IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., KEREFU, J.A., And MAIGE, J.A.)

CIVIL APPEAL NO. 314 OF 2019

1. EMMANUEL RURIHAFI
2. JANETH JONAS MREMA .....APPELLANTS

VERSUS

JANAS MREMA .....RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Dar Es Salaam)

(Mlyambina, J.)

dated 14th day of June, 2019
in
Miscellaneous Civil Application No. 609 of 2018

JUDGMENT OF THE COURT

6th & 28th July, 2021

MAIGE, J.A.

This appeal arises from the decision of the High Court (the first appellate court) refusing to extend time to appeal against the decision of the District Court of Kinondoni (the trial court). The factual background giving rise to this appeal is brief and straightforward. It all along started with a suit for damages arising from adultery alleged to have been committed by the appellants against the respondent. The

claim was successful and the respondent procured a decree for payment of TZS 20,000,000.00 as damages for the said tort. Aggrieved, the appellants lodged a Civil Appeal No. 14 of 2017 to the first appellate court. For the reason of not being accompanied with a copy of the decree, the appeal was struck out, on 17th September, 2018.

The appellants, it would seem, did not doubt the correctness of the ruling striking out the appeal. They were nonetheless still unhappy with the judgment of the trial court. Since the time within which to file an appeal had already expired, they lodged the Miscellaneous Civil Application No. 609 of 2018 at the High Court for extension of time to appeal. The ruling dismissing the application is the theme of this appeal.

In the memorandum of appeal, the appellants have raised four grounds which can be reduced into three complaints. **First**, the first appellate court was wrong in dismissing the application in total disregard of the appellants' account for the delay. **Second**, the first appellate court was wrong in dismissing the application basing on extraneous consideration. **Third**, the first appellate court was wrong in not holding that sufficient cause for extension of time had been established.

In their written submissions in respect of the first and third complaints, the appellants who fended themselves, blamed the presiding Judge for premising his decision on the respondent's submissions in total disregard of the appellants' submissions and more so without assigning any reason therefor. They submitted further that, while in the affidavit it was made very clear that, the delay to timely file a proper appeal was caused by prosecution of Civil Appeal No. 14 of 2017, the presiding Judge dismissed the application without considering their submissions. In their view, if the facts in the affidavit and the submissions had been considered, it would have been held that sufficient cause was established.

The appellants' submission on the second complaint was that, while the factual materials supporting the application was contained in their joint affidavit, the presiding Judge dismissed the application on the same grounds used to strike out Civil Appeal No. 14 of 2017. In so doing, they contended, the presiding Judge improperly exercised his jurisdiction by deciding the application basing on extraneous

consideration. Finally, the appellants urged the Court to grant the application with costs.

In his submission in refutation of the first and third complaints, Mr. Japhet Mmuru, learned counsel for the respondent was of the contention that, the grounds for application were considered and established to be wanting. The counsel rebutted the proposition in the appellants' submissions that, the affidavit demonstrated sufficient cause because they never accounted for every day of delay as the authority in **Lyamuya Construction Company Ltd v. Board of Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) requires.

The counsel further confuted the claim in the second complaint that, the decision of the lower court was based on extraneous consideration. In his view, the determination of the application was based on failure of the appellants to attach in their affidavits a letter requesting for a decree and payment receipt to establish their efforts to procure the same. He prayed, therefore that, the appeal be dismissed with costs.

Having appropriately considered the rival submissions and examined the ruling and proceedings of the first appellate court, it is suitable that we determine the merit or otherwise of the appeal. We understand that the appeal at hand arises from a decision refusing extension of time which is within the discretion of the lower court. While we are aware that, a lower court enjoys a wider jurisdiction to grant or not an extension of time, it is our understanding of the law that, for a decision arising there from to be valid, the discretion must have been exercised reasonably, judiciously and on sound legal principles. Therefore, although as a general rule, an appellate court would not interfere with the discretion of the lower court, where the discretion is exercised in violation of the principle above mentioned, the appellate court may where the result thereof leads to miscarriage of justice., interfere. There are many decisions supporting this view. For instance, in **Swabaha Mohamed Shosi v. Saburina Mohamed Shosi,** Civil Appeal No. 98 of 2018 (unreported), it was held that, an appellate court can interfere with the discretion of the lower court if, among others, it has acted on matter that it should have not acted or it has failed to take into consideration that which it should have taken and, as a result, it

has arrived at a wrong conclusion. A similar position was stated in **Tusekile Dancan v. Republic**, Criminal Appeal No. 202 of 2009 (unreported), where the lower court omitted to consider illness which was raised in the application as a ground for extension of time. On appeal, the Court, though observed that, grant of extension of time was within the discretion of the lower court and that, it could rarely be interfered with on appeal, it was of the opinion that, in not considering the ground for application, the lower court failed to exercise its discretion judiciously and therefore, the Court was entitled to reverse the decision. We shall be guided by the above principle in determining the application.

From the affidavit and submissions in support of the application at the High Court, it is apparent that, the appellants' main justification for the delay was *bonafide* prosecution of Civil Appeal No. 14 of 2017. The debate in the first and second complaints it would appear to us, is whether such an account was considered in the ruling.

Our reading of the ruling and more particularly pages 11 and 12 thereof, reveal that, the presiding Judge refused to grant the application

on two reasons. **First**, the appellants' failure to establish lateness to procure a copy of the decree. **Second,** failure to apply for amendment of the memorandum of appeal soon upon being supplied with a copy of the decree. From the foregoing, it needs not, in our view, much explanation, to conclude that, the presiding Judge misdirected himself on the point of law in addressing the grounds for the application raised in the affidavit and submissions. We agree with the appellants that, whether it was wrong for the appellants to lodge an appeal without the decree being attached, was the subject of the ruling striking out the appeal and not the application under discussion. The relevant issue in the application was whether the prosecution of the previous appeal was *bonafide* and without negligence and whether the appellants fronted sufficient cause for the delay.

It is obvious that, an appeal which is not accompanied by a decree could not be entertained by the first appellate court and that is what led the High Court (Ngwala, J) to strike out the appeal. Of course, while striking out the appeal, the High Court had in mind from the appellants' submission that, when the appeal was being instituted, the

appellants were yet to be availed with a copy of the decree. It follows therefore that, as failure to attach a copy of a decree was the guiding issue in the decision to strike out the appeal, it was conclusive such that, it could not be the basis for refusal to grant an extension of time. Therefore, in **Bank M (Tanzania) Limited v. Enock Mwakyusa** , Civil Application No. 520/18 of 2017 where a single judge of the Court dealing with more or less a similar issue, made the following pronouncement which we fully subscribe to;-

> *"The applicant Bank, having been duly penalized by having Civil Appeal No. 109 of 2012 struck out by the High Court and the High Court (Labour Division) dismissing Miscellaneous Application No. 133 of 2017, the same cannot be used yet again to determine the timeousness of applying for filing the fresh Notice of Appeal in a bid to file a fresh appeal. On the authority of the decisions of the Court cited, that was an excusable technical delay on the part of the applicant which constituted good cause under rule 10 of the Rules, under which the notice of motion has, inter alia, been taken out, to grant the order sought."*

Guided by the above principle therefore, we are in agreement with the appellants that, the first appellate court did not properly exercise its

jurisdiction in determining the application basing on irrelevant considerations and in not properly addressing the appellants' grounds for the application. As a result and to the extent as afore stated, we uphold both the first two grounds of the appeal.

This now takes us to the third ground of appeal as to whether or not the appellants demonstrated sufficient cause for extension of time. As we have noted above, the main ground for the delay was prosecution of Civil Appeal No. 14 of 2017 (the struck-out appeal). It is common ground that, the struck-out appeal was filed within time. The delay arising from prosecution of the said appeal was, therefore not actual. It was a mere technical delay. As held in **Bank M (Tanzania) Limited** (supra), a prosecution of an incompetent appeal when made in good faith and without negligence, *ipso facto* constitutes sufficient cause for extension of time. See also, **Bharya Engeneering & Contracting Co. Ltd vs. Hamoud Ahmed Nassor**, Civil Application No. 342/01 of 2017 (unreported)

In the circumstance, we have no hesitation to hold that, as the incompetent appeal was filed within time and the appellants were, as a

result of their default to attach a copy of the ruling, penalized by having their appeal struck out, the prosecution of the incompetent appeal constituted sufficient cause for extension of time. Consequently, the period between the institution of the said appeal and 17th September, 2018 when the same was struck out has been justified.

At this juncture, it may be imperative to put it clear that, once established, as we have done that, the prosecution of the incompetent proceeding was a mere excusable technical delay in the sense that it was preferred timely and without negligence, the next question to be considered is whether the appellants acted promptly to take necessary steps to institute a competent proceeding. In **William Shija v. Fortunatus Masha** [1997]TLR 213, where, like in this case, the respondent having been aggrieved by a decision of the High Court, timely filed an appeal to the Court which was subsequently struck out for being incompetent. Instead of applying for extension of time to file a notice of appeal, the counsel for the respondent filed an application in the High Court, for extension of time to appeal which was refused for want of jurisdiction. By way of a second bite, the respondent filed a

fresh application to the Court, which was granted by a single judge on account that, the prosecution of the incompetent appeal much as it was for an application to the High Court were mere excusable technical delay. On reference, the Court, while in agreement with the finding of a single judge that, the period used in prosecuting the incompetent appeal amounted to an excusable technical delay, it did not agree with him that, the period spent in prosecuting an application for extension of time in the High Court also constituted an excusable technical delay. The reason being that, the same was caused by negligence of an advocate which could not constitute a good cause for extension of time. If we can quote, it was stated as follows:-

> *"Applying the principle enunciated in these cases to the instant case, we are with respect, satisfied that, the negligence on the part of the Counsel for the first respondent in filing wrong application which caused the delay cannot constitute sufficient reason. In our understanding, what featured prominently before the learned single judge was the fact that the wrong application to the High Court was filed*

immediately after this Court struck out the appeal and that the delay in filing the application which was before him was technical."

In this matter, while the incompetent appeal was struck out on 17th September, 2018, the application for extension of time to the High Court was filed on 10th October 2018. There is thus a difference of hardly 22 days in between. The issue here is whether in lodging the application within 22 days from the pronouncement of the ruling, the appellants acted promptly? The test employed in determining promptness in our view is that of reasonableness. That is, whether the time taken by the appellants to file the application for extension of time was reasonable. In our view, this is a question of fact which has to be decided on case -by case basis. In **Samwell Mussa Ng'omango (as a legal representative of the Estate of the late Masumbuko Mussa) vs. A.I.C. (T) Ufundi**, Civil Appeal No. 26 of 2015 (unreported), a single judge of the Court having considered the circumstances of the case observed that:-

"In my firm view the appiicant acted promptly and diligently having filed the present application in less than 20 days since he obtained the certificate".

Conversely, in **Hamis Mohamed (as the Administrator of the Estate of the late RISASI NGWALE) v. Mtumwa Moshi (as the Administered of the Estate of the late MOSHI ABDALLAH),** Civil Application No. 407/17 of 2019 (unreported), a single judge of the Court considered a period less than 30 days to be reasonable time. In her own words, the single justice of the Court stated as follows:-

"After the latter application was struck out, the applicant took hardly a month to file the present application seeking for extension of time to file an appeal. In other words, the applicant was diligent all along to file an appeal".

In the circumstance of this matter and considering the fact that, the appellants are unrepresented laypersons and they have been so right from the trial, we think that, 22 days was a reasonable time for collecting copies of the ruling and drawn order in the struck- out appeal and for preparation of a meaningful application for extension of time. It seems to us that, appellants acted promptly and without negligence in applying for extension of time within which to lodge a fresh appeal.

In the upshot and for the foregoing reasons, we find the appeal with merit. It is accordingly allowed. The ruling of the High Court refusing to grant extension of time is set aside and substituted with an order granting the appellants 30 days period from the date hereof, within which to file a fresh appeal. We shall not give an order as to costs in the circumstances.

Ordered accordingly.

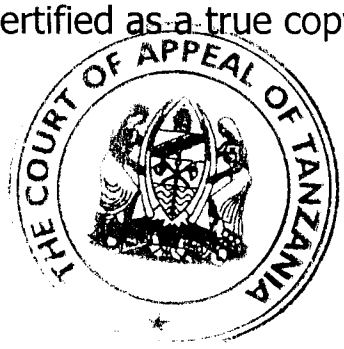
DATED at **DAR ES SALAAM** this 27th day of July, 2021

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 28th day of July, 2021 in the absence of the 1st Appellant and 2nd appellant present in person unrepresented. Mr. Japhet Muro, learned Counsel represented the Respondent is hereby certified as a true copy of the original.



S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL