

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

**BUKOB A DISTRICT REGISTRY**

**AT BUKOB A**

**MISC. CRIMINAL APPLICATION NO. 18 OF 2022**

*(Arising from (PC) Criminal Appeal No.1 of 2021 of the High Court –Bukoba, Criminal Appeal No.52 of 2019 of Karagwe District Court, Original Criminal Case No.48 of 2019 of Kaisho Primary Court))*

**WILSON R. KILANGA** (Administrator of the Estate of the Late John R. Kilanga)

.....**APPLICANT**

**VERSUS**

**GREGORY RUBAHINDURA**.....**1<sup>ST</sup> RESPONDENT**

**CHRISTOSTOM GREGORY**.....**2<sup>ND</sup> RESPONDENT**

**REVELIAN GREGORY**.....**3<sup>RD</sup> RESPONDENT**

**VIANUS GREGORY**.....**4<sup>TH</sup> RESPONDENT**

**RULING**

*06/10/2022 & 26/10/2022*

*E. L. NGIGWANA, J.*

This is an omnibus application. It combines two applications to wit;

- (i) Application for extension of time to file Notice of appeal to the Court of Appeal of Tanzania out of time.*
- (ii) Application for extension of time to file an application for a certificate on points of law so as to appeal to the Court of Appeal of Tanzania*

The application has been preferred under section 11 (1) of the Appellate Jurisdiction Act Cap. 141 R: E 2019. The application is supported by an affidavit deposed by the applicant. The application was contested by a

counter affidavit sworn by Mr. Joseph Bitakwate, the respondents' advocate.

Though there was no objection raised by the respondents against this omnibus application, the issue of competency of this application arose during the hearing therefore, I would like to state at this stage that, it is not automatically fatal to combine more than one prayer in one chamber summons. The Court of Appeal in the case of **Mic Tanzania Ltd versus Minister for Labour and Youth Development**, Civil Appeal No. 103 of 2004 had this to say;

*"The combination of the applications is not bad in law otherwise the parties would find themselves wasting more money and time on avoidable applications which would have been **conveniently combined**.... Unless there is a specific law barring the combination of more than one prayer in one chamber summons, the court should encourage this procedure rather than thwart it for fanciful reasons.*

In the case of Tanzania **Pride Ltd versus Mwanzani Kasatu**, Misc. Commercial Cause No. 230 of 2015 it was held that;

*"In the circumstances in Tanzania where the vision of the judiciary is to administer justice effectively, efficiently and timely, it will be inappropriate for courts of law to encourage multiplicity of proceedings because this course would defeat the very goal of which the vision is intended to achieve."*

See also **Project Manager Es-Ko International INC Kigoma versus Vicent Ndugumbi**, Civil Appeal No. 22 of 2009. There are factors to be

considered whether the prayers can be conveniently combined or otherwise. For instance, in the case of **Gervas Mwakafwala and 5 Others versus The Registered Trustees of Morovian Church in Southern Tanganyika**, Land Case No. 12 of 2013 HC (unreported) where the court when faced with issue of omnibus application had this to say;

*"I must hasten to say, however, that I am aware of the possibility of an application being defeated for being omnibus especially where it contains prayers which are not interlinked or interdependent. I think, where combined prayers are apparently incompatible or discordant, the omnibus application may be inevitably rendered irregular and incompetent".*

The prayers sought in this application are inter-related and catered under the same provision of the law, thus they were conveniently combined.

As depicted from the records and the applicant's affidavit, the background which gave rise to this application may be recounted as follows; before the Primary Court of Kaisho within Kyerwa District, the respondents were charged with the offence of disobedience of lawful orders contrary to section 124 of the Penal Code Cap 16, R:E 2019 now R:E 2022. It was alleged that the respondents disobeyed the lawful order of the District Land and Housing Tribunal for Karagwe in Land Application No. 56 of 2018 restraining them from entering and making any developments on the disputed land pending final determination of the Land dispute. The Respondents pleaded not guilty to the charge, and upon conclusion of hearing, the respondents were acquitted save for the 2<sup>nd</sup> respondent Chrizostom Gregory who was convicted and sentenced to pay a fine of Tshs. 300,000/=.

Aggrieved by the judgment of the trial court, the Applicant appealed to the District Court of Karagwe at Kayanga vide Criminal Appeal No.52 of 2019 of which, even the 2<sup>nd</sup> respondent was acquitted. Dissatisfied by the decision of the 1<sup>st</sup> appellate court, the Applicant appealed to this court vide (PC) Criminal Appeal No.1 of 2020 in which the same was dismissed for want of merit. The Applicant was aggrieved by the decision of this court thus intends to appeal to the Court of Appeal and therefore, he was the supposed to file the Notice of Appeal and certification on the points of law, but delayed to do so.

The reason for delay to file the Notice of Appeal and application for certification on points of law was stated in the affidavit to be serious sickness to wit; chronic peptic ulcers and other diseases. The applicant's affidavit is further to the effect that the applicant was treated in various Health centers and Hospitals whereas; from 05/06/2021 to 10/06/2021, he was admitted at ELCT-Bukoba Town Health Center and upon discharge, he was advised to visit the nearby Hospital for further treatment regarding the nature of his illness. The Copy of the discharge form was attached to the affidavit and marked as **annexture WK-5 to** form part of the applicant's affidavit.

That, the applicant after completing the dosage which he was given at the hospital, he did not recover from such illness, and therefore, on 30/06/2021 to 03/07/2021, he was treated at Nyakahanga District Designated Hospital (DDH) and on 31/07/2021 to 04/08/2021, he was admitted at the same Hospital with the same diagnosis and his discharge was subject to continue treatment at least for five months. The medical

chit has been attached to the applicant's affidavit and marked as **annexture WK-6** forming part of the affidavit.

That, the applicant's health condition did not stabilize therefore, on 03/01/2022 to 04/01/2022, he was attended at Neema Dispensary within Karagwe District due to severe acute gastritis whereas he was discharged to continue with medication at home with instructions to go back to hospital after 6weeks. That, after the said 6 weeks, the applicant went back to hospital and was found with slight improvements but was given medication with instructions to go back to Hospital after 2 months to wit; 20/04/2022 and on that date the Applicant was found to be in good progress and was further advised to go back to hospital after 2 months to wit; 20/06/2022. A medical report was attached to the applicant's affidavit and marked as **annexture WK-7** forming part of the affidavit. After such improvements, he processed the instant application.

The counter affidavit contesting the application is to the effect that, the applicant has failed to establish any reasonable cause for delay to file a Notice of Appeal and an application for certification on point of law, and has failed to account for each day of delay, making this application devoid of merit.

At the hearing of this matter, the applicant was represented by Mr. Ibrahim Mswadick, learned advocate while Advocate Joseph Bitakwate appeared for the respondent.

Submitting in support of the application, the Mr. Mswadick adopted the applicant's affidavit to form part of his submission and reiterated what has been averred therein as stated herein above.

In reply, Mr. Bitakwate adopted the counter affidavit to form part of his submission. He added that, if the Applicant was discharged on 10/06/2021, he had good 24 days to file the Notice and an application for certification on point law because his time lapsed on 03/07/2021. The learned counsel; went on submitting that, according to the Applicant, when he went for treatment on, 20/4/2022, it was confirmed that his health condition had improved, but yet, he remained silent until 20/06/2022 when this application was filed, meaning the days from 20/04/2022 to 19/06/2022 were not accounted for. The learned counsel referred this court to the case of **Sebastian Ndaula versus Grace Rwamafa**, Civil Application CAT (Unreported) where it was held that; in application for extension of time, the applicant has to account for each day of delay, and the case of **Isack Sebegele versus Tanzania Portland Cement Co. Ltd**, Civil Application No.25 of 2002 CAT (Unreported) where it was held that; lapses, in action or negligence on the part of the applicant seeking for extension of time does not constitute sufficient cause to warrant extension of time. The learned counsel ended his submission saying that, in the instant application, what has been demonstrated by the applicant is nothing but in action and negligence, thus he does not deserve to be granted extension of time.

Mr. Mswadick in his rejoinder reiterated that the applicant has managed to demonstrate sufficient cause for the delay.

Having considered submissions, affidavit in support of the application and counter affidavit against the application, the issue for determination is whether the applicant has demonstrated sufficient cause to warrant

extension of time. This application was preferred under Section 11 (1) of the Appellate Jurisdiction Act, Cap 141 R: E 2019 which provides that;

*"Subject to subsection (2), the High Court or, where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned, **may extend the time for giving notice of intention to appeal from a judgment of the High Court** or of the subordinate court concerned, for making an application for leave to appeal or **for a certificate that the case is a fit case for appeal, notwithstanding that the time for giving the notice or making the application has already expired.**"*

However, 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"*

In **Regional Manager TANROAD Kagera versus Ruaha Concrete Company Ltd**, Civil application No. 96 of 2007 CAT (unreported) the court held that;

*"The test for determining an application for extension of time is whether the applicant has established some material amounting sufficient or good cause as to why the sought application is to be granted.*

What amounts to sufficient cause or good cause is not defined in the statutes. However, in the case of **Lyamuya Construction versus Board of Registered Trustees**, Civil Application No.2 of 2010 CAT (Unreported), factors to be considered before granting or refusing extension of time are; 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 feels that there is any point of law of sufficient importance such as the illegality involved in the decision sought to be challenged.

Furthermore, the court of appeal of Tanzania in the case of **Masalu versus Tanzania Processing Ltd**, Civil Application No. 13 of 2020 held that;

*"What constitute good cause cannot be laid down by any hard and fast rules. The term good cause is a relative one, is dependent upon a party seeking extension to prove the relevant material in order to move the court to exercise its discretion."*

Generally, from the herein above Court of Appeal authorities, it can be learnt that extension of time is not a right of a party but an equitable remedy that is only available to a deserving party at the discretion of the court. That, the law does not set any minimum or maximum period of delay. The applicant must give valid, clear and sufficient reasons upon which the discretion can be favorably exercised.

In the instant application, it is apparent that the decision of this court in (PC) Criminal Appeal No. 01 of 2021 was delivered on 04/06/2021. The



copy of judgment was annexed to the affidavit as **annexture "WK-1"** It is also true that Notice of Appeal and application for certification on point of law were not filed within the prescribed time to wit; 30 days from the date of the order or judgment. There is no dispute that while the applicant was still within time to file the Notice of Appeal and an Application for certification on point of law, he became seriously sick whereas, he was admitted at ELCT-Bukoba Town Health Center from 05/6/2021 and discharged on 10/06/2021 with instructions that he should attend any nearby health facility after 3 weeks. On 30/06/2021, 31/07/2021 and 4/08/2021, he was attended at Nyahanga D.D. Hospital with instructions to attend to the Hospital every month for five months consecutively. On 20/04/2022, he was attended at Neema Dispensary where he was found with some good improvements, but also instructed to go back there for check –up on 20/06/2022. It is also not disputed that this application was filed on the instant application was filed on 20/06/2022.

It is the argument of respondent's advocate that the period between 20/04/2022 to 19/06/2022 was not accounted for. However, reading carefully the Medical report to wit; **Annexture WK-7**, it is apparent that the applicant was still sick that is why he was given appointment to appear for medical check-up on 20/06/2022, therefore, in my view, it is not proper to say such time was not accounted for. It should be noted that sickness is a condition which is experienced by the person who is sick. It is not a shared experience. Where the court is satisfied that the applicant was incapacitated or delayed by sickness from taking a necessary action, extension of time has to be granted. Addressing the question of sickness as a ground for extension of time, the Court of Appeal of Tanzania in the case

of **John David Kashankya versus the Attorney General**, Civil Application No. 1 of 2012 (unreported) had this to say;

*"Sickness is a condition which is experienced by the person who is sick. It is not shared. Except for children who are not yet in 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 responded to a doctor for checkup for one year. There is no evidence from the respondent to show that after the period, his condition immediately became better and he was able to come to court to pursue his case. Under such circumstances I do not see reasons from doubting his health condition. I find the reason of sickness given by the applicant sufficient reason for granting the application for the extension of time."*

Being guided by the herein above Court of Appeal decision, it is the finding of this court that there is no evidence provided by the respondent to show that the Applicant, though he was sick, could move, work, and do whatever kind of work he was required to do. The medical reports have shown that the Applicant's health deteriorated since 05/06/2021. During hearing of this application, he entered appearance in court and indeed, it does not need a medical expert or an Angel to descend from Heaven so as to know that Applicant is still facing health challenges. Each case has to be looked at its own circumstances. In the instant matter, I am convinced that the Applicant has accounted good reasons of his sickness preventing him filing the notice and application for certification timely.

In the upshot, this application is granted. The Applicant has to file the Notice of Appeal within fourteen (14) days and Application for certification on point of law within thirty (30) days from the date of this ruling. Each party shall bear its own costs.

Dated at Bukoba this 26<sup>th</sup> day of October 2022



E. L. NGIGWANA

JUDGE

26/10/2022

Ruling delivered this 26<sup>th</sup> day of October 2022 in the presence of Mr. Ibrahim Mswadick, learned advocate for the Applicant, Hon. E.M. Kamaleki, Judge's Law Assistant and Ms. Sophia Fimbo B/C, but in the absence of the respondents and their advocate.



E. L. NGIGWANA

JUDGE

26/10/2022