

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 401 OF 2023

(Originating from the Judgement and Decree of the High Court of Tanzania Dar es Salaam in Civil Appeal No. 173 of 2022 delivered by Honourable Judge H.R Mwanga on 21st day of April, 2023 (Originating from Civil Case No. 25 of 2018 in The Resident Magistrate Court of Dar es Salaam at Kisutu before Honourable A.H. Shahidi PRM)

PROSPER THOMAS ULOMI _____ APPLICANT

Versus

ANGELA LUCAS HOYYA (Administrator of the estate of the late BRYCESON SHABAMESHAK NDOJE..... 1ST RESPONDENT

SANLAM GENERAL INSUARANCE COMPANY..... 2ND RESPONDENT

RULING

Date of Last Order: 04/10/2023

Date of Ruling: 27/10/2023

E.E. KAKOLAKI, J.

Prosper Thomas Ulomi the Applicant herein is seeking an extension of time within which to file an application for leave to appeal from the decision of this Court in Civil Appeal No. 173 of 2022, delivered on 21st April 2023. The application is brought under section 11(1) of the Appellate Jurisdiction Act, [Cap 141 R.E 2019] (the AJA) and any other enabling provision of the law, supported by an affidavit duly sworn by the applicant advancing two grounds

as to why this application should be granted. These are sickness and financial constraints suffered by the applicant.

The application is strongly opposed by two counter affidavits deposed by Benedict Pius Chang'ambwe, counsel for the 1st Respondent and Mudhihir A. Magee, counsel for the 2nd Respondent, which were replied by the applicant too.

Brief factual background as deciphered from the affidavit is simple to tell. The applicant unsuccessfully sued the respondents before the Resident Magistrate Court of Dar es salaam at Kisutu, in Civil Case No. 25 of 2018. Displeased he appealed to this Court vide Civil Appeal No. 173 of 2022 but lucky was not on his side as he lost the fight when the appeal was dismissed on 21/04/2023. Disgruntled and intending to challenge this Court's decision it is averred that on 22nd April, 2023 he suddenly got sick suffering from uncontrolled hypertension and acute bronchitis that led him to be admitted at Mama Ngoma Hospital on the same date up to 17th May, 2023 when he was discharged as disclosed in medical report annexure P1. That he immediately on 18th May, 2023 made a follow by issuing a letter requesting for copies of judgment and decree on appeal, in which the judgment and decree of appeal were collected on 19th May, 2023 and issued a notice of

appeal on the same day as exhibited in annexure P2. It is averred that, upon receiving a copy of judgment the applicant sought legal assistance from advocate Arnold Munisi who advised him of the need to file an application for extension of time within which to file an application for leave to appeal, as he was already out time prescribed by law and that he would be ready to prepare the pleadings upon payment of instruction fees. And that, due to loss of income during his admission in the hospital he managed to mobilize fund through loan from friends and colleague before he instructed advocate Anord on 30th April, 2023 to prepare Misc. Civil Application No. 265 of 2023 (annexure P3) that was drawn on 31st April, 2023 and filed online, admitted and control number for payment of filing fees issued on 1st May, 2023, physical documents filed in the court registry on 2nd July, 2023. It transpired that when the said application was called for mention on 26th July, 2023, counsel for the applicant noted the error in the enabling provision and prayed the court to withdraw the application with leave to refile, the prayer which was granted before withdrawal order (annexure P5) was collected from Court on 27th July, 2023 and the present application filed on 01st August, 2023.

When the matter was called for hearing all parties were represented, as the applicant was represented by Mr. Arnold E. Munisi, while the 1st respondent and 2nd respondents enjoyed the services of Mr. Benedict Pius and Mr. Mudhihir A. Magee, both learned advocates and were heard viva voce.

It is trite law that any party seeking for extension of time within which to perform a certain function or action must advance good cause warranting the Court exercise its discretion and grant him the sought extension of time. As to what amounts to good or sufficient cause there is no fast and hard rule as it all depends on the materials placed before the Court for consideration as to why such extension should be granted. Normally the reasons are ones which prevented the applicant from performing the action or function in which extension of time is being sought for or any other convincing ground such as whether or not the application has been brought promptly; the absence of any or valid explanation for the delay or lack of diligence on the part of the Applicant. See the cases of **Tanga Cement Company Limited Vs. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001, **Regional Manager, Tanroads Kagera Vs. Ruaha concrete Company Ltd**, Civil Application No. 96 of 2007 and **Osward Masatu Mwizarubi Vs. Tanzania Fish Processing Ltd**, Civil Application

No. 13 of 2010 (CAT-unreported). It is however worthy note that, among other factors to be considered is whether or not the applicant has accounted for the delayed days in which the principle is that 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 the cases of **Bushiri Hassan Vs. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007, **Sebastian Ndaula Vs. Grace Rwamafa**, Civil Application No 4 of 2014 and **Wambeke Mtumwa Shahame Vs. Mohamed Hamis**, Civil Reference No. 08 of 2016 (CAT- unreported), which cited the case of **Bushiri Hassan (Supra)**.

With the above principles guiding extension of time in mind, the only issue for determination is whether the applicant herein has advanced good or sufficient cause warranting this Court grant him the sought orders. Submitting in favour of the application on the first ground Mr. Munisi after adopting applicant's affidavit in support of chamber summons argued that applicant's sickness accounting for a period of three weeks after delivery of judgment by this Court from 22/04/2023 to 17/05/2023 is shown in annexure P1 as it is in that period when he failed to make a follow up of the decree and judgment of this Court, requested them on 18/05/2023 and availed to

him on 19/05/2023, the day which he lodged the Notice of Appeal (annexure P2) and served the respondents. He said, it was until when the applicant lodged the Notice of Appeal and received a copy of judgment that is when he consulted him (Advocate Munisi) intending to file an application for leave to appeal to the court of Appeal only to be noted after perusal of the document that he was out of time and therefore required to file an application for extension of time within which to file an application for leave to appeal.

On the second ground he submitted, the delay resulted from financial constraints caused by long term hospitalization of the applicant as he properly instructed his advocate on 30/05/2023 when Misc. Application No. 265 of 2023 was filed before the same was withdrawn on 26/07/2023 before Mkwizu, J with leave to refile, for want of proper provisions to move the Court. And further that, it was until on 27/07/2023 when the copy of the withdrawal order was collected and this application preferred on 28/07/2023. According to Mr. Munisi the delay was not caused by applicant's negligence but rather inevitable circumstances as it was in the case in **Murtazaa Mohamed Raza Virani and Another Vs. Mehboob Hassanali Versi**, Civil Application No. 448/01 of 2020 (CAT), at page 10 quoted in the case of

John David Kashekya Vs. The Attorney General, Civil Application No. 1 of 2012 (CAT-unreported), where the ground of sickness was considered to be sufficient reason for granting extension of time to file notice of appeal and memorandum of appeal out of time.

Like the scenario in the above cited case Mr. Munisi argued in the present matter, applicant who was incapacitated for being bed ridden at Mama Ngoma hospital without working due to hypertension and bronchitis complications, could not generate income to fund legal representation, thus had to seek loan from friends and family members to enable him to take necessary steps to file an application for leave to appeal to the Court of Appeal. While acknowledging that financial constraints is not good cause for extension of time he argued that, under exceptional circumstance like the one obtaining in this matter it may be considered to be a good cause as it was held in the case of **Hamisi Mponda Vs. Niko Insurance Tanzania Ltd and Two Others**, Civil Application No. 254/01 of 2021 (CAT-unreported) when referred to the case of **Yusufu Same and Another V. Hadija Yusufu**, Civil Application No. 1 of 2002 (CAT-unreported). In conclusion he argued should this Court find the ground of financial constraints does not pass the test, then be pleased to hold the delay from

19/05/2023 up to 30/05/2023, when the applicant instructed his advocate after securing funds, is not inordinate, thus proceed to grant the application.

Challenging the merits of the application while adopting his counter affidavit, Mr. Pius for the 1st respondent on the ground of sickness took a different view submitting that there are no sufficient reasons addressed by the applicant to convince this Court to exercise its discretionary power and extend him time. According to him, annexure P1 relied on by the applicant to support the ground of sickness does not qualify to be medical report/chit as it is a mere letter which does not show the instrument used to test the patient before coming up with the said diagnosis apart from general observation that he was suffering hypertension and bronchitis. On the case of **Murtaza** (supra) relied on by the applicant to justify the ground of sickness he fiercely argued that, is distinguishable from the case at hand as in that case the applicant had a medical chit that moved the Court to grant extension. In the present matter he argued there is no any tangible evidence to show that the applicant was in such condition as shown in annexure P1, hence not entitled to enjoy the discretion of this court to either or not grant extension of time.

On the second ground of financial constraints Mr. Pius submitted that, the applicant cannot rely on it as a defence because he could have asked for legal aid from legal assistance institutions. And added that, the applicant ought to have explained the degree of prejudice likely to be suffered by the respondent if the application is granted and the chance of success of the intended appeal if any but failed to do so. To him therefore the application is devoid of merit, and prayed the court to dismiss it with cost.

Mr. Magee for the 2nd Respondent on his side having adopted his counter affidavit opposed the sought prayers by the applicant convincingly arguing that, his reading of the entire application between the lines has shown that financial constraints is the only ground advanced by the applicant for extension of time. In his submission it is so as when the applicant was discharged on 17/05/2023 he was still in time to file the application for leave as he filed the Notice in time given the fact that time for filing the application expired on 21/05/2023. Therefore, sickness though associated to the ground for financial constraints is not proved as the same can only be established by a medical chit that reduces down patient's particulars and not a medical report. According to him, a reliable evidence for sickness is a medical chit, discharge form and the admission form in which the applicant failed to

submit any in court, as annexure P1 brought by him does not prove that the said report originated from Mama Ngoma hospital and that was prepared by Dr. Ramadhan Mvungi. As it is not normal practice for hospital to issue a medical report he convincingly argued, it was mandatory for Dr. Mvungi who prepared the report to swear/affirm an affidavit to that effect, the evidence which is missing. In his submission it can safely be concluded that the same has been manufactured for the purpose of convincing this court to grant applicant extension of time. Since there is no medical chit, nor admission and discharge forms before the Court and since there is only medical report from mama Ngoma hospital, then the ground of sickness is not established to justify the second ground of financial constraints which generally is not good cause for extension of time unless there is exceptional circumstances which are missing in the present matter.

On the case of **Hamisi Mponda** (supra) relied on by the applicant Mr. Magee countered that, extension of time was granted to the applicant because was he dependant on legal aid and was suffering from permanent disability due to accident, unlike the situation in the present matter where there is no evidence that the applicant was depending on legal aid and that had any permanent disability. Relying on the case of **Wambele Mtumwa**

Shahame (supra), which cited the case of **Bushiri Hassan** (supra) it was insisted that delay of even a single day must be accounted for, in which the applicant failed to do hence prayed for dismissal of this application with costs.

Responding to the submission by the 1st and 2nd respondent, Mr. Munisi submitted on the issue of medical report stating that, no advocate established to this Court incompetence of the institution or doctor who issued the report so as to discredit its contents. Thus, to him all the submission trying to fault the medical report does not hold water and should be disregarded in their totality. On the issue of financial constraints as countered by both counsel he argued that, the applicant as the director of the company would not qualify for a legal aid. However, what the court has to consider he insisted is the period under which the applicant was under financial constraint caused by sickness.

With regard to the point raised by the counsel for the 2nd respondent on failure to account for three days after obtaining the copy of the order for withdrawal of the application on 27th July, 2023, he said the period was used to prepare and file this application hence his prayer that, this court finds merit on the application and proceed to grant the same.

Having keenly considered both parties' fighting submissions with deserving weight and peruse both affidavit, counter affidavits by 1st and 2nd respondents and reply thereto by the applicant, this Court is now set to answer the issue raised above as whether the applicant has demonstrated good cause warranting this Court to grant the application.

It is undeniable fact that, time limitation within which to file an application for leave to appeal to the Court of Appeal in Civil matters as stipulated under Rule 45(a) of the Court of Appeal Rules, [Cap 142 R.E 2019] is thirty (30) days. The said provisions of Rule 45 (a) of the Rules provide thus:

***45(a)** notwithstanding the provisions of rule 46(1), where an appeal lies with the leave of the High Court, application for leave may be made informally, when the decision against which it is desired to appeal is given, or by chamber summons according to the practice of the High Court, within thirty days of the decision;*

As the judgment sought to be impugned was delivered on 21st April, 2023 the applicant ought to have filed the application for leave on or before 21st May 2023. To start with the first reason of sickness, health issues or matters are not in the choice of any human being as sickness can strike him/her at any time regardless of his/her status be it financial or position held in the

community or society. So when established the same constitutes good cause for extension of time. See the case of **Emmanuel R. Maira Vs. The District Executive Director, Bunda District Council**, Civil Application No. 66 of 2010, **Kapapa Kumpimbi Vs. Plant Manager Tanzania Breweries Ltd**, Civil Application No. 06 of 2010 and **John David Kashekya Vs. The Attorney General** Civil Application No. 1 of 2012 (CAT-unreported). What remains in dispute in the present matter is whether the submitted evidence of medical report annexure P1 which Mr. Pius challenges by terming it a mere letter is sufficient one to prove the ground of sickness raised by the applicant. I think this issue need not detain this Court. I disagree with Mr. Pius and Mr. Magee who are trying to disqualify the said medical report without providing evidence to the contrary of what amounts to a medical report and that the same cannot be used to prove sickness. I am unaware of any law prohibiting proof of sickness by medical report much as the same provides for important information such as names of the patient, address of the medical institution and names and title of the medical officer who issued or prepared it, the period under which the said patient was under treatment and the illness suffered by him/her, date, signature of the medical officer and official stamp of the institution if any. In this matter glancing at

annexure P1, I am left with no scintilla of doubt that, the same qualifies not only to be a medical report as per the contents provided above but also proves that, the applicant as patient was under care of Mama Ngoma Hospital from 22/4/2023 to 17/04/2023. It is however noteworthy that, there is nowhere it is stated in the said report that the applicant was admitted on the said dates as deposed in paragraph 4 of the affidavit apart from mentioning that he was under care of the said medical facility on the mentioned dates and that, in view of his condition the doctor recommended him bed rest for three weeks without specifying from when. All in all there is no dispute that, the applicant fell sick from 22/04/2023 to 17/05/2023 as the report was prepared on 20/05/2023, the period which he was well within the time to file the application for leave to appeal as correctly submitted by counsels for the respondents. It is so as the applicant filed the Notice of appeal on 19/05/2023 before expiry of time. In view of the above evidence and findings it is evident to this Court that, sickness in itself did not and cannot be said to have delayed the applicant to file the application for leave to appeal to the Court of Appeal. I therefore find the same not good cause for extension of time.

Next for consideration is the second ground on financial constraints which is associated to sickness of the applicant in that, after obtaining the copies of judgment and decree on appeal and filed a notice of appeal on 19/05/2023, he later on approached advocate Munis who advised him to file an application for extension of time which could be prepared and filed after payment of instruction fees, the applicant who had no financial means for failure to work for gain during illness period had to seek for loan from friends and colleagues and managed to instruct the advocate on 31st May 2023. And that the said advocate prepared and filed Misc. Application No. 265 of 2023 online on 1st June, 2023 before the hard copy was presented on 2nd June, 2023. It is the said application which was withdrawn with leave to refile on 26th July 2023 before the present application was filed on 1st August, 2023 after obtaining the copy of withdrawn order on 27th July, 2023 and spent three days in its preparation and filing process as submitted by Mr. Munisi. Mr. Pius is of the contrary view that, the applicant cannot rely on the ground of financial constraints as he ought to have sought to legal aid if he had no means to engage the advocate while Mr. Magee says since he was not dependant on legal aid and that he was not suffering from permanent

disability like the applicant in **Hamis Mponda** (supra) the case is distinguishable.

It is true and I agree with the respondents that, in the circumstances of this matter the applicant is not entitled to rely on the ground of financial constraints for failure to work for gain for a period of three weeks from 22/04/2023 to 17/05/2023 as sufficient cause for delay to file the application for leave to appeal. The reasons I am so holding are not far-fetched. **One**, as found herein above when deliberating on the first ground, the medical report apart from mentioning that the applicant was under medical care of Mama Ngoma Hospital from 22/04/2023 to 17/05/2023 and contrary to what is deposed in paragraph 4 of the affidavit and submitted on by Mr. Munisi, the same does not disclose that applicant was admitted in the said facility on that period hence prevented him from working for gain as Mr. Munisi would want this Court to believe. What is contained therein is the recommendation for bed rest for three weeks without stating the starting date. **Secondly**, it is neither deposed nor specified in the affidavit by the applicant as to the date he consulted the advocate after obtaining the copy of judgment and decree on appeal and issue of Notice of Appeal on 19/05/2023 before he was advised that the intended application for leave to

appeal was out of time, as on the said 19/05/2023 he was still in time.

Thirdly, there is no affidavit by the said advocate Munisi that, he in fact demanded for instruction fees first before rendering legal services to the applicant as deposed in paragraph 6 of the affidavit. In addition to that, the applicant would have annexed the payment receipt from the said advocate Munisi if any payments were made to him but failed to do so. **Fourthly**, as correctly submitted on by Mr. Magee there is no proof that the applicant requested and obtained loan from friends and colleagues as none of them deposed an affidavit proving that fact. It is the law that, where an averment in the affidavit is mentioning another person, it remains a hearsay unless the fact stated therein are exhibited by the person so mentioned in the affidavit. This was the position of the law in the case of **NBC Ltd Vs. Superdoll Trailer Manufacturing Company Ltd**, Civil Application No. 13 of 2002 (CAT-unreported), where the Court of Appeal categorically stated that:

"...an affidavit which mentions another person is hearsay unless that other person swears as well."

In this matter since the applicant mentions advocate Munisi who rendered him legal advice and friends and colleagues who loaned him money for payment of legal fees, the same ought to have sworn or affirmed the affidavit

failure of which renders his averment a mere hearsay. **Fifthly**, even if I am to believe the applicant was admitted for three weeks as claimed which is not true, unlike in the case of **Hamis Mponda** (supra) where there was a proof that, the applicant was totally dependent on legal aid and that, he suffered financial disability in the present case the Court is not provided with any evidence proving that, the applicant who is a Bishop and Director General of Victory Builders General Enterprises had permanent disability or was denied any payment out of his two titles due to his failure to work for all that period allegedly was sick, hence the case is distinguishable from the facts of this matter as rightly submitted by Mr. Magee. For that matter I hold that the applicant has failed to account for the period between 21st May, 2023 to 30th May, 2023 when allegedly advocate Munisi was engaged to file the first application which ended up withdrawn. The period of 10 days in my humble opinion is inordinate and ought to be accounted for. As to the rest of the period from 31st May, 2023 to the time of filing this application I find the same is accounted for taking into consideration the ground of technical delay that was experienced by the applicant after withdrawing his first application on the reason of wrong citation of the provisions of the law before

filing the present one. The second ground therefore crumbles as the applicant has failed to account for the delay of ten (10) days.

In the result, the application is wanting in merit and the same is hereby dismissed with costs.

It is so ordered.

Dated at Dar es salaam this 27th day of October, 2023.



E.E KAKOLAKI

JUDGE

27/10/2023

The Ruling has been delivered at Dar es Salaam today 27th day of October, 2023 in the presence of by Mr. Anord Munisi, advocate for the Applicant who is also holding brief for Mr. Mudhuhiri Magee, advocate for the 2nd Respondent and Ms. Yasinta Simba, court clerk and in the absence of 1st Respondent.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

27/10/2023.

