

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

AT MWANZA

MISC. CIVIL APPLICATION NO. 64 OF 2021

MLEKWA BANOBI 1ST APPLICANT

YAYESU BANOBI 2ND APPLICANT

JUMA BANOBI 3RD APPLICANT

VERSUS

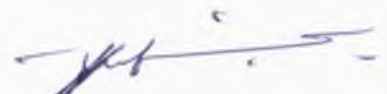
FAIDA LUNSALYA RESPONDENT

RULING

11th, & 16th August, 2021

ISMAIL, J.

In this application, the Court is called upon to exercise its discretion by extending time within which to file an appeal to this Court. The intended appeal is against the decision of the Resident Magistrates' Court of Geita at Geita, in respect of Civil Case No. 22 of 2018. The decision awarded general damages to the respondent, to tune of TZS. 100,000,000/- for defamatory utterances made by the applicants. The application is supported by the



applicants' joint affidavit in which grounds for the extension of time are deponed.

The application has been resisted by the respondent in a counter-affidavit sworn by the respondent himself. The contention by the respondent is that the application has no legal basis and that the allegation of tort that constituted the basis for the claim in the trial proceedings was sufficiently proved. He took the view that the application is an afterthought and a manouvre to deny the stifle execution of the decree.

The brief factual setting can be recapitulated as hereunder. In 2018, the respondent instituted a claim of general damages to the tune of TZS. 100,000,000/-. The respondent's contention in the suit is that the applicants had jointly uttered an abusive language. The defamatory words were uttered at a burial ceremony at Nyankumbu Primary Court, and that they resulted in the loss of his reputation. The trial court was convinced that a case had been made out against the applicants. It held the applicants liable and, as a result, it ordered that the respondent be paid damages in the sum of TZS. 100,000,000/-.

The applicants were aggrieved by the decision of the trial court and resolved that they would challenge it by way of appeal. Their quest began



by instituting Misc. Civil Application No. 162 of 2019 which was placed before Hon. Justice Manyanda. The application was for extension of time to file an appeal out of time. On 18th December, 2020, the Court struck out the application on the ground that the same had been filed prematurely, as time for preferring an appeal had not elapsed. Noting that the ruling on the application had been delivered while time for filing the appeal had expired, the applicants instituted the present application.

When the matter came up for hearing, the applicants were represented by Mr. Chiwalo Nchaisamwel, learned counsel, while the respondent enjoyed the services of Beatus Emmanuel, learned advocate. Mr. Nchaisamwel began with a prayer to adopt the contents of the affidavit as part of his submission. He argued that the application is mainly based on illegality, allegedly apparent in the trial court's decision. The instances of such illegality are as contained in paragraphs 5 and 6 of the affidavit. The counsel's contention is that the impugned judgment has not conformed to the requirements of a valid judgment, as no issues were framed and deliberated upon. This, the counsel argued, is contrary to the provisions of Order XX Rules 4 and 5 of the Civil Procedure Code, Cap. 33 R.E. 2019. The other instance of illegality cited by the counsel is that ingredients of the tort of defamation were not reflected in the judgment, consistent with the holding in ***Titto Peter***

Mwakiyusa v. Juma Abdallah Katikulila, HC-Civil Appeal No. 12 of 2019 (unreported).

Mr. Nchaisamwel contended that whenever an illegality is raised as a point, extension of time is grantable. On this, he relied on the decisions of the Court of Appeal of Tanzania in **VIP Engineering & Marketing Ltd & 2 Others v. Citibank Tanzania Ltd**, CAT-Consolidated Reference Nos. 6, 7 and 8 of 2009 (unreported); and **Arunaben Chaggan Mistry v. Naushad Mohamed Hussein & 3 Others**, CAT-Civil Application No. 6 of 2016 (unreported). He prayed that the application be granted.

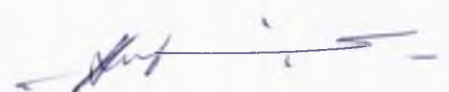
Mr. Emmanuel was of a firm view that the application is baseless and his reason was twofold. One, that the applicants have not shown any instance of illegality or irregularity. He took the view that issues were framed and that this is evident at page 2 of the judgment. Two, that the applicants were not diligent in their conduct. The counsel cited the striking out of Misc. Civil Application No. 162 of 2019 as a testimony of the applicants' indiligence. Mr. Emmanuel took the view that, since the proceedings which culminated in the striking out of the application involved the applicant's advocate, the striking out was as a result of negligence on their part, and the trite position is that negligence of a counsel cannot be a ground for extension of time. On

this, the counsel cited the case of ***William Shija v. Fortunatus Masha*** [1997] TLR 213.

The respondent's counsel wound up by submitting that the applicants' delays are a deliberate act of stifling execution of the decree with a view to denying the respondent, an 85-year old party, from enjoying the fruits of the decree. He urged the Court to dismiss the application with costs.

The applicants' counsel rejoined by reiterating what he submitted in chief. With regards to negligence, the counsel denied that there was any in this case, arguing that the ***William Shija case*** is distinguishable. On the respondent's advanced age, the counsel argued that justice is not dependent on the age of the parties.

Having dispassionately considered the parties' rival arguments, the question that arises is whether the application is meritorious to warrant its grant. It is common knowledge and a trite position that the decision to refuse or grant an extension of time is entirely in the discretion of the Court. The discretion is exercised judiciously according to the rules of reason and justice, and consistent with the holding in the case of ***Mbogo v. Shah*** [1968] EA 93, quoted with approval in ***Ngao Godwin Losero v. Julius***



Mwarabu, CAT-Civil Application No. 10 of 2015 (unreported). In the former, the defunct Court of Appeal for Eastern Africa 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,"

Reason for the delay is what is known as sufficient cause as emphasized in numerous decisions. These include **Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others**, Sup. Ct. Application 16 of 2014); and **Lyamuya Construction Company Limited v. Board of Trustees of YWCA**, CAT-Civil Application No. 2 of 2010 (unreported). In the instant case, the applicants' main reason for the prayer of extension of time is illegality of the decision sought to be impugned, exhibited in the form of the trial magistrates' failure to frame issues, non-compliance with the provisions of Order XX rules 4 and 5 of the CPC; and failure to demonstrate the ingredients of defamation.

It is an established position that, where illegality is cited as a reason and the same is proved to exist, the same can constitute a reason for extension of time irrespective of the applicant's length of inaction. This was propounded in the case of the **Principal Secretary Ministry of Defence**

and National Service v. Devram Valambhia [1991] TLR 387, in which it was propounded as follows:

"In our view, when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and if the alleged illegality to be established, to take appropriate measures to put the matter and the record straight."

While illegality is a cause sufficient enough to allow extension of time, the settled position is that the illegality must be of sufficient importance, and in the mould stated in the case of **Lyamuya** (supra) in which it was observed as hereunder:

"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 VALAMBHI'S case, the court meant to draw a general rule that every 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 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."

The question here is whether the alleged illegality is of any sufficient importance and apparent on the face of the record. My unflustered answer to this question is in the affirmative. Issues relating to failure to frame or consider issues, non-evaluation of evidence, and failure to conform to the imperative requirements of Order XX rules 4 and 5 of the CPC, constitute points of law that are of sufficient importance and are apparent on the face of the record. They are easily discoverable without getting involved in any long drawn argument or process. In my considered view, this is an illegality in respect of which an extension of time may be granted.

In consequence of all this, I hold that this application has met the threshold for granting an extension of time. Accordingly, the same is granted. Costs to be in the cause.

Order accordingly.

DATED at **MWANZA** this 16th day of August, 2021.



M.K. ISMAIL

JUDGE

