

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA**

MISC. CIVIL APPLICATION NO. 90 OF 2020

*(C/f High Court of Tanzania Civil Application No. 19/2015, originating from
District Court of Arusha, Civil Case No. 3/2012)*

ANNEY ANNEY.....APPLICANT

VERSUS

THEONAS MCHAMA1ST RESPONDENT

SAILESHI GORDAN LAXMAN

(t/a SAIBABA EXPRESS) 2ND RESPONDENT

RULING

28th July & 17th September, 2021

MZUNA, J.:

Anney Anney, the applicant herein, has preferred this application seeking for extension of time to file the notice of appeal and leave to appeal to the Court of Appeal of Tanzania out of time. Upon the death of the 1st respondent the 2nd respondent filed a counter affidavit opposing the application.

The background story is that, the applicant was the plaintiff in civil case No. 3/2012 in the District Court of Arusha and the decision was made in favour of the respondents. Aggrieved, the applicant appealed to this court vides Civil Appeal No. 19/2015 (before S. C Moshi J) and the appeal was dismissed. She then appealed to the Court of Appeal of Tanzania via civil Appeal No. 178/2018 and the appeal was struck out for being filed out of

time. The order was supplied to the applicant on 21/08/2020. Since the appeal was struck out, then she lodged this application so as to start afresh the process of appeal.

During hearing of this application, the applicant was unrepresented and fended for himself while the 2nd respondent enjoyed the service of Karolin Valerian Tarimo, the learned advocate. The main issue is whether the applicant has demonstrated sufficient reasons for the grant of extension of time to file the notice of appeal as well as for the grant of leave to appeal to the Court of Appeal?

Submitting on the substance of the application, the applicant adopted and relied on her affidavit and contended that her appeal to the Court of Appeal was struck out because the certificate of delay was signed and sealed on 24th January, 2018 excluding 513 days counted from 23/3/2016 to 17/8/2017.

The applicant also stated that the certificate of delay was signed before being issued to him and cited the case of **Saimon Nchagwa v. Majaliwa Bande & Another**, Civil Application No. 205/01 of 2017 (unreported). She moved this court to find that the Civil Appeal No. 178/2018 was struck out due to the Deputy Registrar's act of supplying the applicant with incorrect certificate of delay.

The applicant also stated that, there is a serious issue of law and fact like the fact that the respondent did not file the written statement of defence nor did he enter appearance to defend his case and yet the first appellate court discharged him from liability. He termed the said act as an illegality which was apparent on the face of record. She therefore prayed that this application be granted with costs.

Contesting the application, Mr Karoli contended that since the grant of extension of time is not automatic then certain factors are crucial and cited the case of **Moto Matiko Mabanya v. Ophir Energy p/c and Others**, Civil Application No. 463/01 of 2017, Court of Appeal of Tanzania at Dar es Salaam (unreported), **Ngao Godwin Losero v Julius Mwarabu**, Civil Application No. 10 of 2015 CAT at Arusha (unreported).

According to Mr Karoli, the applicant has not accounted from 31/8/2020 when the Court of Appeal gave an order and struck out his appeal to the date this application was made thus the delay of 10 days had not been accounted for. Moreover, Mr. Karoli contends that the reason for the delay was not adduced since the Deputy Registrar had issued the certificate of delay which excluded 513 days and that it was the duty of the applicant to attach a letter evidencing that the deputy registrar notified him to collect the documents on 21/01/2018.

Mr. Karoli further stated that, the issue of illegality of the decision has only been raised by the applicant in his submission and was not pleaded in his affidavit thus it's an afterthought since even at the memorandum of appeal there is no any illegality but the matter of evaluation of evidence and not legal matters. The case of **Joseph Paul Kyaula Njau and Another v. Emmanuel Paul Kyaula and Another**, Civil Application No. 7/05/2016 was cited to cement his submission. It is his view that the applicant's intended appeal has no any issue concerning illegality and prayed that this application be dismissed with costs.

In his rejoinder submission, the applicant reiterated his submission and said that good cause has been advanced for the delay in filling the notice of appeal and an application for leave was with good cause. That, the appeal was struck out on technical ground. That, the current application had been preferred immediately without delay on 11/09/2020 after obtaining copy of the order of the Court of Appeal on 31/8/2020. The case of **Miraji Salehe v KCB Bank Tanzania LTD**, Civil Application No. 118/16 of 2018 (unreported), **Diamond Motors Limited v K- Group (T) Limited**, Civil Application No. 72/01 of 2019 CAT at Dar es Salaam (unreported) were relied on. Responding on the ground of illegality, he stated that it was pleaded in his affidavit annexure A6 and thus prayed that this application to be allowed.

This application has been preferred under the provision of Section 11(1) of the Appellate Jurisdiction Act, Cap 141 R.E 2019. The question to ask by this court is:- *Are there sufficient reasons to warrant this court to extend time for the applicant to file a notice of appeal as well as leave to appeal to the Court of Appeal out of time?*

Mindful of the fact that extension of time is in the discretion of the court to grant or refuse, the discretion which however "*is judicial, and so it must be exercised according to the rules of reason and justice, and not according to private opinion or arbitrarily*". This was clearly stated in the case of **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (Unreported). The court further held that:-

"On the authorities however the following guidelines may be formulated:

- a) The Applicant must account for all the period of delay;*
- b) The delay should not be inordinate;*
- c) The Applicant must show diligence, not apathy, negligence or sloppiness in the prosecution of the action that he intends to take; and*
- d) If the court feels that there are other reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged."*

Likewise, in the case of **Wambele Mtumwa Shahame vs Mohammed Hamis**, Civil reference No. 8 of 2010 CAT at Dar es Salaam (unreported), it was held at page 5 and 6 that:-

" There are no hard and fast rule as to what constitutes a good and sufficient cause it is always a question of fact to be determined by the court according to the peculiar circumstance of the case."

In the case under consideration, the applicant has relied on the points of improper certification by the Deputy Registrar as well as illegality of the decision issued by this court. Mr. Karoli has argued that, the applicant has failed to account for the 10 days' period of delay as well as the reasons for the delay.

At this juncture it is not for this court to determine whether the appeal to the Court of Appeal has merit or not. The concern of this court is only for the applicant to furnish this court with sufficient reasons for it to grant extension of time not deal with the merits of intended appeal or leave, as well stated in the case of **Zahara Kitindi and Another vs. Juma Swalehe & 9 Others** Civil Application No. 142/05 of 2018 (CAT) at Arusha (unreported). The court observed that:-

"...it is now settled that a Court hearing an application should refrain from considering substantive issues that are to be dealt with by the appellate Court. This is so in order to avoid making decisions on substantive issues before the appeal itself is heard..."

Reading the certificate of delay (A4), it was issued to the applicant on 24th January 2018 excluding the days which was excluded in the preparation of the documents required and stating that documents were made ready for collection on 17th August, 2017. A certificate of delay clearly states *"...documents were made ready for collection on 17th day of August, 2017..."*

That would mean, time limit starts to run from 17th August 2017 when the documents were ready for collection. The respondent's counsel has said that the applicant is duty bound to account for the days the copies were ready for collection to the date of filling the Appeal to the Court of Appeal, also the applicant was duty bound to account from 31st August, 2020 when the said appeal was struck out by the Court of Appeal until 11th September, 2020 when this application was preferred. According to the learned counsel, since the applicant was duty bound to account for each day of the delay and he has failed to discharge his duty the application lacks merit.

This point I dare say must be considered not in isolation. I would agree that issue of illegality which is not apparent on the face of record cannot be the rescue of the applicant. The applicant however, has said about issue of technicality that the original application was filed well within time and leave was granted but it was struck out by the Court of Appeal on technical grounds.

It was held in the case of **Fortunatus Masha v. William Shija and Another** [1997] TLR 154 that:-

"A distinction had to be drawn between cases involving real or actual delays and those such as the present one which clearly only involved technical delays in the sense that the original appeal was lodged in time but had been found to be incompetent for one or another reason and a fresh appeal had to be instituted. In the present case the applicant had acted immediately after the pronouncement of the ruling of the Court striking out the first appeal. In these circumstances an extension of time ought to be granted."

It is therefore my finding that the delay is due to technical reasons which are explainable and excusable. For the purposes of the extension of time, this reason alone suffices the granting of the extension of time sought.

The struck out Civil Appeal No. 178 of 2018 as can be seen in ground No.9 of the applicant's affidavit, affected even the notice of appeal and leave to appeal to the court of appeal. I find that there are sufficient reasons for the delay.

Application to file notice of appeal as well as application for leave to appeal out of time is allowed with no order for costs. The same be filed within 21 days from today.

By order.




M. G. MZUNA,
JUDGE.