**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(ARUSHA DISTRICT REGISTRY)**
**AT ARUSHA**

**MISC. CIVIL APPLICATION NO. 23 OF 2020**

*(C/F High Court of United Republic of Tanzania (PC) Civil Appeal No. 15 of 2019, District Court of Hanang' at Katesh, Civil Appeal No. 19 of 2019; Original Civil Case No. 29 of 2018, Hanang' Primary Court)*

**NYANZA ELIAS KOROTO ..... APPLICANT**

***Versus***

**GODFREY MSUGURI ..... RESPONDENT**

**RULING**

*7th & 17th December, 2020*

**Masara, J**

This Application is made under Section 93 of the Civil Procedure Code, Cap. 33 [R.E 2002] and section 14(1) of the Law of Limitation Act, Cap. 89 [R.E 2002]. The Applicant is praying to be granted an extension of time within which to file an Application to set aside dismissal order of this Court in (PC) Civil Appeal No. 15 of 2019 dated 5/8/2019. The application is supported by affidavit sworn by the Applicant. The Respondent contested the application and he filed a counter affidavit to that effect. At the hearing of this Application, the Applicant was represented by Mr. Erick Erasmus Mbeya, learned advocate, whereas the Respondent had the services of Mr. Sylvester S. Kahunduka, learned advocate. Hearing proceeded through filing written submissions.

The record shows that the Applicant was the appellant in PC Civil Appeal No. 15 of 2019 which was before this Court. On 29/4/2019 the appeal came for mention for the first time when both the appellant in that appeal

and Respondent defaulted appearance. It was scheduled for hearing on 16/6/2019 and 5/4/2019 but the Applicant did not enter appearance on both dates. The Respondent appeared on those dates. The Court dismissed the appeal for want of prosecution.

The reasons for the Applicant's failure to enter appearance, are canvassed in paragraphs 4, 5, 6 and 7 of the affidavit in support of the application. The affidavit states that the Applicant failed to enter appearance because he was not aware of the scheduling of hearing of the appeal as he lacked communication as a lay person. The Applicant further stated that being a lay person he lacked services of a lawyer. In Court, Mr. Mbeya adopted and sought reliance on the Applicant's affidavit.

Submitting on the substance of the Application, Mr. Mbeya contended that the record of appeal was timely presented before Hanang' District Court on 25/3/2019 and the officer responsible to dispatch the record from the District Court to this Court informed the Applicant to stay calm as he would be notified when the record would have been dispatched into this Court. He added that the Applicant made several follow ups but his efforts were futile. He cited the decisions in ***Yuasa Battery (EA) Ltd Vs. Conciliation Board of DSM and Others*** [1966] TLR 367, ***Martha Daniel Vs. Peter Thomas Nnko*** [1992] TLR b359 and ***Ramadhan Nyoni Vs. M/S Haule& Company Advocates*** [1996] 71 which provide that cases involving lay persons courts are urged do away with procedural technicalities.

Mr Mbeya added that the trial court's decision was tainted with serious irregularities and illegalities as it did not conform to Rule 16 of the Magistrate's Courts (Civil Procedure in Primary Courts) Rules G.N 310 of 1964. He added that if the other defendant was missing, the proper provision would be Rule 19. The learned advocate added that there was no valid agreement between the parties as it was adduced in the trial court. Mr. Mbeya maintained that some exhibits which were not tendered or admitted featured in the judgment. To bolster his position he referred this Court to the decisions in ***VIP Engineering & Marketing Limited and 2 Others Vs. Citibank Tanzania Limited***, Consolidated References No. 6, 7 and 8 of 2006; ***The Attorney General Vs. Tanzania Ports Authority and 2 Others***, Civil Application No. 87 of 2016 (both unreported***); The Principal Secretary, Ministry of Defence& National Service Vs. Devram P. Valambhia*** [1992] TLR 185 and ***Kalunga and Company Advocates Vs. National Bank of Commerce*** [2006] TLR 235 which consider illegality in the decision sought to be challenged as sufficient cause for extension of time.

Mr. Mbeya further contended that the Principles of Natural Justice as enshrined under Article 13(6)(a) of the Constitution requires that parties be accorded the right to be heard before being condemned. He therefore was of the view that dismissal of PC Civil Appeal No. 15 of 2019 is tantamount to condemning the Applicant unheard. The learned advocate emphasized that court's decisions underscore the need to determine cases on their merits. He made reference to the decisions in ***Fredrick Selence and Another Vs. Agnes Masele*** [1993] TLR 99 and ***Mohamed Jawad Mrouch Vs. Minister for Home Affairs*** [1996] TLR 142. He therefore

concluded that there are no notices or summons showing that the case was fixed for hearing to date. He maintained that in the Respondent's counter affidavit there is no indication of negativity indicating that the application is not contested.

According to Mr. Mbeya's submissions, the Applicant became aware of the dismissal of the appeal between November and December 2019. Mr. Mbeya concluded his submission by stating that there is no prejudice to be suffered by the Respondent if extension of time is granted.

Contesting the application, Mr. Kahunduka contended that it is not true that the appeal was preferred by a layman because the record shows that it was drawn and filed by Mr. Erick Mbeya, his advocate, who is well conversant with the court procedures. The learned advocate added that it is not shown when the counsel for the Applicant withdrew himself from that case and it is the same advocate who filed the instant application. In Mr. Kahunduka's view, non attendance in Court was out of the negligence of the Applicant and his counsel which cannot amount to sufficient cause. He cited the case of ***Martha Daniel Vs. Peter Thomas Nko*** (supra) to augment his view. Mr. Kahunduka further stated that the instant application was filed on 11/3/2020, and the Applicant's counsel stated that they became aware of the dismissal order sometimes between November and December 2019 which was almost a four months lapse and there are no reasons advanced for such delay. According to Mr. Kahunduka, the Applicant's contention that he made several follow ups are unsubstantiated as he did not state in which Court the follow ups were

made and there is no any affidavit from any court officer confirming that there was any effort applied.

Regarding the illegality of the decision of the trial court, Mr. Kahunduka argued that such illegalities are not contained in the grounds of appeal lodged in this Court. Therefore, the issue as to existence of illegality in the trial court's decision is used by the Applicant as a backdoor to be granted leave to restore the dismissed appeal. The learned advocate maintained that the Court must exercise its discretion in granting extension of time cautiously as the Applicant has not shown the illegality on the face of the record. He cited the case of ***Hassan Abdulhamid Vs. Erasto Eliphase***, Civil Application No. 402 of 2019 (unreported) which requires the alleged illegality to be apparent on the face of record. Basing on the above submission, Mr. Kahunduka implored the court to dismiss the application in its entirety with costs.

In a rejoinder submission, Mr. Mbeya stated that he was engaged by the Applicant for drawing the appeal documents only and not to represent him in the suit although it showed that it was drawn and filed by him. He added that on the alleged illegality in the trial Court's decision, it is contained under paragraphs 2, 3, 4, 7 and 9 of the Applicant's petition of appeal in PC Civil Appeal No. 15 of 2019.

I have given thorough consideration to the written submissions of the counsel for the parties and the affidavits by the parties. The issue for determination is whether the delay to file an application to set aside the dismissal order in PC Civil Appeal No. 15 of 2019 was for sufficient cause.

I need to state at the outset that sufficient cause for the delay is *conditio sine qua non* for the extension of time. The Court of Appeal in unnumbered decisions has insisted this. In ***Tumsifu Kimaro (The Administrator of the Estate of the Late Eiiamini Kimaro) Vs. Mohamed Mshindo***, Civil Application No. 28/17 of 2017 (unreported) it held inter alia that;

> *"Before dealing with the substance of this application in light of the rival submissions, I find it apposite to restate that although the Court's power for extending time under rule 10 of the Rules is both broad and discretionary, it can only be exercised* ***if good cause is shown****. 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 under rule 10, 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 the Applicant was diligent, whether there is point of law of sufficient importance such as the illegality of the decision sought to be challenged.****"*(emphasis supplied)

Likewise, in the case of ***Regional Manager, TANROADS Kagera Vs. Ruaha Concrete Company Limited***, Civil Application No. 96 of 2007 (unreported), the Court observed the following regarding sufficient cause;

> *"What constitutes 'sufficient reason' cannot be laid down by any hard and fast rules. This must be determined by reference to all the circumstances of each particular case. This means that the Applicant must place before the Court material which will move the Court to exercise its judicial discretion in order to extend the time limited by the rules."*

From the above, extension of time may only be granted where it has been sufficiently established that the delay was with sufficient cause. The question is whether the Applicant's application can be sufficiently covered by the "good cause" circumstances above explained. Mr Mbeya submitted

that the delay was due the Applicant's unawareness that PC Civil Appeal No. 15 of 2019 was dismissed considering him to be a layman. Item 4 of part III to the First Schedule of the Law of Limitation Act, Cap 89 [R.E 2019] provides 30 days as the time frame within which one may apply to set aside dismissal order. The learned counsel, however, pointed out that the delay was due to the fact that the Applicant is a layman therefore not conversant with the court procedures. I must state here that ignorance of the law cannot be a good cause for extension of time to be granted. In this stance I am guided by the Court of Appeal decision in ***Charles Machota Salugi Vs. Republic***, Misc. Criminal Application No. 3 of 2011 (unreported), where it was held;

> *"Ignorance of law has never been accepted as a sufficient reason or good cause for extension of time."*

In the instant application, PC Civil Appeal No. 15 of 2019 was dismissed on 5/8/2019. The instant application was filed on 11/3/2020, which is almost 7 months from the day the appeal was dismissed. Mr. Mbeya in explaining the reasons for the delay stated that the Applicant was not aware when PC Civil Appeal was dismissed, but he became aware between November and December 2019 when he was served with summons Execution in Civil Case No. 29 of 2018 and Taxation Cause No. 21 of 2020.

Neither the Applicant in his affidavit nor Mr. Mbeya in his lengthy written submissions do not account on what transpired after the Applicant became aware of the dismissal order between November and December, 2018 until the filing of this application in March 2020, almost three months later. It is apparent that the delay for the period between December 2019

and March 2020 was not accounted for. In an application for extension of time, the Applicant must account for each day of delay. This position has been sacrosanct in most of the Court of Appeal decision on the subject. In ***Sebastian Ndaula Vs. Grace Rwamafa (Legal Representative of Joshwa Rwamafa)***, Civil Application No. 4 of 2014 (unreported), the Court of Appeal stated:

> *"The position of this Court has consistently been to the effect that in an application for extension of time, the Applicant has to account for every day of the delay."*

The same position was reiterated by the Court of Appeal in ***Tanzanla Rent a Car Limited Versus Peter Kimuhu***, Civil Application No. 226/01 of 2017 while citing its previous decision in ***Bushiri Hassan Vs. Latifa Mashayo***, Civil Application No. 3 of 2007 (both unreported), where it was stated:

> *"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 are to be taken."*

Mr. Mbeya admitted that the Applicant became aware between November and December 2019. However, he did not state as to what he did to prove that he acted expeditiously in filing the instant application. The cited case of ***Sebastian Ndaula Vs. Grace Rwamafa (Legal Representative of Joshwa Rwamafa)*** (supra) in which the Court cited with authority its previous decision in ***Royal Insurance Tanzania Limited Vs. Kiwengwa Strand Hotel Limited***, Civil Application No. 116 of 2008 (unreported) which is instructive in this aspect, where it was held:

> *"It is trite law that an Applicant before the Court must satisfy the Court that* ***since becoming aware of the fact that he is out of***

***time, act very expeditiously and that the application has been brought in good faith.***"(emphasis added)

As alluded earlier on, in the instant application, the Applicant in his affidavit did not account for the period between December and March when the instant application was filed nor did he show the steps taken as soon as he became aware that his appeal had been dismissed. The fact that the Applicant filed this application after being served with the summons in Execution Civil Case No. 29 of 2018 and Taxation Cause No. 21 of 2020 and since there was no action taken from when he became aware of the dismissal, this Court is enjoined to agree with Mr. Kahunduka that the application was not brought in good faith. It was initiated with the aim of blocking the execution process. A party does not come to Court at the time he or she wishes. It is therefore the finding of this Court that the delay to apply for setting aside the dismissal order was inordinate and no good grounds have been made to justify it.

Mr. Mbeya also contended that there are illegalities in the trial court decision which calls for the intervention of this Court for the purpose of having the irregularities and illegalities cleared. M. Kahunduka resisted that assertion on the grounds that the alleged illegality neither featured in the Petition of Appeal nor were they made apparent in PC Civil Appeal No 15 of 2019. It is unfortunate that the said grounds of appeal were not made part of the record in this application.

I agree with Mr. Kahunduka that where a party raises illegality as a ground for extension of time, such illegality has to be apparent. This position has been restated in a number of cases including the Court of Appeal decision

in ***Samwel Munsiro Vs. Chacha Mwikwabe***, Civil Application No. 539/08 of 2019 (unreported), it was held;

> *"As often stressed by the Court, for this ground to stand,* ***the illegality of the decision subject of challenge must clearly be visible on the face of the record, and the illegality in focus must be that of sufficient importance.***" (emphasis added)

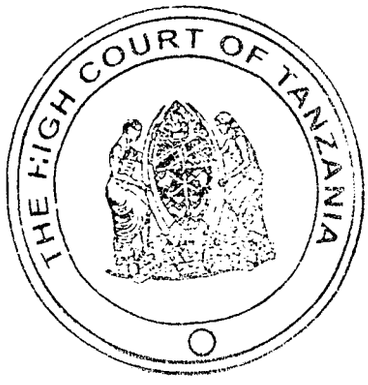
See also; ***The Principal Secretary, Ministry of Defence& National Service Vs. Devram P. Valambhia*** [1992] TLR 185, ***Kalunga and Company Advocates Vs. National Bank of Commerce*** [2002] TLR 235 and ***Lyamuya Construction Company Limited Vs. Board of Trustees of Young Women's Christian Association of Tanzania***, Civil Application No. 2 of 2010 (unreported).

The purported illegality pointed out by Mr. Mbeya is not apparent, as it is subject to proof. The other ground put forth by Mr. Mbeya is that the Applicant will be denied the right to be heard in case the application is not granted. I do not agree with this line of argument. The right to be heard goes hand in hand with observance of the rights of the others, as well as adherence to the legal systems. The Applicant's negligence cannot be covered by the guise of denial of the right to be heard. It has been held that negligence does not act as good cause for extension of time. In ***Paul Martin Vs. Bertha Anderson***, Civil Application No. 7 of 2005 (unreported), it was held:

> *"Negligence, as no doubt Messes Mkongwa and Stolla, learned counsel for both parties are aware, does not constitute sufficient reason to warrant the Court's exercise of its discretion to grant extension of time."*

For the foregoing reasons, the Applicant has failed to advance good cause to justify extension of time. The Application is dismissed in its entirety with costs.

Order accordingly.




Y. B. Masara

**JUDGE**

17th December, 2020