IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

CIVIL APLICATION NO. 07 OF 2019

(Arising from (HC) Civil Appeal No. 17/2015 and original civil case No. 3 of 2013)

BISHOP BAYONA MUTASHOBYA----------APPLICANT

VERSUS

LAURENT DAUDI----------RESPONDENT

RULING

Date of last order 19/02/2020
Date of ruling 28/02/2020

N.N. Kilekamajenga, J.

The applicant was the Bishop of Christian Mission fellowship at Buyekera within Bukoba municipality. It is alleged that sometimes before 1st July 2013, the Bishop received the wife of the respondent in his church as a new convert. The wife of the respondent thereafter continued to attend church services and prayers as usual. However, the respondent was not happy with the move of his wife. As a result, he developed cruel behaviours against his wife. On 1st July 2013, the wife took refuge at the applicant's house for almost eight days i.e. from 1st July 2013 to 8th July 2013. During this time, the respondent did not know the whereabouts of his wife until when he realized that she was been harboured at the applicant's house. The respondent reported the matter to the Ward administrative

authorities who finally advised him to report the matter to the police. The police also advised him to file a civil claim against the defendant. Thereafter, the respondent filed a civil suit against the applicant in the District Court of Bukoba. The claim was hinged on two things; one, inducing the respondent's wife to desert him and two, was adultery. In the plaint the respondent prayed for the following orders:

1. *An order against the defendant for payment of damages to the tune of Tshs. 55,340,000/= for adultery with (sic), and inducing the plaintiff's wife to desert the plaintiff.*
2. *Costs of this suit to be born by the defendant.*
3. *Interest at bank rate from the date of filing the suit to the date of delivery of judgment.*
4. *Interest on the decretal amount at the court's rate from the date of judgment till when payment is made in full.*
5. *Any other reliefs this Honourable Court may deem just and equitable to grant.*

The trial court was fully convinced that the respondent proved his case at the balance of probability or on preponderance of probability. Hence, it decreed the applicant to pay Tshs. 55,340,000/= as damages for adultery and inducing the wife to desert the respondent. The applicant was aggrieved by the decision of the trial court hence appealed to this Court on 7th October 2015. Thereafter, the applicant waited for the summons but never got them. On 14th February 2017,

the applicant travelled abroad to join theological studies. He spent almost a year until he came back in Tanzania in December 2018. Therefore, the applicant never attended to his appeal which was finally dismissed for want of prosecution under **Order XXXIX, Rule 17 of the Civil Procedure Code, Cap. 33 RE 2002** on 1st November 2018. Following the dismissal order, the applicant moved this Honurable Court through the instant application for the following orders:

1. *That, that this Honourable Court be pleased to order for the re-admission of dismissed appeal No. 17/2015 out of time.*
2. *Costs of this application to follow the event.*
3. *Any other orders this Court deems fit and equitable* to make.

The application was made under section **14(1) of the Law of Limitation Act, Cap. 89 RE 2002 and Order XXXIX, Rule 19 of the Civil Procedure Code, Cap. 33 RE 2018**. It is also supported with an affidavit deposed by the applicant. The application was finally called for hearing where the applicant appeared under the legal representation of the learned advocate, Miss Aneth Lwiza while the respondent was also present under the legal services of the learned advocate, Mr. Bitakwate. During the oral submission, the counsel for the applicant prayed to adopt the affidavit in order to form part of the submission. Miss Aneth admitted that the applicant did not attend to his appeal which was scheduled under special session because he was not informed about the case on the date fixed for hearing. She submitted that there were two reasons for failure

to appear before the court. **First**, when the applicant filed the appeal, he was informed by the court registry office that he would be called to fetch the summons. However, the applicant was never called by the court as promised. **Second**, the applicant went to Fiji Island for theological studies. In Fiji, the applicant joined advanced certificate in theology. After graduation, he joined Diploma in theology. He graduated the Diploma course on 1st December 2018 and came back in Tanzania on 7th December 2018.

On 23rd January 2019, the applicant received a summons calling him to appear for an execution cause No. 24 of 2018. He was supposed to appear before the court on 11th February 2019. On the same date, the applicant was informed that his appeal was dismissed for want of prosecution on 1st November 2018. Miss Aneth insisted that from 14th February 2017 until on 7th December 2018, the applicant was abroad. She referred the Court to the copies of the certificates and passport for perusal. He further argued that, the initial appeal was brought on time showing eager and vigilance on the matter. She further submitted that the appeal intends to challenge the errors on the decree because the judgment was delivered on 28th May 2015 while the decree is dated 22nd September 2015. She blamed the Court for failing to summon the applicant as promised. She urged the court to re-admit the case though out of time and also prayed for the costs of this application.

On the other hand, the counsel for the respondent prayed to adopt the counter affidavit to form part of the submission. Mr. Bitakwate submitted that the applicant filed an appeal No. 17 of 2015 and summons for hearing was issued to the parties. The respondent appeared but in all the dates, the applicant never showed-up to argue his appeal. Finally, the appeal was dismissed for want of prosecution. The applicant was supposed to insure that the appeal is scheduled for hearing something which he failed to do. The reason that he never knew about the appeal has no merit. The counsel for the respondent further argued that the applicant was in Tanzania on 30th January 2017, therefore the argument that he was abroad until on 7th December 2018 is baseless.

Furthermore, from the date when he landed in Tanzania on 7th December 2018 to the date when he filed the instant application on 18th February 2019 is about 60 days. It is the trite law that the applicant should account for every day of delay for the court to order for extension of time. Mr. Bitakwate argued that the judgment of the trial court has no any illegality or errors hence there is nothing to challenge. The variance on the dates of the judgment and decree should be corrected by the trial court and not by this Court.

Mr. Bitakwate insisted that the applicant was negligent for not following-up his appeal. He also remarked that the court record shows that the applicant was in court on 19th June 2017 before it was dismissed on 1st November 2017. To cement his argument, he referred the Court to the case of **Bishop Roman Catholic v. Casmir Richard Shemkai, Civil Application No. 507/12 of 2017**, CAT at Tanga (unreported) where the reasons for extension of time were stated.

On the issue whether the initial appeal was brought on time, Mr. Bitakwate submitted that the judgment was delivered on 28th May 2015 but the applicant appealed on 7th October 2015, i.e. after the lapse of about 127 days. Therefore, the anticipated appeal will still be time-barred even if the instant application is allowed. He finally urged the Court to dismiss the appeal with costs.

When rejoining, Miss Aneth insisted that the applicant travelled to Fiji Island on 14th February 2017. Therefore, he was not in Tanzania on 30th January 2017 and on 19th June 2017. The applicant was not informed about his case ever since it was filed. As a matter of procedure, parties are always summoned by the Court by way of summons. She challenged the case of **Bishop Roman Catholic** (supra) for being distinguishable to this application. She urged the Court to allow the application.

I have carefully considered the submission from the parties and perused the court records and observed the following key information: The judgment of the trial court was pronounced on 28th May 2015 and the applicant appealed to the High Court on 7th October 2015. As rightly argued by the counsel for the respondent, the applicant was already time-barred. There are no explanations why the applicant delayed in filing the initial appeal. In my view, the applicant was negligent by not taking prompt steps to ensure that the appeal is lodged on time. Furthermore, when he lodged the appeal, he stayed waiting for the summons from the Court which he never received. The records show that he travelled to Fiji on 14th February 2017, which means he waited for the summons for one year and three months before he travelled. The obvious question is, why did he fail to follow-up the matter in court to know whether it was scheduled for hearing or not?

As if that is not enough, before travelling, the applicant never bothered to inform the court. Even after his return on 7th December 2018, he never followed–up the appeal in Court until he was awakened on 23rd January 2019 by the summons on the execution cause. Reasonably, he ought to inquire about his appeal immediately after his return. In my view, he was negligent for not taking prompt actions on the case.

In extension of time, it is an established principle of law that whoever wishes to move the Court to exercise its discretion, he/she must advance sufficient cause or good cause for the delay. The same position of law applies to whoever seeks to readmission a case under **Order XXXIX, Rule 19 of the Civil Procedure Act, Cap.33. RE 2002**. The applicant must advance sufficient or good cause for the absence when the appeal was called for hearing. On extension of time, see, the cases of **Tanga Cement Co. v. Jummanne Masangwa and Another** Civil Application No. 6 of 2001 (unreported); **Sospter Lulenga v. Republic, Criminal Appeal No. 107 of 2006**, Court of Appeal of Tanzania at Dodoma (unreported); **Aidan Chale v. Republic, Criminal Appeal No. 130 of 2003**, Court of Appeal of Tanzania at Mbeya (unreported) and **Shanti v. Hindochi and Others [1973] EA 207**.

I take the discretion to reiterate the principles state in the case of **Tanga Cement Co. v. Jummanne Masangwa and Another**, Civil Appeal No. 6 of 2001 (unreported) the court had this to say:

> *This unfetted discretion of the court, however, 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*** (emphasis added)*. From decided cases a number of factors has been taken into account, including whether or not the application was*

brought promptly: the absence of any valid explanation for the delay: lack of diligence on the part of the applicant'.

The applicant is obliged, under the law to show sufficient cause for the delay and also take prompt steps or diligence in ensuring that the matter is lodged in court on time. In the case of **Lyamuya Construction Company Limited v. Board of Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), which is quoted with approval in the case of **Bishop Roman Catholic** (supra), the stated the following principles to guide the court in granting extension of time:

1. *That, the applicant must account for all period of delay.*
2. *The delay should be inordinate.*
3. *The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.*
4. ***If the court feels that there are other reasons, such as the existence of a point of law of sufficient importance, such as illegality on the decision sought to be challenged*** (emphasis added).

The same principles of law are reiterated in the case of **Zawadi Msemakweli v. NMB PLC, Civil Application No. 221/18/2018**, CAT at Dar es salaam (unreported) thus:

'Whereas it may not be possible to lay down an invariable definition of good cause so as to guide the exercise of the Court's discretion...the Court must consider factors such as the length of the delay, the reasons for the

delay, the degree of prejudice the respondent stands to suffer if time is extended, whether applicant was diligent, ***whether there is point of law of sufficient importance*** (emphasis added) *such as the illegality of the decision sought to be challenged and overall importance of complying with prescribed timelines.'*

In the instant application, as analysed above, the applicant was negligent and failed to advance sufficient ground why he failed to attend before the Court when the appeal was called for hearing. At some point, the counsel for the applicant argued that the applicant waited for the summons from the court to inform him about the appeal. Of course, I have perused the court file and found out that there was a summons to the applicant issued by the Court on 25th September 2018. However, the same summons was not served to the applicant because he could not be found. The summons is marked as follows:

Said Mohamed mwenye No. ya simu 0767468782 ambaye ni jirani yake amenieleza kuwa Bwan Bishop Bayona alienda Marekani na ana muda mrefu.'

This remark possibly mirrors the submission that he travelled abroad and returned back in December 2018. While the Court was obliged to summon the applicant, he was also responsible to insure that he knows the progress of his appeal. I cannot cast the burden to the Court for the negligence of the applicant who never cared about his case.

This application calls upon this Court to exercise its discretion on re-admitting the appeal upon finding any sufficient cause that prevented the applicant from attending to the appeal. As stated above, it is not easy to define what amounts to sufficient case but this Court may gauge the reasons advanced by the applicant and through examining the court records. It is the duty of the Court to ascertain existence of illegality or point of law sufficient to warrant re-admission of the appeal. I am also aware that this discretion must be exercised judiciously by the Court.

Now, in line with the principles of law state above, and after careful perusal of the trial court proceedings and judgment, I find there are pertinent issues in the trial court decision which call upon the intervention of the appellate court. I am mindful however; it is not the task of this Court to indicate such point(s) of law of sufficient importance or illegality as they will be argued by the parties. In addition, addressing such issues at this point may prejudice the judge who will hear the appeal. On the other hand, leaving such issues unaddressed on appeal will be equally as blessing the errors to exist in the court records. Based on this point, I see there are reasons for this Court to exercise it discretion, though judiciously, to re-admit the appeal which was dismissed for want of prosecution.

The application is hereby allowed and the appeal will be re-admitted though out of time. Order accordingly.

Dated at Bukoba this 28th February 2020.

N.N. Kilekamajenga
Judge
28/02/2020

Court:

Ruling delivered in the presence of the applicant, respondent, counsel for the applicant (learned Advocate Miss Aneth Lwiza) and the learned advocate, Mr. Ali Chamani who was holding brief for the counsel for the respondent, Mr. Bitakwate. Right of appeal explained to the parties.

THE HIGH COURT OF TANZANIA
BUKOBA

N.N. Kilekamajenga
Judge
28/02/2020