

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

**CIVIL APPLICATION NO. 30/08 OF 2022**

**SABINA MASALU MHALAGANI..... APPLICANT**

**VERSUS**

**JULIUS MASALU.....1<sup>ST</sup> RESPONDENT**

**MONICA MASALU.....2<sup>ND</sup> RESPONDENT**

**JULIANA MASALU.....3<sup>RD</sup> RESPONDENT**

**MAYUNGA CHRISTOPHER .....4<sup>TH</sup> RESPONDENT**

**ALOYCE MASALU.....5<sup>TH</sup> RESPONDENT**

**(Application for extension of time to lodge a notice of appeal from the  
decision of the High Court of Tanzania at Mwanza)**

**(Rumanyika, J.)**

**dated the 10<sup>th</sup> day of May, 2019**

**in**

**Probate and Administration Cause No. 3 of 2017**

.....

**RULING**

*22<sup>nd</sup> & 25<sup>th</sup> August, 2023*

**MWANDAMBO, J.A.:**

The applicant was aggrieved by the decision of the High Court at Mwanza (Rumanyika, J. as he then was) made on 10/05/2019 which nullified a will of her deceased father; Christopher Masalu Mhalagani in Probate and Administration Cause No. 3 of 2017. Her appeal in Civil Appeal No. 268 of 2019 was struck out by the Court on 15/07/2022 for being time barred.

The applicant's quest to seek extension of time to lodge a fresh notice of appeal towards institution of her appeal hit a snag before Mnyukwa, J. who dismissed that application having been satisfied that the applicant had not sufficiently accounted for the delay. The applicant is now before the Court on a second bite application for extension of time predicated upon rules 10 and 45A (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

The application is supported by the applicant's own affidavit which gives a narrative of the sequence of events up to the striking out of Civil Appeal No. 268 of 2019 and the subsequent efforts to seek extension of time before the High Court in an application which was refused by the High Court on 16/12/2022. It is averred further that the applicant is currently living in Dar es Salaam and thus her advocate had to send documents to her for signature, before being sent back to Mwanza for filing in Court. The respondents did not file any affidavits in reply but, Mr. Julius Mushobozi, learned advocate representing the appeared at the hearing resisting the application, nevertheless.

Mr. Innocent John Kisigiro, learned advocate appeared before me to prosecute the application on behalf of the applicant. The learned advocate adopted the averments in the affidavit which, as I said earlier on, are a narrative of what transpired after the dismissal of the probate cause and striking out of Civil Appeal No. 268 of 2019.

Essentially, the learned advocate for the applicant urged me to find that the applicant has not sat idle in pursuit of her right against the decision of the High Court sought to be appealed against. It was his submission that the delay was, but a technical rather actual which is excusable. He relied upon the Court's decision in **Geita Gold Mining Limited v. Anthony Karagwa**, Civil Appeal No. 42 of 2020 and **Hamis Mohamed (as the Administrator of the Estate of the late Risasi Ngawe) v. Mtumwa Moshi (as the Administratrix of the Estate of the late Moshi Abdallah)**, Civil Application No. 407/17 of 2019 (both unreported) to argue that the applicant's application for extension of time is timeous considering that she has been in court pursuing her legal right and so the time spent during such pursuit ought to be excluded from computing the time limitation for lodging a fresh notice of appeal.

In his reply, Mr. Mushobozi resisted the application arguing that, contrary to the applicant's contention, the averments in the affidavit are insufficient to warrant the Court's exercise of its discretion and grant of the application. According to him, the averments reveal actual rather than technical delay. The learned advocate contended that in this case, although the applicant was indeed pursuing her right in court, her appeal was struck out for being time barred and thus hers was not a technical delay regardless her first notice of appeal having been lodged in time. It was urged that, since the facts reveal actual delay, the applicant was bound to account for the whole period including the period she was in court.

Rejoining, Mr. Kisigiro reiterated that the facts support technical rather than actual delay because, much as the applicant's appeal was struck out for being time barred, that was not the same thing as saying that the first notice of appeal was also lodged out of time.

The nagging issue in applications such as this one is whether good cause has been shown for the Court's exercise of its discretion under rule 10 of the Rules. As the Court stated in **Mwita s/o Mhere v. Republic** [2005] T.L.R. 107 and in many other cases, discretion

must be exercised judiciously based on what is fair by taking into account all relevant factors to the matter and refusing to act capriciously, arbitrarily on personal whims and sympathy.

Despite his concession on averments in the affidavit, Mr. Mushobozi was emphatic that the applicant has not shown good cause in support of the order sought by her failure to account for each day of delay regardless of her claim that she was caught by technical delay. Although he cited no authority for his argument, there is no doubt that, the learned advocate had in mind the decision in **D.N. Bahram Logistics Ltd. & Another v. National Bank of Commerce Limited & Another**, Civil Reference No. 10 of 2017 (unreported) in which the Court underscored the underlying principle behind the concept technical and actual delay. The concepts were first discussed in **Fortunatus Masha v. William Shija** [1997] T.L.R. 154 and **Salvand K.A. Rwegasira v. China Henan International Group Co. Limited**, Civil Reference No. 18 of 2006 (unreported) guiding the courts in applications for extension of time. Having revisited the concepts in the two previous decisions, the Court made a distinction between excusable technical delay from a palpable one. It stressed that, the former can only be excusable where the first action

was preferred timeously but struck out for incompetence and not where it was struck out for being time barred.

The position in this application is that, the applicant's first appeal was struck out by the Court for being time barred. There is no dispute that the applicant's first notice of appeal was lodged in time but disappeared upon the striking out of the underlying appeal for being time barred. Under the circumstances, it seems to me that the Court's decision in **D.N. Bahram** (supra) is distinguishable from the facts in the instant application.

With respect, I do not share Mr. Mushobozi's view that the applicant was caught up in an actual delay. On the contrary, I hold that the applicant was held up in a technical delay after striking out of her appeal being time barred for failure to serve a copy of a letter on the respondent's advocate which would have entitled her to the exclusion of time necessary for the preparation and delivery of certified copies of documents for appeal purposes. Logically, that had nothing to do with the delay in lodging a notice of appeal which disappeared with the appeal upon being struck out. In my view, it would have been a different thing altogether had the notice of appeal

remained intact and the applicant was seeking extension of time to institute her appeal. Consequently, as the respondents did not controvert the facts explaining the delay in the affidavit, I am satisfied that the applicant has shown good cause for the exercise of the Court's discretion under rule 10 of the Rules.

In the upshot, I grant the application and extend the time to lodge a notice of appeal not later than 30 days from the date of this order. Considering the nature of the dispute from which the application has arisen on which both counsel agree, I order that each party shall bear own costs.

It is so ordered.

**DATED at MWANZA this 25<sup>th</sup> day of August, 2023.**

L. J. S. MWANDAMBO  
**JUSTICE OF APPEAL**

The Ruling delivered this 25<sup>th</sup> day of August, 2023 in the presence of Mr. Innocent John Kisigiro, learned counsel for the Applicant who took brief for Mr. Julius Mushobozi, learned counsel for the Respondent, is hereby certified as a true copy of the original.



  
A. L. KALEGEYA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**