

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

MISC. CIVIL APPLICATION NO. 231 OF 2020

THE MANAGING DIRECTOR ABSA BANK

TANZANIA LIMITED *(Formerly known as **BARCLAYS***

BANK) ----- **APPLICANT**

VERSUS

FELICIAN MUHANDIKI ----- **RESPONDENT**

Date of Last Order: 24/06/2021

Date of Ruling: 03/09/2021

R U L I N G

MGONYA, J.

An application for extension of time has been filed before this Honourable Court under certificate of urgency on the grounds set forth in the Chamber summons as reflected below:-

- 1. That, this Honourable Court be pleased to grant the Applicant an extension of time within which to give notice of intention to appeal against the judgement and decree on appeal in Civil Appeal No. 157 of 2013 between the Managing Director, Barclays Bank Limited versus Felecian Muhandiki dated***

29/04/2015 and to comply with the appeal procedures in respect thereof;

- 2. The Applicant be granted extension of time within which to write a letter to request from the High Court copies of proceedings, judgment, decree and other relevant documents in respect of Civil appeal No. 157 of 2013 between the Managing Director, Barclays Bank Tanzania Limited versus Felician Muhandiki;***
- 3. Any other relief/reliefs which this Honourable Court may deem fit to grant;***
- 4. Costs of this application.***

The same is accompanied by the Affidavit sworn by **DR. ONESMO MICHAEL**, Advocate; The Application was argued by way of written submission. Upon adherence to the scheduling order by each party filing their respective submission, hence this decision.

The Counsel for the Applicant in their submission stated that they sought extension of time as stated in the chamber summons that, according to the contents of **paragraph 4, 5, 6, 7, 8 and 9** of the affidavits in support of the Chamber Summons indicates as to how the Applicant was aggrieved by the decision on appeal from this Honourable Court, in **Civil**

Appeal No. 157 of 2013 of which its decision was delivered on **29/04/2015**.

Further, the Applicant avers that, a compliance to appeal procedures was adhered to and a cross appeal was filed to the Court of Appeal in **Appeal No. 88 of 2016**. However, the order that gave the Applicant leave to appeal to the Court of Appeal was not attached in the said cross appeal on the reason that the same was not provided to the Applicant by the Court despite tremendous efforts to obtain the same. It was then on the **06/05/2020** that the letters requesting for such records was written and the same is attached in the application. The Applicant claims that the Court denied the Applicant the right to attach such document in the appeal since it did not avail such document to the Applicant and hence caused the appeal to have been struck out by the Court of Appeal.

Moreover, the Counsel for the Applicant also states that throughout the affidavit under **grounds 4 to 9** the Applicant has managed to show sufficient cause for the extension sought and has also accounted for each day of delay in pursuing her rights. It is in the submission that the appeal was filed without the attached order to avoid the same being out of time.

Dr. Onesmo, Counsel for the Applicant submitted that there are serious instances of illegalities on which the Applicant

humbly seeks the extension of time so that the illegalities can be well attended by the Court of Appeal.

In reply the Respondent's Counsel Mr. Mgare, Advocate submitted that, extension of time is within the discretion of the Court and the same has to be judiciously exercised. It is also the nature of an Application of time to be proved by a number of factors such as accounting for the days of delay, the delay not to be inordinate, applicant must show diligence and not apathy, negligence or sloppiness in prosecution the matter, illegality and chances of succeeding in the matter to be appealed.

It is in the Respondent's submission that, the failure for the Applicant to have failed to incorporate the order granting them leave was negligence on the part of the Counsel which does not amount to reasonable or sufficient cause. It is also stated that when the Court of Appeal on **19/08/2019** struck out the Applicant's appeal and not the cross appeal as wrongly alleged the Applicant, the Applicant was not in possession of the order granting leave to appeal to the Court of Appeal, because there is no evidence that the Applicant ever requested the said order from its issuance on **13/04/2016**.

Moreover, the order for leave to appeal to the Court of Appeal was first sought by the Applicant as an afterthought on

20/08/2019 after the appeal was struck out from the Court of Appeal of which a reminder letter is seen to be written on the **06/02/2020**. It is evident that the Applicant made no efforts in obtaining the said order within time. It is nowhere shown when the said order was availed to the Applicant though it is claimed that the same was supplied on **06/05/2020**.

Further it was the Respondent's submission that, the order for leave to appeal which the Applicant alleges to have been requested and waited for from **19/08/2019** to **06/05/2020** was not necessary for purposes of seeking extension of time to file a notice of appeal to this Court and for writing a request letter to be supplied with the records of the Court. Otherwise, it was also a wastage of time in waiting for the order so that the Applicant would have filed this Application for the order has no essence in this application of extension of time. In this it is evident that there is an inordinate delay. In this case unaccounted 9 months purely prove that the Applicant lacks good cause to be granted this Application.

It is the Respondent's Counsel averments in the submission that another ground stated to base for this application is illegality where the Applicant states that there is an illegality tainting the matter of which the applicant has been aggrieved by its decision and hence the same needs to be entertained by the Court of Appeal.

The Respondent's Counsel also argued that the Applicant's submission based on the fact that the matter to be appealed against has chances of success are mere allegations though a relevant factor in certain situations can only be ascertained later on appeal after hearing the arguments of both parties.

Having carefully gone through the facts as submitted by both parties in their pleadings and the submissions in respect to the Application at hand, it is from this juncture, I determine the same.

An application for extension of time before the Court is an application that lies with the ambit and the discretion of the Court to be granted or not be granted, through the same ought to be exercised judiciously. The Applicant before this Court has applied for extension of time for the reason that it is within his intension to appeal against a decision of this Court that had aggrieved the Applicant herein.

It appears in the record that the Application is borne from an appeal that had been filed with the Court of Appeal and the same was rendered incompetent for not having been attached with an order that granted the Applicant leave to file an appeal with the Court of Appeal, and hence the appeal resulted into being struck out.

Firstly, this Court from records further has observed that the Applicant has posed fault to this Court for not availing the

said order that granted the Applicant leave even after tremendous follow ups and taking into consideration that time was lapsing the Applicant opted to file the appeal without the Order.

It is this Court's duty to chronologically trace the events as occurred in the circumstance stipulated above. The Order required to have been attached by the Applicant in their Appeal filed before the Court of Appeal was delivered on the **13/04/2016**. After such decision the Applicant filed **Appeal No. 82 of 2016** which in the Affidavit it was stated that the same was due for hearing on the **12/05/2020**. The same was later struck out on **19/08/2019** for lack of being attached with an Order for leave which the Applicant states was not availed to them by the Court.

It is the practice and procedure of the Court that once a decision is delivered before a Court, Counsel representing a party is required to write a letter seeking for the proceeding and Judgement/Ruling for records keeping or further use. The Applicant states not have been availed with the above records of the Court even after a tremendous follow up. But going through the records looking for proof as if there was any letter written to the Deputy Registrar seeking for such documents as a result of determination of **Misc. Civil Application No. 225 of 2016**, attachment of such letter is nowhere to be traced but

only mere words. This Court finds a letter requesting for copies of Court records dated **20/08/2019** and a reminder letter written on **05/02/2020**.

The above dates and facts all appear to have occurred after the matter was struck out by the Court of Appeal on the **19/08/2019**. I find it questionable to ask as why the Applicant had not sought for the copy of the order immediately after the decision of **Misc. Civil Application No. 225 of 2016** so as to be availed with such order and file a proper appeal before the Court of Appeal? If such procedure and practice was adhered to and time had lapsed there was a chance of seeking for a certificate of delay from the Deputy Registrar since the delay was caused by the Court. In this instance I find there is no proof of the tremendous follow up of the order as pleaded by the Applicant.

Secondly, it appears that after the matter was struck out on the **19/08/2019** by the Court of Appeal, it is when then the Applicant sought for the records of the Court as evidenced by letter dated **20/08/2020** of which another letter was written on the **05/02/2020**. These efforts do not cover up for the proper time to have written a letter to be availed with records of the Court that is the Ruling and Drawn Order immediately when **Misc. Application No. 225 of 2015** was pronounced. It is here that the Applicant ought to have

accounted the days of delay and not after when **Appeal No. 88 of 2016** was struck out.

There is a string of factors to be considered as stated in many cases on the grant of extension of time. The case of ***PARADISE HOLIDAY RESORT LIMITED VS THEODORE N. LYIMO, Civil Application No. 435/01 of 2018*** it was stated that:

"...but the Court consistently considers factors such as the length of the delay, the reasons for the delay, the degree of prejudice the Respondent stands to suffer if time is extended, whether the Applicant was diligent, whether there is point of law sufficient importance such as the illegality of the decision sought to be challenged".

In the circumstance of the case above the delay that I find in the records of the Court in accordance to the circumstance of this case has to be counted since **13/04/2016** when the Order for granting the Applicant leave was pronounced. Seeking for copies of this Order on **20/08/2019** and reminding the court of the same on **06/02/2019** is an afterthought by the Applicant's Counsel. The Applicant has not accounted for the days of delay of which from the record are to be **13/04/2016** to when filing this application. It is from

above I find that the Applicant failed to account for all the days as stated above.

Another factor to be proved is illegality of which it is trite law that illegality has to be on the face of records and not an illegality that has to be looked for in the records of the Court. The case of **LYAMUYA CONSTRUCTION COMPANY LIMITED VS TRUSTEES OF YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF TANZANIA, Civil Application No. 02 of 2010** made the observation that:

"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 VALAMBIA'S case, the Court meant to draw a general rule that every Applicant who demonstrates that his intended appeal raises point 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 also 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" [Emphasis supplied].

The case of **NGAO GODWIN LOSERO VS JULIUS MWARABU, Civil Application No. 10 of 2015** also emphasized that an illegality must be on the face of records. The illegality stated in the matter to be appealed against is a matter of evidence and hence, I find such illegality not to fall in the ambit of requirement of the two cases above.

In the event considering the circumstance pertaining to this, I find that the Applicant has failed in illustrating good cause that would warrant this Court to grant an extension of time to file the application intended. Consequently, **the Application is dismissed with costs.**

Ordered Accordingly.

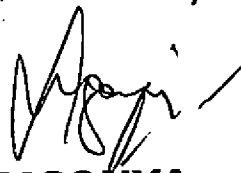


L. E. MGONYA

JUDGE

03/09/2021

Court: Ruling is read in the presence of Ms. Nchimbi, Advocate, for the Applicant, Ms. Kinvuli, Advocate for the Respondent and Mr. Richard, RMA.



L. E. MGONYA

JUDGE

03/09/2021