

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

CIVIL APPLICATION NO. 251/05 OF 2023

**CUTHBERT ROBERT KAJUNA
t/a C.R KAJUNA & COMPANY.....APPLICANT**

VERSUS

EQUITY BANK TANZANIA LIMITED.....RESPONDENT

**(Application for extension of time within which to file written submission in
support of Civil Appeal No. 137 of 2022 against the decision
of the High Court of Tanzania at Moshi)**

(Mwenempazi, J.)

dated the 8th day of November, 2021

in

Civil Case No. 10 of 2018

.....

RULING

29th August & 01st September, 2023

MASOUD, J.A.:

This is an application for extension of time within which to file written submission in Civil Appeal No. 137 of 2022. The application is by way of a Notice of Motion which was taken out under rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules). The same is supported by an affidavit, duly sworn by the applicant. In addition, the applicant has filed written submissions in support of the application. The application has, however, been opposed by the respondent in an affidavit in reply as well as in written submissions in opposition.

When the application was called on for hearing before me, the applicant appeared in person and he was represented by Ms. Fatuma Amiri, learned advocate. The respondent was represented by Mr. Edwin Lyaro, learned advocate. Both parties adopted their affidavits and written submissions.

In his affidavit, the applicant told this Court that the main reason for his failure to submit his written submission in time was due to negligence of his former advocate, one, Mr. Dismas Raphael, who in September 2022 decided to withdraw from representing the applicant. According to the applicant, the withdrawal was communicated to him by text messages. Mr. Raphael, however, advised the applicant to engage another advocate.

The applicant said that on 19/4/2022, Mr. Raphael had filed an appeal before this Court for the applicant. In relation to such appeal, Mr. Raphael was also supposed to file written submission in support of the appeal after lodging the record of appeal. Very unfortunately, he did not lodge one, and the applicant was not informed. Thus, having withdrawn from representing the applicant, the applicant had to engage another advocate, one, Ms. Fatuma Amiri, to represent him in the Civil Appeal No. 137 of 2022 pending before this Court.

After the handing over of the record of appeal, Ms. Amiri perused the record of appeal on 10/11/2022 and 11/11/2022. Consequently, she advised the applicant to file the application at hand in order to be able to file written

submissions as the same were not filed by the former learned advocate. As the time within which the said written submissions could have been filed had already expired, the applicant was advised to apply for extension of time. Henceforth, the application at hand was filed on 16/11/202.

To buttress her argument, Ms. Amiri referred this Court to the case of **Kambona Charles (As an administrator of the Estate of the Late Charles Pangani vs. Elizabeth Charles**, Civil Application No.529/17 of 2019 (unreported), where the Court cited with approval the case of **Zuberi Mussa v. Shinyanga Town Council**, Civil Application No. 3 of 2007 (unreported), and held that:

"Advocates are human and they are bound to make mistakes sometime in the course of their duties. Whether such mistakes amount to lack of diligence is a question of fact to be decided against the background and circumstances of each case. If, for instance, an advocate is grossly negligent and makes the same mistake several times, that is lack of diligence. But if he makes only a minor lapse or oversight only once and makes a different one next time that would not, in my view, amount to lack of diligence".

Picking up from the above holding, Ms. Amiri said that the lapse of time which occurred is the result of negligence of the advocate which happened once without knowledge of the applicant.

Had the applicant known about filing the same, he would have acted diligently, as he did when filing the application at hand. Ms. Amiri submitted that it was on 11/11/2022 when the applicant was advised to file the application at hand. The applicant acted diligently on the advice and filed the instant application on 16/11/2022. In this application, therefore, the applicant seeks to meet the end of justice. Ms. Amiri added that, the submissions to be eventually filed would not prejudice the respondent but enable the Court to make a decision which is conclusive.

The applicant raised another reason of illegality in the impugned judgment. With regard to such illegality, she referred me to the copy of the impugned judgment annexed to the affidavit in support. In doing so, she endeavoured to expound on what in her view amounted to an illegality alleged by the applicant for purpose of the instant application.

Ms. Amiri rested her submission, emphasising that, the applicant has managed to account for each day of delay from the moment he knew about the need to file the written submissions, and that the delay is not inordinate. She relied on the case of **The Attorney General vs. Emmanuel Maragakis (As attorney of Anastansious Anagnostou) & 3 Others**, Civil

Application No.138 of 2019 on the position that illegality is a sufficient cause warranting granting of extension of time.

In reply, Mr. Lyaro, submitted that, the applicant's counsel did not comply with rule 32(2) of the Rules. Thus, the Court is not aware that the applicant is represented by Ms. Amiri. He also, submitted that the content of the illegality is neither shown in the applicant's affidavit, nor clearly explained to warrant the respondent to respond on it.

In any case, Mr Lyaro argued, the prayer before the Court is not necessary because failure to file written submissions is not fatal as it does not vitiate the appeal. He referred this Court to rule 106(10) (b) and (11) of the Rules, saying that the applicant is entitled to argue his appeal even if there was no written submission lodged. In the end, Mr. Lyaro prayed the application to be dismissed with costs.

In rejoinder, Ms. Amiri submitted that the application is necessary because, according to rule 106(10) (b)and (11) of the Rules, one who has not filed written submissions is only allowed to argue his appeal orally within 30 minutes, and that failure to file written submission is not a ground for asking more time to make submission orally, except if the Court deems it proper to do so. In her view, the application is necessary because the applicant once given extension of time to file the submission would on the hearing adopt the

written submissions and use the 30 minutes or less to make necessary clarifications.

As regards to the issue of illegality, Ms. Amiri said that, the particulars are in the memorandum of appeal annexed to the application and that in the application for extension of time the applicant is just required to raise allegation of illegality. As to the instruction, Ms. Amiri said that the filed application particularly in paragraphs 7 and 8 of the affidavit in support satisfy the court that she (i.e Ms. Fatuma Amiri) has been engaged by the applicant to represent her in the pending appeal, and that the former advocate has indeed withdrawn himself from representing the applicant.

I have had regard to the strength of the rival arguments from both parties. It is settled law that whether to grant or refuse an application like the one at hand is entirely in the discretion of the Court. The discretion is however judicial and must be exercised according to the rules of reason and justice. See: **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. 10 of 2015 (unreported) relied on by Mr Lyaro. From the affidavits, written submissions and oral submissions by the two learned advocates, there are two issues which I must consider in the exercise of my judicial discretion to extend time under rule 10 of the Rules.

The first issue is whether the applicant has accounted for all the days of the delay that occurred. That is, from moment he became aware of the need

to file written submission which is, on 11/11/2022 when the applicant received advice from the advocate to file an application for extension of time to file written submission, and on 16/11/2022 when the applicant finally lodged the instant Motion seeking extension of time. The second issue is whether the explanation that the delay was occasioned by the former advocate of the applicant constitutes good cause under rule 10 of the Rules to warrant extension of time.

It is alleged that there was negligence committed by the previous advocate of the applicant which attributed to the applicant's failure to file the written submission on time. The applicant trusted his advocate and entrusted him with the progress of his case. The advocate did not file the written submission for no apparent reason. The applicant only knew about such failure after instructing Ms. Amiri. It was after Ms. Amiri perused the record of appeal on 11/11/2022 that the applicant promptly filed this application on 16/11/2022.

I am thus satisfied that the delay was not inordinate, and was not due to the applicant's mistakes but that of his former advocate although I am not saying that the said advocate was negligent. See the case of **Kambona Charles (As an administrator of the Estate of the Late Charles Pangani vs. Elizabeth Charles** (Supra), and **Felix Tumbo Kissima v. TCCL Ltd** [1997] TLR 57.

It is clear that the applicant made determined efforts to pursue the matter upon being made aware of the flaws. I find this to be a reason good enough to the satisfaction of this court to be able to exercise its discretion to grant extension of time to file his written submission.

The argument that there is an issue of illegality which was alleged in the application should not detain me much. I say so because the alleged illegality is not apparent on the face of the record neither did the applicant allege it as a ground for extension of time in his application. It was not surprising that the learned advocate struggled to impress me that the alleged illegality was raised and could easily be grasped from not only the impugned judgment but also from the copy of the memorandum of appeal annexed to the affidavit in support. I was however not referred to or shown any single paragraph in the notice of motion or the affidavit in support alleging the illegality. See, **Lyamuya Construction Company Ltd versus Board of Registered Trustee of Young Women's Christian Association of Tanzania** Civil Application No. 2 of 2010 (unreported).

On the issue of instruction, although there is no proper notification by the applicant to the registrar on the change of an advocate, it is clear through the applicant's affidavit in paragraph 8, that on 9/11/2022 the applicant instructed Ms. Amiri to represent him in his appeal, and that act did not prejudice the respondent in anyway. As far as I am concerned, the failure of

the applicant to file the notice of change of an advocate is not fatal to the instant application. In other words, for the purpose of the instant application, I do not see that the failure to file the said notice of change of advocate is fatal to the instant application. See, **General Manager African Barrick Goldmine LTD vs. Chacha Kiguha & 5 Others**, Civil Appeal No. 50 of 2017 (unreported).

Applying the foregoing statement of principle to the case at hand, I am persuaded that the applicant has shown good cause under rule 10 of the Rules. He is, as a result, entitled to the sought extension of time.

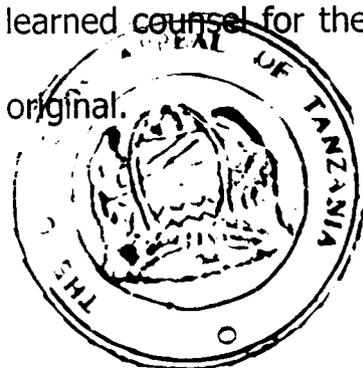
In conclusion, this application has merit and is, accordingly, granted. Thus, the applicant is given thirty (30) days from the date of delivery of this ruling within which to file his written submissions out of time in Civil Appeal No. 137 of 2022.

It is so ordered.

DATED at **MOSHI** this 1st day of September, 2023.

B. S. MASOUD
JUSTICE OF APPEAL

The Ruling delivered this 01st day of September, 2023 in the presence of Ms. Fatuma Amiri, learned counsel for the Applicant and Mr. Edwin Lyaro, learned counsel for the Respondent, is hereby certified as a true copy of the




F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL