IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

MISC. CIVIL APPLICATION NO. 26 OF 2021

(Arising from HC-Civil Appeal No. 11 of 2020 originating from RM. Civil Case No. 03 of 2019)

EXAUD AUGUSTINO KWAYU ..... APPLICANT

VERSUS

CRDB PLC ..... RESPONDENT

RULING

14th July, & 26th August, 2021

ISMAIL, J.

This Court is called upon to grant an extension of time within which to file an application for leave which will enable the applicant to apply for leave to appeal to the Court of Appeal of Tanzania. At the centre of the impending appeal is the decision of the Court (Hon. Tiganga, J) in Civil Appeal No. 11 of 2021, in which the respondent's appeal against the trial court's decision was allowed. The applicant, the losing party in the appeal, imputes illegality in the decision, and that constitutes the basis for the intended appeal.

The application is supported by the affidavit of Lenin Njau, the applicant's counsel, setting out grounds on which the application is based. The deponent's main contention for the delay is that he was furnished a copy of the judgment when time for filing an application for leave had expired, and that such filing would not be possible without having a copy of the judgment supplied to the applicant. Mr. Njau further averred that, having a copy of the judgment at his disposal was significant, taking into account that he had taken up the matter at that stage, meaning that this was a new assignment in respect of which he had no details necessary for subsequent action. The deponent has also averred that there is an irregularity that constitutes a point of law.

The application is strongly opposed by the respondent. Through a counter-affidavit sworn by Ms. Marina Mashimba, its counsel, the applicant has questioned the veracity of the contentions raised by the deponent of the affidavit. With respect to the counsel's instruction to represent the applicant, the averment by Ms. Mashimba is that the counsel ought to have requested for a perusal of a court file with a view to acquainting himself with the facts of the case. The respondent maintained that no sufficient reasons had been adduced for the delay in filing the application for leave. Further to that, the

respondent stated that the lapse between 15th March to 24th March, 2021 had not been accounted for.

The application was disposed through written submissions, preferred in conformity with the schedule drawn by the Court and fully adhered to by counsel for the parties. Credit to both counsel, the submissions were concise and focused. In this matter, Mr. Lenin Njau, learned counsel stood in for the applicant, while Ms. Marina Mashimba's services were enlisted by the respondent.

In his submission, Mr. Njau began by acknowledging the fact that grant of extension of time is conditioned on the applicant showing sufficient reasons. This is as stated in ***Musa & Another v. Wanjilu & Another*** [1970] EA 481. The counsel argued that in the instant application, the applicant requested for a copy of the judgment and that immediately after being furnished with the said copy, he lodged the application. Mr. Njau argued that, in this case, the late supply of the of the copy of the judgment is not disputed by the respondent, and that in none of the respondent's averments has it be shown that the judgment was ready for collection prior to 15th March, 2021. The counsel drew the Court's attention to the decisions of the Court in Charles ***Rick Mulaki v. William Jackson Magero***, HC-Civil Appeal No. 69 of 2017; and ***Ezekiel Miforo v. Joanitha Jovent Mathias***,

HC-Misc. Land Application No. 89 of 2020 (both unreported), in which it was held that, the respondent's silence on the allegations that the applicant was not served with a copy of the judgment timely, is an indication that the respondent was aware that the copy of the judgment was not supplied timely.

With respect to follow up on the copy of the judgment, the applicant's counsel argued that physical follow up cannot be proved by documents, arguing that a statement on oath is sufficient to demonstrate that such follow up was done. He argued that the law does not anticipate written reminders to the Court. Mr. Njau argued that failure to be supplied with a copy of the judgment which is essential in the filing of an application for leave amounts to sufficient cause. Mr. Njau contended that granting of extension of time will not prejudice the respondent, and that the delay was not deliberate, by design, or out of sheer ignorance or negligence. He prayed that the application be granted.

Ms. Mashimba was valiantly opposed to the applicant's contention. She took the view that no sufficient reason has been advanced for the Court to grant an extension of time. The counsel argued that, whereas it is the Court's discretion to grant extension of time, such discretion is only exercisable where there is sufficient reason, and in this case, none has been

demonstrated. The counsel submitted that the applicant has miserably failed to show that a copy of the judgment was not ready for collection earlier than 15th March, 2021, and that the expectation was that the applicant would write a reminder. In the absence of such reminder, the assumption is that delay in obtaining the copies was due to inaction on the part of the applicant's counsel, by not collecting it immediately after it was ready for collection.

Ms. Mashimba refuted the applicant's contention that the respondent did not deny the fact that there was a delay in supplying the copy of the judgment. She argued that the dispute resides in whether the copy of the judgment was ready for collection. She argued that the applicant was duty bound to lead in evidence to prove that the copy of the judgment was not ready until 15th March, 2021, when it was supplied to him.

Ms. Mashimba took the view that the applicant was under obligation to support his contention with an affidavit of the court clerk he communicated with, consistent with the requirements of the law, set out in ***John Chuwa v. Anthony Ciza*** [1992] TLR 233; and ***Nyabazere Gora v. Charles Buya***, CAT-Civil Appeal No. 164 of 2016 (unreported). It was Ms. Mashimba's argument that, even assuming that the judgment was ready for collection on 15th March, 2021, the applicant has failed to adduce reasons

for his failure to file the application immediately. She submitted that the applicant has failed to account for each day of delay between 15th March and 24th March, 2021, in line with the decisions in ***Nyabazere Gora v. Charles Buya*** (supra) and ***Moto Matiko v. Mabanga v. Ophir Energy PLC & 2 Others***, CAT-Civil Appeal No. 463/01 of 2017 (unreported).

Regarding the applicant's contention that he was held in Keko remand custody in connection with criminal allegations, Ms. Mashimba's take is that such allegation did not feature in the supporting affidavit. She urged the Court to disregard it.

Overall, the counsel urged the Court to hold that the applicant has not adduced sufficient reasons. She prayed that the application be dismissed.

The Applicant's rejoinder was a reiteration of the submission in chief. The counsel maintained that there was no legal requirement for any further steps after writing a letter requesting for a copy of the judgment. On this, the counsel referred me to the decisions in the ***Registered Trustees of the Marian Faith Healing Centre @ Wanamaombi v. The Registered Trustees of the Catholic of Sumbawanga Diocese***, CAT-Civil Appeal No. 64 of 2007; and ***Valerie MCGivern v. Salim Farkdun Balal***, CAT-Civil Appeal No. 386 of 2019 (both unreported). In the latter it was held:

"The registry concerned ought to have acted reasonably and diligently well without necessarily being reminded over and over against the appellants were availed with the copies of documents."

The counsel maintained that after serving the letter, the applicant took steps in the follow up of the matter. With respect to an accompanying affidavit of the court clerk, the counsel argued that that was unnecessary.

Mr. Njau further argued that the respondent's counsel has not stated anywhere in the counter-affidavit, or in the submission, that the respondent was served with the judgment prior to the date on which the applicant was served. The counsel relied on the Court's decision in ***Philipo D. Methuselah v. Gabriel Mfoe & Others***, HC-Land Appeal No. 10 of 2017 (unreported), in which it was held that, in the absence of an earlier collection of a copy of a judgment by the respondent, the Court cannot say with certainty that a copy of the decree was ready for collection on the date of the judgment.

Mr. Njau maintained that he needed time to acquaint himself with the case before lodging a meaningful application.

The parties' rival submissions raise one key question. This is as to whether the application has passed the threshold for its grant.

Before I get to the substance of the applicant's prayer, it is apposite that I should address the issue raised by the respondent's counsel. This is

with respect to the applicant's argument that the applicant was incarcerated at the time when he was to make a follow up of the matter. Ms. Mashimba feels that this is an allegation which should be casted away. It is settled law that submissions made from the bar or through written submissions cannot constitute the basis for the grant of an application, unless the contention in question is averred in the supporting affidavit. This position stems from the fact that, an affidavit is evidence, unlike submissions which are generally meant to reflect the general features of a party's case, and are elaborations or explanations on evidence already tendered (See: ***The Registered Trustees of Archdiocese of Dar es Salaam v. Chairman Bunju Village Government and Others,*** CAT-Civil Application No. 147/ 2006).

It is in view of thereof that I find Ms. Mashimba's contention plausible and meritorious, and I go along with it. I choose to disregard Mr. Njau's contention in respect of the applicant's incarceration.

This takes me to the substance of the matter and, in this respect, the legal position is that, extension of time, being an equitable discretion, its exercise must be judicious. As stated in numerous decisions, such discretion must be on a proper analysis of the facts, and application of law to facts, the grant of which is done upon satisfaction by the applicant through presentation of a credible case upon which such discretion may be exercised.

This position was enunciated by the East African Court of Appeal in ***Mbogo v. Shah*** [1968] EA 93, in which it was held:

> *"All relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reason for the delay, whether there is an arguable case on the appeal and the degree of prejudice to the defendant if time is extended."*

The view in the foregoing position was shared by the Supreme Court of Kenya through its persuasive decision in ***Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others***, Sup. Ct. Application 16 of 2014, wherein it was guided as follows:

> *"Extension of time being a creature of equity, one can only enjoy it if [one] acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that [one] was not at fault so as to let time lapse. Extension of time is not a right of a litigant against a Court, but a discretionary power of courts which litigants have to lay a basis [for], where they seek [grant of it]."*

Encapsulating the foregoing position, the Court of Appeal of Tanzania made the following position in ***Ngao Godwin Losero v. Julius Mwarabu*** (supra) as follows:

"To begin with, I feel it is instructive to reiterate, as a matter of general principle that whether to grant or refuse an application like the one at hand is entirely in the discretion of the Court. But, that discretion is judicial and so it must be exercised according to the rules of reason and justice."

The applicant's sole reason for the delay is that the supply of a copy of the judgment, was done belatedly, despite a timely service of a letter requesting for the said copy. The argument by Ms. Mashimba, in opposition to this contention is twofold. One, that no enough follow up was done subsequent to the request; and two, that the allegation of following up on the matter was not backed up by an affidavit of the clerk to whom the applicant alleged enquires were fielded. With respect to the latter, I fully agree that the settled legal principle is that when that is alleged, an affidavit of such person must be sworn or affirmed. In this case, that requirement was not followed. I hasten to state, however, that this requirement is blurred by the fact that it is not the responsibility of a party who has requested a copy of the judgment to be banging the door of a judicial officer, making enquiries about when the said copy would be available. The said party is said to have discharged the responsibility once he submits his request and the court acknowledges receipt of the request. He is said to be home and dry

hence forth. This is what the decision in the ***Wanamaombi*** and ***Valerie McGivern cases*** (supra) guide.

In the instant case no dispute exists that the applicant requested to be supplied with a copy of the judgment sought to be impugned, and that such request was lodged early enough. No evidence exists that after such request, the judgment was processed and issued earlier than the date on which the applicant collected. In such a case, it cannot be said that collection of the said copy on 15th March, 2021 was belated, and the applicant cannot be blamed for that. It is not an act that would be controlled or influenced by the applicant. It was an inaction by the Court and the applicant cannot be made a sacrificial lamb who should shoulder the blame of inaction, as was stated in ***Christopher Ole Memantoki v. Jun Trade and Sellers (T) Ltd***, CAT-Civil Application No. 319/02 of 2017 (unreported).

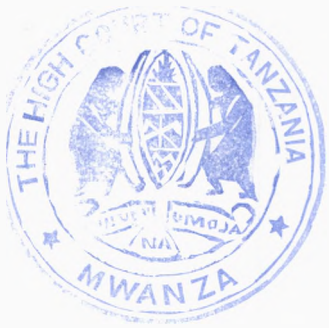
The respondent has taken an issue with the applicant's inaction and failure to account for the days between 15th March and 24th March, 2021, when he finally filed the instant application. This is a spell of nine days. While I am mindful of the fact that every day of delay has to be accounted for, I take the view that, the fact that the counsel was new to this assignment, means that he needed time to acquaint himself with the case before

necessary action was to be taken. I am convinced that this explanation is sufficient to account for the nine-day delay in preferring the application.

In the upshot, I am convinced that the applicant has presented a credible case sufficient to convince the Court to grant an extension of time. Accordingly, the application succeeds and the applicant is given 14 days within which to institute the application for leave to appeal to the Court of Appeal of Tanzania.

Order accordingly.

DATED at **MWANZA** this 26th day of August, 2021.



M.K. ISMAIL

JUDGE