

TANZANIA / JUDGMENT

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA SUB - REGISTRY AT MBEYA CIVIL APPLICATION NO. 16046 of 2024 (Originating from Judgment and Decree of Mbozi District Court on Civil Case No.11 of 2022, dated 16 day of January 2024 by Hon V.D Changwe-SRM) ATUSWEGE MULASA PANJA..... APPLICANT VERSUS YUSUPH SUGIRA.....RESPONDENT

RULING

Date: 17 September 2024 & 22 November 2024 SINDA, J.: The applicant filed this application for extension of time in order to file an appeal out of time from the decision of Mbozi District Court (the Trial Court) in Civil Case No. 11 of 2022. The application was brought by way of chamber summons and supported by an affidavit of the applicant. The respondent filed a counter affidavit to oppose the application. 1 At the hearing of the application, the applicant appeared in person unrepresented while the respondent was represented by Mr. Isaya Zebedayo Mwanri, learned counsel. The appeal was argued by way of written submission. In the affidavit and the submission, the applicant advanced three reasons for delay as follows:

- i) That, the applicant filled an application in the electronic Case Management System (eCMS) on 16 January 2024 with admission number 9680/2024AD/HC/MBY/9680/2024 and admission reference number 20240216000009680 through the account of advocate Jacob Fabian Mwalyego but it was rejected by the eCMS without any reason. ii) The applicant was sick from 16 February 2024 and got better on 14 April 2024. Also, her biological father was sick from 12 April 2024 to the date of filing this application. This led the applicant not appeal within time. iii) Illegality. On the first ground, the applicant submitted that he filed his appeal within time through the account of advocate Jacob Fabian Mwalyego on 2 16 February 2024 through the eCMS with admission number 9680/2024 AD/HC/MBY/9680/2024 and admission reference number. 20240216000009680. He added that unfortunately while waiting for such appeal to be admitted, it was rejected by the eCMS without any

reasons.

On the second ground, the applicant argued that she was sick from 16February 2024 to 14 April 2024. Also, her biological father was sick from 12 April 2024 to the date of filling this application. This circumstance made the applicant not to file her appeal on time. On the point of illegality, she

submitted that there were illegalities in the proceedings of the Trial Court (the Proceedings). That, the respondent a citizen of Rwanda was the plaintiff in Civil Case No. 11 of 2022 and never filed any security for costs as by law required under Order XXV, Rule 1 (1) of the Civil Procedure Code, Cap 33 RE 2019 (the CPC). She referred to the case of *The Registered Trustees of Tanzania Presbyterian Church vs Jung Hwan Kim Sang K Nam*, Misc. Civil Application No. 183 of 2022 HCT at Dar es salaam to cement his argument. 3 Another illegality pointed out by the applicant was during tendering of the exhibits by the respondent at the Trial Court and the competency of the person who tendered the exhibits. That, Lucy Mhando sworn an affidavit which was filed to the court on 28 July 2023 but never testified. That, Steven Mwakajuba Matimba testified on 26 October 2023 and tendered Exhibit A-3 that was obtained from system without swearing an affidavit as to the authenticity of electronic document. This means that the competent person to testify did not testify and the one who testified was not competent since he did not swear an affidavit. The respondent on the first ground, argued that the argument by the counsel for the applicant that the applicant failed to file the appeal on time due to the reason that the eCMS rejected the appeal documents does not hold water because soon after the said rejection the applicant did not take any step to remedy the situation. She relaxed until the lapse of more than 130 days after the said rejection. He further argued that it is also a trite law that an affidavit which mentions another person is hearsay unless that other person swears as well. He referred the case of *Suzan Ng'ondovs Anna Samwel Urassa* (Civil Application 606 of 2021) [2023] TZCA 17266 (22 May 2023). 4 He maintained that the applicant mentioned advocate Jacob Mwalyego in the affidavit supporting her application for extension of time to file an appeal out of time. He further further maintained that advocate Jacob Mwalyego did not swear an affidavit to confirm that it is true that the applicant used his eCMS account to file the said rejected documents for appeal purpose. He added that failure of advocate Jacob Mwalyego to swear an affidavit make the alleged facts be hearsay evidence. On Second ground, he submitted that it is trite law that for sickness to be a sufficient reason for extension of time the applicant must present before the court medical certificates to prove the sickness. He referred the case of *Saverina Ngimbwa and Another vs. Renatus Ngimbwa* (Misc. Land Application 81 of 2020) [2021] TZHC 5655 (23 August 2021). On the third reason that the Proceedings contain some illegalities for failure of the respondent to deposit security for costs when he instituted this matter at the Trial Court. Also, that Steven Mwakajumba Matimba testified and tendered Exhibit A-3 that was obtained from a system without swearing an affidavit of electronic document. Further that, one Lucy Mhando sworn an affidavit and never testified. 5 He submitted that merely erroneous decision on a question of facts or even of law can not be termed illegality. He referred to the case of *Charles Richard Kombe vs Kinondoni Municipal Council* Civil Reference No.13 of 2019 Court of Appeal of Tanzania at Dar es Salaam (Unreported) and the case of *Kabula Azaria Ng'ondi & 2 Others vs. Maria Fransis Zumba & Another* Civil Appeal No. 174 of 2020 Court of Appeal of Tanzania at Dar es Salaam (Unreported). He submitted further that the issue of illegality raised in this application are afterthoughts. This is because the applicant never raised any objection at the Trial Court or made any application for the respondent to deposit security for costs or objected the admissibility of the alleged electronic evidence. He added that is the requirement of Order XXV Rule 1 of the CPC that security will only be needed if it is proved that the plaintiff have no any immovable property in Tanzania. That, the

respondent was never been availed a chance to state if he has sufficient immovable property within Tanzania as a condition specified in the rules. The applicant was 6 represented by a learned counsel during trial but never make an objection on the alleged errors. Also, the wording of Order XXV Rule 1 of the CPC is couched as per section 55 of the Interpretation Act Cap 1 RE 2022 means it was the discretion power of the trial Magistrate. The Court of Appeal in Kabula Azaria Ng'ondi (supra) stated clearly that errors of trial court in exercise it is discretion power is just a mere simple error cannot be termed as illegality. The applicant cited the case of Registered Trustees of Tanzania Presbyterian Church vs. Jung Hwan Kim & Another (Misc. Civil Application 183 of 2022) TZHC 11592 (11 August 2022) of this court, stipulates the conditions necessary for the court to grant an application security for costs. The case is distinguishable with the matter at hand because there was never an application for security for costs before the Trial Court. Again, it is the decision of this court which cannot bound this court. Regarding the argument that the exhibit A-3 was tendered by Steven Mwakabuba Matimba without an affidavit of authenticity, is a myth because as it can be witnessed in the proceeding of the Trial Court that Exhibit A-3 was tendered by the respondent himself. To cement his argument, the counsel for the applicant cited the case of Lyamuya 7 Construction Company Ltd vs. Board of Registered Trustee of Young Women's Christian Association of Tanzania, Civil Application No. 02 of 2010 (unreported) which provided guideline to be followed in order for an application for extension of time to be granted which are;

1. The applicant must account for all period of delay.
2. The delay should not 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 sufficient reasons, such as existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged. He submitted that as per the above guideline it is clear that the applicant did not fulfill any of the said guideline starting with the first guideline that the applicant must account for all period of delay. He argued that in the case at hand the applicant did not account for each day of delay as she has not presented before this Honourable Court any medical certificate to prove that it is due to sickness that she could not file an appeal in time. 8 The delay of the applicant is inordinate because there is a lapse of over 174 days from the date of the time required by the law to file the said appeal and yet she has not accounted for each day of delay, as it was stated in the case of Bruno Wenceslaus Nyalifa vs. Permanent Secretary Ministry of Home Affairs & Another (Civil Appeal No. 82 of 2017) [2018] TZCA 297 (14 December 2018) at page 13 The respondent contended that the applicant did not show any kind of diligence throughout the period of 174 days instead she showed sloppiness for not doing anything all this time regarding the action required to exercise her right of appeal. He prayed for this Honourable Court to dismiss this application with costs for lack of merit. In rejoinder the applicant reiterated his submission in chief and also attached a copy of the affidavit of Jacob Fabian Mwalyego. I have considered both courts records, chamber

application, affidavit, counter affidavit and submission filed by parties. It is a settled principle of the law that extension of time is the discretion enjoyed by the court. The discretion is always exercised after the applicant has advanced sufficient cause or good reason for the delay. See, the cases of Tanga Cement Co. vs. Jummanne Masangwa 9 and Another Civil Application No. 6 of 2001, Sospeter Lulenga vs. Republic, Criminal Appeal No. 107 of 2006, Court of Appeal of Tanzania at Dodoma, Aidan Chale vs. Republic, Criminal Appeal No. 130 of 2003, 3 Court of Appeal of Tanzania at Mbeya. In this application the applicant advances three reasons for delay to file his appeal within time. Starting with the first reason that the applicant filed the application in eCMS via an account of advocate Jacob Fabian Mwalyego but it was rejected. Order XIX, Rule 3 (1) of The Civil Procedure Code [CAP. 33 R.E. 2019] (The CPC) clearly provides that: "Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted: Provided that, the grounds therefore stated. " I have gone through records, as correct submitted by the respondent there is no affidavit sworn by advocate Jacob Fabian Mwalyego to prove the fact that the applicant filed an application in the eCMS via an account of advocate Jacob Fabian Mwalyego but it was rejected. The same was attached in rejoinder after the issue was raised by the 10 respondent advocate. As such, I will not consider the copy of the affidavit of Jacob Fabian Mwalyego as it is an afterthought. It is a position of law that when an affidavit mentions another person is hearsay unless that other person swears as well. This was stated in the case of Sabena Technics Dar Limited vs Michael J. Luwuzi, Civil Application No. 451/18 of 2020 a and Elihaki Giliad Mwambo vs. Mary Mchome Mbwapo & another, Misc. Civil Application No. 449 of 2019. In the case of Sabena Technics Dar Limited stated that "... an affidavit which mentions another person is hearsay unless that other person swears as well" In the line with the above case, I expunge paragraph five of the applicant affidavit which contain information that the applicant filed an application in eCMS via an account of advocate Jacob Mwalyego but it was rejected, because it was not accompanied with an affidavit from Advocate Jacob Mwalyego. On the second reason, the applicant stated that she was sick from 16 February 2024 to 14 April 2024. That, her biological father was also sick from 12 April 2024 to the date of filling this application. It is a settled position of law that reason of sickness has to be evidenced by medical report. This was stated in the case of Christina Alphonse Tomas (as 11 Administrator of the late Didas Kasele Deceased) vs. Saamoja Masingija, Misc. Civil Application No. 13 of 2013 where the court stated that "...as well the applicant counsel failed to show that the sickness he is suffering from is the one which prevented him from attending the court for hearing of application because there is no medical support" In this application the applicant has not attached any medical report to substantiate his ground. This reason also lack merit. On the third reason, the applicant submitted that the Proceedings were tainted with illegalities. It is a position of law that regardless of whether or not a reasonable explanation has been given by the applicant to account for delay, a claim of illegality of the impugned decision constitutes a good cause for extension of time. In the case of Principal Secretary Ministry of Defense and National Service vs. Devran Valambia (1999) TLR 189 the Court of Appeal stated that: "It is therefore, settled law that a claim of

illegality of the challenged decision constitutes sufficient reason for extension of time under rule 8 regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay.”¹² Also, when the point of illegality is raised as one of the grounds for extension of time, it must be satisfied that the claimed illegality really exists, in the case of *Lyamuya Construction Company Ltd* (supra), the CAT stated that; “Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in *Valambia’s* case, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one. The Court there emphasized that such point of law must be that of sufficient importance and, I would add that it must also be apparent on the face of record, such as the question of jurisdiction; not one that would be discovered by a long-drawn argument or process.” In this case the applicant stated that the Proceedings contained illegality because the respondent was a foreigner from Rwanda and never filed security of cost and that the bank statement tendered lacked authenticity. In my opinion, I find that the point raised by the applicant that the respondent never filed security of cost does not meet the condition set in the case of *Lyamuya Construction Company Ltd* (supra) because it would be discovered after a long-drawn argument or process.¹³ It needs some facts to determine on whether the respondent possesses any immovable property in Tanzania or not. Regarding the point that one Steven Mwakajumba Matimba testified and tendered Exhibit A-3 that was obtained from a system without swearing an affidavit of electronic document. Further that, one Lucy Mhando sworn an affidavit and never testified. The respondent advocate argued that the Exhibit A-3 was tendered by the respondent himself. It is important to note that the applicant did not accompany her application with the Proceedings and pleadings to prove her allegation and assist this court to ascertain that the point of illegality exist or not. In that regard, I find that the applicant failed to substantiate her claim that there were illegalities in the Proceedings. It is a position of law that delay for even a single day has to be accounted, this was stated in the case of *Bushiri Hassan vs. Latifa Lukio Mashayo*, Civil Application No. 3 of 2007 (unreported) it was held that: “ Delay of even a single delay, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken.”¹⁴ In this case at the Trial Court, the judgment was delivered on 16 January 2024. This application was filed on 9 June 2024. The ninety days of appeal expired on 16 April 2024. The applicant filed his appeal after expiration of more than 50 days and the reason for delay was not accounted for. I find the applicant failed to advance sufficient reason for delay. The application lack merit and is hereby dismissed with cost. Right of appeal explained. DATED at MBEYA on this 22 day of November 2024. A. A. SINDA JUDGE 15

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