IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(BUKOBA DISTRICT REGISTRY)

AT BUKOBA

MISC. CIVIL APPLICATION NO. 42 OF 2021

MUGISHA MBEHO.....APPLICANT

AND

JOSHUA NTIMBA.....RESPONDENT

RULING

Date of Last Order: 31/01/2022

Date of Ruling: 11/02/2022

A.E. Mwipopo, J.

Mugisha Mbeho, the Applicant herein, has filed the present application for extension of time to file application for re – admission of Civil Appeal No. 36 of 2016 of this Court and set aside dismissal order. The said appeal was dismissed by this Court on 19th March, 2019 for non-appearance of the Applicant. The Applicant also pray for the order for re-admission of the said case. The application is made by Chamber Summons supported by the Applicant's Affidavit. The Respondent namely Joshua Ntimba opposed the application through Counter Affidavit of his legal counsel one Advocate Aaron Kabunga.

When the matter came for hearing, both parties to the application had service of Advocates. The Applicant was represented by Mr. Ibrahim Mswadick, Advocate, whereas, the Respondent was represented by Mr. Aaron Kabunga, Advocate.

The Counsel for the Applicant submitted that the reason for non - appearance of the Applicant on the hearing date was caused by the failure of the Court to inform him of the hearing date after he has filed his appeal. He said that the appeal was filed in this registry where he was told by the court clerk that he will be notified on the date to appear and be furnished with summons specifying the time and date for the hearing of his appeal. The Applicant was never furnished with summons to appear despite his effort to make follow up where he appear in court in February, 2019. The Applicant got an accident on 08.03.2019 and was seriously sick. The appeal was dismissed on 19.03.2019 when the Applicant was still sick and he was never issued with summons as promised notified with the date to enter appearance for his appeal. For that reason, the Applicant had no information concerning his appeal and he could not appear to prosecute the appeal which led to its dismissal.

He said that the Applicant has sufficient reasons which prevented him from prosecuting his case as he was not notified of the hearing date. The failure to appear was caused by court process server who did not serve him with summons to appear. The applicant has been diligently making follow up of his case and still

has interest and desires to prosecute his case in this court. There are serious illegalities in the impugned judgment and proceeding of the trial court. To support his submission he cited the case of **MIC Tanzania Limited v. Minister for Labour and Youth Development and Another**, Civil Appeal Nol. 103 of 2004, CAT at Dar Es Salaam, (Unreported), at page 9.

In reply, the Counsel for the Respondent submitted that there is no good or sufficient cause in this application. He said that it is the duty of the Applicant to make follow up to his case after instituting it. It is not the duty of the court to look for the Applicant to come to prosecute his case in court. The case was fixed for hearing on 19/03/2019 but the Applicant was absent without notice as result the case was dismissed. The Applicant's reason for his absence are confusing. First he states that he was not given summons to appear and on the same time he states that he was sick. He left it to the court to choose for his reason for the delay. The Applicant alleges that it was a court clerk who informed him that he will be furnished with summons but he has not disclosed the name of the court clerk or attached the affidavit of the alleged court clerk. Looking at Annexture MM2 which he alleges to be the letter proving he was sick, it is a fabricated document. The proof that someone was treated at the hospital is receipt of the hospital and not a letter as it was submitted by the Applicant. The letter was obtained on 16/07/2021. The person who wrote the said letter his position is not known. The letter does

not state if the Applicant attended at hospital on 19/03/2019. The letter does not show at all that Applicant was treated for what illness and the kind of treatment he received.

The Respondent's Counsel added that there is no PF3 which was attached to prove that the Applicant got an accident. All of these proves that the letter was fabricated for the purpose of this application. It was after the Respondent has commenced with the execution of a decree of the District Court that the Applicant has come up with this application. The Applicant was served with summons for the execution application on 26/06/2021 to appear to show cause on 22/07/2021 and it is the same date that the Applicant filed the present case. From March, 2019 up to June, 2021 when he was summoned to appear to show cause that is when he filed the present application. This means that the same was not filed in due diligence. The application has been filed as an afterthought to circumvent the execution process. He said that there should be an end to litigation which is the spirit of the state.

In his rejoinder, the Counsel for the Applicant argued that he has shown a good cause for the court to extend time and to re admit the appeal before this court. The Applicant was given a letter from the Dispensary to prove he was treated. The Respondent had time to verify if the Applicant was treated at Chanika Dispensary. The letter shows that the Applicant was suffering from head and chest

pain after he got an accident. He was treated for four sessions of clinic after six months and his development is good. The law does not provides that the person who got accident has to have PF3 before treatment and the Respondent does not state the need or reason for PF3. The letter is not fabricated or prepared for the purpose of this case. The Applicant has been making a follow up to his case but the answer was the summons are not ready. The Applicant does not remember the name of the court clerk who told him that he will be notified as result he could not name him. The end of litigation has to be on the determination of the rights of the parties. As the Applicant was not given right to be heard, the court has to allow application in order to hear the mater on merits.

From the submissions, the only issue for determination in this application is whether the application has merits.

This Court has discretion to grant an application for extension of time for a good and sufficient cause under section 14(1) of the Law of Limitation Act, Cap. 89 R.E. 2019. The section provides that, I quote hereunder:-

> *"14.-(1) Notwithstanding the provisions of this Act, the court may, for any reasonable or sufficient cause, extend the period of limitation for the institution of an appeal or an application, other than an application for the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application."*

The Court of Appeal had similar position in the case of **Tanga Cement Company V. Jumanne D. Masangwa and Another,** Civil Application no. 6 of 2001, Court of Appeal of Tanzania, at Tanga, (Unreported), where it held that:

> *".....an application for extension of time is entirely in the discretion of the Court to grant or refuse it. This unfettered discretion of the Court however has to be exercised judicially, and overriding consideration is that there must be sufficient cause for doing so. What amount to sufficient cause has not been defined. From decided cases a number of factors has been taken into account, including whether or not the application was brought promptly; the absence of any valid explanation for the delay; lack of diligence on the part of the applicant."*

The word "reasonable or sufficient cause" has been interpreted in several decisions of the Court to be a relative one dependent upon party seeking extension of time to provide the relevant material in order to move the court to exercise its discretion [see. **Oswald Masatu Mwizarubi v. Tanzania Processing Ltd,** Civil Application No. 13 of 2010, Court of Appeal of Tanzania]. The good cause must be determined by reference to all the circumstances of each particular case. The Court of Appeal observed in the case of **Dar Es Salaam City Council v. Jayantilal P. Rajani,** Civil Application No. 27 of 1987, Court of Appeal of Tanzania, at Dar Es Salaam, (Unreported), that:

> *"What amounts to sufficient cause has not been defined. From decided cases a number of factors have to be taken into account including whether*

or not the application has been brought promptly. The absence of any explanation for delay lack of diligence on the part of the applicant."

The Applicant's reason for the delay is that he was not aware of the date fixed for the hearing of his appeal as he was informed by the Court Clerk whom he has forgotten that he will be notified of the hearing date and be supplied with summons to serve the Respondent. Another reason for the delay is that on the date fixed for hearing of the appeal he was sick as he got accident. The Respondent argued that this is not true as the Applicant appeared in Court once which means he was aware of the date fixed for hearing of his case and that it was the Applicant's duty to make follow up for his appeal. On the issue of sickness he said that the letter alleged from hospital does not prove that the Applicant was sick on the hearing date.

I have read the proceedings of this Court in the respective appeal. The proceedings shows that the appeal was fixed for mention for the first time on 11.11.2016 where both parties were absent. Then, the appeal came to Court on 08.12.2016, 21.03.2017 and 08.06.2017 where the Applicant was absent but the Respondent was present. The case came to Court once again on 29.08.2017 where both parties were present and the appeal was fixed for hearing on 02.11.2017. On the fixed hearing date the Respondent was present but the Applicant was absent. The case was fixed for hearing on 27.03.2018, 21.06.2018, 25.09.2018, 21.11.2018 and on 19.03.2019 where the Applicant was absent on all those dates.

The Court decided to dismiss the appeal for non- appearance on 19.03.2019. This evidence prove that the Applicant was aware that his appeal was fixed for hearing and as a result he appeared in Court on 29.08.2017 and the case was fixed for hearing on 02.11.2017. But on the said fixed date the Applicant never appeared despite the fact that the case was fixed for several hearing dates. The Applicant had duty to appear and prosecute his appeal on the hearing date and if there is any emergency he has duty to inform the Court of the same.

The Applicant argument that the Court Clerk informed him that he will be notified of the hearing date has no merits since on 29.08.2017 both parties were present in Court when the case was fixed for hearing on 02.11.2017. There was no need for the Court to notify the party of the hearing date while the party was present in Court. Also, the Applicant has not provided the name or the affidavit of the alleged clerk who told him that he will be notified. It is a settled law that an affidavit which mention another person is hearsay unless that other person swear as well. This was stated in the case of **Benedict Kimwaga vs. Principle Secretary, Ministry of Health, Civil Application No. 31 of 2000**, Court of Appeal of Tanzania, at Dar Es Salaam, (unreported). The Applicant's assertion appears to be more of an excuses than the facts.

On the reason of sickness, sickness is good cause for extension of time as it was held in the case of **Fredrick Mdimu V. Cultural Heritage Ltd,** Revision

No. 19 of 2011, High Court Labour, Division at Dar Es Salaam, (Unreported); and **Frank Mngoma V. Everina Yakobo,** Misc. Land Application No. 35 of 2019, High Court of Tanzania, at Tanga, (Unreported). However, the said sickness has to be explained and must be actual reason which stalled the Applicant from appearing in Court on the hearing date. In the case of **Shembilu Shefaya v. Omari Ally [1992] TLR 245,** an application for extension of time on basis of sickness was rejected because the applicant had not provided thorough explanation regarding the sickness. The Court of Appeal was of the view that the application does not provide the elaboration of the sickness.

In the present case, the Applicant relied on a letter alleged to be from Chanika Dispensary in Karagwe District dated 16.07.2021. This means that the letter was written more than two years after the appeal was dismissed by this court. The said latter states that the Applicant got accident on 08.03.2019 and sustained head and chest injuries. The latter does not state as to when the Applicant was received for treatment at the Dispensary or if he was admitted. The letter was supposed to show if the Applicant's injuries were serious that he was not capable of attending his case during the hearing dates. The said letter though was stamped by alleged Dispensary stamp, was signed by a person who did not disclose his or her position. The said letter does not provide details of the sickness which stalled Applicant from appearing in Court on the date fixed for hearing. After

all, the evidence available in proceedings proves that the Applicant failed to appear several times when the matter was fixed for hearing. Thus, I find that there is no sufficient evidence to prove that the Applicant was sick or that the sickness stalled him from appearing to prosecute his appeal.

Therefore, I find the application for extension of time is devoid of merits. For that reason the whole application and its prayers is lacking merits and I hereby dismiss it with cost.

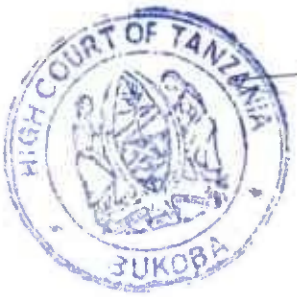
It is so ordered.

A. E. Mwipopo

JUDGE

11.02.2022

The ruling was delivered today, this 11.02.2022 in chamber under the seal of this court in the presence of Respondent and in the absence of the Applicant.



A. E. Mwipopo

JUDGE

11.02.2022