

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CIVIL APPLICATION NO. 388/01 OF 2020

ELIAS KAHIMBA TIBENDERANAAPPLICANT

VERSUS

**INSPECTOR GENERAL OF POLICE }
THE HON. ATTORNEY GENERAL }RESPONDENTS**

**(Application for extension of time from the decision of the High Court
of Tanzania, at Dar es Salaam)**

(Mandia, J.)

dated the 15th day of July, 2008

in

Civil Case No. 15 of 2006

.....

RULING

20th July & 9th August, 2022

MWANDAMBO, J.A.:

Before me is application for extension of time within which to apply for review from the Court's decision in Civil Appeal No. 115 of 2008. The Court dismissed that appeal for being time barred in its ruling delivered on 17/04/2013.

The application, made by way of notice of motion is predicated on rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is supported by the applicant's own affidavit narrating what transpired between 17/04/2013 when the Court dismissed to the date

of filing the present application. Significantly, after the order dismissing the appeal, the applicant lodged an application for review; Civil Application No. 89 of 2013 which was struck out on 17/02/2014. The affidavit narrates series of unfruitful efforts by the applicant to pursue his rights until 17/09/2020 when the applicant lodged the application. Stripped of anything else, the applicant seeks to ask the Court in the intended application to review its decision primarily because it dismissed his appeal instead of striking it out.

Not surprisingly, the respondents resting the application through an affidavit in reply deposed to by Ms. Selina Kapange, learned State Attorney learned State Attorney contains denying most of the averments in the applicant's affidavit. In para 18 thereof, the deponent avers that not only has the applicant failed to disclose sufficient cause in favour of the order sought in the notice of motion, but also has he has not shown any ground for the Court's determination in the intended application.

The applicant appeared in person to prosecute his application during the hearing and asked the Court to grant the application on the basis of the written submissions he had lodged earlier on. For

the respondent, Ms. Selina Kapange, entered appearance assisted by Ms. Zamaradi Johannes, learned State Attorney.

In his written submissions, the applicant attributes his delay to the unsuccessful applications in this Court and the High Court seeking remedies aimed at reinstating his appeal but in vain. Even though neither in the notice of motion nor in the founding affidavit nothing is said of the grounds in the intended application for review, the applicant has listed nine matters which he considers to be the grounds in the intended application if the Court extends the time as prayed. On the whole, the matters boil down to the complaint that, in dismissing the appeal, the Court was more obsessed with technicalities than substantive justice. In an unconventional way, applicant has gone a step further which is not so unconventional insinuating the Court for allegedly colluding against him in dismissing his appeal for being time barred despite the fact that he had obtained a certificate of delay excluding the time required for obtaining requisite documents for the purposes of the abortive appeal.

The above aside, it is contended that the dismissal of the appeal infringed the applicant's constitutional right of equality before the

law, freedom to participate in public affairs and right to be heard. He thus implores the Court to grant the application.

The learned Senior State Attorney has argued in her submission in reply, rightly so in my view, that the grant of an order for extension of time is discretionary upon the applicant disclosing good reasons for the delay. She relies on the Court's decision in **Kalunga and Company Advocates v. NBC Ltd** [2006] T.L.R 235 for the proposition that the Court's wide discretion to extend time presupposes that the applicant has explained away the delay or placed some material upon which the Court can exercise the discretion in his favour. The learned Senior State Attorney argues that the applicant has not surmounted that hurdle. Amplifying, Ms. Kapange argues that neither has the applicant accounted for each day of the delay nor has he pointed out any error or illegality in the impugned decision warranting the exercise of the Court's discretion in line with the holding in **The Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] T.L.R. 387. She thus urged me to dismiss the application.

With the foregoing, I will now turn my attention to a discussion on the competing arguments in the light of the averments in the affidavit and rule 10 of the Rules which stipulates:

10. *"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 the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to that time as so extended" [emphasis added].*

It is common ground that following the dismissal of the applicant's appeal on 17/04/2013, the applicant has been in court corridors pursuing various remedies to resuscitate his appeal. Whether the efforts taken by the applicant were appropriate or not is beyond my consideration. What is important for me in this application is the undisputed fact that the applicant did not sit idle. He was busy in court pursuing unsuccessful remedies until 07/08/2020 when the High Court (Mlyambina, J.) dismissed his last of his applications in Misc. Civil Application No. 383 of 2019, hence, the filing of the instant application before the Court. Such kind of the delay is what is

otherwise referred to as a technical delay which has been held to be excusable in various Court's decisions, amongst others, **China Henan International Co-operation Group v. Salvand Rwegasira**, Civil Reference No. 22 of 2005 referred in **Bharya Engineering & Construction Co. Ltd vs. Hamud Ahmed Nassor**, Civil Application No. 342/01 of 2017(both unreported).

The application was filed in this court on 17/09/2020, a period of 40 days following the dismissal of the applicant's latest application by the High Court. Ms. Kapange has strongly argued that the applicant has not accounted for the delay in lodging the application after the dismissal of his application in a ruling delivered on 07/08/2020. Para 23 of the affidavit says as much but without more.

Consistent with rule 10 of the Rules, the Court has underscored several factors to be considered in applications for extension of time which include, reason for and length of the delay, explanation accounting for such delay and in appropriate cases, existence of a point of law or illegality of sufficient public importance in the impugned decision. See for instance; **Vallambhia Lyamuya Construction Co. Ltd v. Board of Trustees of the Young Women Christian Association**, Civil Application No. 2 of 2010

(unreported). The above reinforces the well-established principle that a litigant who wishes the Court to extend time has an obligation to explain away each day of the delay. See also; **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. 10 of 2015 (unreported).

The chronology of events in the affidavits does not explain what transpired between 07/08/2020 to 17/09/2020 when the applicant filed his application. Confronted with a similar application, in **Sebastian Ndaula V. Grave Rwamafa (Legal Personal Representative of Joshwa Rwamafa)**, Civil Application No. 4 of 2014 (unreported), the Court made the following observation which is relevant this application thus:

*"...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: see-**Bariki Israel vs. The Republic**, Criminal Application No. 4 of 2011(unreported). The need to account each of the days of delays becomes even more important where matters subject of appeal like the present one is, was decided eighteen years ago on 6/02/1997." [at page 8].*

The impugned decision, subject of the intended application for review, was made on 17/04/2013; well in excess of nine years.

Technical delay aside, as alluded to earlier on, the applicant has not offered any explanation for the delayed filing of his application extending to as many as 40 days reckoned from the date the High Court dismissed his application. In the absence of such an explanation, it will be difficult for the court to exercise its discretion in his favour considering that it has long been settled that the court's discretion must be exercised judiciously on the material placed before it as opposed to sympathy or capriciousness. The sentiments echoed by then learned Chief Justice of Tanganyika, Sir Ralph Windham in **Daphne Parry v. Murray Alexander Carson** [1963] EA 546 are as relevant today as they were 59 years ago. The learned Chief Justice made reference to extracts from the works of **Rustomji, Law of Limitation** 5th edition and stated:

"It does not seem just that an applicant who has no valid excuse for failure to utilize the prescribed time, but tardiness, negligence or ineptitude of counsel should be extended extra time merely out of sympathy for his cause."

The Court subscribed to the above sentiments in **Allison Xerox Sila v. Tanzania Harbours Authority**, Civil Reference No. 14 of 1998 and **Daud s/o Haga v. Jenitha Abdon Mchafu**, Civil

Application No.19 of 2006 (both unreported). That will be to demonstrate the difficulty the applicant has in his application.

Even though the applicant did not point out any illegality or point of law in the impugned decision to justify the order sought, I have to consider it is all the same in view of the contentions in the written submissions. It the applicant's contention that the order of the Court constituted an illegality in so far as it dismissed his appeal instead of striking it out. Be that as it may, I do not think that he has made out his case in that regard. At the risk of being pre-emptive of the merits in the intended application, the claimed illegality falls short of the criteria of illegality underscored in **The Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** (supra) and **Lyamuya Construction Co. Ltd** (supra). In the latter application, the Court stated:

"The Court ... 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 the record, such as the question of jurisdiction; not one that would be discovered by a long-drawn argument or process."
[at page 9].

In my view, whether or not it was illegal for the Court to dismiss the appeal will require a long-drawn argument but to cap it all, the issue has no sufficient public importance to constitute a ground for exercising the Court's discretion in the applicant's favour.

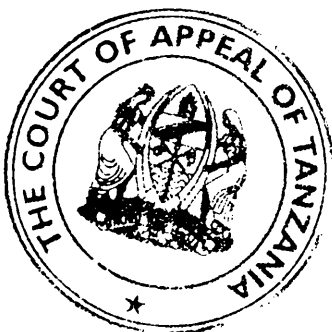
On the whole, the applicant has failed to surmount both hurdles; accounting for the delay and/or showing illegality in the impugned decision worth the Court's attention. The application must be and his hereby dismissed. Considering the nature of the application, each party shall bear own costs.


It is so ordered.

DATED at DAR ES SALAAM this 2nd day of August, 2022.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Ruling delivered this 9th day of August, 2022 in the presence of applicant in person and Ms. Lightnes Msuya, learned State Attorney for the Respondents, is hereby certified as a true copy of the original.




J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL