

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**MISC. CRIMINAL APPLICATION NO. 4 OF 2023**

**(C/F Criminal Appeal No. 11 of 2021 in the District Court of Arumeru at Arumeru,**

**Originating from Criminal Case No. 205 of 2021 at Enaboishu Primary Court)**

**JOSEPH ABRAHAM.....APPLICANT**

**VERSUS**

**JUDITH LOIVOTI.....RESPONDENT**

**RULING**

15<sup>th</sup> May & 23<sup>rd</sup> June 2023

**TIGANGA, J**

The applicant in this application is seeking to be granted extension of time within which to file his appeal out of time against the decision of the District Court of Arumeru in Criminal Appeal No. 11 of 2021. The application was supported by the affidavit sworn by the applicant where he stated that the reason for his delay was contributed by the sickness of his late father who was his co-accused and his brother who also fell sick and subsequently died. The applicant also alleged that there are illegalities in the lower court records as the trial court had no jurisdiction to entertain the matter as the same was a land dispute.

On his side, the respondent opposed the application through his counter affidavit where he stated that, apart from the attached burial permits, the applicant has not established medical proof to establish that his father and his brother were sick and that he was the only person taking care of them. He further stated that the period of delay is of 467 days and the applicant has not accounted for those days. As to the contended illegalities, the respondent argued that the same is not apparent on the face of the record as required by the law and also the applicant herein had once instructed one Calvin Loivoti Kisiri who was not a party to the suit to file Misc. Application No. 06 of 2022 for purposes of challenging the judgment of the 1<sup>st</sup> appellate court.

Hearing of this application was by way of written submission; the applicant was represented by Advocate Victor Jonass Bernard on the other hand the respondent was represented by the learned counsel Mr. Meinrad M. D'Souza.

Supporting the application, the applicant submitted that he failed to file his appeal on time because his father was suffering from Prostate Cancer and that he was the one to take care of him until 01/04/2022 when he passed away. He went further to state that after the death of his father, his brother Isaya Abraham also fell sick with Diabetes and again

he started to take care of him until 17/12/2022 when he also passed away. He further stated that his delay was contributed by the sickness and also, he could not engage an advocate as every cent that he obtained was used for treatment of the sick relatives he was taking care of.

As to the issue of illegality, the applicant submitted that since there was a controversy over the ownership of the land in dispute, then the trial court ought to have advised the parties to resolve the issue of ownership of land in a proper forum and not raise it as an issue and determine the same.

Responding to the above submission, the respondent submitted that the applicant herein has not established sufficient reasons for this court to enlarge the time for him to file the appeal out of time taking into account that the delay is inordinate. As to the question of illegality, it was the submission of the respondent that the same is not apparent on the face of the record and it is an afterthought as the same has never been raised neither at the trial court nor at the 1<sup>st</sup> appellate court. The respondent thus prayed for the dismissal of this application.

Having summarized the parties' submissions above, it is now time for the determination of the application, and the main issue to be considered is whether the applicant has given sufficient reasons to enable

this court to exercise its discretion to grant the relief sought. It was held in the case of **Livingstone Silay Haru v. Collifred Temu** [2002] TLR 268, that:-

*"It is discretion on the part of the court to grant the extension of time depending on sufficient reason being given to explain the delay."*

From the records, the applicant has demonstrated two main reasons to be considered by this court as sufficient reasons, these are; sickness and illegality.

To begin with, in our jurisdiction sickness has been held to be one of the grounds or sufficient reason for extension of time. The applicant has explained in his affidavit that he was prevented to file his appeal on time as he was the one taking care of his sick father until when he died on 01/04/2022 and that after the death of his late father, his brother Isaya also fell sick and he was again the one who took care of him until his demise on 17/12/2022. To support the assertion the applicant attached the burial permits of the said Ibrahim Veino and Isaya Abraham.

Much as sickness can be a good ground for extension of time, nevertheless, the applicant must explain how the said illness contributed to the delay. On this I am guided by the decision of the Court of Appeal

of Tanzania in the case of **Juto Ally vs Lukas Komba & Another**, Civil Application No. 484/17 of 2019 (Unreported) where it was held *inter alia* that;

*".....Indeed, she has not explained how her illness contributed to the delay as the medical evidence she attached to her affidavit concerns the period specifically for the dates when she attended to hospital on 8<sup>th</sup> October, 2016 and 19<sup>th</sup> June, 2016. Besides, there is no indication that on those particular dates, she was admitted and for how long. The only indication is that she attended at Mwananyamala Hospital as an outpatient where she was attended and allowed to go to her residence on both occasions."*

The above authority has said it all. In this particular case, the medical evidence attached is the burial permit which in itself does not sufficiently give proof that the applicant was the only one to take care of both his late father and brother until their demise. Moreover, the burial permits attached do not indicate the dates on which they started to be sick and whether they were attended at the hospital or admitted, and in any case, it was the applicant who was responsible to take care of all of them.

Nevertheless, even if this court decides to support the applicant's assertion, he is yet held accountable with the requirement of accounting for each day of delay from the time of the death of his late brother (17/12/2022) to the time of filing of this application (10/02/2023). Moreover, under the circumstances of this case even if this court is to assume that the applicant was attending his late father and brother, the evidence does not support his claim to warrant this court to exercise its discretionary powers to extend time.

In this regard, this court is of the view that the reason for sickness advanced by the applicant is insufficient as it has not been well established as to how it prevented the applicant from filing his appeal on time.

The applicant has also argued that there are points of illegalities in the decision intended to be appealed against. There are several decisions of this Court and those of the Court of Appeal of Tanzania, which considered this ground as a sufficient reason for extension of time. In most cases, the ground of illegality is taken to be sufficient when the impugned decision is raised. In **VIP Engineering and Marketing Limited and Two Others vs Citibank Tanzania Limited**, Consolidated Civil Reference No. 6, 7, and 8 of 2006 (unreported) it was held inter alia that;

*"It is settled law that a claim of the illegality of the challenged decision constitutes sufficient reason for extension of time under Rule 8 (now Rule 10) of the Court of Appeal Rules regardless of whether or not a reasonable explanation has been given by the applicant under the Rules to account for the delay."*

However, it is worth noting that, in the cases where illegality was considered as a ground for extension of time the said illegalities were explained. Korosso J. In the case of **Finca (T) Limited & Another vs Boniface Mwalukisa**, Civil Application No. 589/12/2018 had the following to say;

*"It is, however, significant to note that the issue of consideration of illegality when determining whether or not to extend time is well settled and it should be borne in mind that, in those cases where extension of time was granted upon being satisfied that there was illegality, the illegalities were explained."*

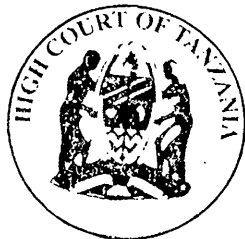
Applying the above position of the law in relation to the application at hand, the applicant in his application in particular in paragraph 10 has stated that, the lower court records suffer illegality which the court has the duty to correct. The alleged illegalities among others, is that the trial court has no jurisdiction to entertain the dispute as the same was the land dispute. Since the applicant has explained the alleged illegality in his

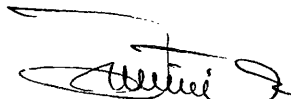
affidavit and the same being on the question of the jurisdiction of the trial court, this court is of the finding that the alleged illegality is apparent on the face of the record and thus can be considered as a good cause for the Court to grant the prayer sought in this application.

In the event, this court is of the view that the reason for illegality is a good cause for the court to exercise its discretion to grant the relief sought by the applicant. Consequently, if this application is granted, the applicant should file his appeal within fourteen (14) days from the date of this ruling.

It is accordingly ordered.

**DATED** and delivered at **ARUSHA** this 23<sup>rd</sup> June 2023



  
**J. C. TIGANGA**  
**JUDGE**