

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

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 41 OF 2020**

*(Arising from the Civil Appeal No. 246 of 2017; Origin Civil Case  
No. 12 of 2016 Kilosa District Court)*

**IGNAS ROMWARD MSAGAYA.....APPLICANT**

**VERSUS**

**LIVINUS SAMATO ..... 1<sup>st</sup> RESPONDENT**

**BLESS MAKANGANYA ..... 2<sup>nd</sup> RESPONDENT**

**RULING**

*Date of Last Order; 22/2/2021*

*Date of Ruling; 20/05/2021*

On 30/05/2019 this court delivered a ruling against the applicant herein but on favour of the respondents that a Civil Appeal case No. 246 of 2017 whose origin is Civil Case No. 12 of 2016 Kilosa District Court, was dismissed for being filed out of time without leave of the court. Intending to move this court to review the said order out of time, the applicant filed this application under section 14 (1) of the Law of Limitation Act [Cap 89 RE 2002] alleging that the said Civil Appeal case No. 246 of 2017 was supposed to be struck out instead of being dismissed.

The matter was disposed of by way of written submissions. While the Applicant is represented by Mr. Shalom Samson Msakyi, Advocate from MA Attorneys the Respondents are represented by Ms. Ester Elias Shoo, Advocate from CSB Law Chambers.

In his written submission Advocate for the Applicant Mr. Shalom Samson Msakyi stated that on 30/05/2019 the presiding Judge dismissed the Civil Appeal case No. 246 of 2017 for being filed out of time without leave of the court. He said that the said appeal originates from the Civil Case No. 12 of 2016 Kilosa District Court. The counsel stated that the remedy for that said fault is not dismissal which was the order entered by the trial Judge, but struck out of the matter. He further said that that being a material error on face of record the matter is supposed to be reviewed. However, as the period of 60 days prescribed for that purpose under Item No. 21 Part III of the 1<sup>st</sup> schedule to the Law of Limitation Act [Cap 89 RE 2019] is lapsed, the applicant ought to have lodged this application for extension of time to file a Review out of time.

The Applicant's Counsel submitted that the reason for failing to file Revision in time is the District Court's delay to supply the Applicant with the copies of ruling and drawn order. He said that the applicant lodged to the District Court a letter praying to be supplied with those documents on the 31/05/2019, that is one day after the

delivery of the ruling on the 30/05/2019. Mr. Shalom Samson Msakyi, Advocate for the Applicant said that under O. XLII, R. 3 of the Civil Procedure Code [Cap 33 RE 2019] the application for extension of time should be attached with the copy of drawn order for the decision that the applicant is going to challenge. The counsel said that the applicant was supplied with the copy of drawn order on 23/12/2019 and filed this application on 27/1/2020 which was the 34<sup>th</sup> day after receiving the copy of decree. The applicant's counsel concluded by praying for the application to be granted.

In reply thereto the Respondents' counsel, Ms. Ester Elias Shoo submitted that whoever seeks for extension of time must have sufficient reasons for that purpose. As for the 1<sup>st</sup> ground that the applicant was supplied late with the copies of ruling/drawn order to be revised the Respondents' Counsel stated that this ground is baseless with no merits as the said ruling was delivered and signed by a Judge on 30/05/2019. She said that there is no reason as to why the applicant couldn't take his ruling on time and file a review. The counsel further stated that if the applicant is referring the extracted date of a Drawn Order which was 23/12/2019 he did not explain where he was for 34 days period from the date that the said Drawn Order was extracted.

The counsel further stated that the applicant was not diligent enough in making follow ups of the matter. He would have written reminders to the respective court so as to get the said copy in time. She added that the applicant has not accounted for each day of delay.

It is also the submission of the Respondent's Counsel, Ms. Ester Elias Shoo that the ruling needs not to be reviewed as it is not tainted with any illegality. The Counsel stated that section 3(1) of the Law of Limitation Act provides that all proceedings instituted after the period of limitation shall be *dismissed*. She said that the argument that the High Court was supposed to *struck out* the application brought out of time is baseless and lacks merit. She concluded that what was done was legal and correct. She concluded by praying the court to dismiss the application with costs.

From the aforesaid submissions I will start to deal with the merits of the application for extension of time, if the same will be found meritorious I will then deal with the review itself.

Starting with the issue of granting extension of time, it is under the discretion of the court upon the applicant showing good cause(s). The Applicant herein raised the ground that the source of delay to

file the application for review against the decision of Civil Appeal No. 246 of 2017 High Court, Dar es Salaam District Registry is the delay to be supplied with the copy of Drawn Order. According to the Counsel immediately after delivery of the ruling on the 30/05/2019 the applicant applied for the copies of the ruling and drawn order on the 31/05/2019, that is one day later. That argument has not been disputed by the Respondents' Counsel. The act of the applicant demanding copies of drawn order immediately after the delivery of the ruling is regarded as a prompt action which is among the things that the court considers in granting the application for extension of time. Moreover, in granting the extension of time there must be a point of law of sufficient importance. See **LYAMUYA CONSTRUCTION COMPANY LTD. V. BOARD OF REGISTERED TRUSTEES OF YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF TANZANIA, Civil Case No. 2 of 2010, CAT at Arusha (unreported)**. In the matter at hand the point of law to be considered is that *the original case's judgment consists of material error which needs to be corrected as it is tainted with illegalities, that it was concluded with "dismissal" instead of "struck out" order.*

This application has also been challenged by the Respondents' Counsel on the ground that the Applicant has no good cause and

that the day to day causes of delay have not been accounted for. On this the respondent's counsel tuned her mind on the period between the date of ruling and the date that the applicant had filed this application

The copy of drawn order and/or ruling, which is mandatory to be attached in the application as per **O. XLII, R. 3 of the Civil Procedure Code [Cap 33 RE 2019]** were supplied to the applicant on the 23/12/2019. By that time the prescribed time limit of 60 days for filing the application as per **Item No. 21 Part III of the 1<sup>st</sup> schedule to the Law of Limitation Act [Cap 89 RE 2019]** had already lapsed. The only remedy therefore was for the applicant to lodge application for extension of time as he has so done.

Actually, the number of days that had passed from the date that the applicant was supplied with the copy of drawn order which is 23/12/2019 and the date that he had filed this application, that is 27/1/2020. It is an aggregate period of 34 days which is not too inordinate as the applicant was in need of time to prepare this application before he files it to court. However, in deciding the application for extension of time the court has discretion to grant or not to grant it depending on the nature of the case. In a case of

**Benedict Mumelo V. Bank of Tanzania, Civil Appeal No. 12 of 2002, CAT at DSM (unreported)** it was held:

*"It is a trite law that an application for extension of time is entirely in the **discretion of the court to grant or refuse it**, and the extension of time may be granted where it has been sufficiently established that the delay was with sufficient cause" (emphasis is mine)*

Apart from the issue of extension of time, the application which I find genuine and reasonable, I hereby step into considering the review itself. The basic principle of law is that **where the pleadings are found incompetent for being filed out of time the remedy is to *struck out* the matter and *not to dismiss it***. This was also held in **YAHYA KHAMIS V. HAMIDA HAJI IDDI & 2 OTHERS, Civil Appeal No. 225 of 2018, CAT at Bukoba (unreported)**. The appeal is dismissed only if it was competent before the court, that it was heard and determined on merit, which is not the case here. In the current matter, the High Court in the Civil Appeal No. 246 of 2017 was of the view that the appeal was not proper before the court for being filed out of time without leave of the court. What happened is just the slip of pen by the trial Judge, the appeal ought to have been ***struck out*** and ***not to be dismissed***. That situation is curable through application for review

under **O. XLII, R. 1(b) of the Civil Procedure Code** which states;

***"(1) Any person considering himself aggrieved—***

*(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*

*(b) by a decree or order from which no appeal is allowed, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or **on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order.***

*(2) .....not applied .....*

It should be noted that the ruling for the said Civil Appeal No. 246 of 2017 having contained some material errors on the face of record which need to be corrected cannot be left as it is just for the reason that the appeal or application filed to challenge it has

been filed out of time. The fact that the applicant has lodged the application which is helpful for the court to rectify its error on the face of record, the said application cannot be disregarded just for technical objections from the other party, as by doing so it implies that the said error should continue to exist.

Leave is therefore granted for the ruling of the Civil Appeal No. 246 of 2017 dated 30/05/2019 to be reviewed. Basing on the fact that the fault was just a slip of pen in noting down the order, instead of ordering the applicant to file a fresh application for review on this same matter, which is wastage of time and resources, I hereby order as follows; the **last paragraph of the ruling for the Civil Appeal No. 246 of 2017 High Court, Dar es Salaam District Registry, delivered on the 30/05/2019 to be read as "*struck out*" instead of "*dismissed*".**

In upshot the application is allowed with no order as to costs.



A handwritten signature in blue ink, appearing to be 'HL', is positioned above the printed name of the judge.

**S.M. KULITA**

**JUDGE**

**20/05/2021**

