

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE SUB - REGISTRY OF MWANZA

AT MWANZA

MISC. CIVIL APPLICATION NO. 54 OF 2023

(Arising from PC Probate Cause No. 5 of 2022)

ELIKANA CHARLES MAGUBU ----- 1ST APPLICANT

LAURENT CHARLES MAGUBU-----2ND APPLICANT

VERSUS

JULIAS MALIGANYA-----RESPONDENT

RULING

June 7th & 30th, 2023

Morris, J

The applicants above, through this application, are moving this Court to extend time within which they will appeal against the judgement of Magu District Court in appeal No. 8 of 2023. The application is supported by the affidavits of the 1st applicant and Masoud Mwanaupanga. The opposition is registered by the counter affidavit of the respondent. Further, the applicant was represented by Advocate Masoud Mwanaupanga while the respondent enjoyed representation from Advocate Yuda Kavugushi.

From the records, the respondent successfully applied for letters of administration of the estates of the late Charles Magubu at Kabila Primary Court Vide Probate Cause No. 5 of 2022. The applicants objected the appointment. They were unsuccessful. Dissatisfied, they again unsuccessfully appealed to the District Court of Magu. That the judgement of Magu District Court was delivered on 30/3/2023. The applicants delayed on filling the appeal before this court. That tardiness is the essence hence this application.

In support of the application, apart from adopting the affidavits the counsel for the applicants submitted that under paragraphs 8 and 9 of the applicant's affidavit; it was deposed that the 1st applicant prepared the appeal but he was not allowed to file the same as it was not prepared by lawyer. That thereafter sought legal assistance from him on 29/4/2023. By that time, it was the last day for him to file the appeal.

It was argued further that the applicants counsel spent 7 days to prepare this application. Reference was further made to the case of ***Ausi Mzee Hassan v Republic***, CoA Criminal Appeal No. 69/2022 (unreported).



In reply it was submitted that, ignorance of law is not a defence. The applicants should have, therefore, taken necessary steps in time. The respondent argued further that, the present application neither indicates how each day of delay was spent nor does it disclose sufficient legal ground to favor the application. He also stated that, according to sections 43 & 44 of ***the Advocates Act***, Cap 341 R. E 2019; people who are permitted to prepare documents to be filed in court include individual parties. That is, they are supposed to sign to verify their authorship of the court documents.

The respondent submitted further that, assuming it was true that up to 29.4.2023 the 1st applicant had prepared appropriate documents of appeal; he was still in time. To him, the seven (7) days spent by the lawyer in drafting the necessary document, if at all, is not only unnecessarily excessive but also amount to negligence on the part of the applicants. That is, the applicant met the advocate on 29/4/2023 but this application was filed on 6/5/2023. He reiterated that these days were spent by the advocate for a mere elementary application negligently. He also added that, the application does not disclose any illegality apparent on the record. So, it lacks merit and wrath of the law should follow accordingly.



In rejoinder, it was submitted that, according to Article 13(6) (a) of ***the Constitution***, applicants have the right to legal representation. So, they did not err by instructing the advocate. Regarding sections 43 & 44 of ***Cap 341*** (*supra*), they still had such right of seeking and making use of legal representation. He further submitted that, it is not mandatory for applications for leave to cite or raise illegality as a ground to support extension of time. So, he insisted that the application is meritorious worth allowing.

Having considered the rival submissions of both parties, it is upon this court to see whether or not the ground advanced by the applicants (legal assistance) constitute a sufficient cause enough to move this court to allow the application. It is a cardinal law, as rightly submitted by parties, that the powers to extend the time is court's discretion. This discretion must, nevertheless, be exercised judiciously as opposed to personal whims, sympathy or sentiment. See, ***Bakari Abdallah Masudi v Republic***, CAT Criminal Application No. 123/07 of 2018; and ***Bank of Tanzania v Lucas Masiga***, Civil Appeal No. 323/02 of 2017 (both unreported).

Further, the law requires that the applicant should demonstrate sufficient reason(s) as to why he/she did not take the necessary step(s) in time in so doing, he/she will discharge the obligation of proving how each day of delay justifiably passed by at no applicant's fault. Accordingly, the subject applicant will deserve a favorable court's discretionary advantage as it was held in ***Hamis Babu Bally v The Judicial Officers Ethics Committee and 3 Others***, CAT-Dar es Salaam, Civil Application No. 130/01 of 2020 (unreported).

In the application at hand, the affidavits reveal that, the 1st applicant upon being supplied with copy of judgement on 14/4/2023, he prepared grounds of appeal by himself for 15 days. He then came to Court to file it on the last date 29/4/2023. Upon arrival in court, he met advocate Masoud Mwanaupanga who advised him that the petition of appeal would not be filed as it had no endorsement of the advocate and it needed to be filed online. Hence, allegedly, the 1st applicant engaged the said advocate who spent 7 days preparing this application.

In the course of submissions, the counsel for the applicant argued that the 1st applicant prepared the appeal but he was not allowed to file the same

as it was not prepared by a lawyer. On part of the respondent, it was submitted to the effect that sections 43 & 44 of ***the Advocates Act***, (*supra*); the petition prepared by the 1st applicant would have been admitted as he is allowed by law to prepare such document provided that he had signified his authorship.

As correctly submitted for the respondent, the applicants under section 43 (1) and 44 of ***the Advocates Act*** (*supra*) were eligible to prepare their own petition of appeal subject to endorsement of names and addresses of the drawer(s) thereof. See also the case of ***Ashura Abdulkadri v Director of Tilapia Hotel***, Civil Application No. 2 of 2005 (unreported). The applicant's draft petition of appeal (annextures E3) was not endorsed with the name and address of the author. Therefore, as correctly submitted for the applicant probably it could have been rejected for filing in court.

However, from the affidavits supporting the application, no averment was made as to whether the said petition of appeal did not exhaust the grounds for intended appeal worth attention of advocate. Save that it needed endorsement of drawer and being required to be filed electronically. According to section 21(1) of ***the Judicature and Application of Laws***



(Electronic Filing) Rules, GN No. 148 of 2018; a document shall be considered to have been filed if it is submitted through the electronic filing system before midnight, East African time on the date it is submitted.

The affidavit reveals that the first applicant met the advocate before filing and immediately instructed him during evening. Therefore, in my view, because it was on the last date, the advocate was enjoined to take it as a matter of urgency bearing in mind that it is claimed that he was the one who advised and persuaded the 1st applicant to refrain from filing the subject petition. Without explanation as how the advocate failed to utilize about 6 hours before midnight to amend one page of the petition of appeal to indicate the drawer, I am inclined to hold that the applicants and/or their advocate overly relaxed and slept on their right hereof.

Further, despite the fact that the applicants and their advocate knew that they were late due to negligence; and that they had all documents necessary for preparation of this application, they spent 7 days to prepare the same. Pursuant to the case of ***Lyamuya Construction Company Limited v Board of Registered Trustees of Young Women's Christian Association of Tanzania***, Civil Application No. 2/2010 (unreported); to be



considered on whether sufficient cause has shown various factors need to be looked at. These factors normally include that;

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

It is also cardinal principle that one applying for extension of time must account for every day of delay. In the case of ***Hassan Bushiri v Latifa Mashayo***, Civil Application No. 3 of 2007 (unreported), the Court said “**Delay, of even a single day has to be accounted for** otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken”. [See also the case of ***Yazid Kassim Mbakileki v CRDB (1996) Ltd Bukoba Branch & another***, Civil Application No. 412/04 of 2018; ***Sebastian Ndaula v Grace Rwamafa (legal personal representative of Joshua Rwamafa)*** Civil Application No. 4 of 2014; ***Dar***

es Salaam City Council v Group Security Co. Ltd, Civil Application No. 234 of 2015; and ***Muse Zongori Kisere v Richard Kisika Mugendi***, Civil Application No. 244/01 of 2019, (all unreported)].

Guided by the above authorities, I find the delay by the applicants to be inordinate. Expected of him, the advocate who had a purported draft petition of appeal ready by the time he was instructed; and in view of the urgency of the matter (that it was about to be time-barred), he was to act quickly than he did herein. The seven days period is, to me, undue for a straightforward document such as petition of appeal for a counsel. Apparently, it was not deposed and/or argued that the matter was so complex or involved the counsel to travel and peruse the subordinate court's record; or something of a sort.

The 1st applicant is also partly negligent to had spent 15 days to prepare his own petition of appeal awaiting to file it on the last date while knowing that he is lay person. Further, time spent by a party seeking legal assistance or advocate constitutes no sufficient reason for extension of time; the right to legal representation notwithstanding. See the case of ***Ally***



Kinanda and 3 others v Republic, Criminal Application No. 1 of 2016 (unreported).

Further; no affidavit of the 2nd applicant was filed to the effect that he also made some efforts to ensure the appeal is timely filed. The availed affidavits only relate to the 1st applicant and the advocate. The 2nd applicant slept on his right too. Once a person sleeps on his own right, he cannot be protected by law rather he may be allowed to continue sleeping forever as stated in the case of ***Miraji Salimu Nyangasa vs. Ramadhan Omary Sewando (Administrator of Estate of Lake Hussain Omary Sewado)***, HC Civil Appeal No. 1/2021 (unreported).

For the stated reasons above, I find no sufficient ground that the applicants have laid for this Court to extend the time for them to appeal. The application lacks merit and it is accordingly dismissed. No orders as to cost. It is so ordered. Right of appeal is fully explained to the parties.



C.K.K. Morris
Judge
June 30th, 2023

Ruling delivered this **30th** day of **June 2023** in the presence of Mr. Elikana C. Magubu, 1st applicant and Julius Malinganya, the respondent



C.K.K. Morris
Judge
June 30th, 2023

