

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

AT DAR ES SALAAM

MISC. CIVIL APPL. NO. 428 OF 2019

(Arising from the decision of this Court in Civil Case No. 7 of 2012)

STANBIC BANK TANZANIA LIMITED.....APPLICANT

VERSUS

SEBASTIAN ABDALLAH MSOLA T/a SABATCORESPONDENT

RULING

3rd and 30th November 2020

MASABO, J.

Before me is an application for enlargement of time to allow the applicant to file a notice of appeal to the Court of Appeal against the judgment decree of this court in Civil Case No. 7 of 2012 dated 29th November, 2017. The Application is supported by an affidavit sworn by Eric Rwelamira who is identified as Head of Legal Unit for the Applicant.

In this affidavit it is deponed that in 2012 the respondent and reply to the plaint, the applicant filed a counter claim which was dismissed on 29th November, 2017 for want of proof. It is deponed further that, the dismissal came after the applicant's failure to render a bank statement which was crucial in the determination of the counter claim. The reasons for delay as deponed in this affidavit are two. First, the applicant was still searching for recovery of a bank statement which had gone missing due to configuration

of its banking system to a new system. Upon successful retrieval of the bank statement on 17th July 2018, the applicant filed an application for extension of time on 2nd August 2018 vide Misc. Civil Application No. 440 of 2018. The application ended barren as it was struck out on 30th July, 2019 owing to wrong citation of an enabling provision.

Hearing of the application proceeded orally. Both parties had representation. Mr. Stanslaus Ishengoma, learned advocate appeared for the Applicant and Mr. Nkumbuke Yongolo, learned counsel, was for the respondent.

Submitting in support of the application Mr. Ishengoma pointed out that extension of time falls within the discretion of this court but it has to be judiciously exercised upon the applicant demonstrating a good cause. With reference to paragraphs 7,6,8,9 of the affidavit, Mr. Ishengoma argued that the applicant has demonstrated a good cause warranting the exercise of court's discretion. In further support to his application, he argued further that it is pertinent that the application be granted so that counter the claim can be determined on merit based on the bank statement which was not tendered at the trial court owing to reasons above demonstrated. Mr. Ishengoma submitted that, practically the Court of Appeal can admit new evidence not admitted in trial court and adjudicate on the substantive matter and in so doing render substantive justice to the applicant who seeks to recover a huge amount of money in recovery of a loan advanced to the respondent. Mr. Ishengoma's further submission was that, the period from 2nd August, 2018 to 30th July, 2019, is excusable because in this time the

applicant was pursuing an application which was dismissed. Therefore, he cannot be condemned for negligence.

In reply, Mr. Yongolo cited the decision of the Court of Appeal in **Ngao Godwin v Julius Mwarabu Civil Application No. 10 of 2015** CAT at Arusha (unreported), and argued that for an application for extension of time to succeed, the applicant must demonstrate a good cause. The good cause he argued, is established by considering four grounds, namely: whether the applicant has accounted for the delay; whether the delay is inordinate, whether the applicant has demonstrated diligence not apathy and lastly, availability of other sufficient reasons such as a point of law or illegality of the decision sought to be challenged.

Based on the criteria above, Mr. Yongolo proceeded to argue that the applicant has not accounted for the days of delay and the reasons that prevented the applicant from filing a notice of appeal on time have not been stated. The case of **Tanzania Rent a Car v Peta Kimuhu** Civil Appl. No. 226/01 of 2017 CAT - DSM (Unreported), was cited in further support of the requirement to account for each day of delay and that even a single day must be accounted for.

As for the time spent in pursuit of Misc. Application No. 440 of 2018 which was struck out, Mr. Yongolo submitted that the 362 days which the applicant spent in court pursuit of an incompetent application from 2nd August, 2018 to 30th July, 2019 intolerable as the delay was caused by negligence or

ignorance of the law which does not suffice as good cause for extension of time.

With these argument's consideration, I now proceed to determine the application. Pursuant to Rule 83(2) of the Court of Appeal Rules, a litigant intending to appeal to the Court of Appeal must file a notice to appeal within 30 days after the date of the decision against which the appeal is intended. This time may be enlarged under section 11(1) of the Appellate Jurisdiction Act [Cap 141 RE 2019], which as rightly argued by both parties, vests in this court powers to extend the time upon a good cause been demonstrated by the applicant. Therefore, the main issue for determination is whether the applicant has demonstrated a good cause?

Although there is no universal definition of the term 'good cause' the authority in **Ngao Godwin v Julius Mwarab** (supra) as cited by Mr. Yongolo echoes the position of the law as it currently stands. When considering whether or not to enlarge the time, such factors as, the total duration of delay; whether the applicant has accounted for grounds of delay; whether the applicant has demonstrated diligence not apathy in pursuit of his right and existence of other sufficient reason such as a point of law or illegality, are critical in establishing whether or not the good cause has been demonstrated.

Applying these factors to the instant application, one can rightly conclude from the outset that the delay is inordinate. As it could be vividly seen from

the record, nearly two years lapsed between the date of the judgment on 29th November 2017 and 22nd August 2019 when this application was filed. This inordinate delay is not excusable unless it is supported by a good cause.

From the affidavit and the submission rendered by both parties, the period of delay can be subdivided into two. The first period constitutes approximately 9 months from 29th November 2017 when the judgment was delivered to 2nd August, 2018 when the applicant filed his first application for extension of time. For all this period, the applicant has advanced only one reason, retrieval of data which had gone missing after configuration of its customer systems.

With due respect to the counsel, while there is no contention on the discretion of the Court of Appeal to admit evidence in certain circumstances where the ends of justices dictate such admission, the late retrieval of data bank statement/receipt is certainly not a sufficient cause to move this court to exercise its discretion to grant extension of time.

Literally in this ground the applicant is inviting the court to enlarge the time for reason that he was searching for an evidence which he could not produce at the trial stage. Much as the narration may attract sympathy for the applicant for having failed to prove its case against the respondent owing to failure to retrieve the statement which shows how the respondent is indebted, that in itself does not constitute a good case. Needless to say, this

court is court of law, not a court of sympathy. The need to abide by procedural rules cannot be emphasized.

Needless to say, as stated by the Privy Council has stated in the case of ***Ratnam Cumarasamy*** (1965) 1 WLR 8 (p.12):

The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step-in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, **a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time-table for the conduct of litigation.** [Emphasis added]

Entertain the ground fronted by the applicant will not only defeat the well-established principles regarding finality of litigation. It will certainly encourage vexatious and frivolous matters being filed in court in anticipation that after conclusion of the suit, the judgment debtor (and this includes the judgment debtor counter claim) will have time to collect new evidence and come back to court at their own pace in total disregard of well-established principles pertaining to time limitations.

As for the second period which is also approximately 9 months ranging from 2nd August, 2018 when Misc. Application No. 440 of 2018 was filed to 30th July, 2019 when it was struck out, I am of the firm view that, it is excusable as it amounts to what has been described as 'technical delay' (see **Fortunatus Masha vs William Shija & another** (1997) TLR 154 and **M.B. Business S Limited V. Amos David Kasanda**, Civil Application No.

7/2018 CAT (unreported). Propounding this position in **Fortunatus Mwanza v. William Shija and Another** (supra) the Court of Appeal 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."

However, much as the time in the second delay amounts to technical delay and warrants the excusal, as it is hereby done, the order for extension of time cannot issue owing to the applicant's failure to demonstrate a good cause for the first period above discussed.

In the final event, I dismiss the application with costs.

DATED at DAR ES SALAAM this 30th day of November 2020




J.L. MASABO

JUDGE