

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
CIVIL APPLICATION NO. 542/16 OF 2022

PETROMARK AFRICA LIMITED & ANOTHER 1ST APPLICANT
FREDDIE ALLY RASHID MBONDE 2ND APPLICANT

AND

EXIM BANK (TANZANIA) LIMITED RESPONDENT
**(Application for extension of time within which to give notice of cross-appeal
in Civil Appeal No. 310 of 2022 against the ruling and order of the High Court
(Commercial Division) at Dar es Salaam)**

(Magoiga, J)

**Dated the 18th March 2022
in**

Misc. Commercial Application No. 183 of 2020

RULING

3rd & 10th November, 2023

MGEYEKWA, J.A.

The applicants have lodged this application seeking an order for extension of time within which they can give a notice of cross appeal in Civil Appeal No. 310 of 2022 pending in this Court against the ruling and order of the High Court of Tanzania (Commercial Division) in Misc. Commercial Application No. 183 of 2020. The application is brought by way of a notice of motion lodged under Rules 10, 48(1), (2) and 49 of the Court of Appeal Rules, 2009.

The notice of motion lists down three grounds upon which the application is brought. Among other grounds, the major grounds are that reasonable explanation of delay has been given and the intended application seeks to cure the illegalities.

The notice of motion initiating this application is supported by two affidavits deponed by Mr. Audax Kahendaguza Vedasto, learned counsel for the applicants and Eradius Bishanga an employee of Adare Advocates. In opposing the application, the respondent filed two affidavits in reply deponed by Mr. Roman Masumbuko, learned counsel for the respondent and James Mgesi, the respondent's employee.

The background to the application may, in the interests of brevity, be stated as follows: According to the record, the applicants were the defendants in Commercial Case No. 38 of 2007 in the High Court of Tanzania (Commercial Division). The suit was decided in favour of the respondent and the applicants were ordered to pay a total of Tshs. 469,767,017.36 plus accruing interest at the rate of 25% from 1st May, 2007 up to the date of judgment, interest on the decretal sum at the court rate of 7 % from the date of judgment up to full and final payment and costs of the suit. The respondent successfully executed the trial court decree against the

applicants by attachment and sale of immovable properties known as Farm No. 596 Mahenge village, Iringa District comprised of Certificate of Title No. 6358 MBYLR and Plot No. 1, Block "E", Sinza area, Dar es salaam with Title No. 37705.

Aggrieved, the applicants lodged an appeal before the Court and the matter was decided in their favour. Subsequently, the applicants preferred a Misc. Commercial Application No. 183 of 2020 *inter alia* for restitution of the proceeds that were realized after the sale of the said immovable properties. On 18th March, 2022, the application was granted, however, their claims for general damages were dismissed.

Undeterred, on 4th July, 2022 the respondent lodged an appeal before the Court against the ruling of the High Court (Commercial Division) at Dar es Salaam in Misc. Commercial Application No.183 of 2020. On their side, the applicants were also dissatisfied with the said decision, thus, on 5th September, 2022 they lodged a notice of cross appeal before the Court which is pending for hearing, henceforth, the instant application for extension of time to give the respondent a notice of cross appeal out of time.

At the hearing of the application, the applicants were represented by Mr. Audax Vedasto, learned counsel whereas the respondent was represented by Mr. Gabriel Mnyele, learned counsel.

Submitting in support of the application, Mr. Audax commenced his submission by fully adopting the contents of the notice of motion and the supporting affidavits. In his submission, Mr. Audax argued that the applicants had lodged a notice of cross appeal on 5th September, 2022 to the Court which was required to be lodged within 30 days after the respondent received the memorandum and record of appeal. Mr. Audax submitted that the applicants have a bona fide cause of action and time has lapsed, but was constrained to pursue within time because of some compelling reasons. He clarified that on 7th August, 2022, the applicants were supplied with the copies of memorandum and record of appeal. However, there was a mix of dates of receiving the said documents as envisaged on page 38 of the record.

Mr. Audax clarified that the confusion arose when Eradius Bishanga, the Officer of Adare Advocate received the memorandum and record of appeal in respect to Civil Appeal No. 310 of 2022 filed in the Court on 4th July, 2022 and erroneously marked in the receipt stamp that they received the said

documents on 7th August, 2022 instead of 8th July, 2022. In the course of filing the notice of cross appeal, they realized that they were already out of time. He went on to submit that the mistake was realized after noting that Bishanga wrongly recorded the date of receipt in the diary as 7th August, 2022 instead of 8th July, 2022 the date which ought to have been relied upon in computing the days of delay. Mr. Audax further clarified that Mr. Bishanga mistakenly overturned the month and date as the correct date of receipt was 8th July, 2022 instead of 7th August, 2022 and he wrote the 26th day of service in the diary as 3rd September, 2022 instead of 2nd August, 2022.

The applicants' counsel invokes this Court's jurisprudence in the cases of **Leila Jalaludin Haji Jamal v Shaffin Jalaludin Haji Jamal**, Civil Appeal No. 55 of 2003 (unreported) and **Zuberi Mussa v Shinyanga Town Council**, TBR Civil Application No. 3 of 2007 [2009] TZCA 16 (28 October 2009) TanzLII and urged the Court to find that it was a human error that anyone could commit. He believed that the applicants' grounds are good grounds for extension of time.

Expounding, the learned counsel continued to submit that after discovering the said mistake, he acted promptly by lodging the notice of cross appeal to remedy the situation. It reiterated the principles for extension

of time as delimited in the case of **Salvand K. A Rwegasira v China Henan International Group Co. Ltd**, Civil Reference No. 18 of 2006 (unreported) and buttresses submissions captured in the grounds in the notice of motion application as having met these principles.

On illegalities, Mr. Audax argued that the High Court decision is tainted with illegalities. He faulted the learned High Court judge for refusing to grant the consequential relief of general damages for the reason that the same is not payable under section 89(1) of the Civil Procedure Code. To buttress his contention, he drew my attention to the case of **The Principal Secretary, Ministry of Defence and National Service v Duram P. Valambhia** [1992] T.L.R 387. He was certain that the applicants' claim for general damages was proper in the eyes of the law.

On the strength of the above submission, Mr. Audax urged me to grant the applicants' application and grant the orders sought as there is already an appeal before the Court.

Mr. Mnyele strenuously opposed the application. His averment is that the applicants have failed to show good cause for extension of time. Relying on the two affidavits in reply, Mr. Mnyele argued that the applicant's counsel

attempted to create a scenario in the affidavit to cover their negligence. He went on to submit that the main issue for determination is the date of service of the memorandum and record of appeal. He explained that Mr. Eradius Bishanga purposely affixed their office stamp dated 7th August, 2022 in the documents in order to reduce the time of delay while the same was served to the applicants' counsel on Friday, 8th July, 2022 and the stamp date shown on the memorandum and record of appeal is 7th August, 2022, which was a Sunday, a non-working day. He spiritedly contended that the service was done on 8th July, 2022 and not 7th August, 2022.

Mr. Mnyele continued to argue that if the memorandum and record of appeal were served to them on 7th August, 2022 then it was served out of time, but they did not complain. He was certain that, the applicants failed to account for 28 days of delay. He added that apart from showing good cause, they were required to account for each day of delay from 9th August, 2022 to 5th September, 2022. To bolster his preposition, he invited me to rely on the jurisprudence in the cases of **Lyamuya Construction Company Ltd v Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010; **Constantine Victor John v Muhimbili National Hospital**, Civil Application No. 214/18

of 2020 [2021] TZCA 77 (17 March 2021) TanzLII and **Wambebe Mtumwa Shahame v Mohamed Hamis**, Civil Reference No. 8 of 2016 [2018] TZCA 39 (6 August 2018) TanzLII and strike out the application.

The learned counsel for the respondent forcefully opposed the applicant's counsel's contention that they had taken steps in preparing the application. He argued that the same is not an excuse and does not constitute a sufficient cause for extension of time. He supported his proposition by citing the case of **Jubilee Insurance Company (T) Limited v Mohamed Sameer Khan**, Civil Application No. 439/01 of 2020 [2022] TZCA 623 (12 October 2022) TanzLII.

On the alleged illegalities, Mr. Mnyele conceded that illegality is a good ground for extension of time. However, it was his view that the refusal by the High Court to grant general damages in the application for restitution under section 89(1) of the Civil Procedure Code was the discretion of the High Court, as such, and in any way it cannot amount to illegality. He therefore urged me to find that the applicants have failed to account for each day of delay and the alleged illegality is unjustified and thus dismiss the application with costs.

In his brief rejoinder besides reiterating his earlier submissions, Mr. Audax urged the Court to consider that the applicants' mistake was an excusable human error. Mr. Audax stressed that the raised illegality is an error that needs to be determined by the Court. Ending, he urged the Court to grant the application considering the fact that the respondent has already lodged an appeal in the Court.

I have considered the notice of motion and the affidavits in support and against the application and it is all about the exercise of discretion by the Court on whether the applicants have met the criteria and the principles of law to benefit as such to extend time. The discretion under rule 10 of the Rules is unfettered, but it has to be exercised judicially, not on whim, sympathy, and caprice. This stance was followed in many decisions among them being the cases of **Ngao Godwini Losero v Julius Mwarabu**, Civil Application No. 10 of 2015 [2016] TZCA 302 (13 October 2016) TanzLII and **Arunaben Chaggan Mistry v Naushad Mohamed Hussein & 3 Others**, Civil Application No. 6 of 2016, [2016] TZCA 581 (16 February 2016) TanzLII. In **Ngao Godwin Losero** (supra), the Court quoted with approval the decision of the defunct Court of Appeal of Eastern Africa in **Mbogo v Shah** [1968] EA where it was held that:

"All relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reason for the delay, whether there is an arguable case on the appeal and the degree of prejudice."

Another factor to be considered is whether there is a point of law of sufficient importance such as illegality of the decision sought to be challenged. Among the decisions on this point include, **Lyamuya Construction Company Limited v Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 and **Arunaben Chaggan Mistry v Naushad Mohamed Hussein & 3 Others**, Civil Application No. 6 of 2016 [2016] TZCA 2026 (20 October 2016 TanzLII

In the application under my consideration, the period that needs to be accounted for is from 9th August, 2022 to 5th September, 2022 when the applicants lodged the notice of cross-appeal. The main reason given for the delay, is that the applicants received the memorandum and record of appeal on 8th July, 2022 at 11:58 hrs. However, Mr. Bishanga affixed a stamp dated 7th August, 2022 instead of 8th July, 2022.

Deducing from the documents filed, the submission made by Mr. Audax and Mr. Bishanga's affidavit specifically paragraphs 5, 8, 9, 10, 11, 12, 13 and 14, it is clear that the confusion started when Mr. Bishanga erroneously marked in the receipt stamp that they received the memorandum and record of appeal on 7th August, 2022 instead of 8th July, 2022. I consider that the mix of dates is an error that can be glossed over. See **CRDB Bank Pic v Heri Microfinance Limited & Another**, Civil Appeal 20 of 2020) [2022] TZCA 159 (29 March 2022). The cited decision of **Leila Jalaludin Haji Jamal** (supra) by the learned counsel for the applicants applies squarely in the application at hand, in that, in protecting parties who are diligent in pursuit of their cases, justice does not require them to be punished for excusable human errors.

I have also taken into consideration that after realizing their mistakes, the applicants' counsel promptly lodged the instant application. This position was stated in the case of **Bulyanhulu Gold Mine v George Allen Gwabo**, Civil Application 23 of 2015 [2016] TZCA 892 (13 October 2016) TanzLII that the applicant was prompt in taking actions, notwithstanding that he did not account for the days he delayed. Consequently, I agree with Mr. Audax that the delay is excusable and that it has been satisfactorily explained.

On the issue of illegality, I am certain that, a claim of the illegality of an impugned decision has, all along, constituted a good cause for extension of time under rule 10 of the Rules. However, such an allegation of illegality must be apparent on the face of the record such as the question of jurisdiction; not one that would be discovered by long drawn argument or process. In **Principal Secretary Ministry of Defence**, (supra) where the Court stated that: -

*"In our view **when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty even if it means extending the time for the purpose to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record right**". [Emphasis added].*

In the current application, the applicants' counsel claimed that the issue of general damage was left undetermined, and by merely looking into the impugned ruling of the High Court, it is clear that general damage was among the reliefs sought by the applicants. However, the learned High Court judge did not determine it. I am therefore in accord with the applicants'

counsel that the allegation of the illegality of the decision sought to be challenged amounts to good cause in terms of rule 10 of the Rules.

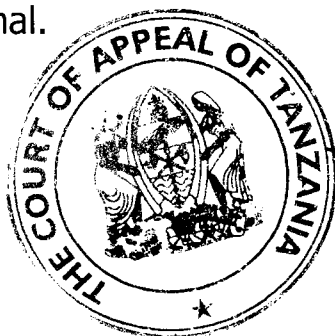
In the premises, the applicants are granted extension of time to serve the notice of cross-appeal on the respondent in Civil Appeal No. 310 of 2022 which is pending in the Court. It ordered that the same should be effected within fourteen (14) days from the date of the delivery of the ruling. Costs to be in the cause.

It is so ordered.

DATED at DAR ES SALAAM this 10th day of November, 2023.

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Ruling delivered this 10th day of November, 2023 in the presence of Mr. Rugambwa, learned counsel for the applicants and Mr. Gabriel Mnyele, learned counsel for the respondent is hereby certified as a true copy of the original.




J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL