

IN THE HIGH COURT OF TANZANIA

DODOMA SUB REGISTRY

AT DODOMA

MISC. CRIMINAL APPLICATION NO. 41068 OF 2023

(Originating from the District Court of Chemba, Criminal Appeal No. 11/2023)

JEREMIAH GELED.....APPLICANT

VERSUS

JAMILA IDDI OMARI.....RESPONDENT

RULING

Date of the last order: 07/02/2024

Date of the Ruling: 20/03/2024

LONGOPA, J.:-

This is an application filed on 28th December 2023 for extension of time under the Section 25(1)(b) of the Magistrates Courts Act, Cap 11 R.E. 2019 and Section 14(1) of the Law of Limitation Act, Cap 89 R.E. 2019 and any other enabling provisions of the law.

The applicant was the appellant before the District Court of Chemba vide Criminal Appeal No. 11 of 2023 where the applicant was appealing against the decision of Primary Court of Chemba which found him guilty of malicious damage to property.



The facts of the case are that on 02/04/2023 during the afternoon the respondent went to his farm located at Majengo hamlet in Paranga village where should herds of 136 cattle and 28 goats grazing in her farm. These livestock herds belonged to the applicant. It is at this juncture that the applicant was arrested thus institution of the Criminal Case No 48 of 2023 at the Primary Court of Chemba.

In the Chamber Summons, the applicant prays for the following orders, namely:

- 1. That this Honourable Court be pleased to extend the time for the applicant to file appeal against the judgment of the District Court of Chamber in Criminal Appeal No. 11 of 2023 delivered on 19/10/2023 by Hon. E.A. Mwakalinga.*
- 2. That costs be provided for.*
- 3. Any other relief this Honourable Court deems fit and just to grant.*

This application is supported by affidavit of the applicant. The reasons for supporting the prayers are stated as follows: First, that he was sick on 15th November 2023 and was granted seven (7) days to rest. Second, that the delay was not caused by any negligence on part of the applicant except due to sickness. Third, being out of time, the only remedy in the circumstances is to file this application for extension of time.



This application is resisted by the respondent. It is stated that the judgment was delivered on 19th October 2023 while the application was preferred on December 2023 some two months later. The applicant's seven (7) days of resting ended up on 22nd November 2023 which was still out of time and there was no proof for such resting days. According to the respondent the time could have ended on 18th November 2023. There is no justification for such delays.

The application was argued by way of written submissions and the parties complied with the scheduling orders of submissions as agreed. I commend them for strict compliance to the submission order.

The applicant submitted that to determine the application there must be a good cause shown on the part of the applicant. It was submitted that reasonable cause must have prevented a party to act timely. It was the appellant's version that applicant was delayed obtaining the copies of the judgment until 14th November 2023 although the decision was made on 19th October 2023. Also, on 15th November 2023, the appellant got sick where he was granted seven days of rest. As a result, he continues to get the medication at home until 10th December 2023.

It was stated that from 14th December 2023 to 15th December 2023, he went to an auction to secure funds to cater for legal services in preparation of the application. He cited the case of **Murtaza Mohamed Raza Virani and another versus Mehboob Hassanali Versi**, Civil

Application No.448 of 2020, TZCA that held among others that sickness is a good reason for allowing an extension of time. The applicant emphasized that his health did not stabilize upon expiry of seven days thus he was prevented by good cause.

The respondent on the other hand, submitted that on dates of judgment and other related aspects as revealed in the affidavit in support of the application were that: first, the judgment was delivered on 13/10/2023 and extracted on 19/10/2023. Second, the applicant fell sick and admitted to hospital on 15/11/2023. Third, that the applicant was given 7 days rest from 15/11/2023 to 22/11/2023. Fourth, the applicant filed this application on 21/12/2023.

It was respondent's submission that applicant's submission departs from the facts in the affidavit by introducing a new aspect that there was delay in obtaining copy of the judgment until 14/11/2023.

The respondent cited the decision in **Mbogo vs Shah** [1968] E.A where it was held that extension of time is entirely discretion of court which must be exercised judiciously according to rules of reason and justice. It was reiterated that every day of delay must be accounted for as per decisions in **Lyamuya Construction Company Limited vs Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 and **Bushiri Hassan vs Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (Unreported).

The respondent summed up that, the applicant has not accounted for every day of delay. First, there is no evidence showing request to be supplied with the said judgment. Second, there is no evidence of bed rest from 15/11/2023 to 21/12/2023. Third, annex A2 does not reveal that applicant was prevented by a good cause. The decision in **Nyanza Road Works Limited vs Giovanni Guidon**, Civil Appeal No. 75 of 2020 (Unreported), failure to account for days after the sickness cannot be ignored.

In rejoinder, the applicant reiterated that all civil cases referred to by the respondent should be disregarded as the same does not apply to criminal cases. He cited the case of **Jumane Hassan Bilingi versus R**, Criminal Application No. 23 of 2013 CAT (Unreported) where the Court defined good cause to mean "reasonable cause which prevented the applicant from pursuing his action within the prescribed time."

Further, the applicant raised the issue of illegality in the decision of the subordinate courts that heard the matter at the first instance or appellate level. It was his submission that the decisions of the Primary Court and District Court of Chamber are marred with illegalities and discrepancies. It was submitted that on strengths of the applicant's affidavit and submissions this Court be pleased to extend time for the applicant to extend time.

I have carefully considered the application supporting affidavit, counter affidavit, and written submissions from the parties to ascertain on



the validity of the application. I have observed that the applicant's affidavit and reply to counter affidavit in support of the application substantially differ with the submissions made.

It is true that law allows extension of time to file an appeal out of time as per section 15(1) of the Magistrates Courts Act, Cap 11 R.E. 2019 and section 14(1) of the Law of Limitation Act, Cap 89 R.E. 2019. The Court is empowered to extend time on circumstances where there a good cause to do so. The Court should not grant extension of time on circumstances that are not demonstrating a good cause. Granting extension of time in circumstances that are not within purview of a good cause then such decision shall be regarded as a wrong decision.

That is in line with the decision in the case of **Robert Kadaso Mageni vs Republic** (Criminal Appeal No.476 of 2023) [2023] TZCA 17504 (18 August 2023) (TANZLII), at pp.7-8, the Court of Appeal stated that:

We are alert that it was within the discretion of the court concerned to grant or refuse the enlargement of time sought and that a superior court would rarely interfere with the exercise of the discretion by an inferior court. Interference is justified on several grounds, but what is relevant for our present purposes is the failure by the court to take into consideration a matter which it should have taken into consideration and in doing so arrived at a wrong

*decision - see **Mbogo and Another v. Shah** [1968] EA 93, at page 94.*

Extension of time is a matter of judicial discretion that must be exercised judiciously. The Court should be able to discern from the facts of each case to weigh if there is a good reason for grant of extension of time. The applicant must ably demonstrate before the court there is contributory negligence and lapse on his part that has made the applicant to fail to act timely. In the case of **Ausi Mzee Hassan vs Republic** (Criminal Application 69 of 2022) [2023] TZCA 247 (12 May 2023) (TANZLII), at pp. 7-9, the Court of Appeal stated that:

*It is a settled position of the law that, for the Court to exercise its discretion to extend time, there must be a "good cause" shown by an applicant that upon becoming aware of the fact that he/she is out of time, there ensued circumstances beyond his/her control that prevented them to act in time to persuade the Court to exercise its discretion in favour of granting an extension of time. Also, what constitutes good cause has not been laid down by any hard and fast rules as the term "good cause" is a relative one and dependent upon the party seeking extension of time to provide the relevant material in order to move the Court to exercise its discretion as held in **Osward Masatu Mwizarubi v. Tanzania Fish***

Processing Ltd, Civil Application No. 13 of 2010 (unreported).

*There are number of factors which have to be considered that there is a good cause as stated in number of cases. Good cause can also be deduced from the decision of **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), that one, an applicant must account for all the period of delay; two, the delay should not be inordinate; three, an applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take; four, if the court feels that there are other sufficient reasons, such as the existence of the point of law of sufficient importance; such as the illegality of the decision sought to be challenged.*

The record indicates that decision of the District Court was delivered on 19/10/2023. The decision that stated categorically the appeal should preferred within thirty (30) days of the decision. The period would ordinarily expire on 18/11/2023. The applicant was aware of this requirement and decided to take his time. The applicant cannot be heard to seek the court to entertain the extension of time in circumstances that do not indicate his zeal to act timely.

The affidavit of the applicant stated that it was the sickness of the applicant that prevented him from preferring the appeal timely. The medical chit reveals that it was on 15/11/2023 when the applicant was given "exempted from duty (ED)" for seven days that would end up on 22/11/2023.

The basis of the submission of the applicant is this affidavit which is a sworn statement. All the submission must support the averments stated in the application and its supporting affidavit. Arguing differently is regarded as an afterthought. I have noted that in the submission by the applicant new issues have been raised as well as in the rejoinder submission. The two raised aspects are: first, delay in obtaining the copy of the judgment of first appellate court. Second, is the claim of illegalities that was raised in the rejoinder submission.

These two aspects are not supporting the supporting affidavit in the application. I am of the settled view that raising them at the submission stage denied the respondent an opportunity to argue and respond effectively. I shall not address them as they are clear departure from the supporting affidavit. This is because there is a cherished principle of law that parties are bound by their own pleadings. In the case of **Charles Richard Kombe t/a Building vs Evarani Mtungi & Others** (Civil Appeal 38 of 2012) [2017] TZCA 153 (8 March 2017) (TANZLII), Court of Appeal of Tanzania, at pp. 9-10 stated that:



It is a cardinal principle of pleadings that the parties to the suit should always adhere to what is contained in their pleadings unless an amendment is permitted by the Court. The rationale behind this proposition is to bring the parties to an issue and not to take the other party by surprise. Since no amendment of pleadings was sought and granted that defence ought not to have been accorded any weight.

It is my humble view that allowing determination of this application on grounds which the parties did not canvass especially the respondent is tantamount to taking the respondent by surprise and denial of the respondent right to be heard. I shall not fall on that trap. Thus, apart from the sickness cause stated in the affidavit it is not for this court to entertain any other grounds that departs substantially with what is contained in the application.

In the case of **Bahati M. Ngowi vs Paul Aidan Ulungi** (Misc. Civil Application No.490/13 of 2020) [2023] TZCA 17503 (16 August 2023) (TANZLII), at page 7 to 8, the Court of Appeal had an opportunity to address sickness as a ground for extension of time. It stated that:

It is equally important to stress the general principle of law that, an application for extension of time shall not be granted where the delay is due to indolent, inaction and or lack of vigilance on the part of the applicant or her

*counsel, if has one. See for instant our previous decisions in **Loswaki Village Council and another v. Shibeshi Abebe**, [2000] T.L.R. 204 and **Mwananchi Engineering and Constructing Corporation v. Manna Investments (PTY) Limited and Holtan Investments Company Limited**, Civil Application No. 5 of 2006 (unreported), where the Court stressed that those who seek the aid of the law by instituting proceedings in a court of justice must file such proceedings within the period prescribed by law, and that they must demonstrate diligence.*

It is my settled view that considered the submission and affidavit in support of the applicant, the applicant has not demonstrated sufficiently that he acted diligently in respect of handling the intended appeal.

As per **Bahati M. Ngowi vs Paul Aidan Ulungi** (supra) at pages 10, the Court stated that:

*It is a settled position that, any applicant seeking for extension of time under Rule 10 of the Rules is required to account for the delay of each day. Indeed, the Court has reiterated that position in numerous cases - see for instance the cases of **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 03 of 2007 and **Sebastian Ndaula v. Grace Rwamafa**, Civil Application No. 04 of 2014 (both unreported). Specifically in the former case,*

the Court emphasized that: "...Delay of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing period within which certain steps have to be taken." [Emphasis added].

The emphasis of the Court of Appeal is that there must be a thorough account of the delay for every single day in that delay. From the record, the applicant has only demonstrated that from 15/11/2023 to 22/11/2023 he had been exempted from duty (ED) due to sickness. That sounds to be valid reason to account for those seven days as the medical chit is categorically clear that ED is for seven days only. There is nothing on record to substantiate that the applicant had any other valid reasons for the delay.

It is lucid that from a conspicuous departure from the affidavit which is based on sickness as the only justifiable reason for the delay to new grounds whose leave was not sought and obtained before this Court makes the whole application unestablished to the required standard of adducing good cause for the grant of extension of time to file an appeal out of time.

In my view there is no tangible evidence on record to substantiate that the applicant was prevented by a good cause for not filing an appeal timely. Therefore, I am inclined to find out that the application lacks merits and it deserves to be dismissed for want of merits.



At this juncture, I shall dismiss the application for extension of time to file an appeal out of time for being devoid of merits. The applicant has failed to demonstrate before this Court that he has any cogent reason to warrant this court exercise its discretionary powers to extend time.

The applicant stands dismissed in its entirety for being conspicuously demerited.

It is so ordered.

DATED at DODOMA this 20th day of March 2024.



Longopa
E.E. LONGOPA
JUDGE
20/03/2024