

IN THE HIGH OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

MISC. CIVIL APPLICATION No. 11 OF 2022

(Originating from Civil Appeal No. 17/2021 of Mpanda District Court and Civil Case No. 133 of 2021 of Mpanda Urban Primary Court)

AGUSTINO JANUARY KWEKA.....APPLICANT

VERSUS

FATUMA CLEMENT JOHN.....RESPONDENT

RULING

24/04/2023 & 01/06/2023

MWENEMPAZI, J.:

The application before this Court seeks leave to file an appeal out of time. The application is well framed by the learned advocate, Mr. Laurence John, learned Advocate and it is made under Section 25 (1) (b) of the Magistrates' Courts Act, Cap. 11 RE 2019. In compliance with the law, the applicant accompanied the application with an affidavit. In the affidavit, the applicant states that there are glaring illegalities in the impugned decision which essentially constitutes a good ground for extension of time. In the counter affidavit as filed by the respondent, she objected the reason outlaid by the applicant as she believed he

failed to declare as to when he had noticed the illegalities in the decision whereas he had not accounted for the days he had delayed to file his appeal.

The application was finally scheduled for hearing on the 16th day of March, 2023 whereas the applicant was represented by Mr. Laurence John learned Advocate and the respondent had no legal representation she appeared for herself. The learned counsel for the applicant prayed for the leave of the court for the hearing to proceed in mode of written submissions. This court gladly granted the leave for the parties to proceed with the hearing by way of written submissions.

Briefly, Mr. Laurence John submitted first that the applicant is aggrieved by the decision of the first appellate court and he intends to appeal to this court whereas the sole ground that he relies on for the extension of time is that there are glaring illegalities in the impugned decision which essentially constitutes a good ground for extension of time and he referred this court to paragraph 6(a) and 6(b) of the filed affidavit in support of this application.

The learned counsel cited several case laws in support of his submissions, which are **HB Worldwide Limited vs Godre's Consumer Products Limited Civil Application No. 2/16 of 2021**

CAT (T) Dar es Salaam (unreported) and **Rose Irene Mbwete (Administrator of the Estate of the Late Mary Dotnata Watondoha) vs Phoebe Martin Kyomo, Civil Application No. 70/17 of 2019 CAT (T) DSM** (Unreported). Both theses cases insists that presence of illegalities in respect of the impugned decision is good cause for granting the extension of time.

Mr. Laurence proceeded further that in this case the judgement of the first appellate court made a fault visible at the face of record and referred this court to paragraph 6 (a) for the making a contradictory orders contrary to the mundane law that court orders must be certain, he added that the court made a trial de novo order of the Civil Case No. 133 of 2021 at Mpanda Urban Primary Court before a Magistrate of a competent jurisdiction but, also resurfaced the decision after six months illegally forgetting the fact that once a suit is ordered to be tried de novo it should be heard afresh.

Conclusively, Mr. Laurence submitted that another illegality as stated at paragraph 6 (b) of the affidavit is that the first appellate court shouldered the applicant the burden to locate necessary parties and bring them to the suit while as it is mundane law that the one who chooses a person to sue is the plaintiff as the counsel referred this court

to the case of **CMA CGM (Tanzania) Limited vs Insignia Limited, Misc. Commercial Application NO. 168 of 2016 (HC)(T) DSM** (Unreported) at page 9 and 10 where it was held that;

"I think the respondent is right, the plaintiff is at liberty to sue a person she wishes to and against whom she has a cause of action."

And therefore, he added that the order that the applicant should locate the whereabouts of Julius Pepino Kaite as the second defendant and be brought to the Primary Court of Mpanda was improper in law as it was the duty of the plaintiff even to fill in the form which initiates a suit and claims at the primary court as per the Rule 5 (1) and 5 (2) of the Primary Court Civil Procedure Rules GN No. 310/1964 and that the plaintiff is also required to fill the forms that are obtained in the Magistrates' Courts (Approved Forms for Primary Courts Rules, 2020). Mr. Laurence then submitted that, basing on the above submissions he made and bearing in mind that the intended appeal has an overwhelming chance of succeeding and that the respondent would not be prejudiced by this application being allowed, he prays for the extension of time be granted with order pertaining to costs.

In a brief response by the respondent, in her submissions she stated that the applicant failed to account for the reasons of his delay in filing the appeal within the time prescribed by the law. She added that, as the judgement of the first appellate court was delivered on 28/02/2022 and certified on 09/03/2022, he slept over his right of appealing over three months and filed this application to this court on the 21/06/2022. She added that the respondent never mentioned the exact date that he had noticed the illegalities within the judgement of the first appellate court. In that, she believes that the applicant can not seek assistance from the said illegalities as a sole ground of being granted the chance to appeal out of time.

In support of her arguments, the respondent cited the cases of **Khalid Hussein Muccadam vs Ngulo Mtiga & Another, Civil Application No. 234/17 of 2019 CAT at Dar es Salaam** (unreported), **Masatu Mwizarabi vs Tanzania Fish Processing Ltd, Civil Application No. 13 of 2010** (unreported), **Henry Muyanga vs Tanzania Communication Company Ltd, BK, Civil Application No. 08 of 2014** (unreported), **Benedict Masanja Maganga vs Nico Basil Sanga and Another, Misc. Land Application No. 501 of 2020 HC-DSM** (unreported) in which all these cases generally suggests that, an

application for extension of time is entirely in the discretion of the court to grant or refuse it.

In submitting further, the respondent then outlined several factors to be considered by the court before granting an extension of time, and she cited the case that had outlined the factors that is the case of **Shabbir Gulamabbambas Nathani vs Saijad Ibrahim Dharamsi & Another, Misc. Civil Application No. 320 of 2021 HC-DSM** (unreported), the factors outlined were;

- i. The applicant must account for the period of the delay*
- ii. The delay should not be inordinate*
- iii. The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.*
- iv. If the court feels that, there are other reasons, such as the existence of a point of law of sufficient importance, such as illegality of the decision sought to be challenged.*

The respondent then insisted that, the appellate magistrate's decision was clear but because the applicant was not diligent as he failed to lodge his appeal within the prescribed time by the law and in doing so, he does not bother to clarify the exact date he was aware of the

illegality within the decision of the first appellate court and in the absence of such explanation, he had to account for each day he had delayed to lodge his appeal within the prescribe time. The respondent then cited the case of **Muse Zongori Kisere vs Richard Kisika Mugendi & Others, Civil Application No. 244/01 of 2019 CAT-DSM** (Unreported), **Bushiri Hassan vs Latifa Lukio Mashayo, Civil Application No. 3 of 2007** and **Bharya Engineering and Contracting Co. Ltd vs James Alan Hamoud Ahmed Nassor, Civil Application No. 342/01 of 2017** (both unreported).

In winding up, the respondent submitted that it is of no doubt that once a court makes an order for trial de novo, the suit has to be heard afresh as it was at the first appellate court, where the learned magistrate ordered that within six months the appellant (applicant herein) has to trace the whereabouts of Julius Pepino Kaite and his wife and the that learned magistrate further remitted the case file to the trial court for another competent magistrate to preside it, as it was to him that the said Julius Pepino Kaite and his wife were necessary party to the suit, and in support of her submissions she cited the case of **Oilcom Tanzania Ltd vs Christopher Letson Mgalla, Land Case No. 29 of 2015**, HC at Mbeya (unreported). And she urged this court

not to be called upon to entertain stale applications as the recent one, and on these grounds, she prays for this court to dismiss this application.

In his rejoinder, the counsel for the applicant reiterated what he had submitted in chief and added that they pray for an extension of time so that they appeal against the illegal orders that were given by the appellate court, and that the respondent had also conceded that there are illegalities in the impugned decision and therefore insist this court to grant the extension of time.

I have considered the rival submissions of both parties and I am fortified that, the major issue for consideration ***is whether the applicant in this matter at hand has adduced sufficient reasons for this court to grant the prayed extension of time.***

In this application, illegality seems to be the major reason that the applicant relies on for attaining the chance of appealing out of time. The counsel for the applicant alleged that there is illegality on the decision of the District Court (first appellate court). I understand, an allegation of illegality is sufficient cause for extension of time, and that the court has discretion to grant extension of time but the discretion has to be exercised judiciously not by sympathy to the party who relaxed for 3 months and 12 days without any action. It is trite law that, in the

exercise of its discretion the court has to look for the factors in considering an application for extension of time as outlined in the case of **Lyamuya Construction Company Ltd v. The Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010, CAT at Arusha** (unreported).

It is my holding that the applicant had slept on his right to appeal within the prescribed time as the judgement at the appellate court was delivered on 28/02/2022 and it was certified on 09/03/2022 but he filed this application on 21/06/2022. It was expected of him, firstly to clarify what made him delay to file his appeal for three months and twelve days and not insist on illegalities in the decision of the appellate court as the sole reason for obtaining the chance to appeal out of time whilst he knew he was aggrieved by the decision of the appellate court on the same date he had received his copy of the judgement, that is on the 09/03/2022.

I am of the view that, the delay was unexplainably excessive, it is unfortunate that granting this application would seem unjust as the applicant did not account for the 3 months, he had taken to notice the illegality in the decision he intends to appeal against, and therefore the


applicant has not given sufficient reasons for this court to grant him an extension of time for appealing out of time.

As a result, I proceed to dismiss this application and that the costs be borne by the applicant.

It is so ordered.

Dated and delivered at Sumbawanga this 01st day of June, 2023.




T. M. MWENEMPAZI

JUDGE