

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

**MISC. CIVIL APPLICATION NO: 510 OF 2019**

*(Arising from in Civil Appeal No, 8 of 2018)*

**PENOR ENTERPRISES .....APPLICANT  
VERSUS  
MVOMERO DISTRICT COUNCIL .....RESPONDENT**

**RULING**

Date of last order 19/10/2020.

Date of ruling 16/11/2020.

**MASABO, J.**

The applicant Penor Enterprises has moved this court under section 11(1) of the Appellate Jurisdiction Act [Cap 141 R.E 2019]. His main prayer is for extension of time within which to apply for leave to appeal to the Court of Appeal against the decision of this Court in Civil Appeal No. 8 of 2018 delivered on 28<sup>th</sup> August, 2018. The application is supported by an affidavit sworn by the applicant's counsel one Frank Ntuta.

In this affidavit Mr. Ntuta has deponed that, the Applicant having been disgruntled by the decision of this court in Civil Appeal No. 28 of 2018 which was decided on 28<sup>th</sup> October, 2018, applied for leave to appeal to the Court of Appeal. On 19<sup>th</sup> August, 2019 his application was struck out for wrong citation of an enabling provision but he was not supplied with the court order

until on 3<sup>rd</sup> September, 2019 when he was supplied with copy of the ruling. On 23<sup>rd</sup> September 2019 he filed this application. His main reason as could be discerned from the affidavit is that the delay was occasioned by two things. **First**, he was bonafide pursuing an application which ended with no fruition and **second**, after his application was struck out, his advocate one Isihaka Ibrahim withdrew his service thus he had to look for a new counsel and upon getting the new counsel he filed this application on 23<sup>rd</sup> September 2019.

During the hearing which proceeded in writing, both parties were represented. The applicant was represented by Mr. Silayo Eben, learned counsel, whereas for the Respondent was represented by its legal officer, Ms. Cotilda Komba.

Unexpectedly, the submission made for and against the application went astray. Instead of supporting or opposing the grounds for delay deponed in the affidavit, the parties dwelt on a matter which is not before the court. Their submission revolved solely around wrong citation of an enabling provision on which basis the applicant's first application for leave, Misc. Civil Application No. 576 of 2018, was struck out by Munis J on 19<sup>th</sup> August 2019. For this reason, I will confine myself to the dispositions in the affidavit and the counter affidavit.

An application for leave to appeal is to be lodged soon after the filing of the notice to appeal. The powers of this court to extend the time within which

such application can be filed as provided for under section 11 of the Appellate Jurisdiction Act [Cap 141 RE 2019] is discretionary, exercised upon the Applicant demonstrating to the satisfaction of this court that the delay was occasioned by a good cause (see ***Benedict Mumello v Bank of Tanzania***, Civil Appeal No 12 of 2012 (unreported). Although there is no statutory definition of the term good cause, what constitutes a good cause has been explained in a plethora of cases. For instance, in **Attorney General Versus Tanzania Ports Authority & Another**, Civil Application No 87 of 2016 Court of Appeal (unreported), it was held that in establishing whether the delay was due to a good cause, the court has to look for such factors as whether the application has been brought promptly, absence of any invalid explanation for delay or negligence on the part of the applicant.

It is apparent on the record that, after the decision in Civil Appeal No. 8 of 2018 was delivered, the applicant timely filed an application for leave to appeal to the Court of Appeal. As stated earlier, his application did not bear fruits as it was struck out owing to wrong citation of enabling provision. Guided by the authorities **Fortunatus Masha v. William Shija and Another** [1997] TLR 154 and **Samwel Kobelo Muhulo v. National Housing Corporation**, Civil Application No. 302/17 of 2017, CAT (unreported), and many other authorities of the Court of Appeal, I am of the firm view that the period between 28<sup>th</sup> October 2018 when the decision sought to be challenged was made to 19<sup>th</sup> August 2019 when the first application for leave to appeal was struck out, is excusable as it qualifies as a technical delay. This Type of delay was well articulated by the Court of

Appeal in **Fortunatus Masha v. William Shija and Another** (supra) where it was stated that:

"... a distinction should be made between cases involving real or actual delays and those like the present one which only involve what can be called technical delays in the sense that the original appeal was lodged in time but the present situation arose only because the original appeal for one reason or another has been found to be incompetent and a fresh appeal has to be instituted. In the circumstances, the negligence if any really refers to the filing of an incompetent appeal not the delay in filing it. The filing of an incompetent appeal having been duly penalized by striking it out, the same cannot be used yet again to determine the timeousness of applying for filing the fresh appeal. In fact, in the present case, the applicant acted immediately after the pronouncement of the ruling of this Court striking out the first appeal."

Accordingly, time between 28<sup>th</sup> October 2018 and 19<sup>th</sup> August 2019 is hereby excluded from computation.

This leaves us with one month computed from 19<sup>th</sup> August 2019 when Misc. Civil Application No. 576 of 2018 was struck out to 23<sup>rd</sup> September 2019. For this period, the applicant had fronted two reasons. The first is that he was waiting to be availed with a copy of the ruling which was availed to him on 3<sup>rd</sup> September 2019. In my view, the time when he was waiting to be supplied with copy of the ruling is equally excusable. Although there is no legal requirement that the application of this nature must be accompanied by the copy of the ruling, it was crucial in this case to append the ruling to the application as proof that the applicant was pursuing his action in court.



When this time is excluded, it leaves us with 19 days during which it had been deponed that the applicant's counsel withdrew his service and the applicant had to look for a new counsel. Although under the ordinary circumstances this would not amount to a good cause, the circumstances pertaining to this case dictates for consideration of this factor. It is to be noted from the sequence of events narrated above, the applicant had his first application dismissed on legal technicalities. Thus, he must have naturally been apprehensive of the risk of falling prey to yet another legal technicality if he proceeded without the assistance of a legal mind.

For these reasons, I find merit on the applicant's prayer and I hereby allow the application. The applicant is to file his leave with 14 days from the date of this ruling. Considering that the circumstances of the application each party shall bear its respective costs.

DATED at DAR ES SALAAM this 16<sup>th</sup> day of November 2020



A handwritten signature in blue ink, appearing to be "J.L. MASABO", written over a circular stamp.

**J.L. MASABO**

**JUDGE**