

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
BUKOBIA DISTRICT REGISTRY  
AT BUKOBIA**

**MISC. CIVIL APPLICATION NO. 26 OF 2021**

*(Arising from Civil Appeal No. 02 of 2019 at the High Court of Tanzania, Bukoba Registry, Civil Appeal No. 44 of 2017 at the District Court of Bukoba and original Civil Case No. 131 of 2017 at Bukoba Urban Primary Court)*

**STEVEN JUMA MUNIGANKIKO..... APPLICANT**

**VERSUS**

**THERESIA ANDREA.....RESPONDENT**

**RULING**

06/12/2021 & 31/01/2022

**NGIGWANA, J.**

Aggrieved by the decision of the District Court of Bukoba in Civil Appeal No. 44 of 2017, delivered on 16/08/2018, Originating from Civil Case No. 131 of 2017 at Bukoba Urban Primary court, the applicant herein filed (PC) Civil Appeal No. 02 of 2019 to this court. On 03/03/2021 (PC) Civil Appeal No.02 of 2019 was dismissed for non-appearance.

The applicant herein intends to pursue his appeal and as such, he filed the present application seeking for the following orders.

- (i) *That, this honorable court be pleased to grant an extension of time for the re-admission of (PC) Civil appeal No. 02 of 2019 at the High Court of Tanzania, Bukoba Registry.*
- (ii) *That, the honorable court be pleased to re-admit, Civil Appeal No. 02 of 2019 at the High court of Tanzania, Bukoba Registry.*
- (iii) *Costs of the application.*

The application is brought under Rule 17 of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules G.N. No. 312 of 1964, Section 14(1) of the Law of Limitation Act Cap. 89 R.E. 2019 and Section 2(1) of the Judicature and Application of Laws Act Cap.358 R.E. 2019, and supported by the affidavit of the Applicant Stiven Juma Munigankiko. The application is contested by a counter affidavit sworn by Theresia Andrea (The respondent).

The brief history of this application gathered from the records is as follows. Sometimes in 2006 via Civil Case No. 15 of 2006 in the Primary Court of Bukoba Urban, the respondent petitioned for divorce, custody of the issues of marriage and division of matrimonial property.

After full trial, the decree of divorce was granted, also the questions of custody and maintenance of the issues of marriage were determined but the question of division of matrimonial property was not determined, instead the respondent was advised to lodge a specific case for division of matrimonial property.

Acting upon the advice, the respondent filed Civil Case No. 131 of 2017 before the same Primary Court for division of matrimonial property. The case ended in the respondent's favor.

Aggrieved by the Primary Court decision, the Applicant appealed to the District Court of Bukoba, but he lost the appeal to wit; Civil Appeal No. 44 of 2017. From there, he knocked the doors of this court to pursue his right via PC Civil Appeal No. 02 of 2019 which was dismissed on 03/03/2021 for non-appearance, hence, this application.

When the application was called on for hearing, the applicant had the legal services of Mr. Dustan Mutagahywa, learned advocate while the respondent had the legal services of Ms. Theresia Bujiku, learned advocate.

Supporting the application, Mr. Mutagahywa prayed for this court to adopt the applicant's affidavit and form part of his submission. He submitted that (PC) Civil Appeal No. 02 of 2019 was dismissed on 03/03/2021 for non-appearance before Kairo, J. (as she then was), whereas on 13/05/2021 the applicant filed application seeking for re-admission of the same.

Mutagahywa went on submitting that there is no specific law which has set the time limit of lodging the application of this nature, however, the Law of Limitation Cap. 89 R: E 2019, First Schedule item 21 of Part III is to the effect that, where there is no law in place stating time which an application has to be lodged, the same has to be lodged within 60 days. He made reference to the case of **Israel Solomon Kivuyo versus Wayani Langoi and another** [1989] TLR 140.

He further argued that, for that matter, in the present application, the applicant delayed for ten (10) days, and the reasons for the delay were sickness/illness, and unawareness that the appeal was dismissed because the applicant was not duly served with the summons. Mutagahywa further submitted that, on 12/05/2021 the applicant became aware that the appeal was dismissed, and immediately, that is to say and on 13/05/2021, he filed the present application, thus the applicant was not negligent. He ended his submission praying for the extension of time and re-admission of the dismissed appeal

Responding, Ms. Theresia prayed for this court to adopt the counter affidavit and form part of her submission. She submitted that (PC) Civil Case No. 02 of 2019 was filed on 17/08/2018 and dismissed in 2021, and that shows that initially, the applicant was so relaxed but he became active when the case was at the execution stage. She further argued that, the applicant had the legal services of Mr. Dustan Mutagahywa who had also a duty to make follow ups of his client's case.

Ms. Theresia further argued that, (PC) Civil case No. 02 of 2019 was dismissed, therefore the available remedy was not application for re-admission but appeal to the Court of Appeal of Tanzania. Ms. Theresia also submitted that no admission form or discharge form attached to the applicant's affidavit to prove that the applicant was really sick.

In his rejoinder, Mutagahywa submitted that he was just engaged to draw the Memorandum of Appeal therefore, had no notice that the applicant's case was dismissed because the said appeal was filed in the District Court of Bukoba, and for that matter, the High Court upon reception of the memorandum together with the complete record of the matrimonial proceedings, had the duty to issue summons to the applicant, the duty which was not discharged.

He also stated that, it is rule of practice that where the case is dismissed for non-appearance, the remedy is to apply for re-admission, and appeal as alleged by the respondent's counsel. He added that the letter of the District Medical Officer attached to the affidavit sworn by the applicant, and which was not disputed in the counter affidavit is sufficient to show that the applicant was sick.

Having seen the rival submissions of both sides, the duty of the court is to determine whether this omnibus application is meritorious or otherwise.

As regards the 1<sup>st</sup> application, the issue is whether the applicant has demonstrated sufficient cause to warrant grant of extension of time for the re-admission (PC) Civil Appeal No. 02 of 2019. The records show that (PC) Civil Appeal No. 02 of 2019 was dismissed on 03/03/2021 for non-appearance of the appellant.

As correctly stated by Mutagahywa, learned counsel for the applicant, there is no specific rule in G.N. No. 312 of 1964 or specific law that prescribe time limit for applications of this nature. In that regard, the Law of Limitation Cap 89 R: E 2019, First Schedule item 21 of Part III must come into play. The item is to the effect

that application under the Civil Procedure Code, **the Magistrates' Courts Act or other written law for which no period of limitation is provided in this Act or any other written law period of limitation shall be sixty (60)**

**Days.**

In the case at hand, appeal No.02 of 2019 was dismissed on 03/03/2021, thus sixty days expired on 03/5/2021, and since the present application was filed on 13/05/2019 it means there was delay of ten (10) days as correctly stated by Mr.Mutagahywa.

It is settled that an application for extension of time can only be granted upon the applicant adducing good cause or sufficient reason (s) for delay. This principle was clearly stated in **Mumello v. Bank of Tanzania** [2006] E.A. 227 that,

*"... an application for extension of time is entirely in the discretion of court to grant or refuse and that extension of time may only be granted where it has been sufficiently established that the delay was due to sufficient cause"*

The term sufficient cause has not been defined as stipulated in the case of **Tanga Cement Company Ltd versus Jumanne D.Masangwa and Another**, Civil Application No.6 of 2001 where the Court of Appeal held that

*"What amounts to sufficient cause has not been defined. From the decided cases a number of factors has 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"*

The Court of Appeal further stated in the case of **Finca (T) Limited and Another v. Boniface Mwalukisa**, Civil Application No. 589/12 of 2018 (unreported) that;

*"It is settled that where extension of time is sought, the applicant will be granted upon demonstrating sufficient cause for the delay. Conversely, it is also well*

*settled that the sufficient cause sought depends on deliberation of various factors, some of which revolve around the nature of actions taken by the applicant immediately before or after becoming aware that the delay is imminent or might occur."*

Furthermore, in the case of **LEO SILA MUTISO VERSUS HELLEN WANGARI MWANGI [1999]2EA** 231 the court held that, it is now well settled that the decision whether or not to extend time for appealing is essentially discretionary. It is also settled that, that general matters which the court has to take into account in deciding whether to grant an extension of time are; **first**, the lengthy of the delay, **secondly**, the reason for the delay, **thirdly**, the chances of the appeal succeeding if the application is granted; and **fourthly**, the degree of prejudice to the respondent if the application is granted.

In the case at hand, the record vividly shows that the grounds given for the delay were sickness/ **illness and unawareness that the appeal was dismissed** as articulated in Paragraphs 4, 5, and 6 of the applicant's affidavit that the applicant had been suffering from Diabetes Mellitus and Hypertensive Heart Disease before and after filing Appeal No.2 of 2019, the complications which have sometimes made him unable to travel long distances. That upon reception of the Memorandum of Appeal together with the records from Bukoba District Court, no summons ever issued and reached the applicant. That on 12/05/2021 after his health improvement, the applicant travelled from Kigoma Region to Bukoba High Court where he learnt that his appeal was dismissed on 03/05/2021, as a result, he took prompt action and filed this application on 13/05/2021.

There is no doubt that there are circumstances in which sickness/illness becomes a ground for extension of time. The Court of Appeal in **Kapapa Kumpindi versus the Plant Manager Tanzania Breweries**, Civil Application No.2 of 2010 (Unreported) held that, sickness is a ground for extension of time.

In the case of John **David Kashekya vs. The Attorney General**, Civil Application No. 1 of 2012 (Unreported) the Court of Appeal had this to say about sickness:

*"... sickness is a condition which is experienced by the person who is sick. It is not a shared experience. Except for children who are not yet in a position to express their feelings, it is the sick person who can express his/her condition whether he/she has strength to move, work and do whatever kind of work he is required to do. In this regard it is the applicant who says he was sick and he produced medical chits to show that he reported to a doctor for checkup for one year. There is no evidence from the respondent to show that after that period, his condition immediately became better and he was able to come to Court and pursue his case. Under such circumstances, I do not see reasons for doubting his health condition. I find the reason of sickness given by the applicant to be sufficient reason for granting the application for extension of time...."*

In the case at hand, Annexure AA1 which is a letter from Dr. Joseph Malima Edward, Kakonko District Medical Officer dated 13/05/2021 annexed to the applicant's affidavit is to the effect that the applicant had been seriously suffering from Diabetes Mellitus and Hypertensive Heart Disease, hence had been attending their facility since 2019. I have considered the nature of the disease and the fact that the applicant currently is residing in Kigoma Region and arrived to the conclusion that the applicant has demonstrated good cause warranting extension of time for re-admission of Appeal No.2 of 2019 which was dismissed for the non-appearance of the applicant.

In **Charles Pantaleo Kingoka versus Abas Musa Kitoi**, Civil Application No.71/76 of 2019 the Court of Appeal held that;

*"There must an account of each day of delay. Delay even of a single day, has to be accounted for"*

There is no evidence from the respondent that the applicant was aware that the case was dismissed on 03/03/2021, until 12/05/2021 when he became aware of that fact. In this application, the delay was not inordinate, after becoming aware that the said appeal was dismissed, the applicant brought the present application promptly, thus it cannot be said that the applicant was negligent. Indeed, the delay of ten days had been satisfactorily accounted for by the applicant. In the event, the first application is hereby granted.

I now turn to the 2<sup>nd</sup> application. It is trite law that appeals for Primary Courts are governed by the Civil Procedure (appeals in Proceedings Originating in Primary Courts) Rules G.N. No. 312 of 1964.

Rule 17 provides that-

***"Where an appeal has been dismissed under sub rule (2) of 13 in default of appearance by the appellant, he or his agent may apply to the appellate court for the re-admission of the appeal; and if the court is satisfied that he was prevented by any sufficient cause from appearing either personally or by agent when in the appeal was called for hearing it may re-admit the appeal on such terms as to the costs or otherwise as it thinks fit".***

In the present application, Appeal No.2 of 2019 was dismissed on 03/03/2021 for the non- appearance of the applicant or his agent. The argument by the learned counsel for the respondent that the proper remedy was appeal to the Court of Appeal of Tanzania is wrong since there herein above rule is self -explanatory.

Basically, taking into account the applicant's founding affidavit and submissions made by his learned counsel, Mr. Dustan Mutagahywa, the court is satisfied that



the applicant was prevented by sickness from appearing either personally or by agent when in the appeal was called for hearing. After reading the court file to wit; Appeal No. 2 of 2019, I discovered that neither the applicant nor his agent ever entered appearance before the High Court but also no proof of service that after the reception of the file and the records from the District Court of Bukoba, the applicant was notified the hearing date.

Furthermore, the records revealed that Mutagahywa was engaged by the applicant for drawing only, therefore he is free from any blame relating to the dismissed appeal.

In the final analysis, and for the interest of justice, Appeal No.2 of 2019 which was dismissed on 03/03/2021 is hereby re-admitted. Given to the nature of the application, each party shall bear its own costs.

It is so ordered.



E. L. NGIGWANA

JUDGE

31/01/2022

Ruling delivered this 31<sup>st</sup> day of January, 2022 in the presence of the Applicant and his advocate Mr. Danstan Mutagahywa who is also holding brief for Ms. Theresia, advocate for the respondent, E. M. Kamaleki Judges' Law Assistant and Gosbert Rugaika, B/C.



E. L. NGIGWANA

JUDGE

31/01/2022