

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

MISC. CIVIL APPLICATION NO. 11 OF 2021

(C/O Probate Appeal No. 2 of 2019, Probate Appeal No. 1/2019

Sumbawanga DC originating from Probate Cause no 34/2011 Sumbawanga
PC)

NICHOLAUS KILAPILO APPLICANT

VERSUS

GRACE MWAKABENGA RESPONDENT

RULING

Date: 19 & 28/07/2021

Nkwabi, J.:

By chamber summons supported by an affidavit the applicant prays for the following orders:

- i) Time be extended to allow the applicant to apply for orders setting aside ex-parte decree.
- ii) Re-hearing of appeal inter-parte.
- iii) Any other relief deemed fit and just.



The application was supported by the affidavit of Baltazar Sichilima Chambi learned advocate for the applicant. Further, the chamber summons is brought under Order XXXIX Rule 19 of the Civil Procedure Code.

The respondent resisted the application by filing a counter-affidavit duly sworn by herself, averring that the applicant had known that his advocate and negligently allowed him to act. She further argued that the delay is due to total negligence and disputed other averments by the applicant.

In submission in Chief, Mr. Chambi learned counsel submitted that they pray for extension of time in order to file an application to set aside ex-parte decree. They pray their application be granted so that the appeal is heard inter-parties.

That there was an appeal which was filed against the decision in Probate No. 34/2011 and probate appeal no 1/2019. The appeal was filed within time. But since the counsel who brought the appeal had not renewed his practicing certificate, the court decided to dismiss the case of the applicant and determined the appeal ex-parte. It took sometimes for the applicant to

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get a lawyer to prosecute the appeal. The applicant was working in NFRA at Songea. It took some time for him to get another advocate.

Mr. Chambi further, argued that the appeal has legal points for determination. The ex-parte judgment was reached while the advocate of the applicant had made reply submission but the objection was brought in rejoinder which has no reply. The decision was reached by hearing only one side. In the judgment, too there was an issue of estoppel which was incorrectly reached at.

In reply submission, Mr. Budodi objected the application for extension of time arguing that all that is submitted by the counsel for the applicant reflect negligence of the counsel of the applicant and the applicant himself. Negligence cannot be good cause for extension of time. The applicant has failed to account for each day of the delay. Judgment was delivered on 15/07/2020 while the current application was filed on 29/04/2021. The affidavit did not show reasons what caused the delay and the 9 months were used for looking for an advocate. The advocate is from within Sumbawanga so as the parties. Incompetent application cannot be an excuse citing the case of **William Shija v Fortunatuc Masha [1997]**

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Replying to the alleged illegality, that an objection was raised during rejoinder, Mr. Budodi said that cannot be a ground for extension of time as it is a ground of appeal and this court is functus officio.

He further argued that looking for legal assistance is not a good cause citing **Ally Kinanda v R. Criminal Application no. 1/2016** CAT at Dodoma at P7. The applicant is wasting time and employing delay tactics. He prayed the application be dismissed with costs.

In rejoinder, Mr. Chambi argued that the applicant was not negligent on the issue of practicing certificate. At the time of engaging the advocate, the advocate had a valid practicing certificate, had he been given time, he would have renewed the practicing certificate. The 14 days delay cannot be said to be delay as delay starts from the 60 days as per the law. He distinguished the case cited by Mr. Budodi the case of **Elfazi Nyatega** to the effect that a delay of 3 years cannot be equated with delay for 14 days.



The appeal will explain illegalities which does away with accounting on each day of the delay and that the applicant was condemned unheard and those should be sufficient grounds for extension of time. The applicant committed no negligence. As to estoppel, this too, was illegally used.

I am grateful to the counsel of both parties for their submissions. The affidavits of both parties and the submissions of both parties, boil to the following issues:

1. Whether the applicant has accounted for every day of the delay.
2. Whether the applicant has managed to establish that there is illegality in the decision of the High Court he intends to challenge in the application to set it aside.
3. Whether the applicant has assigned good cause for this court to grant extension of time within which to file the notice of appeal.

I fully subscribe myself to the decision of the Court of Appeal in **Civil Application No. 218 of 2016 Interchik Company Limited v Mwaitenda Ahobokile Michael** (unreported) delivered by Hon. Ndika, Justice of Appeal, where he had these to say at page 12:

It is this Court's firmly entrenched position that any applicant seeking extension of time under Rule 10 of the Rules is required to account for each day of delay.

In the present application, the applicant has failed to account for each day of the delay, because some of the explanation as to failure to file the application to set aside the alleged ex-parte judgment were just raised from the bar in respect of the claim that the applicant was/is residing in Songea working with NFRA, just like Mr. Budodi claimed and the same cannot be the basis for granting extension of time. See **Civil Application No. 44/08 of 2017 Elfazi Nyatega & 3 Others V. Caspin Mining Ltd CAT Mwanza Oct. 2018 Mwarija JA**

"As to the reason relating to the death of the applicants' advocate, that fact is not contained in their affidavit and cannot therefore, be considered with a view of finding how it contributed to the delay."

The first issue, therefore, must be answered in the negative.



Next, I discuss the 2nd issue which is whether the applicant has managed to establish that there is illegality in the decision of the high court he intends to challenge by application to set aside.

It is trite law that the main relief the applicant is seeking (extension of time to file an application out of time) is discretionary. It is in court's fully discretion to grant or refuse the same. In order this court base its discretion, then applicant has to supply the court with the necessary material upon which the court will use its discretion. See **Regional Manager TANROAD Kagera v Ruaha Concrete Co. Ltd, CAT Civil application No. 96 of 2007, at DSM (Unreported):**

"What constitutes "sufficient reason" cannot be laid down by any hard and fast rules. This must be determined by reference to all the circumstances of each particular case. This means that the applicant must place before the Court material which will move the Court to exercise its judicial discretion in order to extend the time limited by the rules."



It should be noted, at this juncture, what I am supposed to determine is whether there are some illegalities on the face of the record. With respect the applicant and his counsel have failed to demonstrate that on the face of record that the judgment is tainted with illegalities because did not attach the said decision for me to determine whether on the face of the record there are such illegalities.

Lastly, I turn to discuss the 3rd issue which is whether the applicant has assigned good cause for this court to grant extension of time within which to file an application to set aside ex-parte judgment. In the first place, there nothing to suggest on the material put forward to the court that the appeal proceeded ex-parte. Secondly, good cause would have been readily established if the applicant would have furnished this court with the materials necessary for this court to see the alleged illegalities such as condemning unheard and estoppel. No material has been advanced to this court for that matter and hence, it is difficult for me to decide that sufficient cause has been established. Consequently, the application is dismissed with costs.

It is so ordered.



Dated at Sumbwanga this 28th day of July, 2021




J. F. Nkwabi,

JUDGE

Court: Ruling delivered in chambers this 28th day of July 2021 in the presence of Mr. Musa Lwila, learned counsel holding brief for Mr. Chambi learned advocate for the applicant and the applicant present in person and in the presence of Mr. Musa Lwila, learned counsel for the respondent and the Respondent present in person.




J.F. Nkwabi,

JUDGE