

**IN THE COURT OF APPEAL OF TANZANIA**  
**AT DAR ES SALAAM**

**CIVIL APPLICATION NO. 314/01 OF 2022**

**ZET CONSTRUCTION COMPANY LIMITED ..... APPLICANT**

**VERSUS**

**KALOKORA BWESHA AND CECILIA BONIFACE SHIYO**

**(Administrators of the Estate of the Late ALI A. MUFURUKI) ..... RESPONDENT**

**(Application for extension of time to file an appeal out of time against  
the the judgment and decree of the High Court of Tanzania,  
at Dar es Salaam)**

**(Rugazia, J.)**

**dated the 6<sup>th</sup> day of September, 2012**

**in**

**Civil Case No. 173 of 2001**

.....

**RULING**

12<sup>th</sup> & 19<sup>th</sup> March, 2024

**ISSA, J.A.:**

This is an application made by way of notice of motion under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules) seeking extension of time to file an appeal against the judgment and decree of the High Court at Dar es Salaam (Rugazia, J.) dated 6.9.2012 in Civil Case No. 173 of 2001. The application is supported by an affidavit sworn by Kapistran Thomas Haule, the managing director of the applicant company. The application was strongly opposed by the respondent and an affidavit in

reply made by Cecilia Boniface Shiyo, the administrator of the estate, was filed.

The dispute between the parties has had a chequered history. The parties have been tangled in a legal thicket for the past 23 years. The following brief background facts will serve the purpose of appreciating the essence of the present application. The applicant filed Civil Case No. 173 of 2001 at the High Court at Dar es Salaam against the respondent, late Ali A. Mufuruki for a claim of breach of contract. The respondent engaged the applicant to construct his house, but the contract was terminated by the respondent on the claim of under-performance. The High Court delivered its judgment on 6.9.2012 whereby it found the applicant has been defamed by the respondent and awarded her compensation of TZS 5 million. At the same time the counter claim of the respondent was upheld.

The applicant was aggrieved by that decision and he appealed to the Court in Civil Appeal No. 121 of 2012. The appeal was struck out by the Court on 14.2.2017 for being incompetent. The applicant failed to include in the record of appeal the exhibits tendered in the trial court.

Undeterred, the applicant lodged a fresh notice of appeal and filed in Court Civil Appeal No. 18 of 2019. When the appeal was called on for hearing on 9.5.2022, the applicant withdrew the appeal as she realised

there was an error on the certificate of delay. The applicant, still intending to have her appeal determined by the Court, approached the Court with this application for extension of time within which to file her appeal. The application was filed on 10.6.2022.

At the hearing of the application the applicant was represented by Mr. Jonas Stephen Kilimba, learned advocate whereas the respondent had the service of Mr. Bernard Ngatunga, learned advocate.

Having adopted the Notice of Motion, the supporting affidavit and the written submission in support of the application, Mr. Kilimba urged me to grant the application on the ground that: **One**, there was good cause for extension of time as the delay was a result of the applicant being in corridors of the court pursuing justice in good faith. He added that although the applicant's two attempts to have her appeals determined by the Court were fruitless, the applicant was diligent in pursuing her appeal as she immediately filed another appeal once the first was struck out, and she immediately filed this application after she withdrew the second appeal.

**Two**, Mr. Kilimba submitted that the decision of the High Court intended to be challenged was marred with illegality which is a good cause for extension of time. He bolstered his argument by the Court's decision in **Omary Ally Nyamalege (As administrator of the estate of the late Selemani Ally Nyamalege and 2 Others v. Mwanza Engineering**

**Works**, Civil Application No. 94/08 of 2017 [2018] TZCA 230 (2<sup>nd</sup> October 2018, TANZLII).

Mr. Ngatunga, learned advocate for respondent also adopted the affidavit in reply. He added that the Civil Appeal No. 121 of 2012 was struck out on 14.2.2017 for being incompetent as the applicant failed to include the endorsed exhibits in the record of appeal. The applicant refreshed his appeal by filing Civil Appeal No. 18 of 2019 on 28.1.2019 which was also incompetent. Mr. Ngatunga quoted paragraph 8 of the affidavit of the applicant which provides:

*"That on 28<sup>th</sup> January 2019 the Applicant through Taslima Law Chambers - Advocates lodged Civil Appeal No. 18 of 2019 at this Honourable Court believing the appeal is within time and all days have been counted in the certificate of delay but during the hearing of the said appeal Mr. Twaha Taslima counsel for the Applicant discover that other days of delay have not been counted in the certificate of delay..."*

Mr. Ngatunga submitted that the above averment demonstrates lack of diligence and negligence on the part of the applicant's advocate, which does not constitute a good cause for extension of time. Lastly, he submitted that the law is very clear that the applicant ought to account for each day of the delay. In the instant case, the applicant is claiming to have

been in court corridor pursuing justice, but there are gaps where the delays have not been explained. To support his argument he cited page 9 of the **Omary Ally Nyamalege** case (supra).

With respect to the issue of illegality, Mr. Ngatunga pointed out that the applicant failed to elaborate on the illegality. It is a mere unsubstantiated general complaint. He referred to page 13 of the **Omary Ally Nyamalege** case (supra). Lastly, he prayed for this application to be dismissed with costs.

In the rejoinder, Mr. Kilimba reiterated his stance that he has advanced good cause for extension of time, and the issue of illegality was mentioned on paragraph 12 of the applicant's affidavit. He added that the error in the certificate of delay was not applicant's fault, it was the Registrar who committed the error. Hence, the applicant should not be punished for that error.

I shall now proceed to determine the matter on the basis of the arguments and legal principles raised. I have to restate two principles to pave way for my deliberations. **One**, the application was brought under rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules) but the jurisdiction under rule 10 has to be exercised according to the rule of reason and justice and not according to private opinion or arbitrarily. See **Lyamuya Construction Co. Ltd v. Board of Registered Trustees of**

**Young Women's Christians Association of Tanzania**, Civil Application No. 2 Of 2010[2011] TZCA 4 (3<sup>rd</sup> October 2011, TANZLII).

**Two**, there is no universal definition of what amounts to good cause. The Court is bound to consider the prevailing circumstances of the particular case and should also be guided by a number of factors such as the length of the delay, the reasons for the delay, the degree of prejudice the respondent stands to suffer if time is extended, whether the applicant was diligent and whether there is a point of law of sufficient importance such as illegality of the decision sought to be challenged. This position of law has been restated by the Court in a number of cases including; **The Principal Secretary, Ministry of Defence and National Service v. Devram P. Valambhia** [1992] T.L.R. 387 and **Lyamuya Construction Co. Ltd** (supra).

Further, the Court in **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported) stressed the point that the party applying for extension of time must account for each day of the delay. It said:

*"... Delay of even a single day, has to be accounted for, otherwise there would be not point of having ruies prescribing periods within which certain steps have to be taken."*

In this application the issue I have to determine is whether the applicant has advanced a good cause for extension of time. The applicant has implored me to extend the time to allow her to appeal out of time as she spent most of the time in the court's corridor pursuing her appeal in good faith. It is a trite law that, any delay arising from the time the applicant used in court's corridor pursuing his right, whether incompetently or otherwise is not an actual delay. It is referred to as technical delay which constitutes good cause for the grant of extension of time. A single Justice of the Court in **Fortunatus Masha v. William Shija** [1997] T.L.R. 154 laid down a foundation on technical delay, which was later approved by a full Court in **Salvand K. A. Rwegasira v. China Henan International Group Co. Ltd.**, Civil Reference No. 18 of 2006 (unreported) that when there is a technical delay extension of time ought to be granted. See also: **Bank M (Tanzania) Ltd v. Enock Mwakyusa**, Civil Application No. 520 of 2017 [2018] TZCA 291 (22<sup>nd</sup> October 2018, TANZLII), **Bharya Engineering & Contracting Co. Ltd v. Hamoud Ahmed Nassoro**, Civil Application No. 545 of 2018 [2019] TZCA 478 (3<sup>rd</sup> December 2019, TANZLII), and **D.N. Bahram Logistics Ltd and Another v. National Bank of Commerce Ltd and Another**, Civil Application No. 102 of 2021 [2023] TZCA 17377 (6<sup>th</sup> July 2023, TANZLII).

In **Fortunatus Masha** (supra) a single Justice wrote:

*"I am satisfied that a distinction should be made between cases involving real or actual delays and those like the present one which only involve what can be called technical delays in the sense that the original appeal was lodged in time but the present situation arose only because the original appeal for one reason or another has been found to be incompetent and a fresh appeal has to be instituted."*

There is no doubt in my mind the delay in this case as alluded to earlier falls under the term technical delay and is a good reason for extension of time. Mr. Ngatunga, on the other hand, urged the Court to find otherwise as he complained that the applicant's advocate was negligent in his pursuit of both two appeals and negligence is not a good cause for extension of time. This line of resistance is a very old one and a single Justice in **Fortunatus Masha** case (supra) was faced with similar argument and he wrote:

*"In the circumstance, the negligence if any really refers to the filing of an incompetent appeal not the delay in filing it. The filing of an incompetent appeal having been duly penalised by striking it out, the same cannot be used yet again to determine the timeousness of applying for filing the fresh appeal. In fact, in the present case, the*



*applicant acted immediately after the pronouncement of the ruling of this Court striking out the first appeal.”*

That being the position of law the issue of negligence raised by Mr. Ngatunga has no place in the determination of this application once the Court has determined that there is a technical delay. If the issue involved was that of actual or real delay the Court would have considered the question of negligence and on that basis would have required the delay to be accounted for.

In the instant application there is no doubt that after the trial court determined Civil Case No.173 of 2001, the applicant has pursued unsuccessfully two appeals: Civil Appeal No. 121 of 2012 which was struck out on 14.2.2017 and Civil Appeal No. 18 of 2019 which was filed on 28.1.2019 and later withdrawn on 9.5.2022 because of the errors on the certificate of delay. The instant application was filed on 10.6.2022, 30 days after the second appeal was withdrawn. The delay is found not inordinate. Therefore, the Court is satisfied that the applicant has spent much of the time in the court’s corridors in good faith and is entitled to extension of time to file the appeal.

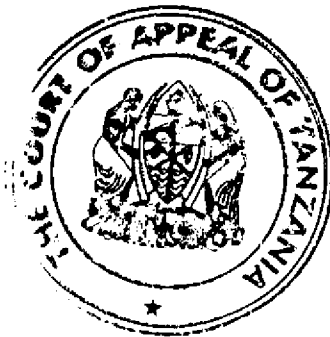
For this reason I allow this application for extension of time to file the appeal. The applicant should file the appeal within 60 days. The costs of this application to be in the cause.

It is so ordered.

**DATED at DAR ES SALAAM** this 18<sup>th</sup> day of March, 2024.

A. A. ISSA  
**JUSTICE OF APPEAL**

The Ruling delivered this 19<sup>th</sup> day of March, 2024 in the presence of Mr. Jonas Kilimba, learned counsel for the Applicant and also holding brief for Mr. Bernard Ngatunga, learned counsel for the Respondent, is hereby certified as a true copy of the original.



  
D. R. LYIMO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**