

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

**BUKOPA DISTRICT REGISTRY**

**AT BUKOPA**

**MISC CIVIL APPLICATION NO. 22 OF 2021**

*(Arising from PC Civil Application No.12 of 2019 High Court Bukoba and Civil Application no. 23 of 2018 Muleba District Court & Civil Case No. 24 of 2018 Mubunda Primary Court)*

**ANASTAZIUS WILLIAM.....APPLICANT**

**VERSUS**

**ERASMUS MUJUNI.....RESPONDENT**

**RULING**

**16/09/2021 & 01/10/2021**

**NGIGWANA J**

This is an application for extension of time to file application for restoration of PC Civil appeal No. 12 of 2019 which was dismissed for want of prosecution. The application has been brought under section 14(1) of the Law of Limitation Act, Cap. 89 R.E 2019 and section 95 of the Civil Procedure Code, Cap 33 (R.E 2019).

The Applicant's affidavit through grounds 3, 4, 5, and 6 present the facts constituting the cause for delay. The applicant's counsel, Mr. Pereus Mutasingwa when invited to take the floor to amplify what was averred by the applicant in his affidavit, he prayed the applicant's affidavit to be adopted in his oral submission and went on elaborating that the case registered as (PC) Civil Case Appeal No. 12 of 2019 in this court was dismissed for want of prosecution on 21/10/2020 when it came for

mention due to lack of information and he was not called by summons to know the date the case was scheduled for hearing. That the reason for non-appearance to court was that the applicant was convicted six months imprisonment being an accused surety of his relative who jumped bail. That after being released from prison the applicant made follow up to get the order of the dismissed case where he found himself out of time.

That the order of dismissing the applicant's case is tainted with illegalities as the case was dismissed the day fixed for mention contrary to Order XXXIX Rule 11(1) and 17(1) of CPC Cap 33 R. E 2019 which requires the appeal to be dismissed when the case is scheduled for hearing. That the pointed-out illegality warrants this court to extend time.

When invited for the oral reply submission, Advocate Ngotolwa submitted that the appeal was dismissed on 21/10/2020 and the applicant had time to file this application on 24/5/2021 which is now 5 months. Mr. Ngotolwa has refuted the reason for delay that the applicant was in prison hence failed to file this application so promptly. He explained that the applicant was set free on 10/12/2020 after being pardoned and brought the application on 24/05/2021 which is equal to six (6) months. That the applicant has not explained why he delayed for quite a long time. That it seems he spent a long time preparing an application which is unusual. Mr. Ngotolwa argued that the reason that the order of the court is couped with illegalities does not feature in the applicant's affidavit.

The respondent's counsel further responds that this case originates from primary court hence the CPC Cap 33 which the applicant's counsel challenges to have been used to dismiss the case on mention does not apply to primary court. The argument that the applicant was not given a

summons and that was not notified for his case has no merit as the applicant was the appellant in the dismissed case, he was therefore duty bound to follow up of his case.

It was further argued by Mr. Ngotolwa that the applicant stated in his affidavit that he filed appeal 19<sup>th</sup> March 2019, but did not disclose as to when he was convicted though he was released on 20/12/2020 hence did not spend 6 months in prison. That on 29/10/2019 Appeal No. 12 of 2019 was scheduled for mention. It is almost 7 months after the appeal being filed and that date, he was not present. On 15/01/2020, 16/03/2020, 15/06/2020, and 10/08/2020 the applicant entered no appearance and he was not in prison on those dates thus he had no intention to prosecute his case. That this application comes after seeing that the respondent was going for execution and the same has already been effected therefore the respondent will be prejudiced.

In rejoinder, Mr. Pereus reiterated his submission in chief and added that the respondent did not dispute that the case was dismissed during mention and the applicant was not summoned. The applicant delayed for being in prison and when he was released, he found his case dismissed that the respondent will not suffer if the application is granted.

The thrust of this application is to determine whether the applicant has demonstrated sufficient cause for delay to warrant extension of time.

It is trite law that an application for extension of time is entirely in the discretion of the court to grant or refuse it. 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 8 1987 (unreported), and **Tanga Cement Company Limited v. Jumanne D. Masangwa and Amos A. Mwalwanda** - Civil Application No. 6 of 2001 (unreported)).

In the applicant's affidavit and in the submission advanced by the applicant's counsel, there is no where the date which the applicant was convicted or sentenced to 6 months in prison was indicated. I have assessed the conduct of the applicant, which is also a consideration factor in exercising discretion in extending time, from the date when the applicant's appeal (PC) Civil Appeal No. 12 of 2019 was filed on 19/03/2019 up to 21/10/2020 when it was dismissed for want of prosecution, the applicant had never entered appearance to court. By whatever standards, it cannot be said that the applicant was in prison for such a long period given the fact that he has not accounted at what time he was convicted and sentenced to prison.

Moreover, Annexure "AN 1" which the applicant himself annexed in his affidavit exhibits that he was not in prison for all six months which he was sentenced as he was released early under parole arrangement. Therefore, there is no valid explanation when he was sentenced and where he was for the whole period, he had abandoned his appeal regard being had that he was the appellant who filed the dismissed appeal.

As said already, conduct of parties has been held as a factor of consideration in exercising discretion of extending time or not to extend.

See **Glory Shifwaya Samson V Rapael James Mwinuka**, Civil Appeal No. 506/17 of 2019, CAT at Dar es Salaam (Unreported).

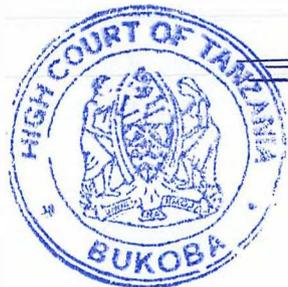
- It is also undisputed fact that the applicant was released from prison on 10/12/2020 and found that his Appeal No. 12 of 2019 was dismissed. The record also shows that he filed this application for extension of time on 24/02/2021. Therefore from the date the applicant was released from prison to the date he filed this application brings about the total of two months and 14 days which have not been accounted why the applicant delayed to file this application promptly as he was no longer in prison.

The applicant had also pointed out that the dismissal order by deputy registrar is tainted with illegalities for dismissing the case at the mention date instead of hearing date. I am alive that the provision of law under which the applicant's case was dismissed uses the words "hearing" and not "mention." But I paused to ask for how long could the court have tolerated the non-appearance conduct of the applicant. It does not come to my understanding how possible the applicant who was the appellant failing to attend to court for about seven months from the date he filed his appeal without any notification to the court. By all standards, there could be no any defence than this court concluding that the applicant was grossly negligent and had totally abandoned his case. Negligence and lack of due diligence in prosecuting cases are inexcusable and are not mere lapses and therefore cannot be taken to constitute good cause for granting extension of time. See **Sophia Mwashusha v Leningrade Mshiu**, Civil Application No. 191 of 2014, CAT at Dar es Salaam. Pg 12 (Unreported).

In my judicial interpretation, **Order XXXIX rule 11**, which requires dismissing cases scheduled for hearing for want of prosecution cannot hinder the court dismissing the long-abandoned cases simply because they were scheduled for mention taking into account the circumstances of this case where the pleadings were complete and the lower court records were in domain of this court.

In recap, for the afore stated reasons, I decline to exercise my discretion in favour of the applicant, instead the application is hereby dismissed with costs.

Order accordingly.

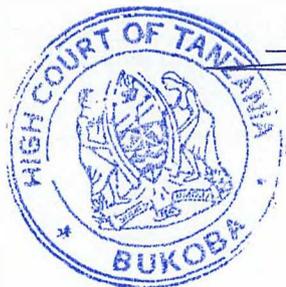


  
E.L.NGIGWANA

JUDGE

01/10/2021

Ruling delivered this 1<sup>st</sup> day of October, 2021 in the presence of the respondent in person, Mr. E.M. Kamaleki, Judges Law Assistant, Gozbert Rugaika B/C, but in the absence of the Applicant and his advocate.



  
E.L.NGIGWANA

JUDGE

01/10/2021