

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

MISC. CIVIL APPLICATION NO. 03 OF 2019

(Arising from Civil Case No. 4 of 2013 High Court of Tanzania at Moshi)

REXFORD KISAKA MGWENAAPPLICANT

VERSUS

INSPECTOR GENERAL OF POLICE1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

16th June, 2020 & 14th August, 2020

RULING

MKAPA, J:

The applicant Rexford Kisaka Mgwena is seeking for extension of time to lodge Notice of Appeal and Leave to Appeal to the Court of Appeal of Tanzania against the decision of this Court in **Civil Case No. 4 of 2013** (P.S. Fikirini, J.) delivered on 12th October 2016. The application is made under **section 14 (1) of the Law of Limitation Act**, Cap 89, [R.E. 2002] and is supported by a sworn affidavit of Mr. Abduel Gilead Kitururu learned advocate for the applicant. The respondent did not dispute the application by filing counter affidavit. By consent the



application was argued by way of filing written submissions. The applicant was represented by Mr. Abduel Gilead Kitururu learned advocate while the respondents were jointly represented by Ms. Jacqueline Cletus Kinyasi, learned State Attorney.

Arguing in support of the application Mr. Kitururu submitted that, the decision to be appealed against was delivered by **Hon. Fikirini J.** on 11th December, 2016, aggrieved, the applicant successfully filed a notice to appeal to the Court of Appeal and the appeal was registered at Arusha as **Civil Appeal No. 87 of 2017**. Further that, appeal was scheduled for hearing on 11th December, 2018 but was struck out for lack of endorsed exhibits and the missing page number 2 of the Plaint in the Record of Appeal hence this application.

Mr. Kitururu went on submitting that, since the time limit to file a fresh notice had lapsed the appellant requested this application to be granted as well as a letter requesting to be supplied with copies of judgment, decree and proceeding, well endorsed exhibits and Certificate of Delay for the purpose of filing a fresh appeal. He went on explaining that, as the appeal was struck out for being incompetent which in his view is a technical error, is sufficient reason for granting of extension of time. To support his argument, he cited the case of **Mary Mchome Mbwambo and Another (as joint administrators of the estate of the**



late Giliad Mbwambo) V Mbeya Cement Company Ltd, Civil Application No. 271/01 of 2016, CAT at Dar es Salaam, where Hon. Lila, J.A. had this to say;

"... the sequence of events and prompt steps taken by the Applicants till when they lodged the instant application positively accounts for the delay. To shut the door will, in the circumstances, cause injustice,"

Mr. Kitururu contended further that, since the initial appeal was filed on time, the delay which is the subject of the current application was not a normal delay but technical delay. Further, after the first appeal was struck out the applicant was affected psychologically to the extent of breaking up relationship with his advocate. After these turbulences the application was filed on 18th January, 2019. He finally argued that incompetent record of appeal is no longer fatal due to the amendment brought by the Court of Appeal (Amendment) Rules, 2019 vide GN No. 344, in order to avoid procedural technicalities, thus granting of this application would not amount to miscarriage of justice to either party.

Contesting the application, Ms. Kinyasi submitted that, section 14 (1) of Cap 89 has not defined what amounts to sufficient cause, thus the practise has been to seek guidance and interpretation from case laws. She cited the case of **Benedict**



Mumelo V Bank of Tanzania, Civil Appeal No. 12 of 2012 quoted with approval the case of **Tanga Cement Company Limited V Jumanne D. Massangwa and Amos A. Mwalwanda, Civil Application No. 6 of 2001** (unreported) which held *inter alia* that;

"...the sufficient cause sought depends on deliberations of various factors, some of which revolve around the nature of actions taken by the applicant immediately before or after becoming aware that the delay was imminent or might occur."

She further argued that, delay of even a single day must be accounted for and such delay should not be inordinate and the applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take. She went on explaining the trite principle of the law to the effect that grant of extension of time is entirely upon discretion of the court. It was Ms. Kinyasi's contention that the applicant's previous appeal was struck out on 11th day of December, 2018 whereas the current application was lodged on 29th January, 2018 without accounting for each day of delay.

Furthering her argument Ms. Kinyasi argued that the claim that the applicant was psychologically ill and frustrated are not supported in his affidavit thus she prayed for the court to



disregard them as no medical proof was attached to substantiate the same.

She finally submitted that since the applicant had failed to account for each day of delay the application lacks merit and the same should be dismissed for want of merit.

In his brief rejoinder applicant maintained his stance to the effect that he had managed to demonstrate sufficient cause for delay and prayed for the application to be granted.

Having considered parties submissions and arguments, as rightly submitted by the respondent, the law is settled on extension of time to the effect that the same is entirely upon discretion of the court to grant or not and as such must be confined to the rules of reason and justice. [See **Eliakim Swai And Another V Thobias Karawa Shoo**, Civil application No. 2 of 2016 (CAT) at Arusha (unreported), **Daudi Haga V Jenita Abdon Machafu**, Civil Reference No. 1 of 2000 and **Lyamuya Construction Co. Ltd V. Registered Trustees of YWCA of Tanzania**, Civil Application [No. 2 of 2010]. These authorities are illustrative on the principle set in determining good cause for granting extension of time.

In the present application the question for consideration is whether the applicant has demonstrated sufficient reasons to



warrant the granting of the application sought. It is undisputed the fact that, the applicant had initially successfully filed notice of appeal, as well as appeal to the Court of Appeal which signifies promptness and diligence, the only problem was that the appeal was incompetent for lack of well endorsed exhibits and missing page number 2 of the Plaint in the Record of Appeal.

In the case of **Cropper V Smith (1884) 26 CH D 700** (CA) the Court had this to say:

"It is well established principle that the object of the court is to decide the rights of the parties and not to punish them for mistakes they made in the conduct of their rights. I know of one kind of error or mistake which if not fraudulent or intended to overreach, the court ought to correct if it can be done without injustice to the other part. Court does not exist for the sake of disciplines but for the sake of deciding matter in controversy."

The same position was observed in the case of **General Market Co. Ltd V A.A. Shariff** [1980] TLR 61, where it was emphasized that *"rules of procedures should not be used to defeat justice"*.

Applying the above legal position to the present application my view is, the applicant had presented before this Court sufficient

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reasons for the delay. More so, justice demands that this matter be determined on merit.

For the reasons discussed, the application has merit and I proceed to grant the same. The applicant is ordered within 14 days from today to file a proper Notice of Appeal with no order as to costs.

Dated and delivered at Moshi this 14th day of August, 2020.




S. B. MKAPA

JUDGE

14/08/2020