

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: NDIKA, J.A., SEHEL, J.A. And KAIRO, J.A.)**

**CIVIL APPLICATION NO. 176/08 OF 2020**

**HOTEL & LODGES (T) LTD ..... APPLICANT**

**VERSUS**

**R.S. NKYA t/a R.S. NKYA WATER BOWSER & SPARES ..... RESPONDENT**

**(Application for leave to appeal from the Decision of the  
High Court of Tanzania at Mwanza)**

**(Ismail, J.)**

**dated the 17<sup>th</sup> day of July, 2019**

**in**

**Misc. Civil Application No. 125 of 2018**

**.....**

**RULING OF THE COURT**

9<sup>th</sup> November 2022 & 05<sup>th</sup> April, 2023

**KAIRO, J.A.:**

By way of notice of motion lodged on 26<sup>th</sup> March, 2020, the applicant is seeking leave to appeal to Court against the decision of the High Court in Misc. Civil Application No. 125 of 2018 dated 17<sup>th</sup> July, 2019 following her unsuccessful attempt to get the same at the High Court in Misc. Civil Application No. 118 of 2019. The application is predicated on Rule 45 (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and supported by an affidavit deposed by Frank Kilian, the applicant's advocate. It is resisted by an affidavit in reply sworn by

Richard Shifrael Nkya, the respondent. No written submissions were filed for or against the application.

A brief background as gathered from the documents accompanying the application is to the effect that, being aggrieved by the decision of the District Court of Serengeti at Mugumu in Civil Case No. 5 of 2013 delivered ex parte, the applicant filed Misc. Civil Application No. 08 of 2016 at the same court praying from it to set aside the ex parte decision. The application was struck out for incompetence following a preliminary objection raised by the respondent to the effect that the proper course to take was to appeal against the said decision. Being out of time to file an appeal, the applicant sought an extension of time to file the intended appeal through Misc. Civil Application No. 217 of 2016, but the same was struck out. Subsequently, she applied for the extension of time vide Misc. Civil Application No. 125 of 2018 which was dismissed for failure to exhibit sufficient cause to warrant the grant of the prayer sought. The applicant thus decided to apply for leave to appeal to the Court to challenge the decision reached in Misc. Civil Application No. 125 of 2018. The application was refused, hence the present application as a second bite.

The grounds upon which leave is sought according to the notice of motion filed by the applicant is that there exist considerable points of law for the Court's consideration as follows:-

- (a). Whether the trial Judge did properly exercise his discretion vested by law in refusing the extension of time by the applicant.
- (b). Whether the reason for the delay stated by the applicant was truly insufficient to warrant the denial of the relief sought.
- (c). That the refusal order dated 12<sup>th</sup> March, 2020 vide Misc. Civil Application No. 118 of 2019 was wrongly determined.

When the application was placed for hearing before us, the applicant was represented by Mr. Frank Kilian, learned counsel as afore stated while Messrs Kassim S. Gilla and Makubi K. Makubi, both learned counsel, represented the respondent.

Submitting in support of the application, Mr. Kilian prayed to adopt the supporting affidavit. In particular, it is in paragraph 10 of the affidavit wherein he brought to the fore the point of law which according to him needs consideration and determination of the Court. According to him, the points were not properly addressed by the High Court as a result, it ended up refusing the application for the extension of time

sought by the applicant so as to appeal out of time against the decision in Civil Case No. 5 of 2013.

Amplifying on the stated points, Mr. Kilian submitted that the Learned Judge failed to properly analyse the reasons for delay exhibited by the applicant when she sought for the extension of time. It was his contention that, the Judge did not consider the fact that the copies of the judgment and decree of Civil Case No. 5 of 2013 were supplied late to the applicant. Elaborating, he stated that the said decision was delivered on 20<sup>th</sup> April, 2016 that is five months later, well beyond the time prescribed by law within which to appeal. Mr. Kilian contended that, since the Judge accepted that there was delay to get the relevant documents for appeal purpose, the same would have been a sufficient reason to extend the time sought.

Mr. Killian went on to submit that, from the time when the relevant copies for appeal purpose were availed to the applicant up to when he filed Civil Application No. 125 of 2015, the applicant was in court seeking for redress through various applications. He contended that the Hon. Judge was satisfied that the time spent in court corridors was a technical delay which is legally tolerable and referred us to page 14 of the decision in Misc. Civil Application No. 125 of 2018. He argued therefore that it was not proper for the Judge to refuse the prayer for

the extension of time sought as he did. According to him, the refusal amounts to failure by the Hon. Judge to exercise the discretion vested in him properly.

Submitting on the 2<sup>nd</sup> point which hinged on the applicant's failure to account for the delay of six days counting from 21<sup>st</sup> September, 2018 when Misc. Civil Application No. 217 of 2016 was struck out, to the time of filing application No. 215 of 2018 seeking for the extension of time, Mr. Kilian attacked the High Court Judge's finding for being incorrect. He elaborated that the days were utilized to prepare the application and eventually lodge it in Mwanza, being an advocate based in Dar es Salaam cannot in his view considered inordinate. It was his contention that the distance from Dar es Salaam to Mwanza in the circumstances, amounted to sufficient cause for delay. According to him, the indication that he is based in Dar es Salaam amounts to accounting for the six days lapse. Hence, a valid reason to warrant the grant of the extension of time sought.

Mr. Kilian also submitted that there were some irregularities in the decision of Civil Case No. 5 of 2013 that needed the Court's intervention. He argued that the presence of the said irregularities constituted sufficient reason for the High Judge to have granted the prayer of

extension sought, but he did not. He contended that the denial was an illegality that calls for the Court's guidance on appeal.

He went on that, the respondent in his affidavit in reply has deposed much on the 1<sup>st</sup> point concerning the delay due to the failure to get the necessary documents for appeal purpose. However, according to him, the point was thoroughly dealt with by the High Court Judge in his decision intended to be challenged. Thus, the point to concentrate on is the one regarding the contended failure by the applicant to account for six days of delay which was the basis for the refusal. He prayed the Court to rule out that the delay was accounted for and grant leave to enable the applicant challenge the decision in Application No. 125 of 2018.

In rebuttal, Mr. Gilla prayed to adopt the respondent's affidavit in reply. He refuted the applicant's contention that she failed to appeal within time as the copies of the Judgment and decree she intends to challenge were supplied to her late. He went on that the applicant did not write any letter to the trial Court applying for the said copies nor took any step to initiate the process for the intended appeal.

Mr. Gilla went on submitting that the reason the High Court refused to grant of the extension of time was the failure by the applicant to account for the six days of delay. He argued that, nowhere in the

applicant's affidavit the applicant had accounted for the said delay. He contended that, though the applicant has argued that the delay of six days was not inordinate but the legal position requires the applicant to account for each day of delay, adding that even a single day has to be accounted for. He cited the case of **Muse Zongari Kisere vs. Richard Kisika Mugendi and 2 Others**, Civil Application No. 244/01 of 2019 (unreported) to back up his contention. In the circumstances, he argued that the applicant's contention that the trial Judge did not exercise his jurisdiction properly has no base.

As regards the issue of irregularities in the trial court's decision, Mr. Gilla equated the contention with the words from the bar as neither in the applicant's affidavit nor in the submission had she pointed out the alleged irregularities. It was his contention that the applicant has failed to exhibit sufficient reason to warrant the grant of the prayers sought. He added that in the circumstances, the applicant cannot fault the High Court Judge for what he contended to be failure to exercise his discretion judiciously resulting in refusal to grant the extension sought. Besides, contended Mr. Gilla, that it is an established legal stance that the pointed irregularities have to be apparent on the face of the record but there is none in the decision concerned. He cited the case of **VODACOM Tanzania Limited vs. Innocent Daniel Njau**, Civil

Appeal No. 60 of 2019 (unreported). It was Mr. Gilla's contention that the applicant in the matter at hand has not even stated the alleged irregularities in the affidavit supporting the notice of motion.

Reacting to the applicant's submission regarding the refusal for leave prayed by the applicant in Application No. 118 of 2019, Mr. Gilla contended that, the High Court Judge was right to do so. He argued that the criteria for granting leave were not met as the applicant failed to point out any disturbing feature that requires the guidance of the Court as rightly analysed in the decision at issue at pages 7 to 8. He went on to submit that the application at hand, being a second bite is legally considered as a fresh one wherein the applicant is required to exhibit the deficiencies to be taken to Court to on appeal so as to qualify the grant of the prayer sought. He insisted that, the applicant however in the present application has not presented any material upon which the Court could have exercised its discretion to grant the leave sought. He concluded by praying the Court to dismiss the application with costs.

In rejoinder, the applicant submitted that, the Court in this application is just required to look at the disturbing features on appeal and not whether or not the applicant has failed to account for each day of delay.

On the absence of any disturbing feature in this application, Mr. Kilian argued that, since the High Court Judge conceded to the sufficiency of the reasons for delay as advanced by the applicant, yet refused to grant the extension of time, the said refusal by itself amounts to disturbing feature for the Court's attention. He distinguished the case of **Muse Zongari Kisere** (supra) arguing that in the cited case, accounting for the days of delay was not done at all while in the case at hand, the applicant has accounted for the days of delay. He reiterated his prayer to have the application for leave granted.

Having dispassionately considered the affidavits in support and opposition to the application, the oral submissions for and against the application together with the authorities cited, the issue that calls for our determination is whether the application has met the threshold requirements for the grant of leave to appeal. It is imperative to restate that in an application for second bite, the Court is invited to reconsider on its own perspective, a similar application that was placed before the High Court Judge and come up with its own decision as it will deem just to make. [See: **Bulyanhulu Gold Mine Limited and Two Others vs. Petrollise (T) Limited and Another**, Civil Application No. 364/16 of 2017 (unreported). In this regard therefore, we wish to state from the onset that we shall not address point (c) in the notice of motion as it

seeks to attack Application No.118 of 2019 which refused leave at the High Court.

We are alive to the fact that, the law does not expressly state the factors for consideration before granting an applicant leave to appeal. However, there is a plethora of decisions which have extensively discussed and provided for grounds and conditions for granting leave. In **Rutagatina C.L.** (supra) the Court observed as follows:

*"Needless to say, leave to appeal is not automatic. It is within the discretion of the court to grant or refuse leave. The discretion must, however judiciously exercised and on the materials before the court. As a matter of general principle, **leave to appeal will be granted where the grounds of appeal raise issues of general importance or a novel point of law** or where the grounds show a prima facie or arguable appeal...."* (emphasis added)

[See also: **British Broadcasting Corporation vs. Erick Sikujua Ng'maryo**, Civil Application No. 138 of 2004; **Rutagatina C. L. Vs. The Advocates Committee and Another**, Civil Application No. 98 of 2010 and **Safari Mwazembe vs. Juma Fundisha**, Civil Application No. 503/06 of 2021] (all unreported) to mention but a few.

Deducing from the cited authorities, much as the grant of leave lies in the Court's discretion, but it is not automatic. Rather, leave to appeal is grantable where grounds of appeal raise issues of general importance or novel point of law or where the grounds show a prima facie or arguable appeal so as not to waste the precious time of the Court as we have decided in **Harban Haji Mosi and Another vs. Omar Hilal Seif and Another**, Civil Reference No. 19 of 1997 (unreported).

Reverting to the application, the question therefore is whether or not the points raised in paragraph 10 of the applicant's affidavit passed the test as set out in the above decisions of the Court for the grant of leave to appeal.

The applicant is complaining that the High Court Judge did not properly exercise the discretionary powers vested in him by law by refusing an extension of time. According to the record of the application, the basis of refusing the prayer for an extension of time by the High Court Judge in the decision subject to challenge was a delay of six days which was found to be unaccounted for. The said delay was not disputed by the applicant. It is trite law that the applicant is to account for each day of delay, and failure to do so would result into dismissal. [See **Hassan Bushiri vs. Latifa Lutao Mashayo**, Civil Application No.

3 of 2007, **Wambura N.J. Waryuba vs. The Principal Secretary Ministry of Defence and Another**, Civil Application No. 320 of 2020] (both unreported).

Mr. Kilian has also argued that six days lapse was tolerable and not inordinate, but it is a settled law that even a single day has to be accounted for. [See: **Bushfire Hassan vs. Latina Lucia Masaya**, Civil Application No. 3 of 2003 (unreported)]. For the aforesaid reasons, we are convinced that there is no novel point of law worth for consideration by the Court.

Mr. Kilian has also argued that the decision in Application No. 125 of 2018 is riddled with an illegality which calls for the intervention of the Court which argument was refuted by Mr. Gilla. According to Mr. Kilian, the High Court Judge conceded to the sufficiency of the reasons for delay but went on to refuse the application for extension of time, the refusal which according to him is an illegality and a disturbing feature calling for Court's intervention. With much respect, we do not subscribe to Mr. Kilian this argument right away. Suffice to state that, the alleged illegality has not been stated in his affidavit, thus, legally is a mere statement from the bar which cannot be considered by the Court. [See: **Ahmed Teja t/a Almas Auto Parts Limited vs. Commissioner General TRA**, Civil Application No. 283 Of 2021] (unreported).

Flowing from the above discussion, we are constrained to rule out that we did not find any point of general importance or novel point of law to warrant the grant of the leave sought and thus, the application has not passed the test as set out for the grant of leave. We proceed to dismiss it with costs.

**DATED at DAR ES SALAAM this 05<sup>th</sup> day of April, 2023.**

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

B. M. A. SEHEL  
**JUSTICE OF APPEAL**

L. G. KAIRO  
**JUSTICE OF APPEAL**

The Ruling delivered this 05<sup>th</sup> day of April, 2023 in the presence of Mr. Frank Killian, learned counsel for the applicant and Mr. Florence Ernest holding brief for Mr. Kassim Gilla, learned counsel for the Respondent, is hereby certified as a true copy of the original.



  
R. W. CHAUNGU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**