

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

MISC. CIVIL APPL NO. 33 OF 2018
(Originating from PC Civil Appeal No. 21 of 2004)

SELEMAN SEIFAPPLICANT
VERSUS
HAFIDHI SAID.....RESPONDENT

RULING

MASABO, J.L.:

This is a ruling in respect of an application for extension of time made under section 11(1) and (2) of the Appellate jurisdiction Act [CAP 141 R.E. 2002]. The Applicant Seleman Seif has made three main prayers:

- i. An extension of time within which he may give a notice of intention to Appeal from the Judgment of this court in Civil Case No. 39 of 2001 dated 21st October 2004, out of time;
- ii. An extension of time apply for a certificate that the case is a fit case for Appeal to the Court of Appeal of Tanzania.
- iii. An extension of time within which he may apply for the copies of the Judgment, Decree on appeal and court proceedings for appeal purpose.

He supports his application with an affidavit affirmed by himself in which he deposes that sometimes in November, 2009 his mother one KASHINDE MACHIBYA (now deceased) appealed to the Court of Appeal of Tanzania in

Civil Appeal No. 105 of 2009 against the decision of this court. Before the appeal was determined, she passed away whereupon he was appointed as administrator of estate. That, immediately thereafter he engaged the service of MASAKA Advocate in pursuit of the appeal which was still pending in the Court of Appeal. That when the appeal came for on 13th **February, 2014** it was struck on the ground of incompetent record. He deposed further that the reason for delay are two fold. First that, the incompetence of the appeal was partly attributed to the fact that his mother was lay and that the person who assisted her, one Kiwale (now deceased), omitted to include the records of the proceedings required. Also it was attributed that, the power of attorney which the respondent used to institute the matter in primary court was in the respondents possession hence she could not have produced it. Further he averred that, the impugned decision has an illegality in that the court failed to hold that the Respondent's subsequent suit, that is, Civil Case No. 39 of 2001 was Res- judicata. The Application was contested through a counter affidavit affirmed by the Respondent.

The Application was argued in writing so that the Respondent who was not represented could solicit legal assistance. In support of the application, Mr. Robert Charles Oteyo, learned counsel who prepared the submission for the Respondent, gratis, briefly submitted that the main reason for extension of time is failure to be availed with the judgment and decree in time after the ruling in Civil application No. 675 of 2015 coupled by the fact that the said Kashinde Machibya had no legal representation. He also argued that the decision was illegally made as the court failed to hold that Civil Case No. 39

of 2001 it was Res – judicata. In support he argued that, since the matter of illegality has been raised the court should be guided by the decision of the Court of Appeal in the case *PRINCIPAL SECRETARY MINISTRY OF DEFENCE Versus DERVAN VALAMBIA (1992) TLR 185* where it was held that:

“ Where the point at issue is one alleging illegality of the decision being challenged the court has a duty even if extending time the purpose to ascertain the point and if the alleged illegality be established to put the matter and record right ”

In response, Mr. Nyaronyo Mwita Kicheere, counsel for the Respondent stently contested the application. He submitted that in an application for extension of time the main issue to be determined is whether the affidavit has disclosed a sufficient cause. He argued that this is however not the only issue upon which the application can be granted. He cited the case of *Ngao Godwin Losero Vs Julius Mwarabu*, Civil Application No. 10 of 2015 where the Court of Appeal of Tanzania, quoting with approval its decision in **Lyamuya Construction Company Limited Vs Board of Registered Trustees of Young Women’s Christian Association of Tanzania**, Civil Application No. 02 of 2010, Court of Appeal of Tanzania (unreported) and argued that in these two cases it was stated that, in an application for extension of time, issues to be determined, include; whether the applicant has accounted for all the period of delay, whether the delay is inordinate; the applicant’s diligence and not apathy, negligence or sloppiness in prosecution of the action; and existence of a point of law or sufficient importance such as the illegality of the decision sought to be challenged. Based on this he challenged the Applicant for not submitting extensively on the issues enumerated above. He

added that in the course of submission in chief, the applicant ought to show diligence and not apathy, sloppiness or negligence in prosecuting of the action that he intends to prosecute but he failed to do so.

Having stated that, he proceeded to argue that, lack of legal representation which has been cited as a reason for delay is not sufficient cause for extension of time as ignorance of law is no defence. In support he cited the case of **Ngao Godwin Losero Vs Julius Mwarabu**, Civil Application No. 10 of 2015 (unreported) where the Court of Appeal held that, ignorance of the law was not a sufficient cause for enlargement of time.

Mr. Kicheere argued further that the Application is not tenable as the Applicant has failed to account for the time of delay. He reasoned that, it is the principle of law that the applicant must account for the time of delay. Thus in this case, the Applicant ought to account for the time between 21st October, 2004 when the impugned decision was made to 2nd October 2018 when this application was filed but the applicant did not account for the said time in his affidavit and the submission thereto. He argued further that the failure by the Applicant to account for this time amounts to gross negligence and sloppiness. Mr. Kicheere further cited the *decision of the court of appeal in* the case of **Tanzania rent a car Limited Vs Peter Kimuhu** Civil Application No.226 of 2017, Court of Appeal of Tanzania (unreported) and **Bushfire Hassan vs Latina Lucia Masava**, Civil Application No. 3 of 2007(unreported) and argued that, it is a principle of law that delay of even a single day must be accounted

for. Thus, since the applicant has not accounted for the delay, the application should be dismissed.

On the issue of illegality Mr. Kicheeere cited the case of **Ngao** (supra) and submitted that, at page 6 of the said decision it was held that for the point of illegality to be regarded as a sufficient cause, the said illegality must be apparent on the face of record. But, in the instant case the applicant has not demonstrated where and how the illegality arose, hence the application is no merit.

I have carefully and dispassionately considered the submission by both parties. Section 11(1) of the Appellate Jurisdiction Act, Cap 141 bests this court with discretion to enlarge the time within which a party to suit can give notice of intention to appeal from a judgment of the High Court; for making an application for leave to appeal or making an application for certification of the point of law, if, the appeal as in the instant case originates from the primary court. As held by the Court of Appeal in ***Benedict Mumello v Bank of Tanzania***, Civil Appeal No 12 of 2012:

“It is trite law that an application for extension of time is entirely in the discretion of the court to grant or refuse it, and that extension of time may only be granted where it has been sufficiently established that the delay was with sufficient cause.

Thus, the duty of the court when dealing with similar applications is to determine whether the applicant has demonstrated a good cause to warrant the exercise of the Courts discretion. The law is silent as to what constitutes a

good cause. The determination of a good cause is dependent on the circumstances of each case and upon consideration of several factors. In **Attorney General V Tanzania Ports Authority & Another**, Civil Application No 87 of 2016 (unreported) it was pointed out that what amounts to good cause includes whether the application has been brought promptly, absence of any invalid explanation for delay and negligence on the part of the applicant. In **Kyalamali Mathayo v R** Criminal Appeal No. 15 of 2013 (CAT at Dar es Salaam) the Court of appeal held that:

“a good cause is made up when the applicant has shown that the delay is not inordinate and has accounted for all the time of the delay. This has been taken to mean an explanation of the reasons every single day of the delay and the duration of those reasons. The second principle is that the applicant must show that (sic) did not contribute to the delay by his actions, inaction or conduct. [Emphasis added]

Expounding this further in **Zahara Kavindi and Another v Juma Swalehe & Others**, Civil Application NO. 4/5 OF 2017 (CAT at Mwanza) the Court of Appeal stated that there are four conditions to be considered in an application for extension of time namely:

- a) That the applicant must account for all the period of delay
- b) The delay should not be inordinate
- c) The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take and
- d) If the court feels that there are other sufficient reasons such as the existence of a point of law of sufficient importance: such as the illegality of the decision sought to be challenged.

In the instant case, the applicant claims that the decision he intends to challenge was delivered on 21st October 2004, while this application was logged on 17th January 2018 hence the delay is for almost 14 years. This is inordinate delay which must be sufficiently accounted for. As stated in the case of **Lyamuya Construction Company Limited Vs Board of Registered Trustees of Young Women's Christian Association of Tanzania** (supra), cited by Mr. Kicheere, before the grant of extension of time the applicant must show diligence and not apathy, negligence or sloppiness in prosecution of the action that he intends.

The Applicant has demonstrated one factors for his delay, namely lack of legal representation. Hence, I am invited to determine whether or not this constitutes a good cause for delay. The answer to this, is obviously in the negative. As argued by Mr. Kicheere in law, ignorance of the law is no defence. In the context of application for extension of time, this principle was well articulated **Ngao Godwin Losero Vs Julius Mwarabu**, (supra) where the Court of Appeal emphatically held that:

“ When all is said with respect to the guiding principles, I will right away reject the explanation of ignorance of the legal procedure given by the Applicant to account for the delay. As has been held times out of number, ignorance of law has never featured as a good cause for extension of time (see for instance, the unreported ASR. Criminal Application No. 3 of 2011- Charles Salugi Vs the Republic). To say the least, a diligent and prudent party who is not properly seized of the applicable

procedure will always ask to be praised of it for otherwise he/ she will have nothing to offer as an excuse for sloppiness.”

Based on this authority, I find the reason advanced to be insufficient for purposes of extension of time.

The applicant has also alleged an illegality in the impugned decision. I entirely agree with him that it is now a trite law that, contentions as to illegality or otherwise of the challenged decision a good cause for extension of time (**CRDB Bank Limited v. George Kilindu and Another**, Civil Application No. 87 of 2009, Court of Appeal of Tanzania (unreported). This principle was also articulated in the case *Secretary, Ministry of Defence and National Service v. Devram Valambia* (1992) TLR 182 where it was stated that that:

“when there is a an allegation of illegality, it is important to give an opportunity to the party making such allegation to have the issue considered.”

It is however to be noted that, as correctly argued by Mr. Kicheere, the application of this rule is subject to certain principles as articulated in ***Ngao Godwin Losero Vs Julius Mwarabu***, Civil Application No. 10 of 2015 where it was held that:

“ But, it is noteworthy that in *Vallambya* (supra), the illegality of the impugned decision was clearly visible on the face of the record in that the High Court had issued a garnishee order against the Government without affording it a hearing which

was contrary to the rules of natural; justice. Incidentally, the court in the case of Lyamuya Construction Company Limited Vs Board of Registered Trustees of Young Women's Christian Association of Tanzania (attached for ease of reference) made the following observations:-

“ Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in vallambya's case, the court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one. The court there emphasized that such point of law must be that of sufficient importance and, I would add that it must also be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process”.

Accordingly, for this rule to apply, the point of law must be apparent on the face of the record as opposed to the one that can only be discovered by a long drawn argument or process. In the instant case, as correctly argued by Mr. Kicheere, there is a lot to be desired from the Applicant's submission in respect of the point of illegality as the details of the said illegality is articulated neither in the affidavit nor in the Applicant's submission. All what the Applicant has states is that the impugned decision constitutes an illegality for failing to hold that the primary court decision in Civil Case No. 39 of 2001 was res-judicata to Civil Case No. 41 of 2000. Under the premise, since the illegality of the

impugned decision has not been clearly demonstrated, I find no limbs on which to base the finding that, indeed there is a point of illegality requiring the attention of the highest Court of the land.

Accordingly, I dismiss the application with cost for lack of merit.

DATED at DAR ES SALAAM this 27th day of April 2020.

