

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

MISC. CIVIL APPLICATION No. 75 OF 2020

(Arising from the decision of the District Court of Ukerewe 05 of 2019 Originating from Civil No.03 of 2019 of Ilangala/Bukonyo Primary Court)

DOMINA AUGUSTI.....APPLICANT

VERSUS

MUSSA JOHN MALEMBO RESPONDENT

RULING

25th March, 2021 & 30th March, 2021

TIGANGA, J.

The Applicant, Domina Augustin sued the respondent, Mussa John Malembo, before the Primary Court of Ilangala/Bukonyo in Civil No.03 of 2019, claiming for the division of the properties obtained when they were living together. The decision passed by the Primary Court aggrieved the applicant; she decided to appeal to the District Court of Ukerewe in Civil Appeal No. 05 of 2019. Once again the decision of the District Court aggrieved her, she decided to appeal before this court, but before doing

so, she realized that she was out of time, which is why she decided to file this application for extension of time.

The application was by way of chamber summons, made under section 14 of the Law of Limitation Act [Cap 89 R.E 2019] and the order sought are for extension of time within which the applicant can file an appeal against the decision of Ukerewe District Court, in Civil Appeal No. 05 of 2019, the other reliefs sought are the costs of the application, and any other order as the court may deem fit and just to grant.

The chamber summons was supported by the affidavit sworn and filed by the applicant herself. The reasons as to why the applicant did not file the appeal in time are that, immediately after the decision of the District Court, she collected all necessary documents for appeal purpose, and instructed Mr. Baraka Alfred Dishon, Advocate to appeal on her behalf, but the Advocate did not so appeal as instructed she became aware of this fact when she visited the court the registry and found no appeal.

The application was served to the respondent, who according to the letter from the hamlet chairman he refused the service, the fact which warranted this Court to proceed with the hearing of an application exparte

against the respondent. The applicant was represented by Ms. Tunu Msangi, learned Advocate, who in her submission in support of the application submitted that, immediately after the decision of the District court, the applicant engaged Mr. Baraka Alfred Dishoni, paid him legal fees and instructed him to appeal. After such instruction, Mr. Dishon told her to go and relax, he assured her that he would appeal within time something he did not do. Following that assurance the applicant believed that the Advocate would appeal, but the Advocate did not do so.

On 30/05/2020, the applicant came to court to make follow up of her appeal but found that there was no appeal filed. She communicated with an Advocate, but the Advocate told her that he assigned the duty to file that appeal to another Advocate who did not file it.

After constant follow ups to Mr. Baraka Dishon without success, the applicant on 16/06/2020, approached and engaged the current lawyer and instructed her to file and prosecute her appeal. Immediately after engagement, the counsel communicated with Mr. Baraka Dishoni through phone and by paying physical visit to his office, but Mr. Baraka Dishon reply was just like what the applicant told her.

Following that reply, she asked Mr. Dishon to swear an affidavit to the effect, but Mr. Baraka Dishon refused to swear the affidavit, therefore, they failed to secure that affidavit and the proof of payment.

Giving the reasons as to why the applicant did not take action immediately, the applicant deposed that, when she communicated with Mr. Baraka Dishon, he responded that, the appeal was on progress and everything was in order, by then the applicant was busy nursing her sick son in Hospital.

On the issue of illegality, she submitted that, the original case based on the division of matrimonial properties. The division was effected, but the quarrel remained on one house at Usagara in Mwanza which the respondent objected to be included in the list of properties on the ground that it was the property of his young brother which he built for the their mother.

To the contrary, the applicant gave evidence that the house was theirs, and she went as far as proving her contribution in building the house. However, the respondent rebutted the said evidence by the applicant and after such rebuttal, the burden shifted on the respondent.

Although the applicant asked the court to order the said young brother and the respondent's mother to be summoned to prove the allegations, the court did not give such order summoning them.

Further to that, the respondent did not bring the contract, even after he had been ordered to do so by the court. Instead of making adverse inference against the respondent, the court proceeded to decide in the favour of the respondent. For that reason, the counsel for the applicant prayed for this court to allow the applicant to appeal so that she can address the court on that illegality.

To support her arguments, she cited the authority in the case of **Principal Secretary, Ministry of Defence and National Service vs D.P Valambhia**, [1992] TLR 387 in which it was held that, allegation of illegality in the decision sought to be challenged is a sufficient reason for extension of time, even if there is no any other reason. She in the end, prayed the application be allowed with costs.

The application for extension of time in our jurisdiction is not a virgin ground; there are so many criteria, some set by the laws while others set by the decisions given in interpretation of the said laws by the court of records of this country.

In the case of **Eliakim Swai and Frank Swai vs Thobias Karawa Shoo**, Civil Application No. 02 of 2016 CAT-Arusha, it was held *inter alia* that,

*"...extension of time may only be granted upon the applicant showing good cause of delay. It is trite law that such decision is entirely in the discretion of the court to grant or refuse it. It is also trite that such discretion is judicial and so it has to be exercised according to the rules of reason and justice, and not according to private opinion, whimsical inclinations or arbitrarily - see: **Yusufu Same & Anor v. Hadija Yusufu**, Civil Appeal No. 1 of 2002 and **Lyamuya Construction Company Ltd v. Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No.2 of 2010, both unreported'.*

In looking for factors to consider as good cause, the court went further and elucidated on the lack of one agreed definition of what amounts to good cause, and held that;

*"Admittedly, what amounts to "good cause" has not been defined. This is so because extension of time being a matter within the Court's discretion cannot be laid down by any hard and fast rules but will be determined by reference to all the circumstances of each particular case - see: **Regional***

Manager, TANROAOS Kagera v. Ruaha Concrete Company Limited, Civil Application No. 96 of 2007 and **Tanga Cement Company Limited v. Jumanne O. Massanga and Amos A. Mwalwanda**, Civil Application No.6 of 2001, both unreported decisions of this court. In *Tanga Cement (supra)* for instance, this court, referring to its unreported earlier decision of **Dar es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987,"

From the stand of the law, it is clear that the decision whether or not to grant extension of time is purely discretionary; with need for the consideration of one main factor which is whether the applicant has given good cause for delay. In **Lyamuya Construction Company Limited vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No.2 of 2010 (unreported), CAT, the following guidelines were formulated in considering of what amounts to good cause:-

- (a) *The applicant must account for all days of the delay.*
- (b) *The delay should not be inordinate.*
- (c) *The applicant must show diligence, and not apathy, negligence or sloppiness in prosecuting the action that he intends to take.*

(d) If the court feels that there are other reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged."

In the authority cited above, the principle requires the applicant in cases for extension of time, to account for every day of delay, for him to be entitled for extension of time. That being the condition precedent, the issue which arises is, whether the applicant in this application, has managed to account each day he delayed?

In this case, the reasons given for delay are that the applicant trusted the Advocate and engaged him to file and pursue her appeal but the Advocate did not do so. When she came to realize that the appeal was not filed, it was already late. There is no proof by the affidavit or otherwise to prove that the allegations are true. There is no proof that the applicant engaged the said Baraka Dishon, as there is no proof of payment of instruction fees.

However looking at the sequence of the narration of facts in the affidavit filed in support of the application, the only conclusion one can make is that, the allegations have the elements of truth. I hold so because, the allegations have mentioned the names of the Advocate who was

engaged, his office and its location here in Mwanza. It is common ground that, once a person engages an Advocate to do something and become assured by that Advocate that, the said thing will be done, or is being done or has already been done, that lay person becomes assured and other things being equal, he is held to have a genuine belief, with nothing to worry about. In this case, from the affidavit by the applicant, the applicant had all reason to believe what she was told by the Advocate.

However, that belief can be genuinely inferred from the date the Applicant engaged Mr. Dishon up to 30th May 2020 when she realized that there was no appeal filed. However, the applicant does not seem to have immediately taken any action up to 16th June 2020, about 16 days later. The reasons she gave are that she was nursing her sick son at Ukerewe and later Bugando Hospital. It may be true that her son was sick as she has not just alleged but also mentioned the names of the child in paragraph 8 of the affidavit. Although she did not attach any medical proof to that effect, but the mentioning of names of the said sick son is an assurance that she is saying the truth.

The decision in the case of **Indo African Enterprises Ltd vs Consolidated Holding Corporation**, Civil Application No.07 of 2007

which cited with approval the decision in the case of **Tanga Cement Company vs Jumanne D. Masangwa and Amos A.Mwalandwa**, (CA), Civil Application No.06 of 2001 (unreported) require the applicant to give valid explanation for the delay, and prove that she acted promptly and without negligence.

Believing the reasons given by the applicant, it goes without saying that, the applicant has given valid explanation for the delay, she acted promptly, and without negligence. It has been proved that but the delay was caused by the Advocate she engaged to file and pursue her appeal who did not do his job.

On the point of illegality, the counsel for the applicant has tried her best to point out a number of issues which she considers to be illegalities. It is not the duty of this court at this stage to discuss the details of the alleged illegalities, the mere feelings that there is existence of a point of law of sufficient importance, such as the illegality in the decision sought to be challenged is enough.

In the case of **Principal Secretary, Ministry of Defence and National Service vs Valambhia**, [1992] TLR 387, it was held that,

allegation of illegality in the decision sought to be challenged is a sufficient reason for extension of time, even if there is no any other reason.

As I have already pointed out that the counsel for the applicant has tried her best to elaborate and point out the alleged illegalities. It suffices to say, that considering of what she said on that point, I feel that, there is existence of a point of law of sufficient importance in the decision sought to be challenged, for the High Court to consider on appeal.

That said, the application is granted, time to file an appeal is extended, the applicant is hereby given 14 days within which to file an Appeal.

It is so ordered.

DATED at MWANZA, this 30th March, 2021



J. C. Tiganga

Judge

30/03/2021

Ruling delivered in the open chambers in the presence of Miss.
Msangi, Advocate for the applicant.





J. C. Tiganga

Judge

30/03/2021

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