

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MWANZA SUB-REGISTRY
AT MWANZA

MISC. CIVIL APPLICATION NO. 52 OF 2022

(Arising from a Misc. Civil Revision No 10 of 2021 before the High Court originating from the decision of the Primary Court in Probate Cause No 78 of 2018).

WINFRIDA SAANANE MKINA----- 1st APPLICANT

EMMANUEL THOMAS MKINA-----2nd APPLICANT

VERSUS

BEATRICE MNANGALE MKINA-----RESPONDENT

RULING

Last order: 28.04.2023

Ruling date: 03.05.2023

M. MNYUKWA, J.

Before me is an application for enlargement of time within which to lodge an appeal to the Court of Appeal against the decision delivered by this Court in Civil Revision No 10 of 2021 decided against the applicants' favour. The application is brought by way of chamber summons, made under section 11(1) of the Appellate Jurisdiction Act, Cap 141 R.E 2019. The application was supported by an affidavit of the 1st applicant. It is on record that the impugned decision which is sought to be challenged by the applicant was delivered by this Court on 5/8/2021.

By the order of this court the matter proceeded by the way of oral submissions whereas, at the hearing, the applicant afforded the services

of Mr. Remedius Mainde, learned advocate and the respondent was represented by Mr. Angelo James, learned advocate.

Submitting first, the applicant's learned counsel prays the court to adopt the 1st applicant's affidavit and form part of his submissions. Referring to paragraphs 3 and 4 of the applicant's affidavit, he avers that the applicant has a genuine reason for the delay. He submitted that, after the decision of this Court was delivered on 5/8/2021, the applicant who was pregnant was hospitalized from 5/9/2021 and she was discharged on 7/9/2021 after she had delivered her baby by operation at Bugando Hospital as evidenced on Exhibit WSM 1.

He added that, the applicant filed notice of appeal on 6/8/2021 and that she was supposed to file an application for leave to appeal within 14 days from the date of the impugned decision. But, since she was pregnant she failed to file the same until on 14/04/2022 when she was in good condition in terms of health after delivering the baby. The applicant's counsel retires by stating that, the applicant delayed for 184 days counting from 10/8/2021 and therefore prays the application to be allowed.

Responding, Mr. Angelo James opposed the 1st applicant's application and prays to adopt the counter affidavit sworn by the respondent to form part of his submissions. He quickly pointed out the anomaly found in the 1st applicant's affidavit as he avers that, the affidavit filed in this court was sworn by Winfrida Saanane Budodi while the



applicant in this case is Winfrida Saanane Mkina. For that anomaly, he was of the view that, there was no affidavit which supports the applicant's application in this Court.

On the reason advanced by the 1st applicant for this Court to consider so as to grant an extension of time to file leave to appeal out of time, Mr Angelo submitted that, in the 1st applicant's affidavit shows that, she fall sick on 5/9/2021 and the impugned Ruling sought to be challenged was delivered on 5/8/2021, that is in the simple calculation, the 1st applicant had 30 good days from the date the decision was delivered to the date she was hospitalized. He went on that, if the 1st applicant managed to file the notice of appeal on 06/08/2021, she was also capable to bring the application for leave within time.

Challenging the 1st applicant's affidavit, he avers that, the same is silent on what prevented the applicant to bring the application from 5/8/2021 to 5/9/2021. He went on that, it is a settled position of the law that for an application of the extension of time to succeed, the applicant must account for each day of delay as it was stated in the case of **Ivona Mazamila & Another v Bank M Tanzania Ltd**, Labour Application No 7 of 2022 which emphasized that, delay of even a single day should be accounted for. He retires his submissions avers that, in our case at hand, the 1st applicant accounted for the day of delay from 5/9/2021 and did



not account from 5/8/2021. He therefore prays the application to be dismissed with costs.

Re-joining, the applicant learned counsel maintained his submissions insisting that, the applicant was sick and that the name of Budodi is just a typing error and this Court shall disregard it for the justice to be done because that is one among the surname of the 1st applicant. He elaborated that, 184 days of delay start to be counted from 10/8/2021 up to the date of filing this Application. He retires by avers that, the notice of appeal was filed by the advocate on time so as to curb the delay and they did not file leave at the time when they were filing the notice of appeal as they were not instructed by the client by that time. He, therefore, prays the application to be granted as the 1st applicant was not negligent.

I have given careful consideration to the arguments for and against advanced by the applicant's counsel as well as the respondent's learned counsels and the central issue for consideration and determination is whether sufficient reason has been advanced to warrant the extension of time sought by the applicant.

Before I embark to determine this application, I have to state on the concern raised by the respondent in his affidavit and his counsel during the submissions. They both challenged the affidavit for being sworn by



the person who is not the 1st applicant in this application as the affidavit is sworn by a person known as Winfrida Saanane Budodi while the applicant is known as Winfrida Saanane Mkina. In his submission, the counsel for the 1st applicant avers that, the anomaly is the typing error and the name of Budodi is the surname of the 1st applicant. He, therefore, prays the court to ignore those typos and concentrate on delivering justice to the parties.

I have considered the submissions of parties in this issue, and I am in agreement with the 1st applicant's counsel that, the anomaly is the typographical error. As we nowadays enjoy the principle of overriding objectives or famously known as the oxygen principle which aimed to do away with the technicalities, I will take into consideration the affidavit filed in this Court as the affidavit of the 1st applicant who is known as Winfrida Saanane Mkina and proceed to determine the application on merit.

After holding so, I now proceed to determine the present application. It is a settled position of law that the decision to grant or not grant an order of extension of time is within court discretion and that discretion should be exercised judiciously, supported by logical, valid, authentic and sound reasoning as it all depends upon a party seeking an order to adduce sufficient reason(s) that prevent him from doing what he was supposed to do within time. There is a surfeit of legal authorities in

this respect. In the case of **Benedict Mumelo vs. Bank of Tanzania** Civil Appeal No. 12 of 2002 the Court of Appeal of Tanzania decisively held;

"It is trite law that an application for extension of time is entirely in the discretion of the Court to grant or refuse it, and that extension of time may only be granted where it has been sufficiently established that the delay was with sufficient cause."

It is also a trite position of law that for an application for extension of time to succeed, the applicant must account each day of delay even if it is a delay of a single day, otherwise, it is meaningless and there is no need to set out the Rules which cannot be followed. In a number of cases, this Court and the Court of Appeal stressed on the need for the applicant to account for each day of delay. For example in the case of **Dar es Salaam City Council v Group Security Co. Ltd**, Civil Application no 234 of 2015, CAT at Dar es Salaam, it was stated that:-

"... the stance which this Court has consistently taken is that an application for extension of time, the applicant has to account for each day of delay."

Also, in the case of **Bushiri Hasani vs. Latifa Lukiko Mashayo**, Civil Application No. 03 of 2007 CAT it was held that: -

"...Delay of even a single day, must be accounted for otherwise there would be no point of having rules



prescribing periods within which certain steps have to be taken."

Now, after I have carefully revisited the applicant's affidavit and going through the counsels' submissions, I find out that the only reason relied upon by the applicant for this Court to exercise its unfettered discretion to grant an extension of time to file leave to appeal out of time is sickness. In his submission, the counsel for 1st applicant avers that, he is aware that the application for leave to appeal to the Court of Appeal must be filed in this Court within 14 days from the date of the impugned decisions. But he prays this Court to enlarge time for the reason that the 1st applicant was pregnant and she was hospitalized from 5/9/2021 and from the date she was discharged, she was incapable to do anything as she was in a recovery process after giving birth by operation.

The above averment was strongly opposed by the respondent's counsel who pointed out that, the applicant did not account for each day of delay from 5/8/2021 when the impugned decision was given to 5/9/2021 when she was hospitalized as her affidavit is silent on that fact.

In our case at hand, the issue of sickness of the 1st applicant is proved by Annexure WSM which shows that the applicant was hospitalized from 5/9/2021 and discharged on 7/9/2021. Therefore, it is my firm view that during this period the applicant was sick, and for that reason could



not be in a position to engage an advocate to file leave to appeal to the Court of Appeal. In her affidavit, the 1st applicant also avers that, after she was discharged, she was advised to get rest after the delivery of her baby by operation. Unfortunately, this fact was not substantiated with any exhibit from the medical doctor if the applicant was required to rest beyond the usual period of maternity leave. This Court also finds it difficult to know the exactly time the applicant was advised to rest as the affidavit is silent on that issue.

As it was rightly submitted by the respondent's counsel, the 1st applicant account only the delay from 5/9/2021 to the date of filing the present application. I am in agreement with the learned counsel for the respondent that the applicant failed to account the delay of approximately 15 days from the date in which her period of filing leave to appeal expires since the impugned decision sought to be challenged was delivered on 5/8/2021, and she was supposed to file leave to appeal within 14 days, which ended on 19/8/2021 and that she was hospitalized on 5/9/2021.

In the same sequence of accounting for each day of delay, I find the applicant had just generalized that she was advised to rest from the date she was discharged without exhibiting the same with any evidence or even an attempt to state that, she was advised to rest for how many days. Thus it is my firm opinion that, the 1st applicant's sickness did not

cover the whole period of delay. And therefore, the 1st applicant failed to prove her claim of sickness as a ground which prevent her from taking a step in court. In **Shembilu Shefaya v Omary Ally** (1992) TLR 245 it was observed that, where the argument is sickness which is relied on as a reason for delay, there must be elaboration in the affidavit the extent to which sickness prevented the applicant from taking a step in court.

Consequently, I hold that the applicant did not give sufficient reasons for this court to exercise its unfettered discretion to extend time to file leave to appeal out of time as prayed. I, therefore, proceed to dismiss the application with costs.

It is so ordered.




M.MNYUKWA
JUDGE
03/05/2023

Court: Ruling delivered on 3rd May 2023 in the presence of the applicant's counsel and in the absence of the respondent.


M.MNYUKWA
JUDGE
03/05/2023