

**IN THE COURT OF APPEAL OF TANZANIA  
AT MWANZA**

**CIVIL APPLICATION NO. 228/08 OF 2022**

**FATUMA MOHAMED ..... APPLICANT**

**VERSUS**

**CHAUSIKU SELEMA ..... RESPONDENT**

**(Application for extension of time to lodge a notice of appeal from the  
Judgment and Decree of the High Court of Tanzania Mwanza  
District Registry)**

**(Hon. Ebrahim, J.**

**Dated 8<sup>th</sup> day of April, 2016**

**in**

**Land Case No. 13 of 2012**

\*\*\*\*\*

**RULING**

2<sup>nd</sup> & 7<sup>th</sup> December, 2022

**MAIGE J.A.:**

Under rules 10 and 45 A (1) (a) of the Tanzania Court of Appeal, 2009 (the Rules), the applicant applies for an extension of time to lodge a notice of appeal from the Judgment and Decree of the High Court of Tanzania at Mwanza (Ebrahim, J). The application comes as a second bite after a similar application has been dismissed by the High Court. In accordance with the notice of motion, the application is premised on two grounds. First, the applicant delayed to file the notice because of good cause. Two, the decision sought to be appealed against is tainted with illegalities, irregularities and improprieties. The factual substantiation of the grounds have been deposed in the affidavit of the applicant which

supports the motion. However, the respondent has deposed an affidavit in reply to rebut some of the facts in the affidavit.

At the hearing, the applicant appeared in person without representation whereas Mr. Deocles Rutahindurwa, learned advocate appeared for the respondent. When I invited her to address the Court on the application, the applicant fully adopted her written submissions in support of the application with no further comments. Mr. Rutahindurwa followed the same approach with some few clarifications. I have duly considered the rival submissions in line with the affidavit and the affidavit in reply. I will hereinafter consider the merit or otherwise of the same.

In her written submissions, the applicant attacks paragraphs 4,5 and 8 of the affidavit in reply to be defective in so far as they contain legal conclusions by way of inference. This, she submits, offends the rules on affidavit which prohibit an affidavit to contain extraneous matters by way of legal conclusion. In rebuttal, Mr. Rutahindurwa while criticizing the applicant for raising a preliminary objection by way of written submissions, he does not agree with her that the respective paragraphs consist of legal conclusions. In any event, submits the counsel, even if the whole affidavit in reply was to be struck out, yet the respondent would be entitled to challenge the application by way of submissions.

I have casted a glance over the respective factual depositions in the respondent's affidavit in reply. On the face of them, they would appear to contain some legal conclusions inferred from the facts therein pleaded. Strictly speaking, that is not permitted both in pleadings and affidavits. In practice however, they are sometimes used for the purpose of clarity and courts have been flexible and thus tolerable where the same do not result into failure of justice or embarrassment to the adverse party. I am inspired on this by the following commentary of the learned author Mogha, in his Mogha's Law of Pleadings in India, 15<sup>th</sup> Edition:

*"But, while the strict rule of pleadings requires that such legal inferences need not be pleaded, still sometimes in addition to the facts which are clearly pleaded, the inference is also pleaded, either for the sake of clearness or for convenience, as that sometimes makes the statements of facts more intelligible and shows their connection with each other. This has been tolerated even in England, as such pleading is , at most, unnecessary and does not affect or in any way embarrass the other party. For example, in a suit on hypothecation bond, if the defendant pleads that the bond was not attested by two witnesses, **and does not therefore amount to a mortgage**, the latter pleading may strictly be against rules, yet it may be tolerated". (page 24)*

In addition, the learned Professor Bernard C. Gavit in his article entitled "*Legal Conclusions*" published in Indiana Law Journal, Vol.9, Issue 2, 1933, article 2, commenting on the relevancy of using liberal approach in determining whether a statement is factual or a legal conclusion stated:

*"There is necessarily much latitude involved in the decision of the question as to whether or not a given word or phrase is a legal conclusion or an operative fact and does or does not give sufficient notice. What the common meaning of the word is sometimes a point which reasonable men may reasonably differ". (page 126 thereof)*

Indeed, the commentaries herein above, are in line with the principle of Overriding Objective under rule 3A(1) of the Rules which require courts of law in dispensation of justice to give precedence to substantive justice over procedural technicalities.

In view of the foregoing discussion, therefore, I am satisfied that the inferences made in the respondent's affidavit in reply much as they neither lead to failure of justice nor embarrassment to the applicant, can be tolerated without affecting the substantial validity of the affidavit. It is on that account that I will overrule the objection.

This now takes me to the substance of the application. As the law requires, the issue which I have to consider is whether good cause has

been established. Certainly, what amounts to good cause is not defined in the Rules. Nonetheless, case law provides some criteria relevant in determining its existence or non-existence . As for instance, in **Henry Muyanga v. Tanzania Communication Company Ltd**, BK Civil Application No. 8 of 2014 (unreported), it was held:

*"The discretion of the Court to extend time under Rule 10 is unfettered, but it has also been held that, in considering an application under the rule, the Court may take into consideration, such factors as, the length of the delay, the reason for the delay, the chance of success of the intended appeal, and the degree of prejudice that the respondent may suffer if the application is granted".*

A similar view was stated in **R. v. Yona Kaponda & Others** [1985]

T.L.R. 84 in the following words:

*"... as I understand it, "sufficient reasons " here does not refer only, and is not confined to delay. Rather, it is sufficient reasons for extending time, and for this I have to take into account also the decision intended to be appealed against, the surrounding circumstances, and the weight and implications of the issue or issues involved."*

The decision of the High Court the subject of the intended appeal was pronounced on 2<sup>nd</sup> May, 2016. The initial application for extension of time at the High Court was lodged on 2<sup>nd</sup> day of May, 2019. There is an interval of three years in between. The period from 2<sup>nd</sup> May, 2016 to 8<sup>th</sup> day of April, 2019 is justified on prosecution of Civil Appeal No. 225 of 2017 which was, on 2<sup>nd</sup> day of April, 2019, struck out for being incompetent. These facts are pleaded in paragraphs 1-7 of the affidavit and have not been denied in the affidavit in reply.

As the incompetent appeal was timely filed and there being no claim of negligence in prosecuting the same, it was, in view of the authority in **William Shija vs. Fortunatus Masha**, [1997] T.L.R. 213 a mere excusable technical delay. Without much ado, I hold, in the circumstance that, the period between the pronouncement of the judgment to 7<sup>th</sup> May, 2019 when the initial application at the High Court was filed has been justified.

The period between 10<sup>th</sup> April, 2019 to 18<sup>th</sup> April, 2019 has been justified on account that, the applicant was preparing and compiling the initial application. As a matter of common sense, 8 days is a reasonable period for preparation of a second bite application. I thus accept the applicant's justification for the said period.

I now remain with the 14 days period between 18<sup>th</sup> April, 2019 to 2<sup>nd</sup> May, 2019. In the affidavit, the applicant associates the delay with the court's admission and registration process. In paragraphs 10, 11,12 and 13 of the affidavit, she claims to have presented the documents for filing on 18<sup>th</sup> day of April, 2019 and which were endorsed by a court clerk to that effect. Despite her several follows up, she deposes, it was not until on 2<sup>nd</sup> May, 2019 when she was informed that the admission process was complete. That, when she was supplied with the documents, she noted that, by correction fluid, the date for receipt in the rubber stamp had been altered to read 2<sup>nd</sup> day of May, 2019. On enquiry, it is in her affidavit, she was notified that the change was made so as to reflect the correct date when the admission process came into completion. She went on deposing that, she could not make payment of filing fees on the same day because the control number was not available due to network problem. She was able to procure the control number on 7<sup>th</sup> day of May, 2019 and on the same day she paid the filling fees and completed the filing process.

The applicant submits, correctly in our view that, in accordance with paragraphs 4,5 and 8 of the affidavit in reply, the said claim has not been seriously denied. The affidavit in support of the application, I have noted, was signed on 17<sup>th</sup> April, 2019 and attested on 18<sup>th</sup> April, 2019. This would support the applicant's claim that, she presented the application for

admission on 19<sup>th</sup> April, 2019. There being no specific denial in the affidavit in reply of the claim, I find no justification why I should not believe it. I have also considered the fact that the applicant is unrepresentative layperson. Since I have accepted the factual justification for the delay, I shall not consider the second ground as to illegality.

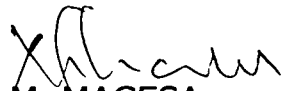
In the upshot and for the reasons as afore stated, I find the application with merit. It is accordingly granted with costs. The notice of appeal should be filed within 30 days from the date hereof.

Ordered accordingly.

**DATED at MWANZA** this 5<sup>th</sup> day of December, 2022.

I. J. MAIGE  
**JUSTICE OF APPEAL**

The Judgment delivered on 2<sup>nd</sup> day of December, 2022 in the presence of the Fatuma Mohamed, applicant present in person and Ms. Chausiku Selema, respondent present in person, is hereby certified as a true copy of the original.

  
C. M. MAGESA  
**DEPUTY REGISTRAR**  
**COUTY OF APPEAL**