

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

CIVIL APPLICATION NO. 956/08 OF 2023

**JAMES PETRO NDAKI.....APPLICANT
VERSUS**

**NYAMALWA WANGALUKE.....RESPONDENT
(Application for extension of time to file application for leave on second
bite out of time, against the Ruling of the High Court of
Tanzania at Mwanza)**

(Ismail, J.)

dated 21st day of April, 2020

in

Probate Civil Appeal No. 9 of 2019

.....

RULING

14th & 23rd February, 2024

MKUYE, J.A.:

Before me is an application for extension of time by way of a "second bite" to file an application for leave to appeal to this Court. It is brought by way of a notice of motion predicated under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules) and supported by an affidavit deponed by James Petro Ndaki, the applicant.

According to the affidavital information, the applicant James Petro Ndaki and the respondent Nyamalwa Wangaluke were involved in a probate matter before the Primary Court in which the applicant lost.

Upon being aggrieved by the outcome, he sought to appeal to the District Court for Nyamagana District. Realizing that he was late, he lodged an application for extension of time to appeal out of time, however, the application was refused.

Dissatisfied by that decision, he preferred an appeal to the High Court (Probate Civil Appeal No. 09 of 2019) which he lost as the High Court dismissed it having observed that it was incompetent for being lodged out of time.

Still undaunted, and intending to appeal to this Court, in the first instance, he applied to the High Court for leave to appeal to this Court but the application was refused. He lodged a similar application to this Court by way of "second bite" but the same was equally struck out for being time barred. Hence, the applicant is now seeking extension of time so that he can lodge an application for leave to appeal before this Court. On the respondent's side, no affidavit in reply was filed.

At the hearing of the application, the applicant appeared in person without any representation, whereas the respondent had the services of Mr. Frank Obeid, learned advocate.

Upon being availed an opportunity to expound his application, the applicant in the first place sought to adopt his notice of motion together with its supporting affidavit. In a bid to account for the delay, the applicant blamed "his advocate" for delaying the process. Otherwise, he submitted as averred in paragraph 5 of the affidavit that he was late to file his application because he was waiting to be supplied with copies of proceedings, Ruling and Drawn Order from the High Court which refused to grant him leave. Essentially, this was an account for the delay from when his application was refused by the High Court up to when he lodged an application to the Court on second bite. However, the applicant offered no account for his delay to file the instant application after the application for leave was struck out by this Court on 25/8/2023 for being time barred. He prayed to this Court to grant the application.

In response, Mr. Obeid resisted the application. He argued that, although the applicant averred in paragraph 5 of the affidavit that he was delayed by waiting for the documents from the High Court, he has not produced any letter requesting for them. Neither has he accounted for the 28 days from when his application was struck out by this Court

up to when he filed the application at hand which could have enabled him to apply for a certificate of delay.

Apart from that he argued that this application seeks time to be extended to apply for leave to appeal but since the matter originated from Primary Court, he ought to apply for a certificate on points of law which essentially this Court lacks jurisdiction to entertain it. He referred to the case of **Shabani Kavitenda v. Yasin S. Kavitenda**, Civil Application No. 252/01 of 2020 page 5 – 6 where the Court categorically stated that:

"as the jurisdiction to certify existence of points of law under section 5 (2) (c) of the AJA is exclusively vested in the High Court, the intended application for a second bite to the Court is beyond the jurisdiction of the Court".

In the end, he urged the Court to dismiss the application.

In rejoinder, the applicant had nothing to add except that he insisted for his application to be granted.

Having considered the notice of motion, its supporting affidavit and the rival submissions from either side, I think the issue for this Court's determination is whether the applicant is meritorious.

However, before the embarking on the merit of the application, I wish to begin with the issue raised by Mr. Obeid that the application seeking extension of time to file application for leave is misplaced.

It is without question that if a party intends to appeal to this Court against a decision of the High Court on a matter emanating from the Primary Court is required to apply for a certificate on point of law. This is a requirement provided for under section 5 (2) (c) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 which states as follows:

"no appeal shall lie against any decision or order of the High Court in any proceedings under Head (c) of Part III of the Magistrates Courts Acts unless the High Court certifies that a point of law is involved in the decision or order".

According to the above quoted provision of the law, it is only the High Court which is vested with exclusive jurisdiction to certify that a point of law is involved in the decision or order of the High Court which is desired to be appealed against as was correctly argued by Mr. Obeid.

See also: **Eustace Kibalgenda v. Venancia Daud**, Civil Appeal No. 70 Of 2011 (unreported).

However, much as that is the position of law, I think, the proposition that the certificate on point of law ought to have been sought is misplaced. This is because the applicant is seeking to pursue an appeal against the decision of the High Court which did not determine the matter which originated from the Primary Court on merit. Rather, it dealt with a matter that arose in the first instance at the District Court. In this regard, the applicant is on a right track.

I now turn to the merit of the application.

An application for extension of time is governed by Rule 10 of the Rules which states as follows:

"The Court may, upon good cause shown, extend the time limited by this Rule 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 that act; and any reference in these Rules to any such time shall be construed as a reference to that time as to extended".

From the above quoted provision of the law, it is plain that an application for extension of time is within the discretion of the Court whether to grant or decline it. It should, also, be noted that such discretion has to be exercised judiciously having regard that there is good cause for doing so. Although there is no definite definition as to what constitutes good cause, through many decided cases there are several factors which need to be taken into account when considering such applications. Such factors may include; whether the application has been brought promptly; absence of any or valid explanation for the delay; lack of diligence on the part of the applicant – See: **Dar es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987; **Tanga Cement Company Limited v. Jumanne D. Masangwa and Another**, Civil Application No. 6 of 2001 (both unreported). But again, the applicant has a duty to explain or account for each day of delay - See: **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported).

From the nature of this application, it seems to me that the applicant is required to explain for a period of delay not only between 14/9/2020 when the application was first made to the High Court to

when he lodged an application for leave to appeal to this Court on second bite but also the period between 25/8/2023 when the application on second bite was struck out by this Court to 21/9/2023 when he filed this application for extension of time. In other words, the first limb requires an explanation of 13 days delay and on the second limb he is required to explain 28 days of delay.

The applicant in paragraph 5 of the affidavit supporting the application has averred thus:

"That the 13 days delay to file before the Court of Appeal of Tanzania the second bite Civil Application No. 541/08 of 2020, was, the High Court's inability to supply to the applicant copies of Ex-parte Ruling, Proceedings and Drawn Order in time".

As it can be seen in the above quoted paragraph, the applicant has only made an attempt to explain the reason why he was late to file an application on a second bite which was struck out by the Court. The reason he advanced in accounting for the period of 13 days delay is that it was due to failure to be supplied by the High Court with the required documents in time. This is also what he reiterated at the hearing of the

application. I see sense on the counsel for the respondent contention that the applicants claim that he was delayed because he was waiting for documents from the High Court was not supported by any communication he made to the High Court. I say so because Rule 45A (1) and (2) of the Rules provides for the lee way of excluding time spent in preparation of such documents. The said Rule states as follows:

"45A (1) Where an application for extension of time to-

(a) lodge a notice of appeal;

(b) apply for leave to appeal; or

(c) apply for a certificate on a point of law, is refused by the High Court, the applicant may within fourteen days of such decision apply to the Court for extension of time.

(2) In computing the time within which to lodge an application under this rule, there shall be excluded such time as may be certified by the Registrar of the High Court as having been required for preparation of a copy of the decision or the order".

[Emphasis added]

In the matter at hand, apart from the applicant's averment that he was delayed by the High Court for not supplying him with the relevant

documents, he did not avail in Court any document showing communication between him and the High Court to that effect. Neither did he produce any certificate of delay that was envisaged under Rule 45A (2) of the Rules which could assisted him in salvaging his application. As it is, in the absence of a certificate of delay issued by the Registrar in that regard, even if the 13 days delay was to be accounted for, it would not have been of assistance to salvage the application.

As regards the delay of 28 days from when the application on the second bite was struck out up to when he lodged the present application, it is crystal plain that there is no averment by the applicant in his supporting affidavit to that effect. Neither did he offer any explanation at the hearing of the application. Diligence is among the factors to be considered in an application of this nature. In the case of **Lyamuya Construction Company Limited v. Board of Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), when the Court was dealing with an application of this nature, propounded some principles for consideration as follows:

- “1. That the applicant must account for all the period of delay.*
- 2. The delay should not be inordinate.*
- 3. The **applicant must show diligence** and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.*
- 4. If the Court feels that there are other reasons such as the existence of a point of law of sufficient importance such as illegality of the decision sought to be challenged”.*

[Emphasis added]

See also: **Dar es Salaam City Council** (supra) and **Tanga Cement Company Limited** (supra).

In the circumstances, given that the applicant has failed to give satisfactory explanation for the 13 days from when the High Court declined to grant the application on 14/9/2020 to 13/10/2020 when he lodged an application for leave before this Court on second bite; also since there is no explanation for the 28 days delay from 25/8/2023 when the application on second bite was struck out by this Court to 21/9/2023 when the instant application was lodged, it is clear that the appellant

lacked diligence in pursuing his right. Also, looking at the totality of the matter, I find that there is no material substance to warrant the grant of application sought.

In the event, in view of what has been demonstrated above, I am satisfied that the applicant has failed to show a good cause to enable the Court grant the extension of time sought. Consequently, the application lacks merit. I accordingly dismiss it. However, given the nature of the matter, I make no order as to costs.

DATED at **MWANZA** this 22nd day of February, 2024.

R. K. MKUYE
JUSTICE OF APPEAL

The Ruling delivered this 23rd day of February, 2024 in the presence of the applicant appeared in person and Mr. Frank Obeid, learned counsel for the respondent, is hereby certified as a true copy of the original.


G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL