

UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOROGORO DISTRICT REGISTRY

AT MOROGORO

MISCELLANEOUS CIVIL APPLICATION NO. 70 OF 2023

(Arising from Land Appeal No. 29 of 2021 of the High Court of Tanzania, Morogoro Sub Registry at Morogoro by Hon. Chaba J, from land appeal no.16 of 2021 of the DLHT for Morogoro originating from land case no. 59 of 2020 of Lukobe Ward Tribunal).

REHEMA ALLY.....APPLICANT

VERSUS

RADHIA MKWIZU.....RESPONDENT

RULING

Date of last Order: 17/11/2023

Date of ruling: 09/02/2024

BEFORE: G.P. MALATA, J

The applicant herein filed an application seeking extension of time within which to appeal out of time against the decision of this court delivered on 16th June, 2023. The application is made under section 11 (1) of the Appellate jurisdiction Act, Cap. 141 R.E.2019 and section 47 (1) of the

Land Disputes Courts Act, Cap.216 R.E.2019. The application is supported by affidavit sworn by the applicant. In the affidavit in support of the application, the applicant stated in paragraphs 5,6, 7, 8 and 9 that;

*5. That I was not satisfied with the decision and I intended to appeal but I was supplied with copy of judgement out of time hence this application but I succeed to file Notice of intention to Appeal on 03^d July, 2023, copy of the notice of intention to appeal is hereto attached and marked as **ANNEXTURE A2**, court leave is craved for it to form part of this affidavit.*

6. That, soon after the judgement in appeal I instructed my advocate to lodge an appeal to the court of appeal Tanzania but for the reasons best known to himself he failed to comply with my instruction.

7. Further after my instruction to the advocate unfortunately I fall sick and I was under medication from 19th June, 2023 up to 26th July, 2023.

8. That, after I recovered from sickness, I found only the notice of appeal but no application for leave have been lodged for no apparent good cause hence this application.

9. *That, the delay to lodge an application for leave to appeal to the court of appeal was not occasioned by negligence but on sickness ground which was beyond my control.*

10. *That, the I made several follow up to this court for copy of judgement and being a lay person, I was not assisted as required by law to lodge application for leave to lodge an appeal to the court of appeal.*

11.

12. *That the delay to lodge an application for leave to appeal to appeal to the court of appeal was not occasioned intentionally or negligence but on sickness ground which was beyond my control.*

Looking at the applicant's affidavit, the reasons for failure to appeal within time are; **one**, the instructed advocate did not discharge instruction accordingly and **two**, applicant's sickness. This is echoed by paragraphs 6,7 and 8 of the applicant's affidavit.

The application was resisted by the respondent who filed counter affidavit by stating that, the applicant had among others failed to provide good cause for extension of time by providing proof that, she was sick from the

date of judgment to the date he filed application. Further, the applicant failed to provide any proof that she ever instructed any advocate.

On 01/11/2023, this matter came for hearing, the applicant appeared through Mr. Mkilya Daudi learned counsel whereas, the respondent appeared through Ms. Alicia Lugakingira learned counsel.

In support of the application, Mr. Mkilya adopted the affidavit and stated that, the applicant raised good cause for delay that, is failure of the instructed advocate to discharge his obligation and applicant's sickness. However, in the affidavit there is no facts mentioning the name of the engaged advocate. He also submitted that; the applicant fell sick thus the delay. He finalised his submission by stating that, the application was just taking medication at home thus no sick sheet and prayed the application to be granted based on the two reasons.

In reply thereof, Ms. Alicia Lugakingira learned counsel first adopted the counter affidavit in opposition of the application. She insisted that, the applicant raised two grounds as reasons for extension of time that is failure by the instructed advocate to take necessary steps and applicant's sickness. That in both two reasons there is no proof of any letter of appointment or name of the said advocate.

Further, she argued that, there is no proof that, the applicant was sick for the entire period from 16th June, 2023 to 5th September, 2023 and that the applicant did not attend any hospital or medication.

Ms. Alicia Lugakingira learned counsel concluded her submission by stating that, extension of time being discretionary granted by the court, can only be exercised where there is good cause. In the present case there is no good cause, thus prayed to be refused.

By way of rejoinder, Mr. Mkilya Daudi learned counsel reiterated to his submission in chief in support of the application.

To start with, it is trite law that, the application for extension is granted discretionally by the court upon being satisfied with the reasons for delay. In the absence thereof, courts are not allowed to exercise such discretion as it will just be granting as favour arising from applicant's negligent at the respondent's detriment. It is for that reason, courts must act judiciously in extending time, meaning that, there must be good cause for delay advanced by the applicant not basing on sympathy or favouritism. Courts of law decide cases in accordance with facts, evidence and law. In other words, courts act on something as nothing can yield something tangible.

The above position is in line with cited provision by the applicant that is section 11 (1) of the Appellate jurisdiction Act, Cap, 141 R. E. 2019 which provides that;

*(1) Subject to subsection (2), the High Court or, where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned, **may extend** the time for giving notice of intention to appeal from a judgment of the High Court or of the subordinate court concerned, for making an application for leave to appeal or for a certificate that the case is a fit case for appeal, notwithstanding that the time for giving the notice or making the application has already expired.*

In the case of ***Hamisi Ismail @ Zulu Vs. Republic***, Criminal Appeal No. 205 of 2015 (unreported) the court held that

"It is settled that in an application for extension of time, the applicant is duty bound to demonstrate good or sufficient cause for delay. Further, every delay, even if for one day has to be accounted for."

In the case of ***Osward Masatu Mwizarubi vs. Tanzania Fish Processing Ltd***, Civil Application No. 13 of 2010 where the Court of Appeal stated that:

"What constitutes good cause cannot be laid down by any hard and fast rules. The term "good cause" is relative one and is dependent upon the party seeking extension of time to provide the relevant material in order to move the court to exercise its discretion."

In the case of ***Sebastian Ndaula vs. Grace Rwamafa***, Civil Application No. 4 of 2014 (unreported) where the Court stated that,

"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"

In the present case, the judgement sought to be appealed against was delivered on 16/06/2023 and the application was filed on 05/09/2023 being 78 days. The application for leave has to be filed within thirty days from the date of Judgement. Thus, the applicant delayed for 48 days of which she is legally required to account for each day of delay.

The reasons for delays as advanced by the applicant are; **first**, failure by her advocate to take necessary steps as instructed. Honestly, the applicant was not fair to herself and the court as she failed to mention in her affidavit who is that advocate. Further, there is no affidavit from such unknown advocate confirming that he/she ever been instructed by the applicant. Had the advocate mentioned in the affidavit, may be the court could have inquired and ascertain as to why he/she failed to perform such functions which amounted to misconduct under **the Advocates (Professional Conduct and Etiquette) Regulations, 2018**.

In the exercise of supervisory mandate of this court to the member of the Bar, it could have taken some steps against the defaulting advocate. This court could have done in accordance with Regulation 55 of the Advocates (Professional Conduct and Etiquette) Regulations, 2018.

Regulation 55 provides that;

(1) *An advocate, shall: -*

(a) represent the client resolutely, honourably and within the limits of the law; and

(b) make every reasonable effort consistent with the legitimate interests of the client to expedite litigation.

(2) An advocate shall discharge the duties under this regulation by fair and honourable means.

In the event, this court finds that, there is not tangible evidence that, the applicant ever engaged any advocate who in return failed to discharge his legal duty to represent the applicant fairly and honorably. **Therefore, this ground fails.**

The **second** reason for delay as advanced by the applicant is sickness. Indeed, the law is settled that once sickness is established and proved as to justify the delay, it constitutes sufficient cause for extension of time. See the case of **Tiluhuma Pima vs. Malogoi Muhoyi**, Civil Application No. 418/ 08 of 2022, CAT at Mwanza (Unreported)

"The law is settled that once sickness is established and proved as to justify the delay."

Mohamed Rabii Honde (As the Administrator of the Estate of the Late Rabii Ismail Honde (Deceased) vs Hamida Ismail Honde And 11 Others, Civil Application No. 461 Of 2017 the court held that;

*"When the application was called on for hearing, the applicant appeared in person. **He informed the Court that his advocate one Edson Mbogoro could not enter***

appearance because he was sick. No proof of sickness was availed to the Court. We accordingly decided to proceed with the hearing of the appeal."

This court was also guided by the principles in the case of **Pastory J. Bunonga Vs. Pius Tofiri**, in Misc. Land Application No. 12 of 2019 where Hon. Mr. Justice Rumanyika, J as he then was High Court Judge held that;

"Where it was on the balance of probabilities proved, sickness has been good and sufficient ground for extension of time yes. But with all fairness the fact cannot be founded on mere allegations. There always must be proof by the applicant that he fell sick and for the reason of sickness he was reasonably prevented from taking the necessary step within the prescribed time."

In the present case, the applicant alleged that, she felt sick, however, in her affidavit, she did not state; **one**, the hospital where she took medication, **two**, no medical sick sheet attached to affidavit proving sickness as stated in paragraphs 7 and 8 of the affidavit, **three**, no account of delay from 16/06/2023 to 05/09/2023 the date when the application was filed.

Additionally, while the applicant claims to fall sick from 19/06/2023 to 27/07/2023 on one hand, as per the annexure 2 to applicant's affidavit, the notice of appeal, on the other hand it is clear that, she personally filed it on 03/07/2023. The notice of appeal was filed within sickness period. In view thereof, the applicant is telling lies through affidavit as in paragraphs 7 and 8 of the affidavit she confirmed that, her failure to pursue the appeal was due to sickness which commenced on 19/06/2023 to 27/07/2023 but in between the applicant personally prepared and filed notice of appeal on 03/07/2023 which date is within the alleged sickness period.

In view of the circumstances of this case, I am satisfied beyond sane of doubt that, the applicant has miserably failed to; **first**, account for a delay of 78 days

Second, there is no evidence that, the applicant was sick, **third**, there is no evidence that the applicant engaged any advocate to perform any legal duty of representing her in the court of law **four**, the applicant has shown negligence in pursuing for her rights as she failed to take necessary steps as required by law. **Therefore, second ground has failed.**

All said and done, I am with no malingering of doubt that, this court is satisfied that, the applicant has failed to discharge his duty of adducing good cause and account for the number of days for purposes of convincing the court to exercise its discretionary supremacies and grant what is asked for.

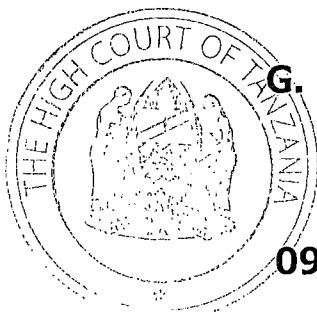
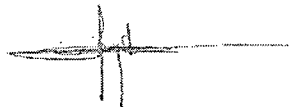
Thence, the judicial discretionary cannot be invoked in the circumstance of this case for want of good cause.

In the upshot, I hereby dismiss the application for want of merits.

Costs to follow the event.

IT IS SO ORDERED

DATED at MOROGORO this 09th February, 2024

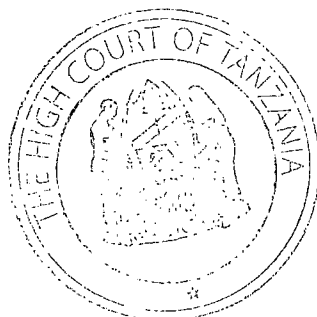


G. P. MALATA

JUDGE

09/02/2024

RULING delivered at **MOROGORO** in chambers this 09th February, 2024
in the presence of Mr. Jackson Mashankara for the applicant and in
absence of the respondent.



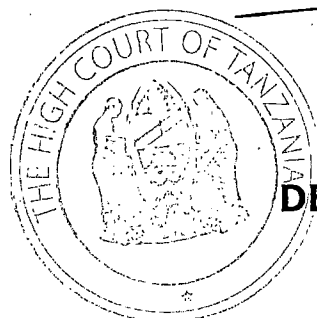
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S. P. KIHAWA

DEPUTY REGISTRAR

09/02/2024

Right of appeal is explained to the parties.



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S. P. KIHAWA

DEPUTY REGISTRAR

09/02/2024