

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

MISC. CIVIL APPLICATION NO. 61 OF 2021

(Arising from Civil Appeal No. 14 of 2021 of Bukoba District Court and original Civil case No. 17 of 2021 of Nsunga Primary Court)

GEORGE MSIKULA..... APPLICANT

VERSUS

FRAVIUS FOTIDAS..... RESPONDENT

RULING

24/03/2022 & 29/03/2022

NGIGWANA, J.

Before me, is an application for enlarging time within which to file an Appeal to this court so as to impugn the decision of Bukoba District Court in Civil Appeal No.14 of 2021 before Kaijage RM, which confirmed the decision of Nsunga Primary Court in original Case No. 17 of 2021.

As usual, the application which has been brought under Section 25 (1) (b) of the Magistrates' Courts Act, Cap. 11 R: E 2019 is supported by the Affidavit. The said Affidavit is sworn by Mr. Aaron Kabunga the applicant's advocate.

At the time of oral submission, Mr. Kabunga for the applicant prayed his sworn affidavit to be adopted in his entire submission. He proceeded to elaborate on the reasons which he found to be sufficient for applicant's delay.

He submitted that paragraph 3,4,5,6,7 and 8 of the applicant's affidavit discloses sufficient reasons for delay which touches on the negligence and fault of the advocate who was firstly approached by the applicant as well as illegality in the impugned decision.

Mr. Kabunga elaborated that the applicant sought to file an application for extension of time at first place where he approached and engaged an Advocate one Mr. Seth Nikiyiza and paid him instruction fees to file an application but unfortunately, the said advocate did not abide to. That later on, the applicant discovered that the said advocate had conflict of interest as he had previously engaged in receiving instructions from the respondent in the same matter and as a result, he couldn't have filed the application for extension of time.

It is therefore Advocate Kabunga's submission that the blunders, negligence or laxity of the advocate should not be a burden to the applicant. He therefore cited the case of **Rwabinumi versus Bahimbisomwe** [2010] EA 337 and the case of **Viginia Arobogast versus Deusdedit Alphonce**, Misc. Land application 23 of 2014 HC-Bukoba Registry which held that blunders committed by the advocate should not be used to defeat the right of the client.

Along with the explained above ground, the Applicant's counsel has also raised the issue of illegality in the impugned decision in his Affidavit as the ground to warrant the grant of extension of time. He substantiated that the decision originates from Nsungu Primary Court which was instituted by the respondent as a normal civil case claiming 5 cows valued at five (5) Million Tanzania Shilling from the applicant which he said there was no dispute that

the respondent herein was employed by the applicant as cattle keeper and therefore was claiming cows as salaries arising from that employment relationship.

Advocate Kabunga was therefore to the effect that the Primary Court of Nsunga had no jurisdiction to entertain the dispute as the matter was in domain of the commission for Mediation and Arbitration (CMA) as a labour matter. He concluded that by the District Court of Bukoba confirming such decision was an illegality which in law warrants this court to extend or enlarge time to appeal. He buttressed his stance with the case of **Ministry of Defence and National Security vs Valambia** [1992] TLR, 182, **Samson Kishasha Goba vs Charles Kingongo Goba** [1990] TLR 138.

In reply, the respondent, Fravius Fortidas, who was paddling for his own canoe and a lay person, had a very brief remark for his response that the applicant had not demonstrated sufficient cause though he admitted that he had employment contract with the applicant.

In application for extension of time, courts are required to determine whether the applicant has demonstrated sufficient cause for delay to warrant extension of time. I am therefore enjoined to consider and determine the same too. There is no fast and heard rule which has drawn the list of sufficient causes in the pigeon hole. It is upon the court to look and assess on the entire circumstances surrounding the particular case and finally exercise its discretion whether to grant or refuse the application. Nonetheless, it is trite that the discretion has to be exercised judiciously.

Coming in our case, I have no problem with a period the applicant engaged the Advocate (Seth Nikiyiza) and paid fee and instruct him to file an application for extension of time. I say so because failure by the said Advocate to take the necessary step was a faulty and blunder of the advocate and not a client and at first the applicant believed the advocate was competent to file the said application while the advocate had conflict of interest in that matter, the fact which the applicant couldn't have reasonably known. Hence it will be a prejudicial to his right to defeat his justice for the advocate's blunder as rightly argued by the applicant's counsel. I derived much help from the persuasive case of **Rwambinomi versus Bahimbisomwe** (2010) EA. 337 also cited in **Viginia Arobogast V. Deusdedit Alphonce** . Misc. Land Application No. 23 of 2014 HC at Bukoba (unreported) also referred to me by the applicant's counsel which held that it was great injustice to deny an appeal simply because of blunders caused by his lawyer. My problem is on, from that period after the judgment was delivered to the time which he went to instruct his lawyer for filing an application for extension of time to file appeal. Because this period the applicant was out of time already to file appeal. This period has not been accounted as every period of delay or even a single day needs to be accounted.

However, the applicant's counsel has raised another issue of illegality which according to him it is apparent in the face of record. The said ground touches on the issue of jurisdiction.

The legal position is settled. When there is an allegation of illegality, it is important to give an opportunity to the party making such allegation to have the issue considered. In the case of **The Principal of Secretary, Ministry of Defence and National Service v. Devram Valambia** (1992) TLR 182, also referred to me by the applicant's counsel, it was stated thus: -

"In our view when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record right."

This position was reiterated in **VIP Engineering and Marketing Limited v. Citibank Tanzania Limited**, Consolidated Civil References No. 6, 7 and 8 of 2006 (unreported) it was stated as follows:-

"We have already accepted it as established law in this country that where the point of law at issue is the illegality or otherwise of the decision being challenged, that by itself constitutes "sufficient reasons....."

Furthermore, In **Attorney General v. Consolidated Holding Corporation and Another**, Civil Application No. 26 of 2014, it was stated thus:-

"With regard to the last point, contentions as to illegality or otherwise of the challenged decision have now been accepted as a good cause for extension of time."

The applicant's Advocate in this application, since has alleged that the trial court which entertained the matter had no jurisdiction as it entertained the employment dispute which was in domain of the Commission for Mediation and Arbitration (CMA).

In view of the fact that there is an alleged illegality and given that the point of illegality *ipso facto* supersedes other reasons, I find it appropriate to exercise my discretion under the circumstances to allow the application, by extending time on the basis of this point so that the issue may be considered.

In the event, I am constrained to hold that the application is hereby granted. I order the applicant to file an appeal within 30 days from the date of this order. No orders to costs.

It is so ordered.




E. L. NGIGWANA

JUDGE

29.03.2022

Ruling delivered this 29th day of March, 2022 in the presence of both applicant and respondent in person, Mr. E. M. Kamaleki, Judges' Law Assistant and Ms. Tumaini Hamidu, B/C.




E. L. NGIGWANA

JUDGE

29.03.2022