

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA
MISC. CIVIL APPLICATION NO. 3 OF 2022**

(C/f Misc. Civil Application No. 23 of 2020 and (PC) Civil Appeal No.15 of 2019, at the High Court of the United Republic of Tanzania, Originating from Civil Appeal No. 19 of 2019 at the District Court of Hanang at Katesh and Civil Case No.29 of 2018 at Hanang Primary Court)

NYANZA ELIAS KOROTO APPLICANT
Versus
GODFREY MSUGURIRESPONDENT

RULING

*Date of last order: 20-9-2022
Date of Ruling: 1-11-2022*

B.K.PHILLIP,J

This application is made under section 11 (1) of Appellate Jurisdiction Act (Cap 141 R.E.2019). The applicant's prayers are reproduced hereunder verbatim;

- (a) That, this honourable Court do grant an order of an extension of time for leave to file a Notice of Appeal to the Court of Appeal out of time in Misc. Civil Application No. 23 of 2020 dated 17th day of December 2020.
- (b) That, costs in due course.
- (c) That, any other relief this Honourable Court may deem necessary to serve the interest of justice.

The application is supported by an affidavit sworn by the applicant. The respondent filed a counter affidavit in opposition to the application.

Before going to the argument raised by parties, let me give a background to this application, albeit in briefly. The Court's records reveal that the applicant and respondent were defendant and plaintiff

respectively, in Civil Case No.29 of 2018 at the Primary Court of Hanang. The same was decided in favour of the respondent. Aggrieved by the decision of the Primary Court of Hanang, the applicant herein lodged his appeal at the District Court of Hanang at Katesh vide Civil Appeal No.19 of 2019 which was dismissed for lack of merit. Undaunted the applicant lodged his appeal in this Court against the decision of the District Court of Hanang Vide (PC) Civil Appeal No. 15 of 2019 which was dismissed on 5th August 2019 for want of prosecution since the applicant (who was the appellant in that appeal) did not enter appearance in Court on the hearing date. Thereafter, the applicant filed Misc. Civil Application No.23 of 2020 praying for extension of time within which to file an application to set aside the dismissal order of this Court in (PC) Civil Appeal No.15 of 2019 dated 5th August 2019. His application did not sail through. It was dismissed on 17th December 2020 on the reason that he failed to advance good cause to justify extension of time. He was aggrieved by that decision but did not file the notice of intention to appeal to the Court of Appeal within the time prescribed by the law. Thus, he filed the instant application seeking for the orders reproduced at the beginning of this Ruling.

In this application the applicant was represented by Mr. Erick Erasmus Mbeya, learned advocate, whereas the respondent enjoyed the legal services of Mr. Sylvester S. Kahunduka, learned advocate. I ordered the application to be argued by way of written submission. Both sides file the written submissions as ordered.

Mr. Mbeya started his submission by raising a point of preliminary objection against respondent's counter affidavit to the effect that

respondent's counter affidavit was filed on 22/3/2022 contrary to the Court order made on 11th March 2022 in which the respondent was granted leave to the respondent leave to file his Counter affidavit within seven (7) days from date of the order. Mr. Mbeya submitted that the respondent filed his counter affidavit after expiration of eleven (11) days from the date of the Order. Thus it was filed out of time. He prayed the respondent's counter affidavit to be expunged from Court's record for being filed in contravention of the Court Order. To support his argument he cited the case of **Ludovic Michael Massawe vs Samson Herman, Civil Application No. 259/08 of 2021** (unreported). He contended, once the respondent's Counter affidavit is expunged from the Court's records, the respondent has a right to submit on issues of law only not on matters of fact.

In rebuttal, Mr. kahunduka submitted that from his understanding he was granted fourteen (14) days for filing the Counter Affidavit. However, he was of the view that if at all it is found out that the Counter Affidavit was filed out of time, the same has to be expunged from the Courts records but he will have right to address the Court on matter of law.

The point of preliminary objection cannot detain me since the answer to the same is readily available in the Court's records which reveal that on 11th March 2022 when this application was called for mention Mr. kahunduka prayed before this Court to be granted seven (7) days for filing the Counter Affidavit for the respondent. His prayer was granted. Thus, it is obvious that since Mr. Kahunduka was granted seven (7) for filing the respondent's Counter Affidavit, not fourteen (14) ,then the

Counter affidavit in question was filed out of time. Thus, the same is hereby expunged from the Court's records. And as conceded by both sides, in the absence of a counter affidavit the respondent has a right to address the Court on matter of law only. [see the case of **Ludovick Michael Masawe**, (supra)]. Therefore, in this Ruling I shall take into consideration only the points of law raised by Mr.Kahunduka in his submission , if any.

With regard to the merit of the application , Mr. Mbeya started his submission by adopting contents of the applicant's affidavit in support of this application and went on submitting that he was unaware of the date of Ruling in Misc. Civil Application No.23 of 2020 (the impugned decision) and the reason behind is that since he resides out of Arusha city in order to avoid unnecessary costs he requested the advocate for the respondent to hold his brief in Court and let him know the date of the Ruling because the application was heard by way of written submissions. The respondent's advocate informed him that the Ruling was scheduled on 18th January 2021. On 18th January 2022 when came to Court, only to find out that the ruling was delivered on 17th December 2020. It was Mr. Mbeya's contention that because the impugned Ruling was delivered in the absence of the applicant and he was absent too that is good reason for this Court to grant the extension of time sought in this application. To support his proposition he cited the case of **Christopher Cosmas Vs Furaha Evarist, Misc. Civil Application No.67 of 2021** (unreported).

In addition to the above, Mr. Mbeya contended that the Ruling in Misc. Civil Application No. 23 of 2020 is tainted with illegalities that goes to

the root of original case, Civil Case no. 29 of 2018 at Hanang Primary Court. Expounding on the alleged illegalities, Mr. Mbeya argued that in Civil Case No.29 of 2018 the respondent was the plaintiff. He instituted claims against two persons, namely Nyanza Elias Koroto (the applicant herein) and Kadongo Madoshi. However, to the applicant's surprised the respondent herein abandoned the his claim against Kadogo Madoshi on the reason that he did not appear in Court. He prayed his name to be removed from the case and the applicant remained as the sole defendant in the case. Mr. Mbeya contended that removing the name of Kodogo Madoshi from the case was illegal since the procedure in Civil Proceedings in Primary Courts as provided under the Magistrates' Courts (Civil Procedure in Primary Courts) Rules GN No. 310 of 1964 does not allow that. Moreover, he insisted that if the issue was non appearance of Kadogo Madoshi in Court , after proof of service, the respondent was ought to proceed ex-parte against the said Kadogo Madoshi. He added that no purchase agreement was tendered before the trial Court by the respondent. That omission is fatal because contract for selling land in order to be enforceable must be in writing . He cited section 64 (1) (a) of Land Act (Cap 113 R.E. 2019) to cement his argument.

Moreover, Mr. Mbeya contended that the proceedings and judgement in Civil Case No. 29 of 2018 do not indicate if the respondent had any purchase agreement in respect of the suit plots. To cement his argument, he cited the case of **Nitin Coffee Estate Ltd and 4 others vs United Engineering Works Ltd and Another (1988) TLR 203**. It was Mr. Mbeya's argument that there was unfair hearing in Civil Case No. 29 of 2018 since the document tendered and acted upon by trial

Court they are not explicitly identified by their list, names and nature. Mr. Mbeya maintained that illegality constitutes good reason for extension of time. To bolster his argument he cited the case of **VIP Engineering and Marketing Limited and Two others vs Citibank Tanzania Limited (Consolidated references 6,7 and 8 of 2006, (unreported), and The Principal Secretary , Ministry of Defence , National Service Vs Devram Valambhia (1992) TLR. 185 .**

Mr. Mbeya maintained that applicant is seeking right to be heard which is enshrined in Article 13 (a) of Constitution of United Republic of Tanzania after being aggrieved by judgment in Civil Case No. 29 of 2018, Ruling in (PC) Civil Appeal No. 15 of 2019 and Ruling in Misc. Civil Application No.23 of 2020. It was Mr. Mbeya's contention that to dismiss this application is tantamount of condemning applicant unheard. To fortify his argument, he cited the cases of **Fredrick Selenge and another Vs Masele (1985) TLR 99** and **Mohamed Jawad Mrouch Vs Minister of Home Affairs (1996) T.L.R.142**

Upon perusing Mr. Kahunduka's submission I have noted that in an attempt to challenge the facts deposed by the applicant in his affidavit, he mainly submitted on matters of mixed fact and law. Under the circumstances, as alluded earlier in my findings on the point of preliminary objection, there is nothing to be considered by this Court as far as the submission made by Mr. kahunduka is concerned.

In the same line of reasoning, I shall not include in this Ruling the rejoinder submission made by Mr. Mbeya because the same was in respect of the submission made by Mr. Kahunduka on matters of mixed fact and law.

I have carefully gone through the contents of the applicant's affidavit and the arguments made by Mr. Mbeya, and am of the settled opinion that my task in this application is to determine whether or not the applicant has adduced good cause for delay to move this Court to grant him the extension of time sought in this application.

It is a trite law that in an application for extension of time the applicant has to account for each day of delay by adducing good cause for the delay. This Court has discretionary power to grant the extension of time or refuse to do so. However, that discretion has to be exercised judiciously. [see the case of **Lyamuya Construction Co.Ltd and Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No.2 of 2010** (unreported)]. It is not in dispute that Misc. Civil Application No. 23 of 2020 was dismissed on 17th December 2020. According to the applicant's affidavit after dismissal of Misc. application No. 23 of 2020 he filed Misc. Civil Application No.16 of 2021 to seek for extension of time but the same was withdrawn on the 23rd December 2021 with leave to refile it . He filed the application in hand on 5th January 2022. I must point out here that the applicant has not attached in this application the Court order in respect of the allegedly Misc. Civil application No.16 of 2021 despite the fact that the same is mentioned in the applicant's affidavit in paragraph 4 as annexure "NEK 3".The pertinent question which arises here is; why the applicant did not annex the said Court Order to his affidavit if at all it is into existence. I am not in position to answer that question, suffice to say that the failure to annex that Court order is fatal, since it raises doubts on the existence of the same. It is noteworthy that this Court cannot work on assumption that there is

such an order which has not been made part of the Court's record in this application.

The above aside, the applicant deponed that the impugned Ruling was delivered in his absence. On 18th January 2021, he went to Court with his advocate, Mr. Mbeya knowing that it was the date for delivery of the Ruling only to realize that Ruling had already been delivered and after doing a thorough research they understood that the Ruling was delivered on 17th December, 2020. The applicant has not stated the exact date he realized that the Ruling was delivered on 17th December 2020. Moreover, the applicant has deponed that he managed to obtain the copies of the ruling and relevant documents required for lodging an appeal to the Court of Appeal on 22nd January 2021. However, he has not attached any document to show that he requested to be supplied with the same timely immediately after knowing that the Ruling was delivered on 17th December 2020. Under such circumstances this Court is not in a position to know whether it was the Court which delayed to supply the applicant with the copies of the relevant documents or not. Let me point out that the applicant's failure to give the necessary information pertaining to the date he became aware of the impugned Ruling is fatal since it denies this Court the opportunity to assess the period of delay properly. All in all, the main reason stated by applicant for the delay in filing the notice of appeal is lack of money.

From the foregoing, looking at the Court's records the applicant has to account for period of delay from 17th December 2020 to the date filing this application, that is 17th December 2021 which is a period of one year. The applicant have not adduced any good reason for such an

inordinate delay. A mere assertion of lack of money has never been a good cause for delay since it is such a general excuse which can be pleaded by anybody. In addition, the Court's records shows that Mr. Mbeya has been representing the applicant in said Misc Civil Application No. 23 of 2020. Thus, the applicant's assertion made in paragraph 15 of his affidavit in support of this application that after obtaining the copy of the impugned Ruling he started looking for a legal expert to assist him in preparing the appeal is not and unfounded.

With regard to Mr. Mbeya's contention that the Judgment of the Primary Court is tainted with illegalities, upon perusing the proceedings and judgment of the Primary Court of Hanang, I am of a considered view the same is misconceived since the respondent herein had the right to remove the 2nd defendant from the case. I do not agree with Mr. Mbeya that the respondent's decision to remove the 2nd defendant from the case is wrong. Thus, the case of **VIP Engineering and Marketing Limited** and **The Principal Secretary , Ministry of Defence , National Service** (Supra) are not applicable in this case.

In the upshot, this application is dismissed with costs.



Date this 1st day of November 2022


B.K.PHILLIP

JUDGE