

UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IRINGA REGISTRY
AT IRINGA

CIVIL APPEAL NO. 05 OF 2023

(Originating from Civil Application No. 07 of 2022 in the District Court of Iringa at Iringa)

PAUL ALPHONCE SHAYO.....APPELLANT

VERSUS

TUBERIO KALOLO.....RESPONDENT

JUDGMENT

Date of the Last Order: 14.09.2023

Date of the Judgment: 29.09.2023

A.E. Mwipopo, J.

The appellant, namely Paul Alphonc Shayo, sued Tiberio Kalolo, the respondent, at the Primary Court for Iringa District at Bomani in Civil Case No.39 of 2022 for recovery of shillings twenty four million paid to buy 2.5 acres of trees. The appellant alleged that he paid the purchase price to the respondent, but there were no trees on the farm. After a full hearing, the trial Primary Court delivered its judgment on 11.10.2022 in favour of the appellant and ordered the respondent to pay to the appellant seventeen

million, seven hundred seventy two thousand (Tshs. 17,720,000/=) since the respondent admitted to receiving the said amount. The respondent was aggrieved with the decision of the Primary Court. On 25.11.2022, he successfully filed Application No. 07 of 2022 in Iringa District Court for an extension of time to file an appeal against the decision. The appellant was aggrieved with the decision of the District Court to extend time, and he preferred this appeal with one ground of appeal as follows:-

- 1. That, the learned Magistrate erred in law and facts in holding that the respondent furnished sufficient reasons that warranted the court to exercise its discretionary powers in granting the application for an extension of time to file a petition of appeal out of time.*

At the hearing, Mr. Jassey Mwamgiga, learned advocate appeared for the appellant, whereas the respondent appeared in person (unrepresented). The matter was argued through written submissions.

Supporting the appeal, it was submitted by Mr. Mwamgiga that an application for an extension of time is granted at the discretion of the court. But, it is a cardinal principle of law that such power must be exercised judiciously. To support his stance he referred to the case of **Lyamuya Construction Company Ltd vs. Board of Registered**

Trustee of Young Women Christian Association of Tanzania, Civil Application No.2 of 2010, Court of Appeal at Arusha, (unreported). He said the respondent alleged before the District Court to be sick, and as a result, he failed to appeal timely. The ground of sickness was an afterthought because the record shows clearly on 11/10/2022 the parties were present when the judgment before the primary court was delivered. The decision was ready for collection on the same date. The respondent's allegation that he was hospitalized from 01/05/2022 to 17/11/2022 and, as a result, he could not lodge his appeal within time does not hold water. The proceedings show that the respondent was not hospitalized when the judgment was delivered since he entered the appearance. Through his affidavit, the respondent deliberately deceived the court and led to injustice.

The counsel submitted further that the respondent's conduct before the District Court was questionable. He failed to account for each day of delay as it was metered out in the famous case of **Lyamuya Construction Company Limited** (supra). The respondent said he got well on 17/11/2022. It took him eight days to file an application for an extension of time in the District Court, but he did not account for the

delay. The District Court grossly erred in extending time because it is a settled principle of law that accounting for the days of delay is one of the paramount factors to be determined before a court exercises its discretionary powers to grant an extension of time, as it was held in **Bahati M. Ngowi vs. Paul Aidan Ulungi**, Misc. Civil Application No. 490/13 of 2020, Court of Appeal at Songea (unreported). The respondent's delay was caused due to indolent, inaction and laxity on his part, which under no circumstance is permissible under the law. He cited the case of **Yazid Kassim Mbakileki vs. CRDB (1996) LTD Bukoba Branch and Another**, Court of Appeal of Tanzania at Bukoba, Civil Application No. 412/04 of 2018 (unreported). to support the position. As the applicant failed to account for eight days, it implies that he did not show a good cause, which would have warranted the court to exercise its discretionary power to extend the time limit to file the appeal. The respondent was able to appear on the date of judgment, which implies that he was an outpatient who could have engaged an advocate as the case was before the District Court. The respondent chose not to take prompt steps until the appellant served him with a copy of an application for execution. The application for an extension of time was maliciously

lodged with bad intent to delay or prevent the execution process. The respondent's inadvertence or laxity caused the delay, which does not constitute sufficient reason for the extension of time. To support the position, he referred to the case of **A.H Muhimbira and 2 Others vs. John Mwanguku**, Civil Appeal No. M.B.Y. 13 of 2005, Court of Appeal of Tanzania at Mbeya, (unreported) at page 8, and in **Isabella John vs. Silvester Magembe Cheyo**, Commercial case No.49 of 2003, High Court at Da es Salaam Dar Es Salaam Registry, at page 12 (unreported).

In his reply submission, the respondent stated that he was aware of the requirements of the law that a person applying for the extension of time should account for each day of delay as per the decision of **Lyamuya Construction Company Limited vs. The Registered Trustees of Young Women Christians Association of Tanzania** (supra) at page 6, and the case of **Tanzania Coffee Board vs. Rombo Millers Limited**, Civil Application No. 13 of 2015 (unreported). He said each case should be determined based on its merits and circumstances to arrive at fair and just decisions. The circumstances of this case are distinguishable from the cases cited by the appellant since the same attracted for determination of the trial Court to the yolk of the dispute. The trial Magistrate was extra

Careful to consider all factors and guidelines enunciated in the cited cases, hence exercising her powers judiciously by granting an extension of time to the respondent. The delay in lodging his petition of appeal within time was out of the applicant's control due to sickness as he was hospitalized, as articulated in paragraphs 6, 7 and 8 of the respondent's affidavit supporting the application before the District Court. There is no general or precise definition of what amounts to the term "**good cause**" concerning the extension of time. However, it has been the elementary principle of law that an extension of time is granted upon the applicant showing a good cause.

The respondent submitted further that extension of time is purely the discretion of the court, which has to be exercised judiciously by the presiding Magistrate depending on the circumstances of each particular case, as it was stated in **Michael Lessani Kweka vs. John Eliafye [1997] TLR 152**. Extension of time may be granted where it has been sufficiently established that the delay was not caused by the applicant's negligence or malice as stated in **Mumelo vs. Bank of Tanzania [2006] 1 EAC 2271**. The attached medical sheet/report marked as "*Annexure RM-2*" in the respondent's affidavit demonstrates that the respondent was

sick/ill and henceforth hospitalized from 01/05/2022 to 17/11/2022, hence unable to lodge his petition of appeal within the time prescribed by law. Sickness is a good cause for extending time as the Court of Appeal held it in the case of **John David Kashekya vs. Attorney General**, [2016] 1 T.L.R. 403, and in **Jehangir Aziz Abdulrasul vs. Balozi Ibrahim Abubakar and Another**, Civil Application No. 79 of 2016 Court of Appeal at Dar es Salaam (Unreported). The respondent said he was sick and henceforth hospitalized at Frelimo Hospital from 01/05/2022 to 17/11/2022, as shown in the attached sick sheet. For that reason, he failed to lodge his appeal petition within time, hence an application for an extension of time before the trial Court.

Regarding the argument by the counsel for the appellant that the application for an extension of time to appeal was lodged after being served with a copy of an application for execution, the respondent said it is speculation and a fictitious story from the appellant. The appellant failed to mention the number of the said application for execution and the court handling the same.

The appellant did not file a rejoinder submission.

Having read the written submission from both parties and the record, the court is called upon to determine if the present appeal has merits.

The gist of this appeal is the decision of the Iringa District Court in Misc. Civil Application No. 07 of 2022. The appellant was not satisfied with the decision of the District Court to extend the time to the respondent to file an appeal against the decision of the Primary Court for Iringa District at Bomani in Civil case No. 39 of 2022. The law is settled that the District Court has the discretion to extend the time to appeal against the decision of the Primary Court after the time limitation for filing an appeal has expired. The same is provided under section 20 (4) (a) of the Magistrate's Courts Act, Cap. 11 R.E. 2019, which reads as follows:-

"20(4) Notwithstanding the provisions of subsection (3)-

(a) the district court may extend the time for filing an appeal either before or after such period has expired;"

In exercising its discretion, the court has to do it judiciously as it was held in by the Court of Appeal in **Tanzania in Rent A Car Limited vs. Peter Kimuhu**, Civil Reference No. 9 of 2020, Court of Appeal of Tanzania at Dar Es Salaam (unreported). In **CRDB Bank P.L.C. vs. STARPECO Limited and Another**, Taxation Reference No. 14 of 2022, High Court

Commercial Division at Dar Es Salaam (unreported), my learned brother Dr Nangela, J., said that:-

"It is worth noting, however, that powers exercised based on discretion are powers that must be exercised judiciously and not on caprice, whim, likes or dislikes. Such a principle was set from time immemorial where over centuries ago, courts long emphasized that discretion should be exercised in accordance with sound and reasonable judicial principles."

From the above cited decisions, the court exercises its discretion in accordance with sound and reasonable judicial principles. It does not act arbitrarily.

In an application for an extension of time like this, the court has the discretion to extend time upon a good cause shown as it was held in **Bahati M. Ngowi vs. Paul Aidan Ulungi**, (supra). In the case of **Martha Iswalile Vincent Kahabi vs. Marieth Salahe and 3 Others**, Civil Application No. 5 of 2012, Court of Appeal of Tanzania at Mwanza (unreported), it was held that:-

"It is a common ground that an application of this nature is at the court's discretion. In exercising the discretion, the court must be satisfied that there are good grounds to decide in favour of an application."

The exact position was stated in **Tanga Cement Company vs. Jumanne D. Masangwa and Another**, Civil Application No. 06 of 2001, Court of Appeal of Tanzania,(Unreported), where it was held that:-

"An application for extension of time is entirely in the court's discretion to grant or refuse it. However, this unfettered discretion of the court has to be exercised judicially, and the overriding consideration is that there must be sufficient cause for doing so. What amounts to sufficient cause has not been defined. From decided cases, a number of factors have been taken into account, including whether or not the application was brought promptly, the absence of any valid explanation for the delay, and lack of diligence on the part of the applicant."

In this case, the decision sought to be challenged was delivered on 11/10/2022, and the respondent filed the application for extension before the Iringa District Court on 25/11/2022. The Magistrates' Courts Act, Cap 11 R.E. 2019, provides in section 20 (3) that every appeal to a district court shall be by way of petition and shall be filed in the district court within thirty days after the date of the decision or order against which the appeal is brought. As the judgment of the Primary Court was delivered on 11/10/2022, the respondent was supposed to appeal to the District Court by 10/11/2022. The respondent filed an application for an extension of

time in the District Court on 25/11/2022, which means he was late for almost 15 days. The applicant was supposed to account for the delay for those 15 days.

The respondent's reason for the extension of time stated in his affidavit supporting his application before the District Court is that he was hospitalized between 01/05/2022 and 17/11/2022. As a result, he could not file the appeal within time. The respondent attached the sick sheet to support his claims. The District Court found that the reason stated by the respondent was sufficient, and he has accounted for the delay. The District Court granted the application to the respondent.

The appellant in this appeal is saying that the respondent's aversion in the affidavit in support of the application was not true as he claimed to be hospitalized from 01/05/2022 to 17/11/2022. At the same time, the proceedings of the Primary Court show that he was present when the Primary Court delivered the judgment on 11/10/2022. He said that if the respondent was sick, as alleged, he was outpatient, and he could have filed the appeal in court within time or engaged an advocate to represent him as it was in the case before the District Court. The respondent admitted in his

submission that he was admitted to the hospital from 01/05/2022 to 17/11/2022. As a result, he failed to file the appeal on time.

As stated by both parties in their submission, the law is settled that sickness is reasonable ground for an extension of time. See. **John David Kashekya vs. Attorney General**, (supra), and **Jehangir Aziz Abdulrasul vs. Balozi Ibrahim Abubakar and Another**, (supra). In **Kapapa Kumpindi vs. The Plant Manager Tanzania Breweries**, Civil Application No. 06 of 2010, Court of Appeal of Tanzania at Mwanza (unreported), it was held on page 4 that:-

"Sickness is a good ground for extension of time."

Nevertheless, the said sickness must be explained and must be the actual reason which hindered the applicant from filing the intended appeal in this court within time. In the case of **Shembilu Shefaya vs. Omari Ally [1992] TLR 245**, the Court of Appeal rejected the application for an extension of time based on sickness because the applicant failed to explain the sickness thoroughly. The Court of Appeal was of the view that the application did not elaborate on the sickness.

In his affidavit in support of the application for an extension of time before the District Court, the respondent stated that he was sick and hospitalized between 01/05/2022 and 17/11/2022. He attached a sick sheet to support the claim. The sick sheet attached shows that the respondent was treated at Frelimo Hospital and was admitted for observation on 01/11/2022 for further treatment. The sick sheet further indicates that on 06/11/2022, the respondent attended Frelimo Hospital four days post admission. He was treated, allowed to go home, and was supposed to return to the hospital for a follow-up after seven days. The sick sheet shows the respondent went to Frelimo Hospital on 17/11/2022, 12 days post discharge. After the respondent was seen, he was allowed to go home.

The sick sheet shows the respondent was admitted on 01/11/2022 but did not show when the respondent was discharged from the hospital. The sick sheet dated 06/11/2022 shows that the respondent was seen, and it was four days post admission. It suggests that the respondent was discharged on 02/11/2022. The sick sheet dated 17/11/2022 shows that the respondent was seen 12 days post discharge from the ward, indicating he was discharged on 05/11/2022. These sick sheets dated 06/11/2022

and 17/11/2022 suggest that by 06/11/2022 the respondent has already been discharged from the hospital. All sick sheet does not show that after he was discharged, the respondent was supposed to have bed rest. By the time it is assumed that the respondent was discharged, only four days remained before the expiry of the 30 days to file his appeal. The respondent was supposed to return to the hospital for further check up on 13/11/2022, according to the sick sheet dated 06/11/2022. But, the respondent went to hospital on 17/11/2022. The reason stated that he was sick during the time required to file the appeal in the district court, and the said reason appears to be genuine and sufficient.

As the application for extension of time was filed in the District Court on 25/11/2022, it means the respondent used just eight days to prepare his application for extension of time and file it in the District Court from 17/11/2022 which is the last date he was treated at Frelimo hospital. The eight days used to prepare the application for an extension of time filed in the District Court was reasonable, and the respondent has explained each day for the delay. The District Court properly and judiciously used its discretion to extend the time to file an appeal to the respondent.

Therefore, the appeal is devoid of merits and is dismissed. As the parties are supposed to appear in the appeal before the District Court, each party shall bear its own cost of this suit. It is so ordered accordingly.



A.E. MWIPOPO

JUDGE

29/09/2023

