

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MWANZA DISTRICT REGISTRY**

**AT MWANZA**

**MISC. CIVIL APPLICATION NO. 47 OF 2021**

(Arising from High Court PC. Civil Appeal No. 78 of 2021)

**KIKUNDI CHA KUKOPESHANA.....APPLICANT**

**VERSUS:**

**MATHIAS KIHIGA.....RESPONDENT**

**RULING**

17<sup>th</sup> August, & 08<sup>th</sup> September, 2021

**TIGANGA, J.**

This is an application for extension of time for filing an application for certification on point of law so as to appeal to the Court of Appeal of Tanzania against the decision of this court dated 04/03/2021 in PC. Civil Appeal No. 78/2021 decided by Hon. Mgeyekwa, J.

The second prayer in this application is for this court to grant certificate on point of law to the applicant upon which to appeal against the judgment of this court in PC. Civil Appeal No. 78/2021, decided by Hon. Mgeyekwa, J. and any other relief(s) this court may deem fit and just to grant.

The application was preferred in the chamber summons filed under Section 11 (1) of the Appellate Jurisdiction Act [Cap 141 R.E 2019], Rule 45 (a) of the Tanzania Court of Appeal Rules, 2019 and Section 95 of the Civil Procedure Code [Cap 33 R.E. 2019]. The chamber summons was supported by the affidavit sworn by Emmanuel Magulugalemi, a Principal Officer of the applicant.

The background of the application as can be deciphered from the affidavit and the record is that, in the year 2018, the applicant filed a suit against the respondent in Katoro Primary Court, that is Civil Case No. 79/2018 in which Kikundi cha Kukopeshana cha Maendeleo Ibondo was claiming for costs which was allegedly incurred in litigating Civil Case No. 73/2015 in Katoro Primary Court, Civil Appeal No. 05/2016 in Geita District Court and Civil Appeal No. 62/2017 of the High Court Mwanza. In Civil Case No. 79/2018, the applicant was condemned to pay Tshs 297,000/= to Mathias Kihiga the respondent.

The applicant was aggrieved by the decision; she filed Civil Revision No. 18/2019 before Geita District Court, which also its decision aggrieved the applicant who appealed before this court in PC. Civil Appeal No. 78 of 2020, which appeal was also dismissed without costs.

Still aggrieved by that decision, the applicant is asking for extension of time to file an application for certification of the point of law so that he can appeal to the Court of Appeal of Tanzania.

The basis upon which the extension of time was sought is the facts that, the judgment of the High Court which is sought to be appealed against, has a number of errors, as follows:-

- i) That the High Court allowed the appeal without appreciating the fact that before the trial court, the respondent though appeared but did not object the application for execution.
- ii) That the Judge erred when she entertained the appeal which was amongst the new parties or wrong parties bearing different names of the applicant i.e Kikundi cha Kukopeshana instead of the original names in Civil Case No. 79/2018 which is Kikundi cha Kukopeshana cha Maendeleo Ibondo. While there is no order of the court allowing the change of names from Kikundi cha Kukopeshana cha Maendeleo Ibondo to Kikundi cha Kukopeshana.
- iii) That proceeding with the appeal amongst wrong parties rendered the decree no-executable as between the parties to per original record.

iv) That the High Court erred in law by failure to state specifically which amount is to be restituted to the respondent, while the execution involved the decretal amount granted in Civil Case No. 73/2015 between Emmanuel Magulugalemi vs. Mathias Kihiga, thereby disregarding the decretal sum of Tshs 297,600/- decreed in Civil Case No. 73/2015 of Katoro Primary Court.

v) That the decision of the High Court in PC Civil Appeal No. 78/2021 has a serious jurisdiction implications which if left unchallenged will seriously undermine the law therefore extension of time is warranted.

He insisted that, without certificate by this court the appeal to the Court of Appeal is impossible.

The application was countered by the respondent, who through the counter affidavit filed by him objected the application. He in the end asked the court to refuse application for extension of time on the ground that, the applicant has failed to show sufficient reasons to warrant extension of time.

At the hearing, the applicant was represented by Mr. Yuda Kavugushi who adopted the affidavit filed in support of the application. He started by

giving the historical background of the case as reflected in the affidavit. He insisted that from the decision of the High Court based on the matter which had different parties from those who were in the original case that is "Kikundi cha Kukopeshana" instead of "Kikundi cha Kukopeshana cha Maendeleo Ibondo" which name was changed by the respondent when he filed application for Revision No. 18/2019. He submitted that the change of names was done without leave of the court; therefore even PC Civil Appeal No. 78/2021 was erroneously decided basing on the changed names thereby making the proceedings to be a nullity.

He asked this court to rely on the decision of **CRDB Bank PLC Formerly CRDB (1996) Ltd vs. George Mathew Kilindu**, Civil Appeal No. 110 of 2017 -CAT - DSM where it was held that, proceedings in new names without leave of the court renders the proceedings a nullity and is tantamount to proceeding with the case against the non existing entity.

He prayed that, that is a point of law which entitled the applicant leave to have the point of law certified for him to appeal to the Court of Appeal.

He submitted further that, even the respondent did not, in the counter affidavit filed by him counter the allegations, but he put the applicant to strict proof of the deposition in the affidavit. Mr. Kavugushi cited and relied on the case of **East African Cables (Ltd) vs. Spencon Services Ltd**, Misc. Application No. 61/2016 HC - Commercial Division, where Hon. Mruma, J, held that, affidavit should not be couched like normal pleading. Thus allegations in the affidavit must be countered, the other party should not be put to proof. He asked this court to find that putting them to strict proof is tantamount to conceding the alleged or deposed facts.

He asked the court to find that, there was a change of names, having so found, two issues be framed to guide the court to decide on those anomalies.

**One**, whether it was proper to change the names of the parties, **two**, whether the decision made after changing names are executable? He prayed this court to certify these two points of law so that the Court of Appeal of Tanzania can deal with them.



In the reply submissions by the counsel for the respondent he **first** attacked the application for being an omnibus, **second**, attacked the applicant concentrating his argument on the application for certification of the point of law and has forgotten to deal with an aspect for extension of time. He submitted that being a crucial part of the application and being not accorded weight in the affidavit and in the argument advanced in the submission in chief.

On the merit of the application, he reminded the court that, in this case the judgment passed by Hon. Maige, J (as he then was) was the last judgment in this dispute and therefore it was conclusive. He further reminded the court that, the applicant did not go to the trial Primary Court to execute the order, but instead they filed new case at the Primary Court in which they changed the names of the applicant to read "Kikundi cha Kukopeshana" instead of the original names of "Kikundi cha Kukopeshana na Maendeleo Ibondo".

He submitted further that, that was the respondent's contention before the District Court and before the High Court, Hon. Mgeyekwa, J, he insisted that, it was not the respondent who changed the names, but it was the applicant who did so.

Distinguishing this case with the authority in the case of **East African Cable** (supra), he said in that case the whole affidavit was putting the other parties to strict proof, while in the case at hand, the paragraphs putting the other party to strict proof are few, but in most cases for example in paragraph 4, 5, 6 and 7, the respondent has been saying the responding's position.

He in the end asked the court to find that, the applicant failed to account for his delay to file an application, and also failed to give any point of law which this court should certify for consideration by the Court of Appeal. He asked the application to be dismissed.

In rejoinder, the counsel for the applicant submitted that, the application for extension of time has based on the illegality shown under paragraph 12 of the affidavit filed in support of the application. He reminded the court that, it is now a principle of law that, illegality is one of the grounds which is taken to constitute sufficient cause for extension of time. He also submitted that, in the rest of the paragraphs in the affidavit including paragraph 13, the applicant has shown illegality in the proceedings and decision to be challenged before the Court of Appeal.



Regarding the issue of who changed the names of the parties, he submitted that, it was not the applicant who changed the names. He said it is in the application for execution where the respondent changed names. He invited the court to refer the records which speaks louder on the complained issue.

On the 3<sup>rd</sup> ground, he asked the court to appreciate that the counsel managed to show the point to be certified by this court for determination by the Court of Appeal. He reiterated on the points he presented in the submission in chief.

Further to that, he also asked for the court to find that all case authority referred to by the applicant are relevant. He prayed for the application to be granted for the reasons given.

That being a summary of the application and the record, it is on record that the application at hand combines two prayers in single application which in the normal course each constitute an independent application. One, is an application for extension of time for the applicant to be allowed to file an application for certification of points of law, and two, is an application for certification of the point of law. This means, before

filing the application for certification of point of law, the applicant realized that he was already late to do so that is why he also filed inclusively, the application for extension of time to do so.

The requirement to file for the application for certification of point of law is under section 5 (2)(c) of the Appellate Jurisdiction Act [Cap 141 R.E 2019]. The same is supposed to be filed within 14 days from the date of the order or decision sought to be appealed against.

In this case the decision sought to be appealed against, was delivered on 04/03/2021, while the application for extension of time and certification of point of law was filed on 18/05/2021, more than 60 days after the decision sought to be appealed against was delivered. From their nature, where the application to be made and for which extension of time is sought is filed together with an application for extension of time, then the said application for which extension of time is sought becomes consequential, depending the outcome of the application for extension of time.

In other words, it can be said that, unless the application for extension of time is sought and granted, the application for certification of

point of law cannot be entertained. This means, where the two prayers, for extension of time and certificate are filed in the single application, then the applicant must, as a matter of procedure, establish, that he had good or sufficient cause for delay which would warrant for extension of time, and unless the court is satisfied that there was reasons for delay (sufficient or good cause) it is when it shall entertain and determine the application for certification of point of law.

Now the issue in this application, which has combined two prayers, in the same application, is whether the applicant has managed to adduce good cause for delay which warrants the extension of time?

In a plethora of case authorities' good cause has been interpreted to mean the following but not limited to whether the applicant has accounted all days delayed, whether the delay is inordinate or not, whether the applicant has shown diligence, and not apathy negligence or sloppiness in prosecution of the action that he intends to be taken. Last but not least, if the court feel that there is any point of law of sufficient importance such as the illegality involved in the decision sought to be challenged, see **Lyamuya Construction Company Ltd cs The Board of Registered**

**Trustees of the Young Women Christian Association of Tanzania,**

Civil Application No. 02/2020 CAT (unreported).

In the case of **Mohamed Suleman Ghona Vs. Mahmoud Mwemus Chotikungu, Civil Application No. 179/01/2020 CAT - DSM**, it was held *inter alia* that;

*"In determining if good cause has been disclosed, the court has consistently taken into account considerations such as:-*

- i) The cause of delay involved*
- ii) The length of de delay,*
- iii) The conduct of the parties,*
- iv) The degree of prejudice if any that each party suffers depending on how the court exercises its discretion,*
- v) The need to balance the interest of a party who has constitutionally under pined right of appeal, and*
- vi) Whether there is a point of law of sufficient importance such as illegality of the decision sought to be challenged".*

In this case, in asking for the extension of time, the counsel for the applicant has based his application on the illegality of the decision sought to be appealed against. The illegality he has stressed was on the change of names of the parties without leave of the court, secondly was on un executability of the decision due to that change of names.

It is now the principle and trite law that not every time when the point of law is raised as illegality as the reasons for extension of time, constitutes good or sufficient cause for extension of time, that point of law must be of sufficient importance, and must be apparent on the face of record for the same to constitute good cause to warrant for extension of time.

In some cases, even if illegality is raised as a ground for extension of time, still the court may require the reasons for delay to be given and may also require the applicant to account for the days delayed.

One of the circumstances where the court may so demand is when the court is of the feeling that the motion for which extension of time is sought is nothing but a calculated delaying tactic.

In this matter, the dispute between parties started way back in 2015, the same has landed to the High Court two times and more importantly, the amount which parties are litigating for ranges from Tshs 297,600/= to 2,290,000/= as the case may be. In the circumstances, and the point raised as illegality is based on the change of names which by all standard does not in any way affect the conscious of the parties on the



understanding of who are the proper parties who appeared in the original case.

It goes without saying that even if, the application is allowed, it will not vitiate the proceedings in original case, but on the subsequent proceedings which have no effect on the substantive part of the case.

Given the circumstances of the case at hand, and the alleged illegality which the applicant was aware of, I find that, it was important for the counsel for the applicant to tell the reasons as to why the applicant delayed to file an application for certification of point of law, while the judgment of the High Court was delivered in their presence as reflected at page 8 of the judgment of PC. Civil Appeal No. 76 of 2020.

Further more, the counsel for the applicant gave no mention for the delay and the reasons thereat, he has not cleared that, the applicant was not negligent in prosecuting his right to appeal, and looking at the balance of convenience and the prejudice principle, I find the errors which are sought to be the base of the application for certification of point of law and consequential appeal, are likely to prejudice the respondent most than the applicant. That said, I find applicant to have failed to account the days he



delayed, and the point of law raised as illegality have no any sufficient importance for the same to constitute good cause.

In the upshot, I find the application for extension of time to have not been made good, therefore the same is refused. Consequently the application for certification of point of law being a consequential application dies a natural death. The application is therefore dismissed with costs.

It is accordingly ordered.

**DATED at MWANZA on this 08<sup>th</sup> day of September 2021.**



  
**J. C. TIGANGA**

**JUDGE**

**08/09/2021**