

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MBEYA**

**~~CIVIL APPLICATION NO. 191/06 OF 2019~~**

**THE REGISTERED TRUSTEES OF  
KANISA LA PENTEKOSTE MBEYA.....APPLICANT**

**VERSUS**

**LAMSON SIKAZWE ..... 1<sup>ST</sup> RESPONDENT**

**ANDONDILE MWAKANYAMALE.....2<sup>ND</sup> RESPONDENT**

**ISAACK MPAGAMA.....3<sup>RD</sup> RESPONDENT**

**NSANGARUFU SHABANI .....4<sup>TH</sup> RESPONDENT**

**AMBINDWILE KAMAGE .....5<sup>TH</sup> RESPONDENT**

**(Application for extension of time to appeal against the Ruling of the High  
Court of Tanzania at Mbeya**

**(Levira, J.)**

**dated the 5<sup>th</sup> day of December, 2018**

**in**

**Misc. Civil Application No. 37 of 2017**

**RULING**

5<sup>th</sup> November & 6<sup>th</sup> December, 2019

**MKUYE, J.A.:**

This is a notice of motion under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules) in which the applicant, the Registered Trustees of Kanisa la Pentekoste Mbeya, through the services of Advocate Mr. Francis Stolla is seeking for extension of time within which to appeal

against the decision/ruling of the High Court of Tanzania at Mbeya (Levira, J. as she then was) dated 5/12/2018 in Misc. Civil Application No. 37 of 2017. The ground for this application as reflected in the notice of motion is that the applicant cannot file the appeal without seeking and obtaining leave of the High Court or the Court of Appeal; and further that there is Misc. Civil Application No. 53 of 2018 for leave to appeal to the Court of Appeal which was filed and it is still pending in the High Court of Tanzania at Mbeya Registry. The application is supported by an affidavit deponed by Mr. Francis K. Stolla, the learned advocate for the applicant. They also filed written submission in support of the application on 4/4/2019.

The respondents filed a joint affidavit in reply to the application sworn by Mr. Ladislaus Rwekaza, learned advocate for the respondents. They also filed a written submission in reply in terms of Rule 106(8) of the Rules.

The brief background of the matter is as follows: The applicant and the respondents had a dispute as to who were the lawful trustees of the Kanisa la Pentekoste Mbeya. The matter was referred to the Administrator General who informed them of other trustees different from the

respondents. Then the applicant was advised to refer the dispute to the judicial process. She filed Misc. Civil Application No. 6 of 2017 seeking an opinion of the High Court on the matter but the same was dismissed for failure by one of the trustees to sign the joint affidavit in support of the application. According to the affidavit and the written submission in support of the application, following the dismissal of that application, the applicant lodged a notice of appeal with intention to appeal to this Court against the dismissal order and she also filed a letter requesting for the record. At the same time she filed Misc. Civil Application No. 37 of 2017 in view of rectifying the anomaly found in Misc. Civil Application No. 6 of 2017. She also filed Misc. Civil Application No. 38 of 2017 seeking leave to appeal to this Court against the dismissal of Misc. Civil Application No. 6 of 2017. However, on 5/12/2018, the said Misc. Civil Application No. 37 of 2017 was dismissed on account that as the applicant had filed another application seeking leave to appeal to against the dismissal of Misc. Civil Application No. 6 of 2017, the two applications could not co-exist. Since the applicant was aggrieved, on 10/12/2018 she filed a notice of appeal; lodged a letter requesting for the record for appeal purposes; and filed Civil Application No. 53 of 2018 seeking leave to appeal against the decision in Misc. Civil

Application No.37 of 2017 of which at the time she filed the application at hand, was still pending in the High Court.

When the application was called on for hearing, the applicant was represented by Mr. Francis Stolla learned counsel; whereas the respondents appeared in person. Mr. Ladislaus Rwekaza, the learned counsel who initially appeared for the respondents and prepared the pleadings in respect of this application did not enter appearance. In this regard, the respondents sought and were granted leave to represent themselves.

Submitting in support of the application, Mr. Stolla in the first place sought to adopt the notice of motion, affidavit and written submission in support of the application. In elaboration, he submitted that the applicant was not able to file the appeal within time because she was yet to obtain the leave to appeal which was among the requirements for lodging such appeal to this Court. He added that, at the time of filing this application on 11/2/2019, the application for leave to appeal against the Ruling in Civil Application No. 37 of 2017 through Misc. Civil Application No. 53 of 2018

was still pending. He, however, contended that right now the Ruling in respect of the said Misc. Civil Application No. 53 of 2018 granting leave to appeal has been delivered since 14/8/2019 (Mongella, J.). The said Ruling was produced and admitted for identification purpose as Exh. ID1. The counsel for the applicant stressed that, the applicant filed this application instead of waiting for the result of the application for leave because the documents required for filing the appeal do not include the documents in relation to leave to appeal. Mr. Stolla contended that they thought they would be safe to apply for extension of time in advance. He referred this Court to the cases of **Mrs. Kamiz Abdullah M.D. Kermal v. The Registrar of Buildings and Miss Hawa Bayona** (1988) TLR 199; and **Professor Sendui Ole Nguyaine (as an Administrator of the Estate of Mzee Nguyaine Meijo Mollel) v. The Arusha City Council**, Civil Application No. 32 of 2015 (unreported) in support of his argument. Since the time to file an appeal has lapsed, he urged me to grant the extension of time sought.

Besides that, in the written submission the applicant has also advanced other grounds for the application in that there are overwhelming

chances of success in the intended appeal; there issues of illegality in the impugned decision; and that the respondents would not be prejudiced should the application be granted.

On the other hand, the first respondent Lamson Sikazwe, who sought and was granted leave to submit on behalf of other respondents adopted the joint affidavit and written submission in reply. While conceding that this application was filed when Misc. Civil Application No. 53 of 2018 was still pending, he urged the Court to dismiss it on account that there are no chances or likelihood of the intended appeal to succeed. He also added that there is no point of illegality to be addressed by the Court of Appeal as the issue of co-existence of Misc. Civil Application no 37 of 2017 and Misc. Civil Application No. 38 of 2017 was not canvassed by the High Court. Further to that, he argued, if the application is granted the respondents would be prejudiced as they would have to engage an advocate to represent them. In the end he stressed that, since the applicant has failed to establish good cause to persuade this Court to grant the extension of time, the same be dismissed with costs.

The issue to be determined is whether the applicant has established good cause to warrant this Court to grant the extension of time sought.

Rule 10 of the Rules which governs the application of this nature provides as follows:

*"The Court may upon good cause shown extend the time limited by these Rules or by any decision of the High Court or tribunal for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after doing of the act, and any reference in these Rules to any such time shall be construed as a reference to that time so extended."*

This Court has always taken a stance that when considering an application for extension of time under Rule 10 of the Rules, the courts have to take into account among others such factors as, the length of delay, the reason(s) for the delay and the degree of prejudice that the respondent may suffer if the application is granted. (See **Tanzania Revenue Authority v. Tango Transport Co. Ltd**, Consolidated Civil Applications No.4 of 2009 and 9 of 2008; **Unilever Tanzania Limited v.**

**Said Sudi and 26 Others**, Civil Application No. 88 of 2013; and **Rutagatina C.L v. The Advocates Committee and Another**, Civil Application No. 98 of 2010 (all unreported).

In this case, the applicant has given an account that she was not able to file an appeal within time as the application for leave to appeal to this Court was still pending in the High Court and that she felt safe to bring this application instead of waiting for the outcome of the said application. And in fact, she filed this application on 6/2/2019 which was the last day upon which the appeal ought to have lodged. In the case of **Mrs. Kamiz Abdallah M.D. Kermal** (supra) when the Court was confronted with a similar scenario welcomed such move and stated as under:

*"(iii) where delay in instituting the appeal is caused by good reason, other than the time taken in preparing the record of appeal a prudent party to the proceedings may safeguard its position by applying for extension of the period prescribed for the doing of any act under rule 8 of the Court of Appeal Rules [Now Rule 10]. It was thus open for the appellant in this case, particularly at the time when she*



***was applying for leave and certificate of the High Court, to also apply to this Court to extend or enlarge the period prescribed for the instituting the appeal”***

[Emphasis added]

Also, in the case of **Professor Sendui Ole Nguyaine (as an Administrator of the Estate of Mzee Nguyaine Meijo Mollel)** (supra) when the Court faced an akin similar situation, it stated as under:

*“The reason for seeking extension of time as can be gleaned from the affidavit of **Mr. Maro is that so far as the High Court has yet to grant the applicant leave to enable him appeal despite the fact that he has in possession with all other documents required for appeal purposes. The applicant therefore wanted to play safe...** Rules 10 read together with rule 60 (1) and (2) of the Rules empowers a single Justice of the Court to grant extension of time whether before or after the expiration of the time in question provided good cause is shown...”*

[Emphasis added]

On my part, I subscribe to the above cited authorities. I find that the reason advanced by the applicant is pertinent in the circumstances of this case. Since the application for leave was still pending and the time to file an appeal was about to elapse she had no other option than to file this application. In my considered view, she acted diligently in taking a precautionary measure to salvage her appeal. Besides that, at the hearing of the application, the applicant availed the Court with the Ruling which was being awaited. Based on the authorities which I have already cited, I agree with the learned counsel for the applicant that, the applicant has advanced good cause for the delay in instituting the appeal within the prescribed time.

This ground alone could have been sufficient to grant the application. However, for purpose of putting the record straight, I need to address other reasons for this application.

The applicant in the written submission has contended that the intended appeal has likelihood or chances of success. On the other hand, the respondents have forcefully argued that there is/are no such likelihood or chances of success in the intended appeal.

Perhaps it is appropriate at this juncture to state that the practice of this Court has been to disregard a claim about chances of success of an intended appeal. For instance, in the case of **Tanzania Posts & Telecommunications Corporation v. M/s H. S. Henritta Supplies** (1997) TLR 141 at page 144, where the issue of the intended appeal having overwhelming chances of success arose, Lubuva, J.A. (as he then was) stated as follows:

*" It is however relevant at this juncture, to reflect that this Court has on numerous occasions taken the view that the chances of success of an intended appeal though a relevant factor in certain situations, it can only meaningfully be assessed later on appeal after hearing arguments from both sides."*

For me, the contention that the applicant's intended appeal has great chances of success cannot stand since it cannot be assessed at this stage. After all, there is no material before me to enable me to ascertain the chances of the intended appeal succeeding if such appeal was to be filed and heard by this Court. Hence, I do not see any reason for me to speculate on whether or not there are chances of success in the intended

appeal by the applicant. This ground, therefore, does not constitute good cause in the circumstances.

The applicant has also argued that it is in the interest of justice that she be granted a chance to appeal as even the degree of prejudice to the respondent is very low. The respondents are of the view that they would be prejudiced because it will entail them incurring some expenses in engaging the advocate to represent them.

I am aware that in considering application for extension of time courts are also enjoined to take into account among others the degree of prejudice to the respondent if the time is extended. ( see **Dar es Salaam City Council v. Jayantal P. Rajani**, Civil Application No. 27 of 1987; and **Wembele Mtumwa Shahame v. Mohamed Hamis**, Civil Application No. 138 of 2016 (both unreported)). However, I do not think that that factor is absolute. It would normally depend on the prevailing circumstances of each particular case. In this case, much as the respondents allege that they would incur some expenses, in my view, the interest of justice demand that the matter be looked into by the Court

moreso when the issue of illegality is involved. In this regard, I find that this ground constitutes a good cause.

As regards the issue of illegality as averred in paragraph 6 of the affidavit and written submission, I think, the law is now settled. Where the issue of illegality in the decision sought to be impugned is raised, the Court is required to extend the time even if it means that the applicant has failed to account for the delay. (See **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [199] TLR 189; **Kalunga and Co. Advocates v National Banks of Commerce Ltd** [2006] TLR 235; **VIP Engineering and Marketing Ltd and 2 Others v. Citibank Tanzania Ltd**, Consolidated Civil Reference No. 6, 7 and 8 of 2006; **Amour Habit Salim v. Hussein Bafagi**, Civil Application No. 52 of 2009; **Attorney General v. Consolidated Holding Corporation and Another**, Civil Application No. 26 of 2014; **Eliakim Swai and Another v. Thobias Kawara Shoo**, Civil Application No. 2 of 2016; and **Ezrom Magesa Maryogo v. Kassim Mohamed Said and Another**, Civil Application No. 227 of 2015 (all unreported).

For instance, in the case of **Ezrom Magesa Maryogo** (supra) which was rightly cited by Mr. Stolla, the Court held as under:

*"Even if there was an attributed negligence on the initial advocate of the applicant to timely lodge an application for leave to appeal, the applicant deserves the grant of enlargement of time to seek leave on the complaint of illegality of the impugned decision which has not been vigorously contested by the 1<sup>st</sup> respondent. The complainant raising possible illegality constitutes good cause whether or not a reasonable explanation has been given to account".*

In this case the applicant has alleged that there two points which hinge on illegality which are: **one**, whether or not the co- existence of the two pending applications warrants the dismissal of one application; and **two**, whether the co-existence of Misc. Civil Application No. 37 of 2017 and Misc. Civil No. 38 of 2017 warranted the dismissal of the former. In my view, the points of illegality raised by the applicant constitute good cause requiring to be addressed by the Court.

In the event, looking at the totality of the submissions from both sides. I am satisfied that the applicant has shown good cause for extending the time to lodge the memorandum of appeal out of time. Hence, the application is hereby granted and the applicant is given 30 days within which to file an appeal from the date of this Ruling.

**DATED at DAR ES SALAAM** this 15<sup>th</sup> day of November, 2019.

R. K. MKUYE  
**JUSTICE OF APPEAL**

The Ruling delivered this 6<sup>th</sup> day of December, 2019 in the presence of Mr. Peter Ngange holding brief of Francis Stolla learned counsel for the Applicant and 1<sup>st</sup> and 5<sup>th</sup> respondent in person other respondents absent due served is hereby certified as a true copy of the original.



E. F. Fussi  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**