

IN THE COURT OF APPEAL OF TANZANIA
AT MOSHI
CIVIL APPLICATION NO. 119/05 OF 2024

CHARLES MARKO NAIBALA APPLICANT
VERSUS
LILIAN MARKO NAIBALA RESPONDENT
(Application for extension of time within which to file appeal against the decision
of the High Court of Tanzania at Moshi)

(Mkapa, J.)

dated the 20th day of April, 2020

in

Misc. Civil Application No. 39 of 2018

RULING

11th & 14th June, 2024

MGONYA, J.A.:

In this application, the applicant, by way of notice of motion filed on 2nd February, 2024 under Rules 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules) is seeking extension of time within which to file an appeal against the High Court decision in Miscellaneous Application No. 39 of 2018.

The application has been supported by an affidavit, duly sworn by the applicant himself. Along with that, the applicant filed a written submission in support of the application. On the adversary side, the respondent filed affidavit in reply as well as written submissions bravely contesting the application.

Before determining the merits or otherwise of the instant application, it is, in my view, useful to provide the facts of the matter albeit brief as can be gathered from the supporting affidavit and affidavit in reply.

The parties here are siblings, whereby the applicant vide Probate and Administration Cause No. 5 of 2015, was appointed as Administrator of estate of the late Marko Naibala. However, the appointment was later revoked by the trial court. It is the said revocation which aggrieved the applicant hence, intended to appeal to this Court with leave of the High Court. However, since he did not seek leave within time, his struggle to apply for the extension of time began, although due to various reasons the applications were unsuccessful. That the applicant was later informed that the requirement for leave is no longer the legal requirement as a result, he is before this Court seeking extension of time to file an appeal.

At the hearing of the application before me, the applicant appeared in person whereas the respondent was represented by Mr. Martin Kilasara, learned counsel.

When invited to submit on the application, the applicant prayed to adopt the Notice of Motion, affidavit in support of, written submissions and authorities which were prior lodged in Court. He went on to submit that, his delay was due to the advocate he engaged as he was not

assisting him effectively as he was promising to assist him while not, hence he sued him to the Advocates Disciplinary Committee. On the issue of illegality, the applicant submitted that he was advised that the decision had illegalities which out to be adjudicated upon and decided by this Court.

On his turn, Mr. Kilasala, prayed to adopt the affidavit in reply along with written submissions which were prior lodged in Court on 4th March, 2024. He went on to submit that the applicant's reason that, his advocate was unsupportive is not a good cause. On the facts that the applicant instituted the claim against his advocate, he contended that, the same is not supported with an affidavit. He further contended that from 8th May, 2020 when the applicant filed a notice of appeal, 330 days has lapsed without any effort and the applicant did not account for the delayed days.

Further, on the ground of illegality, he submitted that the applicant did not demonstrate sufficient point of illegalities for the Court to exercise his discretion power. Mr. Kilasala urged the application be dismissed with costs for being meritless.

In his rejoinder, the applicant submitted that, he attached a letter to his submission to prove that he sued his advocate to the Committee. He finally, prayed the Court to allow his application for extending time for him file an appeal.

I have painstakingly examined the record and considered the arguments by the parties in the weight they deserve. The issue for consideration is whether there is sufficient cause to warrant the extension of time.

Basically, the power of this Court to grant extension of time is obtained in the provision of Rule 10 of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules), which reads *inter alia* 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 doing of that act: and any reference in these Rules to any such time shall be construed as a reference to that time as so extended."

From the wording of the above provision, it is clear that, for the applicant to succeed to move the Court to exercise its discretion power to enlarge the time, the applicant must show good cause for the delay. There is a series of decisions on that respect including; **Benedict Mumello v. Bank of Tanzania**, Civil Appeal No. 12 of 2002, **Kalunga and Company Advocates v. National Bank of Commerce Limited** [2006] T.L.R. 235.

Although Rule 10 does not go further to demonstrate as to what amounts to good cause, there are case laws which illustrated that good cause depends on the circumstances of that particular case. If I may cite a few, is the case of **Tanga Cement Company Limited v. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001 and **Oswald Masatu Mwizarubi v. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010 (both unreported) are sufficient. In the latter it was stated that:

"What constitutes good cause cannot be laid down by any hard and fast rules. The term "good cause" is relative one and is dependent upon the party seeking extension of time to provide the relevant material in order to move the court to exercise its discretion."

Nonetheless, the discretion must aim at avoiding injustice and should not be designed at assisting a person who may have deliberately sought it as delaying techniques of the other party's rights of justice in order to evade or otherwise. See; **Shah v. Mbogo and another** [1967] E.A. 116.

As already indicated above, the gist of the applicant's complaint hinges on technical delay, inactivity of his advocate and the illegality of the High Court decision in Miscellaneous Civil Application No. 39 of 2018.

Starting with the ground of technical delay, it is on record that after being revoked, the applicant intends to challenge the decision which was delivered on 20/4/2020 in Misc. Civil Application No. 39 of 2019. The applicant was required to seek for the leave to appeal, but he did not act on it immediately hence, he had to seek for extension of time, the prayer which was refuted by the High Court Judge as he failed to establish the good cause. Thereafter, the applicant filed various applications which ended in vain, due to various legal shortcomings. Therefore, it is on this point we find that the ground of technical delay does not fit in, on the reason that, the applicant delayed in filing first application which was for leave to appeal to this Court. In **Sablina Masalu Mhalagani v. Julius Masalu & Others**, Civil Application No. 30/08 of 2022 (unreported) this Court stated that:

"It stressed that, the former can only be excusable where the first action was preferred timeously but struck out for incompetence and not where it was struck out for being time barred."

On the ground that the delay was occasioned by inactiveness of his advocate, at the outset we reject this ground as it has been the stance of this Court that; negligence and inaction of an advocate is not an excuse and does not constitute sufficient cause for extension of time. See; **Jubilee Insurance Company (T) Limited v. Mohamed Sameer**

Khan, Civil Application 439 / 01 of 2020 and **Omar Ibrahim v. Ndege Commercial Services Ltd**, Civil Application No. 83 of 2020 and **Wambura N. J. Waryuba v. The Principal Secretary Ministry of Finance & Another**, Civil Application No. 320 of 2020 (all unreported). In **Wambura N. J. Waryuba** (supra) the Court held that:

"Lack of diligence on the part of the counsel is not sufficient ground for extension of time."

On the third ground of illegality, at the outset I wish to point that I am very aware of the decision made by the Court in **Principal Secretary, Ministry of Defence v. Devram Valambhia** [1992] T.L.R. 182 at page 189 that:

"where 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 purpose, to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and the record straight."

Likewise, it was stated by this Court in **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) that, the illegality in question must be that of sufficient

importance and the same must be apparent on the face of record and the one that would be discovered by a long-drawn argument or process. I fully subscribe with this position.

In this application it is gathered from paragraph 19 of the supporting affidavit that:

"That, I have also been advised by my lawyer the ruling and drawn order in Misc. Civil Application No. 39 of 2018 which revoked my appointment as administrator of estate of late MARKO NAIBALA raises as multiple legal issues of the patent illegalities which ought to be adjudicated upon and decided by the Court of Appeal of Tanzania."

I have reproduced the above paragraph deliberately in order to facilitate an easy determination on whether there is any alleged illegality deponed by the appellant. Apart to that, to determine whether this Court can exercise its discretion to extend time, on the illegality allegedly advised by an advocate while there is no affidavit deponed to that effect. It is my firm view that, if there is no any affidavit sworn by the advocate alleged to inform the applicant that there are illegalities, the same remain to be hearsay which this Court could not act upon.

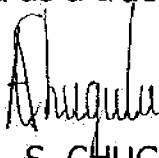
It is my considered view, that the applicant is trying to buy this Court's mercy for extending the time while there is no sufficient cause for the delay stated, of which I am not prepared to do.

For the above reason, I find that no sufficient cause has been shown for this Court to exercise its discretion. The application is therefore dismissed accordingly for being meritless. As the application emanated from Probate matter, I make no order as to costs.

DATED at **MOSHI** this 13th day of June, 2024.

L. E. MGONYA
JUSTICE OF APPEAL

The Ruling delivered on this 14th day of June, 2024 in the presence of the appellant in person unrepresented and Ms. Fay Grace Sadalla, learned counsel holding brief for Mr. Martin Kilasara, counsel for the respondent, is hereby certified as a true copy of the original.


A. S. CHUGULU
DEPUTY REGISTRAR
COURT OF APPEAL