

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

MISC. CIVIL APPLICATION NO. 374/02 OF 2022

PHILEMON MANG'EHE t/a BUKINE TRADERS APPLICANT

VERSUS

GESO HERBON BAJUTA.....RESPONDENT

**(An Application for Extension of Time to file in the Court of Appeal of Tanzania an
Application for Extension of Time to file Notice of Appeal against the Decision of
the High Court of Tanzania, at Arusha)**

(Shayo, J.)

**dated the 10th day of June, 2011
in
Civil Case No. 8 of 2006**

RULING

20th & 29th September, 2023

KEREFU, J.A.:

Before me is an application for extension of time made under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules) seeking the indulgence of the Court to exercise its discretion to extend time within which to file a second bite application, in this Court, for extension of time to lodge a notice of appeal against the decision of the High Court of Tanzania at Arusha, (Shayo, J.) dated 10th June, 2011 in Civil Case No. 8 of 2006. The Application is supported by an affidavit deposed by Philemon Mang'ehe t/a Bukine Traders, the applicant and it is resisted by an affidavit in reply deposed by one Eivaison Erasmo Maro, learned counsel for the respondent.

As intimated above, the application traces its origin from the decision of the High Court dated 10th June, 2011 in respect of Civil Case No. 8 of 2006 which was decided in favour of the respondent. Aggrieved, the applicant timely lodged a notice of appeal in this Court on 13th June, 2011 and on 12th October, 2011, he lodged a record of appeal vide Civil Appeal No. 103 of 2011 to challenge the said decision. However, the said appeal was struck out by the Court on 17th May, 2012 for being incompetent.

Subsequently, the applicant unsuccessful lodged Misc. Civil Application No. 55 of 2012 before the High Court seeking extension of time to file notice of appeal to this Court out of time. Thus, on 31st October, 2013, he lodged Misc. Civil Application No. 32 of 2013 in this Court (second bite). However, the said application was struck out for being misconceived, as by that time, the power to extend time to lodge a notice of appeal was the exclusive domain of the High Court.

Undaunted, the applicant, again unsuccessful, lodged Civil Reference No. 5 of 2017 to challenge the decision of the single Justice in Misc. Civil Application No. 32 of 2013. Specifically, the Court directed him to comply with the requirement of Rule 45A (1) of the Rules as amended by GN. No. 362 of 2017, because, by that time the Court Rules

were already amended to cloth this Court with powers to entertain the second bite application on that aspect. However, since the applicant was already out of time to comply with the order of the Court, he lodged Misc. Civil Application No. 399/02 of 2020 for extension of time to file his application (second bite). The said application was granted on 30th November, 2021 and the applicant was given thirty (30) days to do so. It was the applicant's averment under paragraph 23 of the affidavit in support of the application that, on 29th December, 2021 instead of lodging the said application in this Court, he erroneously filed it in the High Court vide Misc. Civil Application No. 103 of 2021.

Subsequently, on 24th February, 2022, when he first appeared before the High Court, he was advised to withdrawal the said application for purposes of lodging it in this Court. He thus, on 25th February, 2022, requested for certified copies of the High Court's documents which was supplied to him on 7th March, 2022. He then lodged the current application on 19th April, 2022. He attributed the delay with (i) the time he spent in the High Court while pursuing the application which was wrongly filed in that court, (ii) the shock, he suffered for almost a month upon discovering that he filed the application in a wrong court, and (ii) financial constraint to engage an advocate to assist him to pursue the

matter. He thus prayed for the Court to grant the prayers sought in the notice of motion.

When the application was placed before me for hearing, the applicant entered appearance in person whereas the respondent had the legal services of Mr. Elvaison Erasmo Maro, learned counsel.

The applicant commenced his submission by fully adopting the contents of the notice of motion and the supporting affidavit as well as the written submission he earlier on filed to form part of his oral arguments. The large part of the said documents had narrated the historical background to this application as indicated above. It was the applicant submission that he had taken various steps to challenge the impugned decision including, timely lodging of the notice of appeal but his efforts to have his appeal being heard by the Court had been delayed and/or blocked by technicalities. Specifically, on the current application, the applicant submitted that the decision of this Court which granted him thirty (30) days to file his application was issued on 30th November, 2021 and on 29th December, 2021, he filed the said application in the High Court within time. That, it was only on 24th February, 2022, at his first appearance before the High Court, when he was informed that he filed it in the wrong court. He thus prayed to

withdrew it and, immediately, on the following day, i.e 25th February, 2022, he wrote a letter to the Deputy Registrar of the High Court requesting to be availed with the certified copies of the High Court documents for purposes of lodging this current application. The said documents were supplied to him on 7th March, 2022. That, having observed the above mistake, he suffered from shock which lasted for a month. He argued further that, his ill health coupled with his financial constraint to engage an advocate, delayed him to pursue his case. Thus, he filed the current application on 21st April, 2022.

Upon being probed as to whether he had availed medical chits to prove his ill health, the applicant responded that he had no medical chits to prove his ill health, because, due to his financial constraint he did not afford to attend to any hospital for medical treatment and/or engaged an advocate to assist him to pursue his case. He however insisted that, he has been diligent in pursuing this matter as he made tireless follow-ups to seek the audience of this Court to challenge the impugned High Court decision, but all in vain. He thus urged me to find that the extension of time is still warranted as he had advanced good cause to enable the Court to exercise its discretion.

The respondent resisted the application with some force. Speaking through Mr. Maro, and having adopted the affidavit in reply and the reply written submission earlier filed to form part of his oral arguments, he argued that, the applicant has completely failed to demonstrate good cause for extension of time. He clarified that, the reasons for the delay advanced by the applicant in her affidavit in support of the application and his oral submission before the Court do not constitute good cause for grant of an application of this nature. Specifically, the learned counsel attributed the applicant's act of filing his initial application in a wrong court (High Court) to the negligence of his undisclosed legal adviser. That, the applicant with his legal adviser have themselves to blame for such an obvious omission, which, he said, cannot constitute sufficient cause for extension of time. To justify his point, he referred me to page 86 of the record of application where this Court directed the applicant to lodge his application in this Court. Mr. Maro argued further that, it is a settled position that negligence of an advocate does not constitute sufficient cause for the delay.

Mr. Maro also challenged the applicant for failure to account for the delay of each day. He contended that, although in his affidavit the applicant had indicated that he received the High Court's documents on

7th March, 2022 and lodged the current application on 21st April, 2022, after lapse of almost forty-five (45) days, he did not accounted for the delay of those days as required by the law. To support his proposition, he cited the cases of **Inspector Sadiki & Others v. Gerald Nkya** [1997] T.L.R. 42 and **Granitech (T) Company Limited v. Diamond Trust Bank Tanzania Limited and Others**, Civil Application No. 447/16 of 2021 [2023] TZCA 17470: [1 August 2023: TanzLII].

As for the reason of the applicant's ill health, Mr. Maro contended that, apart from alleging in general terms that he was suffering from shock which lasted for about a month, the applicant has not submitted any proof to prove that fact. He contended further that, even after his recovery, the applicant has failed to account for the fifteen (15) days of delay.

The learned counsel also challenged the issue of financial constraint raised by the applicant by arguing that, the same is not sufficient cause to warrant extension of time. To support his proposition, he cited the case of **Wambele Mtumwa Shahame v. Mohamed Hamis**, Civil Reference No. 8 of 2016 [2018] TZCA 39: [6 August 2018: TanzLII]. Finally, and based on his submission, he urged me to dismiss the

application with costs on account of failure by the applicant to demonstrate good cause for the delay.

In his brief rejoinder, the applicant mainly reiterated what he submitted earlier and once again prayed for the application to be granted.

It is clear from the above arguments that the parties have taken sharply contrasting positions on whether the application should be granted. While the applicant submitted that there is good cause for doing so and therefore the prayer for extension of time sought should be granted as prayed in the notice of motion, the learned counsel for the respondent contended that no good cause has been brought to the Court and thus the application should be dismissed.

The law is settled on applications for extension of time. Pursuant to Rule 10 of the Rules, an application of this nature, will only be allowed if an applicant has shown good cause to warrant the Court exercise its discretion to extend time. This has been pronounced in a number of our previous decisions. See for instance **Kalunga & Company Advocates Ltd v. National Bank of Commerce Ltd** (2006) TLR 235 and **Dar es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987 (unreported).

It is also settled law that in applications of this nature, an applicant must show good cause by accounting for each and everyday of the delay. See for instance the case of **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported).

Given the above position of the settled law, the main issue for my determination is whether the applicant has shown good cause for the delay to trigger the Court to exercise its discretion to grant the extension of time sought.

Starting with the first reason of the delay which is attributed to the filing of the first application in the wrong court. It is on record that, upon being granted extension of time by this Court on 30th November, 2021, to file his application, the applicant erroneously, but well within time, filed it in the High Court vide Misc. Civil Application No. 103 of 2021. Being a layperson, who depended mainly on the advice given by his undisclosed legal adviser, he did not detect the said error, until, on 24th February, 2022 at his first appearance before the High Court when he was informed by the presiding Judge of the same. As such, he did not have any other option, but to withdraw it. In my view, that period of delay, from 30th November, 2021 to 7th March, 2022, is technical, as opposed to the actual delay. For the avoidance of doubt, technical delay

is applicable in a situation when the first appeal or application was timely filed but failed to proceed due to some other factors. See for instance **Fortunatus Masha v. William Shija** [1997] T.L.R. 154 and **Salvanda K.A. Rwegasira v. China Henan International Group Co. Ltd**, Civil Reference No. 18 of 2006 (unreported). In the latter case, the Court observed that:

*"A distinction had to be drawn between cases involving real or actual delays and those such as the present one which clearly only involved technical delays in the sense that **the original appeal was lodged in time but had been found to be incompetent for one or another reason** and a fresh appeal had to be instituted. In the present case the applicant had acted immediately after the pronouncement of the ruling of the Court striking out the first appeal. In these circumstances an extension of time ought to be granted."*[Emphasis added].

Therefore, and being guided by the above authorities, there is no doubt that, on the first segment of the delay, the applicant, is entitled to plead technical delay.

As for the period from 7th March, 2022 to 21st April, 2022 when the current application was lodged, although, I do agree with the submission

made by the learned counsel for the respondent together with the authorities he cited to me that, reasons of ill health and financial constraints do not constitute good cause, but based on the checkered history of this matter as indicated above, and for the interest of justice, I find sufficient reasons have been shown. It is evident under paragraph 25 of the affidavit in support of the application that, the applicant stated that, upon being informed that he had lodged his first application in a wrong court, he started suffering from shock which lasted for a month. That, due to his financial constraint, he failed to engage an advocate to assist him to pursue his case. It is also on record that during the hearing of this application, when I probed him as to why he did not attach medical chits in his affidavit to prove his alleged ill health, he responded that due to his financial hardship he did not afford to obtain medical services and/or engage an advocate to assist him to pursue his case. In the case of **Yusufu Same & Another v. Hadija Yusufu**, Civil Application No. 1 of 2002 (unreported) while acknowledging that financial hardship is not a good cause, the Court held that there are certain circumstances where it may accept such reason. It stated:

*"We are aware that financial constraint is not sufficient ground for extension of time. See **Zabitis Kawuka v. Abdul Karim** (EACA) Civil*

Appeal No. 18 of 1937. But in the circumstances of this case at hand, where the respondent was a widow, depending on legal aid, her plea of financial constraint cannot be held to be insignificant...we are satisfied that the delay from 29.11.1996 to 3.1.1997, about one month and five days, was with sufficient cause.” [Emphasis added].

-See also the cases of **Constantine Victor John v. Muhimbili National Hospital**, Civil Application No. 214/18 of 2020 [2021] TZCA 77: [17 March 2021: TanzLII] and **Hamisi Mponda v. Niko Insurance Tanzania Limited & 2 Others**, Civil Application No. 254 //01 of 2021 [2023] TZCA 240: [10 May 2023: TanzLII].

In terms of the above authorities, generally, lack of adequate financial resources to engage an advocate, does not fall within the realm of good cause to grant extension of time to perform a certain step in litigation. However, in peculiar circumstances where, like in this application, the applicant who is a lay person who fended for himself as he could not manage to afford medical and/or legal services, the said handicap cannot be taken lightly. I take it as sufficiently demonstrated that the applicant's delay is exceptionally excusable. In view of what I

have stated above, it is my settled view that, the delay, in the circumstances of this application is with good cause.

In the premises, I find merit in the application and it is hereby granted. The applicant should lodge the intended application within fourteen (14) days from the date of delivery of this ruling. Considering the circumstances of this application, I make no order as to costs.


It is so ordered.

DATED at **ARUSHA** this 29th day of September, 2023.

R. J. KEREFU
JUSTICE OF APPEAL

The Ruling delivered this 29th day of September, 2023 in the presence of the applicant in person and Mr. Valentine Nyalu, learned counsel holding brief for Mr. Elvaison E. Maro, learned counsel for the respondent is hereby certified as a true copy of the original.




J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL