

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

**CIVIL APPLICATION NO. 692/02 OF 2021**

**RASHID MUSSA MCHOMBA** (Administrator of the  
Estate of the Deceased **MUSSA MCHOMBA MASSAWE**) ..... **APPLICANT**

**VERSUS**

**SIRI NASSIR HUSSEIN SIRI**.....**RESPONDENT**

**(Application for Extension of Time to Lodge Notice of Appeal from the  
Decision of the High Court of Tanzania, at Arusha)**

**(Sambo, J.)**

**dated the 18<sup>th</sup> day of May, 2010**

**in**

**Civil Appeal No. 15 of 2009**

.....

**RULING**

18<sup>th</sup> September & 2<sup>nd</sup> October, 2023

**MDEMU, J.A.:**

The applicant, in exercise of his right for a second bite, invited this Court to extend time within which to lodge the notice of appeal. Initially, the High Court refused to extend time because the applicant neither accounted for the days of the delay nor did he state in the affidavit the existence of illegality in the impugned decision in Civil Appeal No. 15 of 2009. The application is by way of notice of motion premised under the provisions of rule 10 and 45A (1) (a) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The supporting affidavit of the applicant was also deposited in support of the application thereof.

The battle of rights between the applicant and the respondent is traced way back in Civil Case No.57 of 1994 where the respondent herein among other reliefs, moved the Resident Magistrate's Court of Arusha to declare null and void transfer of property in Plot No.29, Block I, Area "F" Arusha Municipality in the name of Mussa Mchomba Massawe, now deceased, but succeeded by the applicant herein as administrator of his estate. The respondent lost. He was successful in Land Appeal No. 15 of 2009 in the High Court of Tanzania at Arusha as the said transfer was declared null and void in its decision dated 18<sup>th</sup> May, 2010 by Sambo, J. This is the decision which both parties are struggling for an opportunity or to the contrary to have this Court pronounce itself to that effect.

As contained in the record, the first attempt was through the notice of appeal lodged on 21<sup>st</sup> May, 2010 by the Late Mussa Mchomba Massawe followed by an application for leave to appeal in Miscellaneous Application No. 52 of 2010. This latter was snagged by a notice of preliminary objection which was heard *ex parte* thus the application was dismissed for being time barred. The applicant then filed notice of appeal on 25<sup>th</sup> April, 2013 to appeal to the Court of Appeal. Instead of taking essential steps to appeal following the lodged notice of appeal, the applicant approached again the High Court in Civil Application No.253B of 2014 for extension of

time for leave to appeal to the Court of Appeal. Unluckily, the High Court, Massengi, J. dismissed the said application on 26<sup>th</sup> July, 2016. The applicant then lodged the notice of appeal to appeal against that decision and also moved the High Court through Miscellaneous Civil Application No.177 of 2016 for leave to appeal to this Court. This latter was withdrawn and also the applicant moved this Court again through Misc. Civil Application No. 32 of 2017 to withdraw the notice of appeal. It was marked withdrawn by the order of this Court on 21<sup>st</sup> August, 2017.

On his part, the respondent herein noted that, no appeal was filed following the notice of appeal lodged by the applicant on 21<sup>st</sup> May, 2010 to challenge the decision of the High Court in Civil Appeal No.15 of 2009. He thus moved this Court through Civil Application No.24 of 2016 to have the notice of appeal struck out. He was successful as per the ruling of this Court dated 4<sup>th</sup> August, 2017. The applicant thus commenced afresh appeal processes. As said, his first application to the High Court for enlargement of time to lodge notice of appeal was fruitless, hence this second bite application in the following grounds as contained in the notice of motion:

- 1. The previous Civil Application No.119/02/2019 filed in this honourable Court was filed beyond the prescribed*

*time by the Rules, hence withdrawn on 23<sup>rd</sup> November, 2021.*

- 2. The previous notice of appeal to High Court Civil Appeal No.15/2009 by the applicant was duly filed in the Court of Appeal of Tanzania at Arusha Sub Registry on time i.e 21<sup>st</sup> day of May, 2010 and subsequently struck out by the Court of Appeal on 4<sup>th</sup> August, 2017 through Civil Application No.24 of 2016 brought by the respondent for failure to take necessary steps.*
- 3. The applicant Misc. Civil Application No.98/2017 for extension of time to appeal to the Court of Appeal against the High Court decision in Civil Appeal No.15/2009 by Justice K.M.M. Sambo delivered on the 18<sup>th</sup> day of May, 2010 was rejected by Honourable Madame Judge S.C. Moshi without proper consideration on the reasons for the delay.*
- 4. The applicant intended appeal to the Court of Appeal raises substantial points of law such as illegalities in the disputed appeal as follows:*
  - a) The first appeal court raised the allegations of forgery **suo motu** at the appeal level and based*

*its decision thereon without affording parties the right to be heard.*

*b) That, part of the proceedings at the High Court level proceeded up to its decision against the applicant's deceased father without impleading the administrator.*

*c) That, whether the respondent's father had to obtain consent from his child who was three (3) years old before he could have sold the property in dispute to the applicant's father.*

*d) That, the High Court relied on documents produced at the appeal level and relied its decision therein without according parties right to be heard.*

*e) The applicant intended application to the Court of Appeal raises other substantial points of law to be determined and the delay in filing of the second bite application was inadvertently based on human error and technical delay.*

At the hearing of this application on 18<sup>th</sup> of September, 2023 the applicant was represented by Mr. Innocent Mwanga, learned advocate whereas the respondent had the service of Mr. Ezra Mwaluko, learned advocate also.

Submitting in support of the application, Mr. Mwanga adopted first the notice of motion, supporting affidavit and his written submissions. Having made such adoption, Mr. Mwanga's main thrust was in threefold. **One** was that, given long battles parties engaged in court corridors as stated above, the applicant was not idle. The learned counsel thus urged me to hold so banking on the decision in **Salvand K.A. Rwegasira v. China Henan International Group Co. Ltd**, Civil Reference No.18 of 2006 (unreported).

**Two**, in respect of technical delay, the applicant appeared to have the views that, as the first notice of appeal which was struck out was timely filed, any move to have another notice in Court should be preceded by an application for enlargement of time. In this, reference was made by the learned counsel to the case of **Fortunatus Masha v. William Shija and Another** [1997] T.L.R. 154. **Three**, that there is existence of illegality in the impugned decision. He mentioned such illegality as, first, raising allegations of forgery *suo motu*; second, part of High Court

proceedings proceeded against the deceased and third, reliance on documentary evidence produced at the appellate stage. The learned counsel also intends the Court of Appeal to decide as to whether the respondent's father was legally bound to obtain consent from his three years old child prior to the disposition of the property through sale. He cited the following cases insisting that, illegality in the impugned decision constitutes sufficient cause to extend time: **Hamis Mohamed (the Administrator of the Estates of the Late Risasi Ngawe) v. Mtumwa Moshi (the Administratrix of the Estate of the Late Moshi Abdallah)**, Civil Application No.407/17 of 2019; **Hamis Babu Bally v. The Judicial Officers Ethics Committee and Three Others**, Civil Application No.130/01 of 2020 (both unreported) and **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] T.L.R. 185.

On his part, Mr. Mwaluko in the first place resisted the application. As Mr. Mwanga did, he also adopted his written submissions filed in that behalf. After restating the litigation battles in court corridors between the parties, the learned counsel submitted that, there is no sufficient cause shown by the applicant for the delay of almost seven years following the striking out of the notice of appeal in Civil Application No.24 of 2016. In

his view therefore, this application being filed after the striking out of the notice of appeal for failure by the applicant herein to take essential steps, then it is in abuse of court processes. He added further that, the applicant is not permitted to invoke court processes to commence appeal processes in circumstance where the notice of appeal was struck out for failure by the applicant to take essential steps. He referred me to the following cases: **Siri Nassir Hussein Siri v. Rashid Mussa Mchomba (the Administrator of the Estate of Mussa Mchomba Massawe)**, Civil Application No. 24 of 2016; **Mrs Kamiz Abdulla M.D. Kermal v. the Registrar of Buildings and Miss Hawa Bayona** [1988] T.L.R. 199 and **Atlantic Electric Limited v. Morogoro Region Cooperative Union** [1993] T.L.R.12.

I heard the parties. This being an application for extension of time, this Court in **Benedict Mumello v. Bank of Tanzania**, Civil Appeal No. 12 of 2002 (unreported) at page 5 through 6 of the judgment remarked that, the granting of extension of time is entirely in the discretion of the court to grant such an application or to refuse it. The Court went on to state that, in the exercise of such a discretion, the court may only grant the application where it has been established by the applicant that the



delay was with sufficient cause. In fact, this is the spirit envisaged under rule 10 of the Rules that:

*"The Court may, upon good cause shown, extend the time limited by these Rules or by any decision of the High Court or tribunal, for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to that time as so extended."*

As alluded to above, the High Court refused to extend time to the applicant for failure to establish sufficient cause. **One**, that the applicant has not shown or accounted for each day of the delay and **two**, that there is no illegality established by the applicant which would have allowed the learned Judge to consider in exercise of her discretion in granting or refusing to extend time. The question now is whether, the applicant herein has indicated good or sufficient cause for that matter. In the notice of motion, supporting affidavit, written and oral submissions, the applicant demonstrated two grounds. First is in respect of technical delay and second is illegality in the impugned decision. I will demonstrate the two seriatim.

Beginning with technical delay, parties are at one that, the notice of appeal lodged by the applicant to challenge the decision in civil appeal No.15 of 2009 was struck out by the Court. This, as said, followed an application by the respondent herein that no essential steps taken by the applicant to institute an appeal. I therefore entirely agree with the applicant's counsel that by all standard, the applicant has no any means to have the notice of appeal filed unless time is extended. This kind of delay is what this Court in **Fortunatus Masha v. William Shija and Another** (supra) ruled out to be a technical delay and urged a distinction be drawn to that of real or actual delays as follows:

*"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 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."*

Concerning the ground of illegality, Mr. Mwaluko did not submit on this. An affidavit in reply incorporates general denials. On the other hand, the learned Judge who determined the application in the first bite at the High Court, made an observation such that, the applicant failed to indicate presence of illegality in the impugned decision in the following version:

*"The applicant also was supposed to show the novel points of law that are involved but he did not show the points of law that are involved in his affidavit nor did he attach the intended memorandum of appeal so that I can consider them"*

In the record, particularly in the supporting affidavit, in paragraph 22, illegalities such as, **one**, raising allegations of forgery *suo motu*, **two**, part of the High Court proceedings proceeded against the deceased; **three** reliance of documentary evidence tendered at the appellate stage and **four** whether the respondent's father was legally bound to obtain consent from his three years old child prior to disposition of the property through sale have been mentioned. However, when the counsel for the applicant was further probed, he abandoned the ground on illegality relating to "proceedings proceeded in the High Court against a deceased person". The reason was one, that is, in the record, the deceased was alive all through to the conclusion of Civil Appeal No. 15 of 2009.

The remaining grounds of illegalities, in my view, need the attention of this Court which may only be corrected given an appeal before the Court. As of now, the principle is clear that, where the issue of illegality in the impugned decision is raised as a ground or reason for extension of time for that matter, then such reason amounts to good cause. See **Hamis Mohamed ( the Administrator of the Estate of the Late Risasi Ngawe) v. Mtumwa Moshi (the Administratrix of the Estate of the Late Moshi Abdallah)** (supra); **Hamis Babu Bally v. The Judicial Officers Ethics Committee and Three Others** (supra) and **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** (supra). For instance, in **Vodacom Tanzania Limited v. Innocent Daniel Njau**, Civil appeal No.60 of 2019 (unreported), at page 9 on illegality as a ground for enlarging time, the Court observed that:

*We are of the considered opinion that the learned Judge ought to have exercised his discretion judiciously to consider even the ground of illegality which was also pleaded by the appellant because "sufficient cause" does not entail only reason for the delay but also sound reasons for extending time. In particular, whether the ground of illegality raised by the appellant was worth consideration in determining whether or not to grant the application.*

Having settled this, I should conclude on one aspect raised by Mr. Mwaluko that, as long as the notice of appeal of the applicant was struck out for failure to take essential steps, thus allowing the import of rules 89 (2) and 91(a) of the Rules, then a party to whom the notice was struck out may not be permitted to revamp the notice of appeal. With due respect to the learned Advocate, the striking out of the notice of appeal following failure of a party to take essential step in itself does not mean that a party in whose notice was strike out may not commence appeal processes afresh. In **Caste Corporation v. the Board of Trustees of the Public Service Social Security Fund**, Civil Application No.288/16 of 2021 (unreported) at page 8, it was observed that:

*"Through the cases cited, the Court has stated categorically that, an order striking out an appeal places the parties at the position they were before the institution of such appeal and a litigant interested in pursuing his appeal has to start the whole process afresh commencing with the initial step of lodging a notice of appeal. **This the respondent did after obtaining an order extending time to lodge a notice of appeal following the striking out of her first notice of appeal.** Was she required to make a fresh application to be supplied with the certified copies of proceedings? Mr. Rweyongeza would have us*

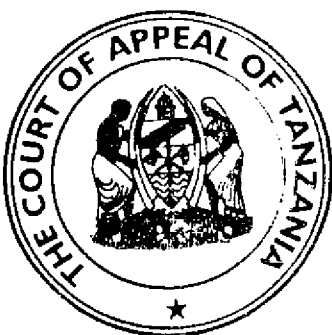
*answer that question affirmatively.” [Emphasis mine]*

This also is now settled. As it is, all cases cited by Mr. Mwaluko are distinguishable because they are all on the striking out of the notice of appeal for failure to take essential steps and none restricted the commencement of appeal processes afresh by the parties. In the final analysis, and for the foregoing, I am of the firm view that, the applicant herein has demonstrated sufficient cause basing on two reasons; technical delay and the ground of illegality in the impugned decision. I thus find merit in the application and consequently allow the same. Costs to follow the outcome of the intended appeal.

**DATED** at **ARUSHA** this 30<sup>th</sup> day of September, 2023.

G. J. MDEMU  
**JUSTICE OF APPEAL**

The ruling delivered this 2<sup>nd</sup> day of October, 2023 in the presence of Mr. Gwakisa Sambo, holdings brief for Mr. Innocent Mwanga, learned advocate for the applicant and Mr. Ezra Mwaluko, learned advocate for the respondent is hereby certified as a true copy of the original.



A handwritten signature in black ink, appearing to be "J. E. Fovo", written over a horizontal line.

J. E. FOVO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**