IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 245 OF 2021

EMMY MAGANGA..1ST APPLICANT

HABIBA MAJALIWA..2ND APPLICANT

VERSUS

ATHUMANI SAIDI BWILINGU... RESPONDENT

RULING

Date of last Order: 08/12/2021.

Date of Ruling: 10/12/2021.

E.E. KAKOLAKI, J

The applicants above named by way of chamber summons supported by affidavit of one **Mafuru Mafuru**, their advocate, have moved this court for grant of extension of time within which to appeal to this court against the Judgment and Decree of the District Court of Kibaha exercising its appellate jurisdiction in Civil Appeal No. 14 of 2020, delivered on 18/03/2021. In that appeal, applicants were challenging the decision of the Primary Court of Mkuza. The application which was preferred under section 25(b) of the Magistrates Courts Act, [Cap. 11 R.E 2019] and section 14(1) of the Law of Limitation Act, [Cap. 89 R.E 2019], is strenuously resisted by the respondent

through the affidavit sworn and filed by his advocate one James Venant Ndumbaro to that effect. With leave of the court the application was argued by way of written submissions as both parties were represented. The applicants hired the services of Ms. Sia Ngowi, learned advocate whereas the respondent is defended by Mr. James Venant Ndumbaru, learned counsel. I wish to note from the outset that, the applicants in moving this court to grant them orders sought among other provisions cited the provisions of section 14(1) of the Law of Limitation Act, [Cap. 89 R.E 2019], in which the respondent's counsel Mr. Ndumbaro, rightly submitted is inapplicable in this matter as the matter originates from the Primary Court. However that anomaly notwithstanding does not in my opinion render this application incompetent as the applicants also cited section 25(a) of the Magistrates Courts Act (MCA), which I find to be a proper provision for moving this court to grant extension of time to appeal upon good cause shown by them. The said section 25(a) of MCA reads:

> *25 (b) in any other proceedings any party, if aggrieved by the decision or order of a district court in the exercise of its appellate or revisional jurisdiction may***, within thirty days after the date of the decision or order, appeal there**

from to the High Court*; and the* ***High Court may extend the time for filing an appeal either before or after such period of thirty days has expired****. (Emphasis added)*

From the above cited provision it is evident to me that, any party aggrieved by the decision of the District Court when exercising its appellate jurisdiction has to appeal to this court within thirty (30) days of the decision or order sought to be impugned.

This court is empowered also under the said provision to extend time to such party to appeal to this court either before or after expiry of such time, subject to supply of good cause. What amounts to good cause, there is not fast and hard rules as it depends on the materials advanced by the applicant accounting for the delayed days or reasonable cause which prevented him from pursuing his action within the prescribed time, or any other sufficient reasons warranting the court exercise its discretion to grant him/her extension of time such as illegality of the decision sought to be impugned. See the cases of **Osward Masatu Mwizarubi Vs. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010, (CAT-unreported) , **Jumanne Hassan Bilingi Vs. Republic**, Criminal Application No. 23 of 2013 (CAT-unreported) and **Republic Vs. Yona Kaponda and 9 Others**

(1985) T.L.R 84. It should be noted however that, in accounting for the reasons for the days delayed, the applicant has to account for each and every day of his delay as a short time delay is not in itself sufficient ground for condoning the delay. See the cases of **Bushiri Hassan Vs. Latifa Lukio, Mashayo**, Civil Application No. 3 of 2007 (CAT-unreported), **Alman Investment Ltd Vs Printpack Tanzania and Others**; Civil Application No. 3 of 2003 (Unreported) and **Moto Matiko Mabanga Vs. Ophir Energy PLC and 2 Others**, Civil Application No. 463/01 of 2017 (CAT-unreported) and **Paradise Holiday Resort Limited Vs. Theodore N. Lyimo**, Civil Application No. 435/01 of 2018 (CAT-unreported). In **Bushiri Hassan** (supra) the Court of Appeal on the need of the applicant to account for each and every day of delay had this to say:

> *"Delay, even a single day, has to be accounted for otherwise there would be no meaning of having rules prescribing periods within which certain steps have to be taken."*

On the short period of time not being sufficient ground to condone the delay the Court of Appeal in **Paradise Holiday Resort Limited** (supra) observed:

> *"Admittedly, the delay involved in this matter is rather short. It is sometimes urged that the delay of a few days is very short*

and that itself is sufficient for condoning the delay. The fact that the delay is short is certainly one of the circumstances that will have to be taken into account in exercising the discretion to enlarge time. ***Nonetheless, that does not mean that the fact that the delay is short is by itself sufficient in all cases for condoning the delay****." (Emphasis added).*

In this application, the decision in which the applicants are seeking extension of time to challenge was delivered on 18/03/2021, meaning the time within which to appeal lapsed on 17/04/2021. This application was filed in court on the 27/05/2021, forty (40) days from the date of the decision in which the applicants are supposed to account for. Ms. Ngowi in her submission stated that, the applicants managed to account for the delayed days not on arithmetical precession but rather on the events that occurred and relied on the case of **Tanzania Ports Authority Vs. Ms Pembe Flour Mills**, Civil Application No. 49 of 2009 (CAT-unreported). She also raised the ground of illegality of the judgment sought to be impugned as the reason for extension of time. Submitting on the reasons for the delayed days while adopting the averments in paragraphs 3,4,5,6, 7 and 8 of the applicants' affidavit, Ms. Ngowi told the Court that, upon delivery of the decision sought to be impugned on 18/03/2021, on the 13/04/2021 the applicants applied for issue

of the impugned judgment and decree of appeal but were issued with the judgment only on the 11/05/2021. According to her, since the decree on appeal was a necessary document for appeal purposes, on the 13/05/2021 appellants had to write the reminder letter to the court for issue of the decree on appeal, the document which was made available to them on 18/05/2021 before they filed this application on 25/05/2021. It was her submission that, time started to run on the 18/05/2021 when the decree was collected by the applicants. As to the illegality of the decision sought to be challenged as deposed in paragraphs 9 of the affidavit she argued, the appellate court's (District Court) Judgment is tainted with illegalities for misinterpreting the provision of section 124 of the Law of Contract, [Cap. 345 R.E 2019] by imposing terms of the contract which according to her are repugnant to the doctrine of sacrosanct of the contract provided in law for relying on the authority of the High Court reached per incurium. It was her submission therefore that, the applicants have advanced sufficient grounds to warrant this court extend them extension of time as prayed and implored this court to so find and grant extension as sought.

In rebuttal Mr. Ndumbaro contended the applicants have failed to advance sufficient reasons accounting for each and every day of the delayed days

arguing that, they were negligent as upon being supplied with the copy of certified judgment on 11/05/2021 would have filed this application but unnecessarily awaited for the supply of the decree on appeal which according to section 25(3) of MCA is not a necessary document for appeal purposes, thus failure to account for the days from 11/05/2021 to the time of filing this application on 27/05/2021. He said, the case of **Tanzania Ports Authority** (supra) relied on by the applicants is inapplicable in the circumstances of this case as the delayed days ought to be accounted for on each and every day and not the events as Ms. Ngowi would want this court to believe. On the ground of illegality he argued, the same must be visible or apparent on the face of record which is not the case in this matter as interpretation of the law is exclusive in the domain of the court in which this case the appellate court in interpreting the provisions of section 124 of the Law of Contract Act, exercised it judicially. Thus there is no any illegality shown by the applicants something which marks this application as unmeritorious, thus deserve dismissal. He relied on the case of **Kilombero Sugar Company Limited Vs. Commissioner General, Tanzania Revenue Authority**, Civil Appeal No. 218 of 2019 (CAT-unreported). In her rejoinder Ms. Ngowi almost reiterated her submission in chief while

countering the issue of necessity of the decree in appeal in supporting the petition of appeal that, there is no law stating that it is not one of the necessary document. To her, the same is necessary document for appeal purposes and therefore, it was important for the appellants to secure it first before preferring this application hence the days delayed accounted for. As to the cases relied on by the respondent Ms. Ngowi argued, the same were distinguishable and therefore inapplicable to this matter. She prayed the court to grant the application.

I have taken time to study the pleadings as well as the submission from both parties in regard to the reliefs sought by the applicants. As alluded to earlier, the applicants deposed a series of event in their urge to account for the delayed days as well as raising the ground of illegality of the decision sought to be challenged. It is my findings that, the applicants have managed to convince this court that, were delayed by the appellate court in supply of the judgment which in my opinion is the mandatory document to be attached to the petition of appeal when filing the appeal or an application for extension of time. It is the law, when the party is delayed in the course of pursuing the copy of judgment such time spent must be excluded. This was the position in the case of **Trustees of Mariah Faith Healing Center @**

Wanamaombi Vs. Registered Trustees of the Catholic Church of Sumbawanga Diocese, Civil Appeal No. 47 of 2007 (CAT-unreported) where the court said that:

> *"In computing the time period of appeal, the time spent to obtain a copy of judgment should be excluded."*

Basing on that principle of the law, I proceed to exclude the days spent by the applicants in following up the judgment until when they were supplied with the same on 11/05/2021. Now the remaining time for the applicant to account for from such date to the date of filing this application on 27/05/2021 is seventeen (17) days. Ms. Ngowi claims that the time spent awaiting for decree on appeal must also be excluded for being a mandatory document to accompany the petition of appeal or this application as there is no law which clearly state which documents must accompany the said petition, while Mr. Ndumbaro submits as per section 25(3) of MCA, the decree on appeal is not part of the required documents. I agree with Mr. Ndumbaro's proposition as under the said section 25(3) of MCA, the decree on appeal is not one of the mandatory document for appeal purposes apart from the decision or order sought to be challenged. Section 25(3) of MCA provides that:

25(3) Every appeal to the High Court shall be by way of petition and shall be filed in the district court ***from the decision*** *or* ***order*** *in respect of which the appeal is brought:*

My interpretation of the above provision is that, the petition of appeal is sourced from the decision or order of the District Court exercising its appellate jurisdiction which is sought to be challenged and not the decree on appeal as Ms. Ngowi would want this court to believe. It follows therefore that, the said decree on appeal was not a mandatory document to be accompanied to the petition of appeal or this application. The appellants' decision through their advocate to await for the supply of the said decree on appeal, I hold is tantamount to both ignorance of the law and advocate's negligence which have never been grounds for extension. See the case of **William Shija Vs. Fortunatus Masha** (1997) TLR 213 (CAT). With such finding, the seventeen days were not accounted for and I so hold.

I now move to the ground of illegality which I think need not delay me much. It is the law, illegality of the decision must be visible or apparent on the face of record and not far-fetched by long drawn argument or process. See the cases of **Lyamuya Construction Company Ltd Vs. Board of Registered Trustees of Yong Women's Christian Association of Tanzania, Civil**

Application No. 2 of 2010 (CAT-unreported), **Ngao Godwin Losero Vs. Julius Mwarabu**, Civil Application No. 10 of 2015 (CAT-unreported) and **Moto Matiko Mabanga** (supra). On the requirement of illegality of the decision to be visible or apparent on the face of record the Court of Appeal in the case of **Ngao Godwin Losero Vs. Julius Mwarabu**, Civil Application No. 10 of 2015 (CAT-unreported) stated that;

> "...*the illegality of the impugned decision should be visible on the face of record."*

Similarly on the same principle the Court of Appeal in the case of **Moto Matiko Mabanga** (supra) had the following observations:

> *"... **I am not persuaded that the alleged illegality is clearly apparent on the face of record**. Certainly, **it will take a long drawn process to decipher from the impugned decision the alleged misdirection or non-direction on the point of law**. i.e. going through the two cases to certify if they are similar or completely unrelated and whether the conclusion of one of them will affect the other. I am therefore not persuaded, the illegality in this application constitutes a good cause." (Emphasis added)*

Applying the above cited principle to the facts of this case, I would say, I am far from being convinced that, the alleged illegality of the decision sought to

be impugned exists leave alone the fact that is not apparent on the face of record. The argument by Ms. Ngowi that, the appellate court misinterpreted the provisions of section 124 of the Law of Contract Act basing on the decision arrived at per incuriam by this court, in my opinion, requires a very long drawn process to discern the alleged misinterpretation of the law. I say so as it is not in the mandate of this court to determine whether the decision in **Kilimanjaro Truck Company Limited Vs. Tata Africa Holding Tanzania Limited and Another**, Misc. Commercial Application No. 169 of 2015 (HC-unreported), relied on by the appellate court to interpret the provisions of section 124 of the Law of Contract as alleged was arrived at per incuriam so as to appreciate existence of the alleged illegality of the decision on the alleged misinterpretation of said section. I am therefore not persuaded that, this is a merited ground for extension of time.

All that said and done, and for the fore cited cases and reasons, I am satisfied that, the applicants have failed to demonstrate sufficient reasons or good cause to warrant this court exercise its discretion and grant them extension of time as prayed in the chamber summons. The application is therefore devoid of merits and the same is hereby dismissed with costs.

It is so ordered.

DATED at DAR ES SALAAM this 10th day of December, 2021.

E. E. KAKOLAKI

JUDGE

10/12/2021.

The Ruling has been delivered at Dar es Salaam in chambers today on 10th day of December, 2021 in the presence of the Mr. **James Ndumbaru** advocate for the Respondent who is also holding brief for Ms. **Sia Ngowi** Advocate for the Applicants and Ms. **Asha Livanga**, Court clerk.

E. E. KAKOLAKI

JUDGE

10/12/2021