

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 803 OF 2018

BETWEEN

ALLIANCE ONE TOBACCO

TANZANIA LIMITED.....1ST APPLICANT

HAMISI SHONI.....2ND APPLICANT

VERSUS

MWAJUMA HAMISI (*as the administratrix*

***Of the estate of PHILEMONI R. KILENYI*)1ST RESPONDENT**

HERITAGE INSURANCE COMPANY (T) LIMITED...2ND RESPONDENT

RULING

Date of last Order: 14/07/2020

Date of Ruling: 02/10/2020

MLYAMBINA, J.

The application has been brought under *Rule 45 A (1) (B) of the Court of Appeal Rules as amended by G.N No. 362 of 2017 and Section 5 (1) (c) of the Appellate Jurisdiction Act Cap 141 (R.E. 2002)*. It seeks for an order for extension of time for the Applicants to file an application for leave to appeal to the Court of Appeal of Tanzania. The application is supported with the affidavit of Alfred Roman Woiso, Advocate for the Applicants.

The main reason advanced by the Applicants in their supporting affidavit can be gathered under paragraph 5 which provides:

That failure to file this current application promptly was occasioned by awaiting the ruling and drawn order of this Court Honourable I.C Mugeta, Judge so as to comply with the previous order of Honourable Mruke, Judge.

The application was resisted by both Respondents through Counter Affidavits of Godfrey Gabriel Mwansoho for the 1st Respondent and Karolo Valerian Tarimo for the 2nd Respondent. The brief facts leading to this application has been well stated by the Applicants in their submission in chief.

On 22nd September, 2016, the Applicants launched an application for leave, before Honourable Muruke, Judge. which was within the prescribed time of thirty days since the date of the judgment. As the Applicant were yet to be supplied with copies of the Judgment and Decree, they attached their letter requesting the Judgment and Decree of Honourable Feleshi, Judge. The application was withdrawn on 5th June, 2017, for failure to attach copy of Judgment and Decree as aforementioned but with leave to re-file. On 8th June, 2017 they wrote a letter requesting a certified copy of the

said Drawn Order. After obtaining copies of the said Judgment and Decree, on 14th July, 2017, they filed an application for extension of time.

On 15th November, 2018, the Applicant conceded a preliminary objection and the application was struck out before Honourable I.C Mugeta, Judge. The Applicants wrote a letter dated 15th November, 2018 requesting copy of the said order and when they got the same on December, 2018 launched this application for extension of time before this Honorable Court, Honorable Mlyambina, J.

On 20th December, 2018, *the Respondents raised a preliminary point of law*, which was overruled on 25th October, 2019 paving way that the application should be dealt with on merit. In view of the above the Applicants contended that they have accounted for each day of delay. The Applicants cited a number of cases including the case of **Elfazi Nyatega and 3 Others v. Caspian Mining Ltd.** Civil Application No. 44/08 of 2017, Court of Appeal of Tanzania at Mwanza, (unreported) in which, at page 10 and 11, the Honourable Court stated that:

*As stated above, the Applicant ought to have accounted for every day of the delay. Underscoring that requirement in the case of **Sebastian Ndaula v. Grace Rwamafe**, Civil*

Application No. 4 of 2014 (unreported) the Court stated as follows:

The position of this Court has consistently been to the effect that in an application for extension of time, the Applicant has to account for every day of the delay.

In another cited case of **Bruno Wencelaus Nyalifa v. the Permanent Secretary and Another**, Civil Appeal No. 82 of 2017 Court of Appeal of Tanzania at Arusha, (unreported) at page 10-11 the Honourable Court stated that:

*...in deciding to grant or refuse an application for extension of time as aptly stated in the case of **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported);*

- a) The Applicant must account for all the period of delay.*
- b) The delay must not be inordinate.*
- c) The Applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intended to take.*
- d) If the Court feels that there are sufficient reasons such as existence of a point of law of sufficient importance;*

such as the illegality of the decision sought to be challenged.

In their submission in chief, the Applicants went further to raise a point of illegality that was occasioned in the Judgment and Decree of this Court Honourable Feleshi, Judge, vide its own motion, as it was never a ground of appeal in *Consolidated Civil Appeals No. 70 and 77 of 2013*. The Applicants were never part of *Civil Appeal No. 77 of 2013*. Therefore, the same was never served upon them. *Civil Appeal No. 77 of 2013* ended up exonerating the 3rd Respondent as insurer, for liability, which they had never objected; that they were duty bound to indemnify the 1st Applicant from the onset of this suit. Hence the above Judgment, as far as *Civil Appeal No. 77 of 2013* was concerned, condemned the Applicants unheard.

The Applicant therefore wished for the Court of Appeal to revisit this illegality. The Applicants cited the case of **Zakaria Kitungwa v. Alliance One Tobacco Tanzania Limited**, Civil Application No. 500 of 11 of 2019 Court of Appeal of Tanzania at Dar es Salaam, [unreported] at page 10-11, in which the Court speaking through Mwambegele, J.A while dealing with what's is illegality referred to the case of the **Principal Secretary Ministry of Defence and National Service v. Devram Vallambia** [1991] TLT 387 and stated that:

In our view, when 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 the purpose, to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record straight.

Apart from that, the Applicant re-cited the case of **Bruno Wencelaus Nyalifa** (*supra*) whereby the Court at page 12 continued stating that:

Delay of even a single day, has to be accounted for otherwise there would be no proof of having Rules prescribing periods with which certain steps have to be taken.

The Respondent objected the application for main reason that the Applicants failed to account each day of delay and that the Applicants new reasons other than those under paragraph 5 of their affidavit are unacceptable. In correct view of the Respondent, submissions are not evidence and they cannot be used to substitute the contents of their affidavit as it was observed by the Court of Appeal of Tanzania in the case of **Bruno Wenceslaus Nyalifa V. Permanent Secretary, Ministry of Home Affairs and the**

Attorney General, Civil Appeal No. 82 of 2017 where it was held that:

Submissions are not evidence submissions are generally meant to reflect the general features of a party's case. They are elaborations on evidence already tendered. They are expected to contain arguments and the applicable law. They are not intended to be a substitute for evidence.

I have considered the submissions of both sides. I entirely agree with the Respondents that the Applicants failed to account for each day of delay especially from 15th November, 2018 when the copies of ruling of Honourable Judge I.C. Mugeta was readily available to 20th December, 2018 when this application was filed.

Indeed, the question of illegality was not deponed in the supporting affidavit. It will be a grave error for this Court to treat submissions from the bar as supporting evidence. Even if this Court is to brook its legal eye and treat the Applicants submissions from the bar, the question of illegality is not the sole ground for extension. It is subject to diligence.

In the upshot, the application is dismissed with costs for lack of sufficient cause.



Y. J. MLYAMBINA

JUDGE

02/10/2020

Ruling delivered and dated 2nd day of October, 2020 in the presence of Counsel Saidi Nyawambura for the Applicants and Saidi Nyawambura holding brief of Marwa Masanga for the 1st Respondent and in the presence of Mwang'enza Mapembe for the 2nd Respondent.



Y. J. MLYAMBINA

JUDGE

02/10/2020

