

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

**SONGEA DISTRICT REGISTRY**

**AT SONGEA**

**MISCELLANEOUS CIVIL APPLICATION NO. 01 OF 2022**

*(Originated from Civil Case No. 06 of 2020 Songea District Court at Songea)*

**FILBERTHA KAYOMBO ..... APPLICANT**

**VERSUS**

**MAHAMUD DOST MOHAMED T/A**

**RUVUMA OIL SUPPLIES..... 1<sup>ST</sup> RESPONDENT**

**MAJEMBE AUCTION MART LTD ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

Date of last Order: 06/09/2022.

Date of Ruling: 25/10/2022

**MLYAMBINA, J.**

The Applicant, Felbertha Kayombo moved this Court by way of chamber summons made under the provision of *section 14(1) of the Law of Limitation Act [Cap 89 Revised Edition 2019]*, seeking for extension of time to file an application for leave to appeal to the Court of Appeal out of time prescribed by the law. This application was supported by an affidavit sworn by the Applicant. The 1<sup>st</sup> Respondent filed his counter affidavit in opposition of the application. Despite of proper service, the 2<sup>nd</sup> Respondent neither appeared nor

filed his counter affidavit against the application. Hence the application was determined *ex parte* against him.

The Applicant was an appellant in *Civil Appeal No. 06 of 2020* which was dismissed on 3<sup>rd</sup> December, 2020 before Hon. Judge S. C. Moshi. She was not satisfied with the decision, for that reason, she filed *application No. 16 of 2020* for leave to appeal to the Court of Appeal against the said decision. Unfortunately, the application was struck out on 10<sup>th</sup> June, 2021 due to the defectiveness of the affidavit in support of the application.

The Applicant averred further that; while she was preparing to lodge an application for extension of time, she became seriously ill and admitted at Peramiho Mission Hospital, that been 5 days after the impugned ruling was delivered. She was discharged but not allowed to engage into any work including travelling for at least three months. She added that; the same illness attacked her in early September, 2021 which necessitated her admission for the second time (from 7<sup>th</sup> to 15<sup>th</sup> September, 2021). She was exempted from duties for eight weeks.

Moreso, she continued to attend treatment as outpatient until March, 2022 when she felt completely recovered, hence this

application. She averred that the aforementioned reason is the grounds which led to her delay to file the application within the time.

In his counter affidavit, the 1<sup>st</sup> Respondent denied the Applicant's allegation. The 1<sup>st</sup> Respondent stated that; even if the Applicant was sick and admitted for the whole time as she explained, preparing the document for application is not one of the hard works. She could have engaged an advocate to act on her behalf as she did in her previous application. As for the document attached in her application, the 1<sup>st</sup> Respondent contested on its genuineness as it has not shown the name of the Doctor who attended her or who prescribed for her.

The Applicant was unrepresented while the 1<sup>st</sup> Respondent was represented by Mr. Makame A. Sengo learned Counsel. In his written submission, Mr. Makame added that; there are various Court decisions which insist on accounting each day of delay so as to assess the diligent and or effort put on by the Applicant upon fighting for his right. A delay of even a single day must not be left untouched. He cited the case of **Tanzania Revenue Authority v. Tanga Transport Co. Ltd**, Consolidated Civil Application No. 4 of 2009 (unreported) as it was cited in the case of **Elius Mwakalinga v. Domina Kagaruki and 5 Others**, Civil Application No. 120/17 of

2018, Court of Appeal of Tanzania at Dar es Salaam. The Court laid down the following factors worthy of consideration in determining application for extension of time. These are:

- (a) The length of the delay
- (b) The reasons for delay
- (c) Whether there is an arguable case such as whether there is a point of law on the illegality or otherwise of the decision sought to be challenged, and
- (d) The degree of prejudice to the defendant if the application is granted.

Mr. Makame submitted further that there were five days before the Applicant was admitted to the Hospital. The Applicant did not account for those five days of her delay. He backed up his submission with the case of **Bharya Engineering and Contracting Co. Ltd v. Hamoud Ahmed Nassor**, Civil Application No. 342/01 of 2017 Court of Appeal of Tanzania at Tabora (unreported), where the Court held that:

In respect of the delay regarding the period between 19.07.2017 when the Court struck out Civil Application No. 70/11 of 2017 and the lodgement of the present

application on 03.08.2017 this period of fifteen days has not been accounted for. There is not an iota of explanation in the notice of motion, in the affidavit supporting it, in the written submission filed in, support of the application; not even in the oral arguments before me.

Mr. Makame prayed to Court the application to be dismissed for want of merit.

The Applicant reiterated what she has submitted in her affidavit and the written submission in chief and she added that what amount to good cause cannot be laid by any hard and fast rules but depends on the facts of each particular case. Also, she contested the rule of accounting each day of delay because it is not a dogma, it can be departed from as well there is an issue of illegality or point of law of public importance.

After due consideration of the affidavits evidence from the parties and their written submission, this Court is of the finding that, the impugned decision which the Applicant intent to challenge was delivered on 3<sup>rd</sup> December, 2020. The Applicant lodged an application for leave to appeal to Court of Appeal within the time prescribed by the law. Unfortunately, the application was struck out on 10<sup>th</sup> June,

2021 for being accompanied with incompetent affidavit. Five days after her application being struck out the Applicant was befallen with a disease which necessitated her to be admitted to Peramiho hospital. After a while she was admitted once again for the same disease.

Furthermore, the Applicant upon been discharged one of the Doctor's prescriptions prohibited her to engage into any work including traveling, except the light one. For that reason. The Applicant could not file her application on time.

In the light of the above-mentioned sequence of events the Court is of the findings that the Applicant has not been negligent in pursuing the matter, and no one is complaining that he will be prejudiced if the Applicant will be granted the extension of time to file her application for leave to appeal to the Court of Appeal out of time prescribed by the law. In the case of **Moto Matiko Mabanga v. Ophir Energy PLC, Ophir Service PTY Ltd and British Gas Tanzania Limited**, Civil Application No. 463/01 of 2017, Court of Appeal of Tanzania at Dar es Salaam (unreported); the Court stated that:

In exercise of its discretion to grant extension of time, *the Court consider the following crucial factors; the reason for the delay and decree of prejudice that the Respondent may suffer if the application is granted.* It is therefore the duty of the Applicant to provide the relevant material in order for the Court to exercise its discretion. [Emphasis added]

The Applicant was diligent on dealing with her case. She lodged her first application on time but due to the technical defect the application was struck out. The Applicant insisted that the predicament of sickness befallen her is the reason for her delay as depicted in Annexures FK2 and FK3. In the case of **Richard Mgala and 9 Others v. Aikael Minja and 4 Others**, Civil Application No. 160 of 2015, Court of Appeal of Tanzania at Dar es Salaam (unreported), sickness was accepted by the Court to be a sufficient reason to warrant extension of time especially when the Applicant attached the authenticated medical documents.

Counsel Makame claimed that the Applicant could have used the time when she was discharged to prepare her application on time or hire the advocate on her behalf. To the contrary, this Court is of a

settled view that the expert opinion of a Doctor has to be respected. Just like an Advocate who belongs to noble profession, a Doctor cannot give a false prescription on his patient but based on a condition of his patient and in accordance to his noble profession. That means, the Applicant was in a condition which required her to rest for her better recovery. In the case of **Mitalami Loti Sangalai v. The Registered Trustees of Free Pentecostal Church of Tanzania**, Misc. Land Application No. 35 of 2021, High Court of Tanzania at Arusha (unreported), where the Court held that:

Sickness is a condition which is experienced by the person who is sick and that it is not a shared experience except for a sick person who is in a position to express her or his feeling.

In the premises, the Court is of the findings that the Applicant explained how her sickness led to her delay. Therefore, it will be inappropriate to deny this application. The above finding is buttressed with the case of **Mobrama Gold Corporation Ltd v. Minister for Energy and Minerals and Others** [1998] TLR 425, where it was stated that; it will be inappropriate to deny the



Applicant the order is seeking from the Court as the said denial will stifle his case.

More to that, it is a cardinal rule that to grant or refuse extension of time to the Applicant is the discretion of the Court which has to be exercised judiciously. This was stated in the case of **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. 10 of 2015. Court of Appeal of Tanzania at Arusha (unreported), where it was stated that:

As the matter of general principle that whether to grant or refuse an application ... is entirely on the discretion of the Court, but that discretion is judicial and so it must be exercised according to the rules of reason and justice.

The Rules of reason and justice in this case dictates the Applicant be afforded with the right to be heard on the intended appeal to the Court of Appeal of Tanzania.

In the upshot, the application is hereby allowed. The Applicant is given fourteen days to file her application. Costs shall follow event.

Order accordingly.

**Y. J. MLYAMBINA**  
**JUDGE**  
**25/10/2022**



Ruling delivered and dated 25<sup>th</sup> October, 2022 in the presence of the Applicant in person and learned Counsel Makame Sengo for the 1<sup>st</sup> Respondent and in the absence of the 2<sup>nd</sup> Respondent.



**Y. J. MLYAMBINA**

**JUDGE**

**25/10/2022**