

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
MISC. CIVIL APPLICATION NO. 11 OF 2018
(From Civil Appeal No. 21 of 2016 High Court of Tanzania at Mbeya,
Original Civil Case No. 74 of 2013 Resident Magistrate's Court of
Mbeya at Mbeya)**

NIKO INSURANCE (T) LTD.APPLICANT

VERSUS

**YAHAYA BROWN MWANJOKA
(Administrator of the estate of the
late Asia Yahaya, Fatuma Bahati**

and Abubakari Matia.....1ST RESPONDENT

CIPEX COMPANY LTD.2ND RESPONDENT

ABDILAH BAKARI.....3.RD RESPONDENT

R U L I N G

Date of last order: 22/09/2020

Date of Ruling: 30/10/2020

NDUNGURU, J.

Before me is an application by Niko Insurance (T) Ltd., hereafter the applicant, for extension of time within which to lodge an appeal against the judgment and decree of the Resident Magistrates Court of Mbeya at Mbeya in the Civil Case No. 74 of 2013 dated 21/01/2016.

The application is by way of chamber preferred under Section 14 (1) of the Law of Limitation Act, Cap Revised Edition 2002 and it is

supported by an affidavit of Mary Laurent Mgaya, the advocate of the applicant.

The 1st respondent resisted the application and has filed an affidavit in reply. While the 2nd and 3rd respondents never filed the affidavit in reply.

At the hearing of the application, the applicant was represented by Ms. Mgaya while the 1st respondent was represented by Mr. Tazan Mwaiteleke and the 2nd respondent enjoyed the service of Ms. Gatuna, while the 3rd respondent never appeared in court and the application proceeded *ex parte* against him.

The legal feud was between Ms. Mgaya, learned advocate for the applicant and Mr. Tazan learned advocate for the 1st respondent. The application was heard by way of written submissions. This ruling is in respect of their rival submissions for and against the application.

The reasons for the application are contained in the applicants' affidavits which raises the issue of illegality, and delay to obtain copies of judgment and decree.

Submitting for the application, Ms. Mgaya was of the argument that the applicant delayed to obtain the copies of judgment and decree which are documents necessary to accompany the memorandum of appeal. That following delivery of judgment subjected of this application

on 21/01/2016 on the same date, the applicant lodged a letter requesting to be supplied with the judgment and decree but the said documents were supplied on 26/09/2016 by then the time for appeal was already lapsed. This is contained at paragraph 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the affidavit. She referred the case of **Benedicto Mumello vs. The Bank of Tanzania**, Civil Appeal No. 12 of 2002 (Unreported).

The counsel went further submitting that having obtained the necessary documents, the applicant filed an Appeal No. 21 of 2016 before this court. Unfortunately the appeal was struck out on 31/01/2018 for being incompetent. It was her contention that under Section 21 (2) of the Law of Limitation Act, the time spent in pursuing a cause before the court have to be considered in application of this nature.

Apart from the above ground, yet the counsel for the applicant submitted that there are illegalities apparent on the face of the record which make the intended appeal viable the same is pleaded at paragraph 3 and 21 of the affidavit and paragraph 3, 4, 5, 6, 7, 9, 11 and 12 of the supplementary affidavit. The counsel was of the contention that the existence of illegalities in the impugned decision has always been considered as a sufficient cause to grant extension; The

counsel fortified her submission by referring the case of **Tanzania Breweries Limited vs. Herman Bildad Minja**, Civil Application No. 11/18 of 2019.

The counsel submitted that the applicant was denied the right to make defence without any reason. She said that is contrary to the principles of natural justice. The counsel submitted the illegalities existing do not need an extensive perusal of the record rather a simple casting of the eye reveals the fact.

The counsel, thus urged the application be granted.

Mr. Tazan Mwaiteleke counsel for the 1st respondent strongly resisted the application. He submitted on the relevance of the order sought in the chamber summons. He said, the applicant has not shown which decision or decree in which he prays for extension of time to appeal against. he said that is improper as the court is left to guess which decision the applicant intends to appeal against.

It was his further contention that, judgment subjected of this application was delivered on 21/01/2016 while this application was filed on 28/02/2018 which is almost two years. That the applicant has not sufficiently explained on this inordinate delay of two years and one month. he buttressed his assertion by citing the case of **National**

Housing Corporation vs. Takela Somji, Civil Application No. 344/17 of 2018 (Court of Appeal of Tanzania) (Unreported), **Mashaka Juma Shaban & 42 Others vs. The Attorney General**, Civil Application No. 279/01 of 2016 (Court of Appeal of Tanzania) Unreported.

The counsel was of the further submission that the reasons advanced by the counsel of the applicant if looked carefully show pure negligence and ignorance of law on the part of the advocate of the applicant. He further said negligence and ignorance of law do not constitute a sufficient cause for extension of time. He referred to a number of authorities in this aspect including; **Tanzania Ports Authority vs. M/s Pembe Mills Ltd.**, Civil Application No. 49 of 2007, **Masumbuko Roman Mahunga Lamwai vs. Venance Francis Ngula & The Hon. Attorney General**, Civil Application No. 60 of 1998 Court of Appeal of Tanzania (Unreported) to mention but few.

On the question of illegality the counsel for the 1st respondent was of the submission that, the point of law or illegality to be considered in the application for extension of time must be of sufficient importance and should be on the face of the record. He referred the case of **Lyamuya Construction Company Ltd. vs. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 02 of 2010 (Court of Appeal of Tanzania)

unreported. He submitted that alleged illegalities are not apparent, if any are discovered by long drawn argument.

The counsel for 1st respondent was of the submission that the applicant was denied the right to be heard but, when the right to make defence was given to him, he never appeared in court no informed the court of his absence thus the case proceeded under Order XVII Rule 3 of Civil Procedure Code to close the defence case and set the suit for judgment.

In the end the counsel for the 1st respondent urged the court to hold that the applicant has failed to show sufficient cause to warrant extension of time thus humbly prayed the application be dismissed with costs for being devoid of merit.

The counsel for the applicant in her rejoinder reiterated her submission in chief. The counsel emphasized that the cause of delay to file an appeal was the delay to obtain necessary documents requisite for appeal. The counsel added that, there was is no dispute that the applicant filed Appeal No. 21 of 2016. The appeal was filed not under ignorance interpretation of Section 19 (2) of the Law of Limitation Act, Cap 89 (Revised Edition 2002) which excludes the time the intended appellant was waiting to be availed with the copies of necessary documents requisite for appeal purpose. It was neither filed under

ignorance of law nor negligence on the part of the applicant's advocate as submitted by the counsel of the applicant. That the application was filed promptly following the struck out order of the then filed appeal.

On the question of illegalities, the counsel rejoined that there is no dispute that there exist illegalities. Thus the reason advanced are sufficient for the court to grant the application.

Having gone through the applicant's affidavits in which the grounds of this application are contained affidavit in reply by the 1st respondent and the rival submissions of the counsel of the parties, before me the question that calls for determination is whether the reasons stipulated are sufficient to move this court to grant extension of time.

The law in these kind of applications is settled. It is that application for extension of time is entirely the discretion of court to grant or refuse it. But such discretion must be exercised judicially and the overriding consideration is that there must be sufficient cause for doing so. What amounts to sufficient cause has not been defined the court is left to consider circumstances of each case. This has been held in a number of cases see: **Moses Mchunguzi vs. Tanzania Cigarette Co Ltd.**, Civil Reference No. 03 of 2018, Court of Appeal of Tanzania at Bukoba (Unreported), **Regional Manager Tanroads**

Kagera vs. Ruaha Concrete Company Limited, Civil Application No. 96 of 2007, Court of Appeal of Tanzania, **Oswald Masatua Mwizarubi vs. Tanzania Fish Processors Ltd**, Civil Application No. 130 of 2010 Court Appeal of Tanzania and **Shant vs. Shindocha and others [1973] E.A 202**. The recent development of our jurisprudence, it is now a settled law that the time awaiting for to be availed with the copies of judgment and decree necessary for appeal should be excluded in computing time limit as provided by Section 19 (2) of Cap 89 see case of **The Director of Public Prosecution vs. Mawazo Saliboko @ Shagi & 15 Others**, Criminal Appeal No. 384/2017, Court of Appeal of Tanzania (Unreported).

But even before such development, it had been the position that the delay to be availed with the copies of the documents necessary for appeal is a good cause for the court to grant extension of time. See **Benedicto Mumelo vs. Bank of Tanzania**, Civil Appeal No. 12 of 2002. In this application it is not indispute that the applicant delayed to be availed with the necessary documents for appeal purpose.

Further it is not disputed that having availed with the copies, the applicant promptly filed Civil Appeal No. 21 of 2016 relying on Section 19 (2) of Cap 89. But by then there were diverging thoughts as to who excludes the time when the applicant was waiting to be availed was

waiting to be availed with the copies. This is now settled. It is therefore that the applicant did not sleep over his rights but was in the court of law seeking for his right. Thus applying the principle of technical delay, I find his delay was upon sufficient cause.

On the question illegalities, it has been extensively submitted by the counsel of the parties. From the submissions, both counsels are at one that illegality is a sufficient cause for extension of time provided that the said illegalities must be in the face of the record. I have no dispute on that. See **Lyamuya Construction Company Limited vs. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 02 of 2010.

It is a position of law that once an illegality is proved to exist, is sufficient cause to grant extension regardless the applicant has failed to account for each day of delay. In the application at hand failure for the court to avail the applicant right to make defence is quite apparent on the record, it does not need long drawn argument as contended by the counsel for 1st respondent.

Being said and done, I find merit in the application at hand. I hold that the applicant has shown sufficient cause to move the court exercise its discretion. Being done, I hereby grant extension of time for the applicant to file his intended appeal.

The applicant is given 45 days from the date of this ruling within which to file the intended appeal.

No order as to costs.

It is so ordered.




D. B. NDUNGURU
JUDGE
30/10/2020

Date: 30/10/2020

Coram: D. B. Ndunguru, J

Applicant:

For the Applicant: Ms. Mary Mgaya – Advocate

1st Respondent: Present

For the 1st Respondent: Mr. Msegeya advocate holding brief of Mr. Tazan Mwaiteleke

For the 2nd Respondent: Ms. Mgaya holding brief of Mary Gatuna advocate

3rd Respondent:

B/C: M. Mihayo

Ms. Mary Mgaya – Advocate:

The case is for ruling, we are ready.

Court: Ruling delivered in the presence of Ms. Mary Mgaya for the applicant, Mr. Msegeya advocate holding brief of Mr. Tazan Mwaiteleke, the 1st applicant.




D. B. NDUNGURU
JUDGE

30/10/2020

Right of Appeal explained.