

**IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA**

MISC. CIVIL APPLICATION NO.02 OF 2021

(Arising from the High Court of Tanzania at Mwanza in PC Civil Appeal No. 76 of 2020. Arising from the District Court of Nyamagana at Nyamagana in Civil Appeal No.15B of 2018 and Mwanza Urban Primary Court at Mwanza in Civil Case No. 439 of 2017)

LETSHEGO BANK (T) LIMITED formerly

ADVANCED BANK TANZANIA LIMITED APPLICANT

VERSUS

LILIAN LAMBO 1ST RESPONDENT

S.I ISANGI AUCTION MART & COURT BROKER 2NDRESPONDENT

RULING

Date of last Order: 21.05.2021

Date of Ruling: 24.05.2021

A.Z.MGEYEKWA, J

I am called upon in this matter to decide whether this court should exercise its discretion under Rule 3 of the Civil Procedure (Appeals in Proceedings Originating in Primary Court Courts) Rules G.N No. 312 of 1964 to extend time within which the applicant files an appeal to

appeal against the Judgment of the District Court of Nyamagana in Civil Appeal No. 15 'B' of 2018. The application is supported by an affidavit deposed by Hezron Malyasa, Principal Officer of the applicant. The respondents resisted the application and have demonstrated their resistance by filing a joint counter affidavit deposed by Baraka Dishon, the learned counsel for the respondents.

The application was argued before this court on 21st May, 2021 whereas the applicant enjoyed the legal service of Mr. Stephen Kaswahili, learned counsel while the respondents enjoyed the legal service of Mr. Baraka Dishon, learned counsel.

Commencing his submission, Mr. Stephen urged this court to adopt the applicant's affidavit and the reply to the counter affidavit to form part of his submission. He stated that they have filed the application of extension of time in order to file an appeal to challenge the Judgment and Decree of Nyamagana District Court in Civil Appeal No.15 'B' of 2018 and from Urban Primary Court of Mwanza in No.439 of 2017. He testified that the applicant immediately after receiving the trial court judgment filed an appeal at the District Court. He stated that in accordance to section 25 (4) of the Magistrate Court Act Cap.11. Mr. Stephen argued that the applicant made a follow up and was informed

that the proceedings were not typed. Then he was informed that the file was missing. He went on to argue that the applicant hired KZR Law Chambers to represent her in legal litigations whereas on 24th August, 2020 they wrote a letter to Nyamagna District Court requesting him to intervene the matter. He added that upon the Resident Magistrate In Charge intervention the missing file was traced and the same was brought to this court on 15th October, 2020.

It was Mr. Stephen's further submission that the applicant lodged an appeal before this court but only came to learn that the appeal was defective. He added that the appeal was withdrawn with leave to appeal. He went on to state that after the withdrawal the time for appeal to this court lapsed thus they immediately filed this instant application. Mr. Stephen stated that the applicant was not negligent to institute the said appeal but the delay was due to the loss of the court file at the trial court registry. He added that the applicant has good reasons for his delay. To support his submission he referred this court to the case of **Sultan Bin Ali Bin Hilal El Esri v Mohamed Hillal and 2 others**, Misc. Commercial Case No. 116 of 2016.

Mr. Stephen continued to submit that both decision of both lower courts are tainted with illegalities which attracts the attention of this

court. He stated that there is a confusion of applicant's names in the Civil Appeal No.15B thus in his view, the applicant was not well identified. He further stated the trial court decision is also tainted with irregularities; the compensation in a tune of Tshs. 5,600,000/= was not proved by any documentary evidence. Mr. Stephen stated that the Court of Appeal of Tanzania has in its numerous cases held that where there is an issue of illegality an application for extension of time is granted. The learned counsel for the applicant fortified his submission by citing the case of **Losindilo Zuberi v Ally Hamis**, Civil Application No.5 of 2019 (unreported).

On the strength of the above submission, Mr. Stephen beckoned upon this court to grant the applicant's application with costs.

The application has encountered a formidable opposition from Mr. Dishoni, the learned counsel for the respondents. He urged this court to adopt the counter affidavit and form part of his submission. Mr. Dishoni contended that the applicant has not adduced good reasons for this court to warrant her application. He argued that the District Court issued its judgment on 24th September, 2018 and the applicant lodged his appeal before this court on 15th October, 2020, a delay of two years. He went on to state that in his affidavit he did not account

the 2 years delay. The learned counsel for the respondents contended that the applicant lodged a Civil Appeal No. 76 of 2020 before this court before filing an application for extension of time.

Mr. Dishoni did not end there, he argued that the learned counsel did not consult the AL & PEG Advocate's chamber who represented the applicant in the previous case. He claimed that failure to consult the AL & PEG Advocates, Mr. Stephen submission remains hearsay evidence.

The learned counsel threw his last jab by contending that the ground of illegality cannot stand. He contended that there is no any prove to when Letshego Bank changed its name to Advanced Bank while in 2018 Letshego name was valid. He claimed that the Advanced Bank name was featured in the contract that means the two names were used interchangeable. Mr. Dishon claimed that it is impossible for the applicant to attach the properties of the guarantor while the properties of the owner were available. He lamented that the applicant did not give any reasons for attaching the 1st respondent's properties. Mr. Dishoni went on to state that there is uncertainty on paragraph 15 of the applicant's affidavit, it is not clear why he has approached this court.

In conclusion, the learned counsel for the respondents beckoned upon this court to dismiss the application with costs for failure to demonstrate sufficient cause.

The applicant's rejoinder did not introduce anything new on the first ground. The learned counsel simply reiterated what was stated in the submission in chief. With respect to illegality, Mr. Stephen stated that attached the listed properties including the guarantor's properties. The learned counsel for the applicant insisted that there is a point of law which attract the attention of this court.

In conclusion, the learned counsel for the applicant argued this court to grant the applicant's application for extension of time to file an appeal out of time with costs.

From these rival submissions, I should now be in a position to determine the grounds of extension of time on which the parties bandying words. In the light of the arguments raised by the learned counsels, the shove on this Court is *whether or not, the application by the applicant has merits.*

It is trite law that the court of law can only grant an application for extension of time if good cause is shown which include the length of

the delay, the reason for the delay, the degree of prejudice the respondents stands to suffer if time is extended, whether the applicant was diligent, whether there is a point of law of sufficient importance such as the illegality of the decision sought to be challenged.

There is an overabundance of authorities as to what is meant by good or sufficient cause. As it was held in the cases of **Joseph Paul Kyauka Njau and Another v Emanuel Paul Kyauka and Another**, Civil Application No. 7/5 of 2017, and the famous case of **Lyamuya Construction Company Limited v Board of Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (all unreported). In **Lyamuya Construction Company Limited** (supra), the Court laid down some factors which can be used to assist the Court, in assessing as to what amounts to good or sufficient cause which were as follows:-

- 1. The applicant must account for all the period of delay;*
- 2. The delay should not be inordinate;*
- 3. The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action he intends to take;*

4. If the Court feels that there are other reasons, such as the existence of a point of law of sufficient importance, such as illegality of the decision sought to be challenged.

Basing on what has been highlighted above, this court is enjoined in this application, to consider whether it qualifies in terms of the captioned factors. To that fact, I read between the lines the submissions made by both learned counsels, whereby the applicant's Advocate submitted that the applicant has accounted for each day of delay. In his submission and rejoinder, Mr. Stephen insisted that there were some illegalities in the impugned decision of the lower courts.

I have gone through the affidavit and counter affidavit and found that Mr. Stephen accounted the days starting when the appeal was withdrawn at this court to the date when he filed this instant application. However, as rightly pointed out by Mr. Dishoni, the learned counsel for the applicant did not account the delay of 2 years from when the judgment in Civil Appeal No.15 of 2018 the District Court was delivered to the date when the applicant's Advocate intervened and wrote a letter request the first appellate court to find the trial court file which was lost.

Additionally, the applicant did not attach any supporting documentary evidence to prove that the applicant made the said follow

up in court. Therefore, I am in accord with the learned counsel for the respondents that the applicant has not account the days of delay to warrant this court to grant his application for extension of time to file an appeal out of time in this court.

Apart from the requirement of accounting the days of delay, the applicant has also raised a complaint of illegality. In the case of **TanESCO v Mufungo Leonard Majura and 15 Others**, Civil Application No. 2016, (unreported), the Court of Appeal of Tanzania held that:-

“ Notwithstanding the fact that the applicant in the instant application has failed to sufficiently account for the delay in lodging the application, the fact that, there is a complaint of illegality in the decision intended to be impugned suffices to move the Court to grant extension of time so that., the alleged illegality can be addressed by the court.”

Guided by the above authority, I will determine whether there is point of law involved in this instant application. The applicant in his affidavit specifically paragraph 14 has stated grounds of irregularities believing that the same form part of illegality. Fortifying his position the learned counsel for the applicant cited the case of **Losindilo Zuber**

(supra). In this case, the illegality of the decision was challenged and the Court of Appeal of Tanzania, it observed that an issue of illegality is a sufficient reason for granting an application for extension of time.

Likewise, in the case of **Paul Juma v Diesel & Auto Electric Services Ltd and 2 Others**, Civil Application No. 54 of 2007 (unreported), the Court of Appeal of Tanzania held that when the issue of illegality is raised the court needs to be careful to consider the alleged irregularities and give room to rectify the same. It is clear from the record that the appellant raised serious point of illegality since he wanted to challenge both lower courts' decision based on the question of illegality.

Equally, in the case of **Moto Matiko Mabanga v Ophir Energy PLC and 2 Others**, Civil Application No.463/01 of 2017, the Court of Appeal of Tanzania stressed that:-

"... for the ground of illegality to stand, the challenged illegality of the decision must clearly be visible on the face of the record, and the illegality in focus must be that of sufficient importance."

Applying the above-settled position to the instant application, I have noted that in the applicant's affidavit particular paragraph 14 the applicant's Advocate has raised an issue of illegality some of them are

visible for example the issue of compensation, the learned counsel for the applicant is complaining that it was not specifically proved. In my view, the illegality of the decisions which is challenged is apparent on the face of the record and is of sufficient importance to merit the attention of this court.

Consequently, the applicant's application for extension of time to file an appeal before this court is granted. The applicant is required to file the appeal within 21 days from today. No order as to the costs.

Order accordingly.

Dated at MWANZA this date of 24th May, 2021.




A.Z.MGEYEKWA
JUDGE
24.05.2021

Ruling delivered via audio teleconference whereas Mr. Bundala, learned counsel for the applicant and Mr. Baraka Dishoni, learned counsel for the respondents were remotely present.


A.Z.MGEYEKWA
JUDGE
24.05.2021