

**IN THE HIGH COURT OF TANZANIA**

**AT SONGEA**

**MISCELLANEOUS CIVIL APPLICATION NO. 09....OF...2013 .**

**SONGEA RESIDENT MAGISTRATE COURT CIVIL CASE NO. 5 OF  
2011.**

**NATIONAL MICROFINANCE BANK PLC**

**AND 2 OTHERS.....APPLICANT**

**VERSUS**

**ODDO ODILO MBUNDA.....RESPONDENT**

**Last Order: 11<sup>th</sup> February, 2014**

**Date of Ruling: 03<sup>rd</sup> April, 2014**

**RULING**

**FIKIRINI, J:**

This application through the chamber summons is for orders, for an extension of time to file the appeal out of time against the judgment of

the Resident Magistrate Civil Case No. 5 of 2011 which was delivered on 19<sup>th</sup> February, 2013, and for the stay of the execution of the issued orders in that judgment, pending the hearing and determination of an intended appeal against the said judgment. The Application was brought under section 14 (1) of the Law of Limitation Act [Cap 89 R.E 2002]; Order XXXIX Rule 5 (1) and section 95 of the Civil Procedure Code [Cap 33 R.E 2002].

The application was supported by an affidavit of one Lugano Mwampeta, who on behalf of the applicant stated that, upon being dissatisfied with the judgment of the RM Civil Case No. 5 of 2011 an appeal was lodged on 4<sup>th</sup> April, 2013, however the appeal was rejected on 13<sup>th</sup> August, 2013, for being out of time, and thus this application.

When this application was called for hearing, parties agreed to file written submissions, and as scheduled both parties filed their submissions.

The applicant through the services of Mwakolo & Co. Advocates submitted that, the delay to file the appeal on time was caused '*by the fact that taken the appeal which was struck for being argument*' (sic). Also the applicant submitted with insistence that, since the trial court had no jurisdiction to entertain the said main suit, such irregularity could

only be cured if this application was granted. In order to support this contention, the applicant cited and referred this court the case of **Kalunga & Co. Advocates V NBC [2006] T.L.R 235**; and **Herzon Jimson Mwankenja V Mbeya City Council, Misc. Land CaseApplication No. 19 OF 2012 (HC-MBEYA) (Unreported)** in which the court referred the former case law.

More so, the applicant submitted that, if this application for an extension of time to file the appeal out of time would be granted, neither part will be prejudiced. In regard to the second prayer of stay of execution, the applicant was of the view that, if the order for stay of execution was issued then the execution of the decree will not be enforceable, until the intended appeal was determined.

In reply, the Respondent through the services of Mr. Ngafumika learned Counsel strongly opposed this application since, there is no sufficient reasons advanced by the applicant to justify the said delay, as the advanced reason do not fall within the ambit of section 21 of the Law of Limitation Act. In regard to the cited case law, Mr. Ngafumika submitted that, the said case law is inapplicable in the instant application since it is related to the applicability of Rule 8 of the Court of Appeal Rules, 1979 which do not apply in the High Court.

In his rejoinder, the Applicant insisted that the advanced reason fall within section 21 of the Law of Limitation Act; and in regards to the cited case law, the applicant submitted that, the said case law is applicable in this court that is why it was even referred by the High Court of Mbeya; the delay to file the intended appeal was not caused deliberately.

After going through the submissions from both parties in relation to the application, the issue is whether this application has merit. However, before I dwell into the merit of this application, I find it appropriate to start with dealing on the chamber summons filed by the applicant.

As I have said earlier, the said chamber summons contains two distinct prayers that is an application for extension of time by virtue of section 14 (1) of the Law of Limitation Act and stay of execution by virtue of Order XXXIX Rule 5 (1) and section 95 of the Civil Procedure Act. There is in actual fact nothing wrong having two prayers in one application, as in the instant application, since it reduces multiplicity of proceedings.

**See: Tanzania Knitwear Ltd Versus Shamshan Esmail [1989] T.L.R 48; MIC Tanzania Ltd V Minister for Labour and Youth Development and Another, Civil Appeal No. 103 OF 2004 (CAT-DSM) (Unreported).** However, there is a concern as to whether it was

proper for the applicant to pray for an order of stay of execution as one of the prayers. This is because

an application for stay of execution can only be granted where there is a pending appeal, as this was emphasised in the case of **Express (T) Ltd and Another V El-Nasr Import Export Co. Ltd and 2 Others, Civil Reference No. 25 OF 2006 (CAT-DSM) (Unreported)** at pages 11, 12 the Court had this to say;

*"In other words, the Court may only stay execution of a decree or order whose appeal is intended or is pending before the Court. It cannot stay execution of a decree or order which is not subject of the appeal before it."*

Thus, in the instant application, there is no intended appeal before this court since at this stage the applicant is merely seeking an extension of time to lodge an appeal out of time. For that reason, I find this application for stay of execution as premature one.

Turning to the main application of extension of time which was made by virtue of section 14 (1) of the Law of Limitation Act, in which the Respondent strongly opposed it by arguing that, the applicant has failed to advance sufficient reason.

From the outset I agree with Mr. Ngafumika that, under the circumstances of the instant application, the applicant has to advance sufficient reason (s) for his delay to lodge the appeal on time. This is because, by virtue of section 14 (1) of the Law of Limitation Act, an extension of time can only be granted by the court in *suo motu* and where there are reasonable or sufficient cause to do so. **See: Parin and Another V Abduliasul Ahmed Jaffar and 2 Others [1996] T.L.R 110**

Now, at this juncture the issue is whether the applicant has advanced sufficient reason.

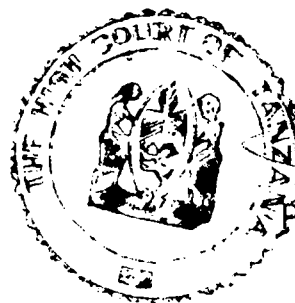
After going through the entire affidavit and the court's record, the applicant only conceded that, upon his appeal being rejected for being out of time, he is now seeking an extension of time. However, no sufficient reasons were advanced to have caused the applicant's delay to file his intended appeal timely, instead, what the applicant appears to rely mostly on the allegation that, the trial court had no jurisdiction; hence this issue need to be determined by way of appeal, so that the extension of time has to be granted in order to ascertain the said irregularity.

Despite the above argument by the applicant, but my own observation and perusal of the available documents including the applicant's affidavit, the delay is due to the applicant's negligence, which in law is not a sufficient reason. **See: Salum Sururu Nabhai V Zahor Abdulla Zahor [1988] T.L.R 41; Athuman Rashid V Boko Omary [1997] T.L.R 146.** I am saying so because, at the trial, both parties were represented by the same Counsels as appearing at this stage. The Counsels or the one representing the applicant must have known what it takes if one intends to lodge an appeal. From such knowledge then I expected the responsible Counsel would file the appeal promptly without any delay.

The applicant raised an issue of jurisdiction, that the trial court had no jurisdiction to entertain land matter. Relying on that argument, the applicant is urging the Court to entertain the application so that the irregularity can be dealt with. I find this ground as having no legal basis. This is because, at the trial, the cause of action between the parties was not relating to land matter as alleged by the applicant, rather it was concerning to the loan agreement. From the record it appears that, the applicant confiscated some of the respondent's properties to settle the said loan. However, had the trial court had no jurisdiction to entertain

the suit, then obviously I would have come to a different finding, for two major reasons **one**, I am alive to the legal position that, a point of jurisdiction can be raised at any stage, even at the appellate stage. **See: Peter Ng'homongo V The Attorney General, Civil Appeal No. 114 OF 2011 (CAT-MWZ) (Unreported).** **Two**, I concur with the applicant that, whenever there is any irregularity in the proceedings, that by itself constitutes a sufficient reason to ground extension of time. **See: Principal Secretary, Ministry of Defence and National Service V Devram Valambhia [1992] T.L.R 182; VIP Engineering and Marketing Ltd and 3 Others V Citibank Tanzania Ltd, Consolidated Civil Reference No. 6, 7 and 8 OF 2006 (CAT) (Unreported); Amour Habib Salim V Hussein Bafagi, Civil Application No. 52 OF 2009 (CAT-DSM) (Unreported)**

For the above stated reasons and the fact that no sufficient and/or good cause was shown as to warrant grant of the application, I thus find this application has no merit and consequently dismissed with costs.



P.S.FIKIRINI

JUDGE

03<sup>rd</sup> APRIL, 2014