

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MWANZA DISTRICT REGISTRY**

**AT MWANZA**

**MISCELLANEOUS CIVIL APPLICATION No. 56 OF 2021**

**(Arising from the judgment of the High Court of Mwanza, Hon. Rumanyika, J, in PC Civil Appeal No. 81 of 2020)**

**ABIUS ERASTO.....APPLICANT**

**VERSUS**

**JOSEPH CHILYA.....RESPONDENT**

**RULING**

23<sup>rd</sup> August & 16<sup>th</sup> September, 2021.

**TIGANGA, J.**

This is an application for extension of time to file an application applying for certificate on the point of law for the applicant to appeal to the Court of Appeal of Tanzania. The application has been made under section 11 of the Appellate Jurisdiction Act [Cap 141 R.E 2019] and any other enabling provision of the law. The same is accompanied with a chamber summons containing the following prayers namely;

1. That this honourable Court be pleased to extend time within which the applicant may lodge an application applying for a certificate on a point of law,
2. Costs of the application be borne by the respondent,
3. Any other reliefs the Hon. Court may deem fit and suit to grant.

It has been supported by the affidavits deposed by the applicant and his counsel. In the affidavit filed by the applicant he deposed he was the appellant in PC Civil Appeal No. 81 of 2020 which was decided against his favour. That the decision in the above mentioned appeal was delivered on 26/02/ 2020 in his absence as he had travelled to Burundi where he took more than two weeks to be aware on what it decided by court following the pronounced judgment, and this was due to the poor network at Burundi.

That on 15/03/2021 is when he was able to communicate with his Advocate he was informed of the result and instructed the advocate to start the appeal process to appeal to the Court of Appeal, before on 23/03/2021 he was informed that she had already filed the petition of appeal but she was out of office nursing her sick child for more than a week, therefore during that period she could not file the application leave to appeal to the Court of appeal.

That his advocate spent than two weeks out of office and on his return he was already out of time to file the application for certificate on point of law thus decided to file an application for extension of time.

Together with these reasons he highlighted two points which can be certified as the points of law, namely;

- a) Whether the lower courts and the High Court were right to rely on the text message as an exhibit which was not tendered to court as exhibit
- b) Whether the lower courts and the High Court were right to rely on the evidence of the respondent which was taken while he was not under oath

The affidavit filed by the by Bitunu Msangi, Advocate who represent the applicant was almost a replica of the affidavit sworn by the applicant, save that it was a bit elaborate regarding the sickness of her son that he had to undergo operation and that she asked her fellow Advocate to file the application for her, but on return she found the application had not been filed, that is why he decided to file this application asking for extension of time.

The application has however been countered by the respondent who through his counsel filed a counter affidavit in which he disputed practically all the averments by the applicant. The arguments in support and against the application were made through written submissions whereby the parties were represented by the learned counsel Ms. Msangi and Mr. Ryoba respectively.

Submitting in support of the application, Ms. Msangi prayed to adopt the two affidavits filed in support of the application to form part of the submission and stated that the grounds upon which the application is sought as shown in the supporting affidavits are that, there is a good cause for extending time, secondly, that the proceedings and judgment in the High Court and trial court contain irregularities and illegalities to the effect that, both courts were wrong to rely on the text message as evidence while the same was not tendered in court and admitted as evidence also that the trial court was wrong to rely on the evidence of the respondent which was taken while he was not under oath.

Counsel cited the case of **Lyamuya Construction Company Ltd vs Board of the Registered Trustees Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 which held that the main issue that this court is called upon to decide is whether there is a good cause for extending time whereby the applicant is required to account for the delayed days, the delay should not be inordinate, to show that there has been diligence and not apathy, negligence or sloppiness in prosecuting the action that he intends to take and lastly where the court feels that there are other sufficient reasons such as the illegality of the decision sought to be challenged.

Proving that the applicant has met the requirements, counsel submitted that the applicant has been tirelessly knocking the doors of this court whereby he lodged a notice of appeal on time on 23<sup>rd</sup> March 2021 and on 12<sup>th</sup> of April he lodged an application applying for a certificate on point of law which was however rejected for being filed out of time. Again, on 23<sup>rd</sup> April 2021 he managed to file an application for extension of time which was again rejected for wrong citation of enabling provision and that after following the instruction from the registry he was able to lodge the instant application.

Accounting for the delayed days, counsel submitted that from 26<sup>th</sup> April to 12<sup>th</sup> March 2021 she was in hospital taking care of her son who had undergone an operation and that it was until 23<sup>rd</sup> April 2021 when she was able to lodge an application for extension of time and had to wait for more than a week before she got feedback as to whether the application had been rejected or admitted. It was therefore counsel's submission that from the sequence of events, the delayed days have been well and satisfactorily accounted for and the applicant has never abandoned his right to come to court as the notice of appeal was lodged within time.

On the issue of illegality, counsel for the applicant submitted while referring this court to the authority in **VIP Engineering and Marketing Limited and Others vs CITIBANK Tanzania Limited**, Consolidated Civil Reference No. 6, 7 and 8 of 2006 (unreported) that it is now settled law that the claim of illegality or otherwise of an impugned decision constitutes sufficient cause for extension of time whether or not reasonable explanation has been given by the applicant under the rule to account for the delay.

Now in this application, learned counsel for the applicant pointed at two grounds of illegality as shown in the supporting affidavit of the applicant the same being firstly, the reliance by both trial and appellate courts on the text message as evidence regardless of the fact that it was not tendered nor admitted as evidence in court and secondly, the reliance on the respondent's evidence while the same was not taken under oath.

It was also her submission that those are the grounds which the applicant intends to use to challenge the impugned decision and strongly believes that the intervention of the Court of Appeal is important so that those illegalities can be addressed.

Opposing the application, learned counsel for the respondent stated that from the applicant's submission, the main issue to be determined is whether the applicant has adduced sufficient reasons for the court to extend time within which the applicant may file an application for certificate on point of law. The learned counsel expressed his awareness of the fact that, an appeal is a statutory right but at the same time the rules of procedure are a handmaid of justice facilitating substantive justice.

Also, that the court before which an application of this nature is placed has discretion to or not to grant the same basing on whether or not it has been supplied with sufficient materials upon which to exercise the discretion. He cited the case of **Sultan Bin Ali Bin Hilal El Esri vs Mohamed Hilal & Two Others**, Misc. Comm. Application No. 116 of 2016 (unreported) and that of **Juluma General Supplies Limited vs Stanbic Bank Limited**, Civil Application No. 48 of 2014 to strengthen his point that the applicant must show sufficient reason and that delay has not been contributed by dilatory conduct on his part.

He was of the view, basing on the cited authorities, that the applicant has failed to show good cause to move the court to grant the application because in the affidavit filed in support of the application, the

applicant has not stated any reason for delay except for the unreasonable cause that has not been supported by any evidence. The claim that he had travelled to Burundi when the judgment was delivered cannot be termed as good cause for extension of time taking into account that the applicant has not given any evidence except mere words to prove that.

As for the claim that the advocate was out of office thus she could not have filed the application in time, the counsel strongly argued that it cannot be used as reason simply because a law firm comprises of more than one Advocates therefore any other Advocate from the firm would have continued with the procedure.

On the issue of illegality, he submitted that there was no illegality committed by the trial court in reaching its decision and the trial Magistrates and Judge were right to hold the applicant accountable to pay the amount claimed. Citing the case of **Ngao Godwin Losero vs Julius Mwarabu**, Civil Application No. 10 of 2020, the learned counsel for the respondent was of the opinion that the applicant has not been able to prove that there is any illegality on the face of record nor has he shown any sufficient reason to move this court to extend time. He lastly



prayed that this application be dismissed as the respondent stands to suffer loss both socially and economically.

That being the summary of the submissions, affidavits filed and authorities cited in support and against the application, it is apparent that under the enabling provision, that is section 11(1) of the Appellate Jurisdiction Act (supra), this court has been conferred with discretion to extend time to applicant to lodge an application out of time but it has to be shown that there is sufficient cause. There are however no any hard and fast rules as to what amounts to sufficient cause. The same depends on the reasons advanced by the applicant to account for the delay and move the court to grant the extension depending on the circumstances of each case. See **Osward Masatu Mwizarubi vs Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010 (CAT-unreported).

However, whenever the issue of illegality of the decision sought to be challenged arises, the court is required to overlook compliance of the requirement to account for the delayed days and enlarge the time. Read **The Principal Secretary, Ministry of Defence and National Service vs Devram P. Valambhia** (1992) TLR 387.

In this application, the grounds raised by the applicant upon which he is seeking for an extension of time are that one, the applicant was away when the impugned decision was delivered and could not file an application for certification on points of law in time due to the fact that his counsel was not at the office as she was attending her sick son who had undergone an operation. Two, there is illegality in the decision sought to be challenged which arises from the trial court's reliance on the evidence of a text message which was not tendered nor admitted in court and also the reliance on the testimony of the respondent which was given without oath.

Regarding the first point, the counsel for the respondent held a strong view that the applicant has not shown sufficient cause as no account for delay has been made and on the part of illegality he contended that there is no illegality on the face of record to warrant the grant of extension of time sought.

I agree with the learned counsel for the respondent that the applicant has failed to account for all days of delay from 26<sup>th</sup> March 2021 which was the last day to file the application until 12<sup>th</sup> April 2021 when he lodged an application applying for a certificate on a point of

law. Although attending a sick son in hospital has been given as the reason, the same has not been substantiated by any evidence.

Furthermore, in his submission, learned counsel for the applicant has stated that he was able to file another application on 23<sup>rd</sup> April 2021, however, no explanation has been given as to what he was doing from 12<sup>th</sup> to 23<sup>rd</sup> April, 2021. In other words, he has failed to account for a total of 11 days from when an application was rejected by the system for being out of time to when he filed another application for extension of time. It is for the above stated reasons I find that the applicant has failed to effectively account for all the days of delay.

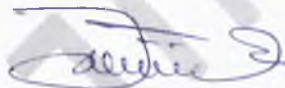
Coming down to the other reason advanced by the applicant the same being illegality in the proceedings and decision of the trial and appellate courts, the applicant's claim was centred on two main grounds of illegality which are first, the reliance on a text message as evidence the same having not been tendered nor admitted in court as evidence, and second, the reliance on the respondent's testimony taken while not under oath. Even though the learned counsel for the respondent was of the view that the raised points of the alleged illegality are meritless and baseless, I am of the profound view, basing on the authority in the cited case of **Valambhia** (supra), that the raised grounds of illegality contain

legal questions which are of sufficient importance to warrant an extension of time sought.

In view of the above, I find that the application has merit and the same is hereby granted, the applicant is given 14 (fourteen) days within which to file the application for certificate on points of law in terms of section 11(1) of the Appellate Jurisdiction Act [Cap 141 R.E 2019] . Costs be in due cause.

It is accordingly ordered

**DATED at MWANZA, this 16<sup>th</sup> September, 2021**



**J. C. TIGANGA**

**JUDGE**

**16/09/2021**

**COURT:**

Ruling delivered in open chambers in the presence of Ms. Tunu Msangi counsel for the applicant and Jackson Ryoba Counsel for the Respondent on line through Audio teleconference.



**J. C. TIGANGA**

**JUDGE**

**16/09/2021**