

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

MISC. CIVIL APPLICATION NO. 12 OF 2023

(Originating from the Ruling of the Nyamagana District Court at Mwanza in Misc. Civil Case No. 47 of 2022 before Mushi, SRM)

- 1. JOSEPH NDELEMBI**
- 2. FELICIAN CLEMENT NDELEMBI (Both administrator of the estate of late Josephat I. Ndelembi) APPLICANTS**

VERSUS

LEAH MWANYAMBO (Co-administratrix of the estate of late Josephat I. Ndelembi)..... RESPONDENT

RULING

23rd May, & 14th July, 2023.

ITEMBA, J.

This court is called upon to exercise its discretion and grant an extension of time within which to file an appeal to this court. The intended appeal is against the decision of the District Court of Nyamagana, exercising its appellate powers in respect of Misc. Civil Application No. 47 of 2022 delivered on 13th of October, 2022, in favor of the respondent. The applicants felt hard done by the decision and intend to appeal against the said decision.

The application, preferred under the provisions of Section 25 (1) b of the Magistrate’s Court Act, Cap 11. R.E 2019, is supported by the affidavit of one Geoffrey Kalaka in which grounds on extension of time are found within paragraphs 4 to 8 of the affidavit

The respondent has opposed the application through a counter-affidavit in which he has attributed the said delay to the applicant's counsel's negligence.

At the hearing of the application Mr. Angelo James, learned advocate fended for the applicant, against Ms. Milembe Lameck, learned counsel who advocated for the respondent.

In his terse submission, Mr. James began giving a sequence of events from the dismissal of the application to the filing of this application, he submitted that the impugned decision was delivered on 13th day of October, 2022 and they filed their appeal in time, on 11th of November, 2022. However, because the online system was not working properly, he opted to file the same at the High Court registry as he was on a deadline and he was outside Mwanza. That, after his return in Mwanza, he managed to file the appeal on 16th day of November, 2022, which was already out of time.

The second ground was based in irregularity that the trial court had no jurisdiction to entertain matrimonial issues while the case was of probate and that the court had no jurisdiction to distribute the deceased's properties.

Submitting in rebuttal, Ms. Lameck stated that the applicant was negligent and that such negligence cannot be condoned by this court.

Relying the decision in **Rozalia Bushakali v. Rozatha Phillip**, Misc. Land Application No. 10 of 2022. H.C (Bukoba-unreported), she contended further that, filing a case at wrong registry has never been a good cause for extension of time. The respondent's Counsel took an issue of delaying in taking action as a waste of the court's precious time and that there is nothing such as irregularity which occurred at trial court.

In his brief rejoinder, the applicant's counsel submitted that, he did the filing at the High Court under honest belief, in order to show his efforts due the unavoidable circumstances which caused the delay.

From the submissions made by the parties, the question for my determination is whether a sufficient cause has been given for extension of time to file the appeal.

The law is settled that applications for extension of time are granted upon court's discretion that the applicant has presented a credible case and he has acted in an equitable manner. The wisdom behind this requirement has been stated in **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, CAT-Civil Application No. 2 of 2010 (unreported), where the key conditions on the grant of an application for extension of time were laid down. These are:

"(a) The applicant must account for all the period of delay.

- (b) The delay should not be inordinate.*
- (c) The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action he intends to take.*
- (d) If the Court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as illegality of the decision sought to be challenged.”*

As stated earlier on, the applicant’s reliance in the quest for extension of time is that preference of the application was delayed by a wrong approach taken by filing his application before the High Court registry instead of the District Court registry and illegality. Starting with the ground of illegality, the applicant has not submitted the said trial court judgment to support his aversion. This court is not in position to determine the said ground.

The applicant’s counsel argued that delays which are the result of pursuing a wrong procedure may be excusable and they constitute a sufficient cause for extension of time. I had a look at some Court of Appeal authorities, in **Fortunatus Masha v. William Shija** [1997] TLR 154, prior filing of a defective notice was considered a technical delay. In **Amani Girls Home v. Isack Charles Kanela**, CAT-Civil Application No. 325/08 of 2019 (Mwanza – unreported), the notice of appeal was struck out on technical grounds and this was considered as a good cause warranting an extension of time. In the recent case of **Victor Rweyemamu Binamungu v. Geoffrey Kabaka & Another**, CAT- Civil

Application No. 602/08 of 2017 (Mwanza-unreported) where the applicant was not aware of the impugned decision being issued and later, when he filed the notice, it was struck out, this was also considered a technical delay. Having considered these decisions, I find that the applicant made efforts to file his appeal within time only that he used the wrong platform. The applicant lodged this application on 16.11.2022, barely 4 days after the dead line. In my opinion, this misdirection can also be considered as technical delay.

Circumstances of this case reveal sufficient cause capable of exercising the court's discretion and extend time within which to file an appeal.

Accordingly, I grant the application and the applicant has 28 days from the date of this ruling within which to institute his appeal. Costs to be in the cause.

It is so ordered.

DATED at **MWANZA** this 14th day of July, 2023.



L. J. ITEMBA
JUDGE