IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA SUB- REGISTRY

AT BUKOBA

MISC CIVIL APPEAL NO. 2431 OF 2024

(Arising from Misc. Civil Application No. 10 of 2023 and Civil Revision No. 02/2022 of the District Court of Bukoba at Bukoba)

JULIAN JOHN ICHULIKA.. APPELLANT

VERSUS

EDITHA EMMANUEL..1ST RESPONDENT

EVELINA EMMANUEL...2ND RESPONDENT

GEORGE KAGILE..3RD RESPONDENT

ANETH APOLINARY..4TH RESPONDENT

ANORD EMMANUEL..5TH RESPONDENT

DORIS EMMANUEL..6TH RESPONDENT

SCHOOLASTICA APOLINARY..7TH RESPONDENT

REGINA ARCHARD ICHULIKA..8TH RESPONDENT

CONSOLATHA EMMANUEL..9TH RESPONDENT

VICTOR GERVAS..10TH RESPONDENT

JUDGMENT

04/06/2024 & 18/06/2024
E.L. NGIGWANA, J.

Before the District Court of Bukoba at Bukoba, the appellant filed Miscellaneous Application No. 10 of 2023 seeking for extension of time within which to file an application for setting aside the revisional order made ex-

parte on 18/11/2022. The application was made under Rule 3 (4) of the Magistrates Courts (Limitation of Proceedings under Customary Law) Rules G.N No.311 of 1964.

For a better understanding of this matter, the material background is important. In February 2022, the District Court of Bukoba received a complaint letter from the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th respondents herein above complaining on the un-procedural revocation of the 10th respondent herein (Victor Gervas) as the Administrator of the estate of the Late John Buriti Ichulika, and appointment of one Julian John Ichulika (now appellant) in lieu said Victor Gervas.

Following the said complaints, the District court opened Revision Application No. 02 of 2022 and then called and examined proceedings in Misc. Application No.1 of 2021 (*Arising from Probate and Administration Cause No.82 of 2015*) filed 21/01/2021 by appellant (Julian John Ichulika) whereas on 19/04/2021, appointment of Victor Gervas (10th respondent) was revoked, and Probate and Administration Cause No.21 of 2021 filed on 11/05/2021 in which the same appellant petitioning for letters of administration of the estate of the late John Buriti Ichulika, and on

02/08/2021, he was appointed as the administrator of the estate of the late John Buriti Ichulika.

The District court record revealed that the appellant who was the 1st respondent in Revision No. 02 of 2022 refused the court summons and a result, the hearing proceeded in his absence. Finally, on 18/11/2022, the proceedings of the Primary court of Bukoba Urban in Application for revocation No.1 of 2021 and Probate and Administration Cause No.21 of 2021 were nullified and decisions and/or orders thereto were quashed and set aside. Furthermore, the District Court (A.W. Kabuka-RM) restored the appointment of Victor Gervas (10threspondent) as per Probate and Administration Cause No.82 of 2015, and ordered him to proceed with his duties according to law.

Aggrieved by the decision of the District court of Bukoba, the Appellant Knocked on the doors of this court by way of appeal, but the same was objected on the ground that it was time barred. The objection was sustained by this court (Banzi, J) and therefore, on 16/06/2023, PC. Civil Appeal No.11 of 2023 was dismissed for being filed out of time.

Thereafter, that is to say; on 28/06/2023, the appellant went back to the District court of Bukoba and lodged Miscellaneous Application No. 10 of 2023 seeking for seeking for extension of time within which to file an application for setting aside the revisional order made ex-parte on 18/11/2022.

It was agreed in the trial court that the same should be disposed by way of written submission. However, the appellant failed to file his submission in-chief within the time set by the trial court and as a result, his advocate approached the trial court seeking for extension of time within which to file submission. The prayer was objected by the respondents through their advocate Mr. Alex Nathan.

Upon hearing both sides on whether the appellant had demonstrated sufficient cause for the grant of extension of time within which to file the written submissions in –chief, the trial court on 19th day January 2024, resolved the issue in the negative. Consequently, the application was dismissed for the appellant's failure to prosecute his application. The appellant was aggrieved by the trial court decision hence this appeal.

Aggrieved by the trial court decision, the appellant has knocked on the doors of this court armed with four grounds of appeal as follows;

1. *That, the trial Magistrate erred in law and fact to dismiss the application without hearing it on merit following the prayer to extend time to file submission in Miscellaneous Application No.10 of 2023.*
2. *That, the trial Magistrate erred in law and fact to entertain and decide the case with sentimental feelings despite being notified that by the appellant that he had interest in the case, wherein such notification assisted him to deny the extension of time to file the written submission.*
3. *That, the trial Magistrate misdirected himself to deny the extension of time to file written submission despite good reasons for delaying to file the said written submissions*
4. *That, the trial Magistrate misdirected himself in law and facts as the proceedings were tainted with irregularities.*

Wherefore, the appellant is praying to this court to allow this appeal with costs by quashing and setting aside the decision of the lower court, and order the hearing of the application grant the appellant extension of time within which to file submission in chief.

At the hearing of this appeal, the appellant appeared in person but also represented by Mr. Pontian Mujuni learned advocate whereas the respondents were represented by Mr. Nathan Alex, learned advocate.

On the 2nd ground, Mr. Mujuni submitted that the trial Magistrate was asked by the appellant to recuse himself from the conduct of the matter on the ground he had interest but he refused, and as a result, he decided the case with sentimental feelings.

In reply to the 2nd ground, Mr. Alex argued that there nowhere indicated in the trial court record that the appellant asked the trial Magistrate to recuse himself from the conduct of the matter on the ground that, the trial Magistrate had interest over the matter. He Added that the reason as to why the appellant asked the trial magistrate to recuse himself is because, he previously handed over his two matters, the matter which were decided in favor of the of the appellant, that is why the trial Magistrate found that there were no good grounds to recuse himself from the conduct of the matter.

In rejoinder to the 2nd ground, Mr. Mujuni submitted that in the affidavit supporting the application, the applicant (Appellant) had demonstrated that

he had no confidence with the trial magistrate after being mishandled by him.

On the 1st and 3rd grounds of appeal, Mr. Mujuni submitted that as per the law, sickness constitutes sufficient ground for extension of time. The advocate of the appellant had failed to file submission within the time set by the trial court due sickness of his little child. He added that the trial Magistrate misdirected himself towards the principles governing extension of time and therefore arrived to an erroneous decision.

In reply to the 1st and 3rd grounds, Mr. Nathan Alex submitted that the learned counsel just said that his son was sick but he produced no medical proof. He added that he did not even explain to the court that he was the only person taking care of his son. He further said, the learned counsel did not state when his son became sick and when he recovered. The learned counsel went on to submit that it is a cardinal principle that failure to file submission as per court schedule is tantamount to a non –appearance and hence failure to prosecute or defend the case. He supported his stance with case of **Godfrey Kube versus Peter Ngonyani,** Civil Appeal No.41/2024[1017] TZCA 1921 July 2017) Tanzlii. It is his further submission

that since the appellant had failed to file the submission as per court schedule, the trial Magistrate was entitled to dismiss the application for non-appearance or want of prosecution.

In his brief rejoinder on the 1st and 3rd grounds, Mr. Mujini submitted that sickness of his little child was sufficient reason for extension of time.

Having carefully gone through the trial court records, the grounds of appeal and submissions by both parties, the issue for determination is whether this appeal is meritorious.

The complaint is the 2nd ground arises from refusal of the trial Magistrate to recuse himself from the conduct of the matter. Now, the issue here is whether the prayer for recusal leveled by the appellant against the trial Magistrate met the legal threshold for judicial recusal.

Judicial recusal is the withdrawal of the Judge or Magistrate from ongoing proceedings for reason of a conflict of interest, bias, or lack of impartiality. Principally, a Judge or Magistrate is best advised to remove himself or herself if there is any air of reality to a bias claim; **however the Judge or Magistrate does a disservice to the administration of justice by yielding too easily to a recusal application that is unreasonable and**

unsubstantiated. In other words, the presumption of judicial impartiality is not easily dislodged; it requires **cogent and convincing evidence to be rebutted.**

It is worth noting that litigants are not to pick their Judges or Magistrates of their choice nor are they entitled to eliminate Judges or Magistrates randomly assigned to their cases by raising partiality claims against those Judges or Magistrates; and that to step aside in the face of an unsubstantiated bias claim is to give credence to the most objectionable tactics.

The Supreme Court of Uganda in **Uganda Polybags Ltd versus Development Finance Company Ltd & Others** [1999]2 EA 337 stressed that; litigants have no right to choose which judicial officer should determine their case, since all judicial officers take oath to administer justice to all manner of people impartially, and without fear, favor, affection or ill-will.

In other words, there is a presumption of impartiality which every judicial officer is believed to possess. It therefore follows that where bias is alleged; such allegation must overcome the presumption of judicial impartiality and integrity.

The onus of proving the ground for recusal is on the applicant. The proper test to recusal is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge or Magistrate has not or will not bring an impartial mind to bear on the adjudication of the case.

As a matter of law, recusal applications by litigants ought to be used by them as a shield for safeguarding the administration of justice as well as the integrity of the judiciary, and not as a sword for attacking Judges and Magistrates. It should never be for merely expressing a litigant's displeasure at a Judge or Magistrate or satisfying the litigant's ego; but an instrument for enhancing honour and dignity of judicial office. See **Director of Public Prosecutions versus Charles Kiprotich Tanui & 2 Others,** Nairobi HC Anti-Corruption Criminal Revision No. E. 003 of 2024.

In our jurisdiction, Rule 9 (1) and (2) The Code of Conduct and Ethics for Judicial officers, 2020, GN. No. 1001 published on 20/11/2020 provides for the circumstances under which a judicial officer may disqualify or refuse to disqualify himself; A judicial officer shall disqualify himself in any case in which he/she believes that he will be unable to adjudicate impartially, or

he/she believes that a reasonable, fair minded and informed person, would have a reasonable suspicion of conflict between a judicial officers personal interest or that of a judicial officers immediate family and his judicial functions, or he/she has a personal bias or prejudice concerning a party or personal knowledge or facts, or he/she has served as a lawyer in a matter in controversy or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter or the judicial officer or such lawyer has been a material witness in the matter.

However, disqualification is not appropriate if the matter giving rise to the perception of a possibility of conflict is trifling or would not support a plausible argument in favor of disqualification; or no other judicial officer can deal with the case or because of urgent circumstances, failure to act could lead to a miscarriage of justice; or upon disclosure of the ground(s) of intended recusal by the judicial officer, parties agree that the judicial officer may participate in the proceedings.

In the case at hand, the reason advanced by the applicant now appellant for the recusal of the trial Magistrate was that the trial Magistrate had already had his two cases. The records show that the two cases were decided in

favor of the applicant now appellant. Indeed, the ground advanced does not amount to a ground for recusal. It was unreasonable. As a matter of law, recusal on trivial grounds is tantamount to abduction of judicial function. This principle of law was stated in the case of **Registered Trustees of Social Action Trust Fund & Another versus Happy Sausages Ltd & Others (2004) TLR 264 where it was held that:**

"It is our considered view that it would be an abduction of the judicial function and an encouragement of spurious application for a judicial officer to adopt the approach that he/she should disqualify himself or herself whenever requested to do so on application of one of the parties on the grounds of possible appearance of bias".

To that extent, I find no legal justification to fault the trial Magistrate who refused to recuse himself from the conduct of the matter.

I now turn to the 1st and 3rd grounds; The trial court revealed that on 29/11/2023 following the prayer by both advocates; Mr. Pontian Mujuni for the applicant (now respondent) and Mr. Nathan Alex for the respondent, it was ordered that the application should be disposed of by way of written submissions, and the filing schedule was set by the trial court. Written

submissions in chief were to be filed on or before 13/12/2023. Reply submissions were to be filed on or before 20/12/2023 and rejoinder (if any) on or 03/01/2024. The ruling date was fixed to wit; 23/01/2023.

On 23/01/2024, Mr. Pontian Mujuni appeared and informed the trial court that he had failed to file the written submission because his child became sick, therefore he was busy taking care of his little child in order to rescue his life. Having stated the ground for his failure to file the written submission, he sought extension of time to wit seven (7) days within which to file the written submission out of time.

Since the learned counsel for the respondents was absent, the matter was adjourned whereas on 9/01/2024 he appeared and strongly objected the prayer by the learned counsel for the applicant on two grounds; **one,** negligent had never been sufficient cause for extension of time and since the learned counsel for the appellant had been so negligent, the remedy is to dismiss applicant's application.

Two, it is a principle of law that failure to file written submission in chief is tantamount to non- appearance or failure to prosecute the case and the remedy is to dismiss the matter for want of prosecution, and there failure by

the applicant's advocate to file the written submission, the remedy is to dismiss the applicant's application for want of prosecution.

Mr. Mambo learned advocate holding brief for Mr. Mujuni with instructions to proceed made a brief rejoinder that the learned advocate for the applicant is not negligent because he informed the court that he had failed to prepare and file the written submissions within 7 days because his little child became sick and therefore he was busy taking care of him to rescue his life. He drew the attention of the trial court that sickness is something beyond human control thus it has always been sufficient cause for extension of time. Mr. Mambo also went on submitting in case the court would find that the learned advocate was negligent, the principle that a party to the case should not be punished for the mistake or negligent committed by his advocate.

In its ruling, the trial court ruled out that the ground by Mr. Mujuni that he was taking care of his little child was an afterthought that is why he did not support his argument with any medical proof. The trial Magistrate did consider the principle that a party to the case should not be punished by the mistakes or negligent of his advocate and as a result, the applicant's, (now appellant) application ended up being dismissed.

The position in regarding the hearing by way of written submission is very clear in our jurisdiction. In the case of **P3525 LT Maganga Gregory versus The Judge Advocate General, Court Martial**, Criminal Appeal No. 2 of 2002 (unreported), the Court of Appeal held that:

"It is now settled in our jurisprudence that the practice of filling written submission is tantamount to a hearing and; therefore, failure to file written submission as ordered is equivalent to non-appearance at a hearing or want of prosecution...similarly, Courts have not been soft with the litigants who fail to comply with orders, including failure to file written submission within the time frame ordered. ***Needless to state here that submissions filed out of time and without leave of the Court are not legally placed on records and are to be disregarded"*** (Emphasis supplied).

Reading the herein above authority, it is clear that with leave of the court, submission may be filed out time. For instance; in the case of **Heri Investment Limited versus Dongxing International Real Estate**, Civil Application No 65/01 of 2022 CAT (unreported), the Court of Appeal, after being satisfied that the applicant's advocate had failed to file the reply to written submission due to sickness, exercised its discretionary powers to

grant the applicant extension of time within which to file a reply to written submission.

In the matter at hand, the learned advocate for the applicant prayed for extension of time within which to file written submissions out of time.

Principally, an application for extension of time is entirely in the discretion of the Court to grant or refuse it. This unfettered discretion of the Court however has to be exercised judicially, and overriding consideration is that there must be sufficient cause for doing so. The term good cause has no universal definition. What amounts to good cause depends on the peculiar circumstances of the case. As held in **Osward Masatu Mwizarubi versus Tanzania Fish Processing Ltd,** Civil Application No. 13 of 2010, CAT (unreported):-

*"What constitutes good cause cannot be laid down by any hard and fast rules. The term **good cause** is a 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."*

Similarly, in the case of **African Banking Corporation Limited versus T-better Holding Company** Limited (Civil Application 481 of 2021) [2023] TZCA 188 (31 March 2023) it was held that;

"The term good cause has no single definition. It can be defined in accordance with the peculiar circumstances of each case. Therefore, genuine reasons for the delay may, among other factors, amount to good cause"

Coming to the matter at hand, the record show the learned counsel told the trial court that he delayed to file submission in chief because he was taking care of his sick little child. However, he presented no medical proof. The trial court ruled out that the learned counsel was negligent.

I am aware that a lower court enjoys a wider jurisdiction to grant or not an extension of time, but also for a decision arising there to be valid, the discretion must have been exercised reasonably, judiciously and on sound legal principles.

Therefore, although as a general rule, an appellate court would not interfere with the discretion of the lower court, where the discretion is exercised in violation of the principle above mentioned, the appellate court may where the result thereof leads to miscarriage of justice, interfere. See **Emmanuel**

Rurihafi & Another vs Janas Mrema (Civil Appeal No. 314 of 2019) [2021] TZCA 332 (28 July 2021)

In the matter at hand, the trial lower court did not consider the principle that negligence of an advocate should not be to the detriment of a party, or the degree of prejudice the respondents stood to suffer if time was extended. It should be noted that before the lower court, the applicant now appellant was seeking for extension of time within which to file application for setting aside the revisional order made ex-parte. Under the circumstances of this case, interference of the court is inevitable.

In the upshot and for the foregoing reasons, I find the 1st and 3rd grounds meritorious. In the premises, I see no reason to address the remaining last grounds of appeal. Having considered the fact that at the trial court, submission in chief was to be filed within 7 days period; the ruling of the Lower Court refusing to grant extension of time is quashed and set aside and substituted with an order granting the appellant 5 days period within which to file submission in- chief and the days shall start to run from the day of his appearance before the lower court after remittal of the case file to the trial court. I direct that the hearing should proceed before another competent

Magistrate. Considering the fact that parties to this probate matter are relatives, I enter no order as to costs. It is so ordered.

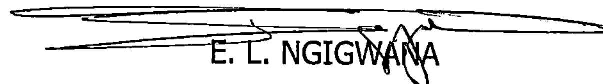
Dated at Bukoba this 18th day of June 2024.

E. L. NGIGWANA

JUDGE

18/06/2024

Delivered this 18th day of June 2024 in the presence of the appellant and his advocate Mr. Pontian Mujuni, Ms. Pilly Hussein learned advocate for the respondents, Hon. A.A. Madulu-JLA and Ms. Queen Koba.



E. L. NGIGWANA

JUDGE

18/06/2024