

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

MISC LAND APPLICATION NO. 63 OF 2021

(Arising from Misc. Land Application No. 44 of 2020)

JOSEPH SYLIVESTER MARIANGWEAPPLICANT

versus

PAULINA SAMSON NDAWAVYARESPONDENT

RULING

14th & 22nd July, 2021

RUMANYIKA, J.:

Following a dismissal order dated 21/7/2020 of this court (Mgeyekwa, J) for want of sufficient grounds, the application for extension of time within which Joseph Sylivester Mariangwe (the applicant) to apply for leave to appeal to the Court of Appeal of Tanzania is brought under Section 11 (1) of the Appellate Jurisdiction Act Cap 141 RE. 2019 against Paulina Samson Ndawavya (the respondent). The application is supported by affidavit of Joseph Sylivester Mariangwe whose contents Mr. Richard Kalumuna Rweyongeza learned counsel for the applicant adopted on 14/7/2021 during audio teleconference hearing. Mr. D. Richard learned counsel appeared for the respondent. I heard them through mobile numbers 0713273428 and 068630405 respectively.

Mr. R. K. Rweyongeza learned counsel submitted; **(1)** that however wide discretionary powers that the court may have had in granting or not granting extension of time, only sufficient grounds counted as it was elaborated in the case of **Yusufu Same & Another v. Hadija Yusufu**, Civil Appeal No. 1 of 2002 (CA) unreported and, with respect to availability of the records the applicant having had trusted the advocate he was home and dry that inaction/negligence of advocate Lubango who previously represented the applicant therefore it constituted a sufficient ground for extension of time **(2)** that the presiding judge may have had no jurisdiction yes, but on that ground, instead of dismissing the application she should have only struck it out (the case of **Nassoro Mohamed Mtawazi v. Tanzania Remix Centre Limited**, Civil case No. 111 of 2019 (HC) unreported much as the point of illegality sufficiently constituted a ground for extension of time (the case of **TANESCO v Mufungo Leonard Majura & 15 Others**, Civil Application No. 94 of 2016 (CA) unreported. We humbly submit and pray. The learned counsel further contended.

In reply, but having adopted contents of the counter affidavit of Jones Samson Ndawavya (Administrator of the estate of the late Paulina

Samson Ndawavya), Mr. D. Richard learned counsel submitted; **(1)** that in fact the applicant had not shown a sufficient ground for the delay that if anything, the latter only he blamed advocate of his choice and. on that one there should have been a supplementary affidavit of the advocate much as if advocates were that simply blamed and the applications granted, the courts would have set bad precedents because everybody would always take advantage of it **(2)** that as for the issue of illegality, the case of **Nassoro Mohamed Mtawazi** (supra) was distinguishable. That whatever the difference between dismissing or striking out a matter it was, it was all about the matter getting into finality such that none of the parties allowed back to court. In the alternative, that one may have had been the mere error of which the applicant should have come back only for corrections. That is all.

On rejoinder, Mr. R.K. Rweyongeza learned counsel submitted that on that one no way the applicant would have procured the advocate's affidavit because as it now stood, no longer the applicant had a control and, if anything, the provisions of the Civil Procedure Code provided for corrections yes, but the impugned point was neither clerical, arithmetical or accidental slip of the pen.

The central issue is whether the applicant has shown a sufficient ground for extension of time.

At least the respondent's counsel did not sufficiently dispute the vital facts deposed by the applicant in paragraphs 6 – 11 inclusively. All along one having had legal representation of Mr. Lubango advocate and upon receiving the impugned ruling without any delay or failure the applicant lodged a notice of appeal and, in writing he asked for the copies. Reasonably the applicant had reasons to trust the advocate as it was argued, correctly so in my considered view by Mr. R. K. Rweyongeza learned counsel the former therefore was done. Whether or not, for the reason of negligence or something the advocate lied on her, with the contractual relationship that they had the applicant should not have been so much to blame because the legal principle was long settled that advocate's negligence it constituted sufficient ground for extension of time (the case of **Yusufu Same (supra)**). Moreover, I think by itself right of legal representation in the courts of law it also constituted extended arm of right to be heard guaranteed under the Constitution of the United Republic of Tanzania. It therefore follows that a court which embraces negligent advocates' negligence at the detriment of an innocent subject it amounts

to denial of right to be heard whether or not on that one the applicant had no advocate's supplementary affidavit it was immaterial in my considered opinion because human psychology and instincts were as old as human himself and it was common knowledge that no one of them would self-inflict the wound suffices the point to dispose of the application.


Without prejudice to the foregoing, the issue whether where the court lacked jurisdiction the proper course was to dismiss or strike out the matter and, on that one whether the presiding judge was right or not, the it needs not to retain me. Like Mr. D. Richard rightly so argued, with all intents and purposes that one constituted no a point of illegality but simply a ground of appeal in my opinion respectfully brought both in disguise and prematurely. It is very unfortunate that although the words did not belong to the same or even similar family or specie, at times Mr. R. K. Rweyongeza, advocates he either used the words interchangeably or, with a very thin thread a point of illegality and grounds of appeal he just separated the two. Whereas illegality entailed any order or court findings in blacks and whites prohibited by the law say corporal punishment being imposed on a female or on above 45 years old male convicts, or in the most unlikely events an armed robber being sentenced to death by

hanging (in any case not counted as excessive penalty either) to mention but few, 31 years custodial sentence for instance imposed on a convict of armed robbery in Tanzania it is counted as excessive penalty therefore a good ground of appeal.

The 2nd limb of the application therefore it constituted no point of illegality. It is dismissed.


As said however, the application is granted. Each party shall bear their costs. It is so ordered.

Right of appeal explained.


S. M. RUMANYIKA
JUDGE
15/07/2021

The ruling delivered under my hand and seal of the court in chambers this 22/07/2021 in the absence of the parties.




S. M. RUMANYIKA
JUDGE
22/07/2021