

IN THE HIGH COURT OF TANZANIA

(MOROGORO SUB-REGISTRY)

AT MOROGORO

MISC. CIVIL APPLICATION NO. 4 OF 2022

(Arising from Ulanga District Court, at Mahenge in Civil Appeal No. 1 of 2021,

Originating from Civil Case No. 29 of 1996 in Ilonga Primary Court)

BETWEEN

SUZANA MAWANJA APPLICANT

VERSUS

ALLY NAMSA RESPONDENT

HASSAN MYOLOWA RESPONDENT

ALLY MWICHANDE RESPONDENT

MARILENA MCHWANGA..... RESPONDENT

SAIDI MYOLOWA RESPONDENT

ABDALLAH NAMSA RESPONDENT

MOHAMMED MYOLOWA RESPONDENT

RULING

2nd May, 2023

CHABA, J.

This application has had a chequered history. It has been in the corridors of this Court and in the Court of Appeal for almost twenty-seven years now. Apart from its long history, in particular the present application emerged on 9th February, 2022 where the applicant brought in Court this application and

registered sickness as the main reason for seeking enlargement of time to file an appeal out of statutory time against the judgment of the District Court of Ulanga District in Civil Appeal No. 1 of 2021. The application has been brought in Court by way of chamber summons made under section 14 (1) of the Law of Limitation Act [Cap. 89 R. E, 2019].

The application was supported by an affidavit sworn by the applicant, Susana Mawanja. The 1st respondent, Ally Namsa resisted the application by filing a counter affidavit deposed by himself, whereas the 4th, 5th and 6th respondents, collectively objected the application by filing a joint counter affidavit sworn by Marilena Mchwanga, Saidi Myolowa and Abdallah Namsa. On the other hand, the 2nd and 3rd respondents namely, Hassan Myowola and Ally Mwichande did not respond and or file any counter affidavit to challenge the applicant's application.

Facts raising to the present application can be briefly narrated as follows: That, the applicant sued the respondents herein by instituting Case No. 29 of 1996 before the Ilonga Primary Court within Ulanga District which ended in favour of the respondents. Aggrieved by the decision of the Ilonga Primary Court, the applicant herein filed an appeal before the Ulanga District Court through Appeal Case No. 08 of 1997 which ended in favour of the applicant where she was declared as the lawful owner of the disputed plot. Believing that she was a lawful owner of the disputed parcel of land, in the year 1998 she knocked the door of Ilonga Primary Court and lodged an application for

execution of a decree. However, her application was struck out after the respondents successfully applied for an extension of time to lodge their appeal out of the statutory time against the judgment of Ulanga District Court in Appeal No. 8 of 1997 via Misc. Civil Cause No. 174 of 1999 where the respondents were granted two weeks to lodge their intended appeal, though they never pursued for their rights.

It appears that the applicant was unhappy with the decision that arose from Misc. Civil Cause No. 174 of 1999 which granted extension of time to the respondents. Therefore, she lodged an appeal before the Court of Appeal of Tanzania (the CAT) through Civil Appeal No. 60 of 2003 where its judgment was delivered on the 19th day of February, 2008 of which the appeal was struck out for want of prayers. Considering the fact that the respondents unexpectedly changed their minds to appeal against the decision of Ulanga District Court in Appeal Case No. 08 of 1997, it means that the decision of that Court stands to be executed.

It is on the basis of the above background, and the order of the CAT in 2008 the applicant on the 14th day of August, 2019 decided to file an application for execution of a decree before the Ilonga Primary Court seeking for what she believes to be her rights. Nevertheless, such an application for execution was dismissed on account of being time barred. Discontented, the applicant preferred an appeal before the Ulanga District Court through Civil Appeal No. 1 of 2021 but again she lost. Still determined to pursue for her rights and untired

and unwilling to surrender after all her struggles, she wanted to appeal before this Court but due to sickness or health conditions she was prevented to access the Court, hence the present application.

At the hearing of the application, Ms. Kay Zumo entered appearance for the applicant, whereas the 1st respondent who was reported dead was represented by Mr. Hamis Hassan Mbugira, an administrator of the estates of the deceased. The 2nd and 3rd respondents were nowhere to be found, whilst the 4th, 5th and 6th respondents though they filed their joint counter affidavits and written submissions as well, but they never entered appearance before this Court. Therefore, I ordered the matter to proceed ex-parte against all the respondents save for the 1st respondent.

With the parties' consensus, this application was argued and disposed of by way of written submissions.

Arguing in support of the application, the learned advocate Ms. Kay Zumo commenced by praying the Court to adopt the affidavit deposed by the applicant and continued to submit that, the applicant was unable to file the appeal within the time prescribed by the law due to sickness reasons stated in her sworn affidavit in particular at paragraphs 5, 6, 7 and 8 respectively.

The learned advocate averred further that, apart from the issue of sickness of the applicant, the intended appeal has chances of success due to illegalities which are apparent on the face of the impugned judgments of both the trial Court and the first appellate Court. She highlighted that, both judgments of the

lower Courts are tainted with illegalities that cannot be left without being legally addressed, taking into account that the ultimate decision of the trial court affected the rights of the parties. To buttress her proposition, the learned advocate referred this Court to the case of **Vodacom Tanzania Limited Vs. Innocent Daniel Njau**, Civil Appeal No. 60 of 2019, CAT at Dsm (unreported) where the Court held inter-alia that: -

"We have already established the learned judge did not consider the ground of illegality raised by the appellant as sufficient cause for extension of time. We entertain no doubt that lack of jurisdiction is a point of illegality worth consideration in an application for extension of time. Therefore, the appellant demonstrated sufficient cause warranting the grant of extension of time..."

In another case of **The Principal Secretary Ministry of Defence and National Services Vs. Devram Valambia [1991] TLR 387**, the Court observed that: -

"An illegality of an impugned decision may be ground to extend time even where an applicant has not shown good cause for the delay".

Placing reliance on the above excerpt of the CAT decisions, the learned advocate prayed the Court to consider the applicant's application and grant the

sought extension of time on the ground that the intended appeal has chances to succeed.

In reply to the applicant's submission, the first respondent gave a detailed background as hinted above and vehemently opposed this application stating that there is no sufficient cause advanced by the applicant explaining reasons for delays to file the appeal out of time. He averred that, the applicant failed to narrate genuine reasons to substantiate why she delayed to file the intended appeal for eight months which were not accounted for. To fortify his argument, he cited the case of **Kennedy Owino Onyachi and Charles John Mwanyika Njoka Vs. Republic**, Criminal Application No. 26, 2019 (unreported), which is wrong citation. The proper citation is, **Kennedy Owino Onyachi and Charles John Mwanini Njoka Vs. United Republic of Tanzania**, Application No. 003 of 2015 (Full text of the decision of the African Court, may be found on the website at <https://www.african-court.org/cpmt/details-case/0032015>) which is irrelevant to matter at hand.

He further cited the case of **Caritas Kigoma Vs. KG Denis Ltd (2003) TLR 420** wherein the Court observed that, in an application for extension of time, the question to be considered is whether sufficient cause has been shown by the applicant for the delay in applying to set aside the judgment.

To conclude, the first respondent submitted that since the applicant has failed to advance genuine reasons to back up her application, he prayed the Court to dismiss the application with cost.

Having summarized the rival submissions advanced by the parties, and fully considered the application in line with the affidavit deposed by the applicant which lays the basis of this application, no doubt that the applicant is seeking for enlargement of time to file an appeal out of time. The provision of the law cited by the applicant in moving this Court is section 14 (1) of the Law of Limitation Act [Cap. 89 R. E, 2019] which provides that: -

"(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." Emphasis provided.

Guided by the above provision of the law, the pertinent question for consideration is whether the applicant has assigned and registered good cause to warrant this Court exercise its discretionary power for extending time to appeal out of time.

Reverting to the matter at hand, the applicant has advanced sickness as the main grounds for the delay. As exhibited under paragraphs 5, 6, 7 and 8 of the applicant's affidavit, the applicant has described that within the year 2006 she was involved in a motor vehicle accident which resulted to long time hospitalization at Muhimbili National Hospital and even after being discharged,

she is continuing with a prolonged physiotherapy and rehabilitation as outpatient, something that has prevented her from lodging the intended appeal within the period prescribed by the law. To make more comprehensible, the annexure SM3 which is a medical report issued by Muhimbili National Hospital (the MNH) dated 4th October, 2021 describes the medical progress of the applicant, Suzana Kitango whereby it shows that she first reported at MNH facility in the year 2006 following a Motor Traffic Crash caused injury to her spine. She was then admitted at the hospital due to her injury and associated weakness of both lower limbs. According to the report, the medical examination and investigation found that, the applicant had paraparesis secondary to wedge compression posture of T12. She was hence treated conservatively with bed rest, analgesics and lumbar consent. As hinted above, after she had been discharged from the hospital, she had prolonged physiotherapy and rehabilitation as outpatient for more than 12 years. The reports reveal further that, though she has improved on terms of weakness but still have deformity of her spine with pain.

I understand that sickness if sufficiently proved, can be a good cause for the delay. **See: Kapapa Kumpimbi Vs. Plant Manager Tanzania Brewers Ltd**, Civil Application No. 6 of 2010 CAT at Mwanza and **Emmanuel R. Maira Vs. The District Executive Director Bunda District Council (Civil Application 66 of 2010) [2010] TZCA 87 (13 August 2010)**, extracted from (tanzlii.go.tz). Apart from proving sickness by medical evidence or document, the applicant must also show and establish how the sickness

prevented him or herself from taking the required action or steps within time. This stance was explicated by this Court (Rumanyika, J., As he then was) in **Pastory J. Bunonga Vs. Pius Tofiri**, Miscellaneous Land Application No. 12 of 2019 (unreported), wherein it was observed that: -

".... Where it was on the balance of probabilities proved, sickness has been good and sufficient ground for extension of time yes. But with all fairness the fact cannot be founded on mere allegations. There always must be proof by the applicant that he fell sick and for the reason of sickness he was reasonably prevented from taking the necessary step within the prescribed time....."

Beside the issue of sickness of the applicant, the counsel for the applicant averred that there is another point of illegalities which are apparent on the face of the impugned judgments of both the trial Court and the first appellate Court. She asserted that, both judgments of the lower Courts are tainted with illegalities that cannot be left without being legally addressed. I agree. It is trite law that, an illegality of the impugned decision may be ground to extend time even where an applicant has not shown good cause for the delay as it was underscored by the CAT in the case of **The Principal Secretary Ministry of Defence and National Services** (supra). On scrutiny of parties' pleadings, I do not see any reason as to why this Court should refuse to grant the orders sought by the applicant.

Hence, based on the above analysis, it is my holding that there was no negligence on the part of the applicant to file her appeal in accordance with the law. The applicant has managed to advance sufficient reasons to warrant the Court to exercise its discretionary power to grant the orders sought for extending time to appeal out of time and I am satisfied that the applicant has managed to persuade this Court to grant leave for extending time to appeal out of time.

In the result, the application has merit, and it is hereby granted with no order as to costs. **It is so ordered.**

DATED at MOROGORO this 2nd day of May, 2023.




M. J. CHABA

JUDGE

2/5/2023