

IN THE HIGH COURT OF TANZANIA

AT TABORA

MISC. CIVIL CASE APPLICATION NO. 51 OF 2018

(Arising from Original Civil Case No. 2 of 2017 Igunga District Court)

MOUNT MERU MILLERS LTD APPLICANT

Versus

**1. STEPHEN BITURO
2. FAUSTINE BUGINGO
3. GILBERT SAGUDA** } **RESPONDENT**

RULING

20/08/2019 - 28/2/2020

BONGOLE, J.

Mount Meru Millers Limited herein after referred to as the applicant has preferred this application against **Stephen Bituro, Faustine Bugingo** and **Gilbert Saguda** hereinafter referred to as the **1st, 2nd and 3rd** Respondent respectively.

The application is made under section 14(1) of the Law of the Limitation Act No. 10 of 1971; section 95 of the Civil Procedure Code Cap. 33 R.E. 2002 and any other enabling provision of the law.

The reliefs sought by the applicant are for orders that:-

- 1) A period for institution of an appeal by the applicant be extended and the applicant be allowed to file his appeal out of the prescribed time.
- 2) Any other order deemed just by the court.

The application is supported by an affidavit deposed on by ALANUS MUBEZI Advocate with instructions from the Applicant to swear the affidavit.

The facts as deposed by Mr. Alanus Mubezi in the affidavit inter alia materially run thus:-

That, the applicant was the defendant in Civil Case No. 2/2017 before the District Court of Igunga at Igunga and the said case No. 2/2017 ended in the Respondents' favour by a judgement of the court delivered on July 21st, 2017.

That, the applicant was aggrieved with the said decision and timely filed Civil Appeal No. 23/2017 in the High Court at Tabora Registry and the same was struck out on the 19th June, 2018 for being incompetent on the basis that it was annexed with a copy of a defective decree.

That on 20th June, 2018 the applicant wrote a letter to the Igunga District Court seeking for correction to be done upon the decree in Civil Case No. 2/2017 specifically on the date to which the said decree was signed.

That on the 25th July, 2018 he was supplied with the corrected copy of decree from the District Court of Igunga at Igunga in Civil Case No. 2/2017. (The said copy attached).

That the applicant's delay in filling the appeal against the decision of the District Court of Igunga in Civil Case No. 2/2017 was caused by a technical reasons as the applicant had once timely filed Civil Appeal No. 23/2017 before the High Court at Tabora.

That the applicant is still aggrieved with the said decision of the District Court of Igunga and that the intended appeal has a huge chances of success.

The Respondents were duly served with the Courts' summons but the 1st Applicant in the service of Mr. Fadhil R. Kingu filed Counter Affidavit and whereas the 2nd and 3rd Respondents never entered appearance to defend the application.

Hearing of the application proceeded ex-parte against the 2nd and 3rd Respondents.

When the application came for hearing Mr. Kelvin Kayaga appeared for the applicant and whereas Mr. Fadhili R. Kingu learned Advocate appeared for the Respondent.

Arguing the appeal, Mr. Kelvin adopted the averments in the affidavit. He insisted that the applicants' delay in filing the appeal was a technical delay as it was stated in the case of ***Fortunatus Masha Vs. William Shija and Another*** (1977) TLR 154 (CAT) where the Court made a distinction between actual delay and technical delay.

Further that the applicant having secured a correct decree he promptly filed this application exhibiting a sign of diligence. He said, the trial District Court stands to be blamed for supplying a defective decree as it is stance law that a part should not be punished for the mistakes of the Court.

He finally submitted that no harm shall occur on the part of the Respondent if this application is granted and the appeal be determined on merits. He prays basing on those reasons that the appeal be granted and each part bare own costs.

Responding to, Mr. Fadhili argued that it is para 4 and 5 of the affidavit which advanced reasons for the delay. He said, after the striking out order the applicant quickly applied for correct copy of the decree which the same was supplied on the 25th July, 2018. That the applicant filed this application on the 3rd August, 2018. He argued that there is no any scientilia evidence on the affidavit or arguments submitted in this period of 8 days as to where he was. That the 8 days period have not been accounted for as the principle of law is that every day of delay must be accounted for. He cited the case of ***Vodacom Foundation Vs. Commissioner General of TRA*** Civil Application No. 107/2017 Dar es Salaam (Unreported) where it was held that:-

"delay even for a single day has to be accounted for".

That as the applicant has failed to account for the 8 days, it is his argument that he has not advance any reason.

That the case referred of ***Fortunatus Masha*** is that in this application we are not looking for technical delay but for the actual delay. That the applicant has failed to give explanation of the actual delay. He urged that the application is wanting hence it should be dismissed.

From the arguments from both Advocates, it is with no shadow of doubts that the applicant was first supplied with a defective decree by the trial District Court of Igunga. The said defective decree led to the striking out order of the High Court in the appeal that was timely filed by the applicant and admitted. Diligently the applicant applied for a copy of the correct copy of the decree from the trial court where the same was supplied

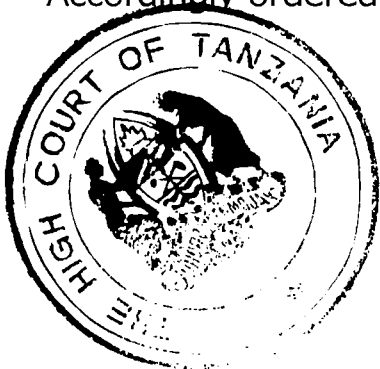
to him on the 25th July, 2018 and as the applicant was out of the prescribed period he filed this application of extension of time on the 3rd August, 2018.

It is blatant and obvious therefore the reasons for delay of instituting the intended appeal was the defective decree that was issued by the trial court to the appellant. It appears that Mr. Fadhil misconceived the gists of this application. The 8 days counted from when the applicant received the correct copy of the decree to the date he lodged this application was not and is not the issue at hand in this instant application. The issue is not why the applicant delayed for the 8 days in filing this application, rather the issue is why the applicant delayed to file the appeal against the impugned decision of the trial court from when its time to do so elapsed. The applicant has demonstrated the steps he took diligently and the fact that it was the trial court which made the mistake and not himself.

That been observed, I am satisfied that the applicant has managed to raise good and sufficient cause for the delay which justifies him to be granted the reliefs sought. I find the arguments raised by Mr. Fadhili in objecting this application though not lacking in attractiveness and persuasiveness to be unmeritorious.

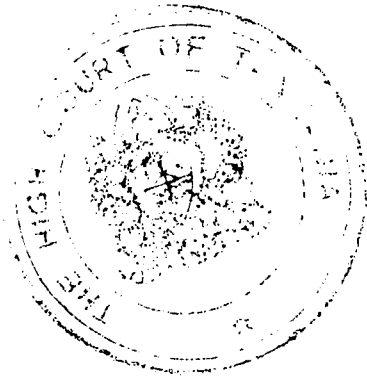
The application is granted with orders that the applicant files his appeal within 30 days from the date of this order and each part to bare own costs taking into account that it was the trial court that made the mistake.

Accordingly ordered.




S.B. BONGOLE
JUDGE
28/2/2020

Ruling delivered under my hand and seal of the court in chambers, this 28/02/2020 in the presence of Ms. Flavia Francis Holding a brief of Mr. Fadhili Kingu for the 1st Respondent and in the absence of the Applicant.



A handwritten signature in black ink, appearing to be "S.B. Bongole", is written over a horizontal line.

S.B. BONGOLE

JUDGE

28/02/2020