

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

CIVIL APPLICATION NO. 633/08 OF 2021

KIKUNDI CHA NZENGO HALWEGO.....APPLICANT

VERSUS

HOSEA OBEDI.....RESPONDENT

**(Application from the Ruling of the High Court of Tanzania
at Mwanza)**

(Mnyukwa, J.)

dated 28th day of September, 2021

in

Misc. Civil Application No. 107 of 2021

.....

RULING

06th & 07th December, 2022.

KITUSI, J.A.:

It is not clear if the applicant is a legal person, but it has been litigating with the respondent. The matter commenced at Ukerewe Primary Court. As it were, an appeal to the Court in a matter that commenced at that level requires certification of points of law, but the applicant did not timely apply for the same. It applied to the High Court for extension of time within which to apply for that certificate, but the application was refused.

In terms of rule 45A (1) (c) of the Court of Appeal Rules, 2009 (the Rules) the applicant is making a second bite application for extension of time. The supporting affidavit cites one major reason for the delay, and that is that the applicant was not given a copy of judgment to enable it apply for certificate until when it was time barred. According to the affidavit, judgment was delivered on 30/06/2021 and the applicant wrote to request for copies on 14/07/2021. The affidavit is silent as to when the said documents were supplied to the applicant.

Mr. Mussa Mhingo, learned advocate who represented the applicant at the hearing, submitted from the bar that the documents were supplied to the applicant on 30/07/2021. The learned advocate explained the absence of documentary proof of that fact by arguing that the proceedings were conducted virtually. He prayed for the application to be granted as, according to him, the applicant acted diligently.

The respondent was represented by Mrs. Leticia Sabas Lugakingira, also learned advocate, who resisted the application on the ground that the copy of judgment was ready for collection on the same date of delivery, that is, 30/06/2021. The reason she held that view was that, after the delivery of that judgment virtually, the registry officer of the High Court informed her by phone that she could collect it

(judgment) on that very day. The learned counsel further submitted that even if the applicant was not given similar information by the registry officer as assumed, it must be taken that on 14/07/2021 when the applicant wrote to request for the documents, they were, by that date, ready for collection. She submitted also that since the affidavit is silent as to when the documents were supplied to the applicant, the possibility that they were supplied earlier than 30/08/2021 cannot be overruled.

At the outset, I need to emphasize that the person who prosecutes an application for extension of time must account for each day of the delay. See **Hassan Bushiri v. Latifa Lutao Mashayo**, Civil Application No. 3 of 2007 (unreported). In this case, the period to be accounted for is between 30/06/2021 when the judgment was delivered to 20/08/2021 when the first application for extension of time, vide Civil Application No. 107 of 2021, was lodged. The Court has held previously that determination of good cause for the delay in applications of this nature is based on what is stated in the affidavits. See **Ahmed Teja t/a Almas Auto Parts Limited v. Commissioner General TRA**, Civil Appeal No. 283 of 2021, citing **Richard Mchau v. Shabi F. Abdulhussein**, Civil Application No. 87 of 2008 (both unreported).

Ironically, and to the concession of Mr. Mhingo himself, the affidavit filed by the applicant does not allude to the date of the supply of the requisite document for purposes of lodging the application for certificate. In view of the affidavit in reply stating that the documents were ready for collection since 30/06/2021, the applicant has not surmounted the duty to prove that it obtained them on any other later date. The contention by Mr. Mhingo that some steps cannot be proved because the proceedings were virtual is, with respect, feeble, because that mode of conducting proceedings did not preclude the applicant from raising that fact in its affidavit.

In the case of **Ahmed Teja** (supra), we reproduced this paragraph from **Richard Mchau** (supra): -

"It is our considered view that if the applicant was served out of time, he would not have failed to raise such alarm in the affidavit. Having not done so, we think, the respondent's contention to the effect that the applicant's assertion is an afterthought holds a lot of water".

Likewise, if the applicant pleaded in the affidavit that it wrote to request for documents on 14/07/2021 why did it leave for speculation the fact as to when those documents were supplied.

In my conclusion, the applicant has not accounted for each day of the delay as required. For that reason, the application is dismissed.

Mr. Mhingo prayed that I should not order costs because the parties are close relatives. With a lot of respect, I cannot figure out how would the applicant going by the name of KIKUNDI CHA NZENGO HALWEGO, an inanimate, be a relative of the respondent, a natural person.

The respondent shall have the costs.

DATED at **MWANZA** this 07th day of December, 2022.

I. P. KITUSI
JUSTICE OF APPEAL

The Ruling delivered this 07th day of December, 2022 in the presence of Mrs. Leticia Sabas Lugakingira, learned counsel for the Respondent and in the absence for the Applicant, is hereby certified as a true copy of the original.


C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL