the form that statutory declarations (including affidavits) must take such declarations must be in the form prescribed in the Schedule to Cap. 34 (supra). The aforesaid Schedule specifically directs* ***that the commissioner for oaths must indicate in the declaration either to have known the deponent personally or the deponent before him must have been identified to him by a person known to him personally****." (Emphasis added)*
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> The *jurat* under scrutiny that it reads
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> *"Sworn at Musoma before me ABEDIWEGO LEVI by the said MAGIGE GIBOMA who is identified to me by GERVAS EMMANUEL* ***the latter being known personally*** *in my presence this 4th day of November, 2019...."*

I concur with the respondent's advocate that the *jurat* of attestation does not state in black and white that the Commissioner of Oaths personally knew the person who introduced the deponent to him. An affidavit is evidence and it is vital to ensure that a person giving such evidence is the one who swears or affirms. It is therefore mandatory for the Commissioner

of Oaths to ensure and indicate that he knows the deponent personally or the deponent is introduced to him by a person he personally knows. The Commissioner of Oaths in the application at hand did not specify that he personally knew **Gervas Emmanuel**, the person who introduced the deponent to him. The Commissioner of Oaths simply stated that **the latter being known personally**.

Given the above statement, on one side it is justified to conclude that the Commissioner of Oaths did not personally know the person who introduced the deponent to him. Thus, *jurat* is defective. On the other side, it can be construed from that statement that the Commissioner of Oaths personally knew the person who introduced the deponent to him. Given the fact that the Commissioner of Oaths' statement is ambiguous and with the oxygen principle in mind, I resist to declare the *jurat* defective. I will proceed to determine the application on merit.

As shown above an application for extension of time discretionary remedy, to be granted, the applicant has to establish that he was prevented by sufficient reason or good cause to take the required step within the prescribed time. It is therefore, upon this Court to find out whether applicant has discharged the above described burden. An applicant for extension of time has to account for each and every day of the delay. The principle was laid down by the Court of Appeal in number of cases including *Hassan Bushiri v. Latifa lukio Mashayo*, CAT Civil Application No. 3 of 2007 (unreported).The above named case was cited with approval in the case cited by the respondent's advocate of *Finca (T) Limited and Another V. Boniphace Mwalukisa* Civil Application No. 589/12 of 2018 (CAT unreported). In that case, the Court imposed a duty on litigants who seek to extend time in taking actions to account for each and every day of delay. It stated that-

"Delay of even a single day has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken.

The applicant advanced two grounds of delay; **one** that he was arrested, charged and later imprisoned in economic case No 20/2014 on which the case was instituted on the 26th March 2014. He was later released on the 24th July 2017 after his appeal was decided in his favour. **Two**, that after his release he could not lodge his appeal as he contracted skin diseases. The applicant deposed that he attended informal treatment from July 2017 until September, 2019. After he recovered, the applicant applied and obtained a copy of the judgment, and instituted the current application.

The respondent vehemently opposed the application. He submitted the applicant did not exhibit any efforts to appeal while in custody and or while he was serving his sentence. He contended that it was possible for him to lodge and pursue his appeal while in custody and during the time he was serving his sentence.

I totally agree with the respondent's advocate that the applicant was not prohibited to institute the appeal for reason of facing an economic case. **Firstly**, there is no evidence that the applicant after he was charged with the said economic case he was detained in custody for want of bail. **Secondly**, even if he was so detained, that alone could not have made him fail to write to the court and obtain a copy of the judgment and prepare his appeal if he wanted. I am not convinced that the fact the applicant was facing an economic case and that he was later convicted and sentenced to serve a custodial sentence was a good ground to delay to file his appeal.

Even if, I find in his favour that he, the applicant was unable to appeal during the pendency of the criminal charges and after he was convicted and

sentenced, the applicant was released from prison on the **25th July, 2017**. The date of release although not state in the applicant's affidavit can be discerned from the documents annexed to his affidavit. The applicant did not institute the current application for extension of time until after two years from the date he was released, that is **on the 26th November, 2019**. The applicant's account for the two years delay was that he was attending treatment of skin diseases he contracted while in prison. He contended that he was being treated by an herbalist. I am unable to buy the applicant's explanation. It an argument of a person at a loose end.

The applicant ought to have taken action immediately after he found out that he was time barred to appeal by instituting this application after he was released in prison. It is an established legal maxim that *vigilantibus non dormientibus jura subveniunt*. That is the law serves the vigilant, not those who sleep. This position was stated by the Court of Appeal in *Royal Insurance Tanzania Limited vs. Kiwengwa Strand Hotel Limited,* Civil Application No. 116 of 2008 (unreported) while considering an application for extension of time under Rule 8 of the Court of Appeal Rules, 1979 (old Rules) where an applicant therein was required to show "sufficient reason." It stated:

> *"It is trite law that an applicant before the Court* ***must satisfy the Court that since becoming aware of the fact that he is out of time, acted very expeditiously*** *and that the application has been brought in good faith." (emphasis added)*

In the upshot, I find that the applicant has adduced no sufficient reasons for his failure to appeal within the prescribed time. He has not given this Court tangible reasons for which to exercise its discretion in his favour.

The Court of Appeal of Tanzania in *Regional Manager, Tanroads Kagera V. Ruaha Concrete 2 Company Ltd* Civil Application No.96 Of 2007 (Cat Unreported). The court in this case observed that;

> *"The test for determining an application for extension of time, is whether the applicant has established some material amounting sufficient cause or good cause as to why the sought application is to be granted".*

Further still, the applicant did not account for the period from the date he was released until the date he filed this application. He was duty bound to account for every day of his delay.

For the reasons stated above, I am of the considered view that this application has no merit and it is dismissed with cost.

It is ordered accordingly.

J. R. Kahyoza
JUDGE
22/4/2020

Court: Ruling delivered at 11.30 Am in the absence of the parties and their advocate. The parties within the Court premises not let in the Court due COVID-19 outbreak. **Copies of the Ruling to be dispatched to them.** B/C Mr. Charles present.

THE HIGH COURT OF TANZANIA MUSOMA

J. R. Kahyoza
JUDGE
22/4/2020