

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

MISC. CIVIL APPLICATION NO. 38 OF 2020

(Intended Appeal from the Judgment and decree of the High Court of the United Republic of Tanzania at Arusha (Hon. Justice Madam S.C Moshi, J) dated 23rd day of October, 2015 in Civil case No. 6 of 2005 as corrected by an Order of the High Court of the United republic of Tanzania at Arusha in Misc. Civil Application No. 82 of 2018 (Hon. Justice I. Maige J. dated 29/10/2018)

SCAN- TAN TOURS LTD.....APPLICANT

VERSUS

THE REGISTERED TRUSTEES,

DIOCESE OF MBULURESPONDENT

RULING

13/7/2021 & 3/9/2021

ROBERT, J:-

The applicant, Scan- Tan Tours Ltd, moved this Court under section 11 of the Appellate Jurisdiction Act, Cap. 141 (R.E.2002) and Rule 47 of the Tanzania Court of Appeal Rules, 2009 as amended by G.N. No. 362/2017 and G.N. No. 344/2019 seeking for the following orders:-

- a) *An order extending the time limited by Rule 83 (1) and (2) of the Tanzania Court of Appeal Rules, 2009 (as amended by the Tanzania Court of Appeal (Amendment) Rules, 2017, Government Notice No. 362 of 2017 and Tanzania Court of Appeal (Amendment) Rules, 2019, Government Notice No. 344 of 2019) of lodging a Written Notice of Appeal from the decision of the High Court of Tanzania to the Court of Appeal of Tanzania for the purpose of Appealing against the Judgment of the High Court of the United Republic of Tanzania, Arusha District registry (Hon. Justice Madam S.C Moshi, J) dated 23^d day of October, 2015 in Civil case No. 6 of 2005 as corrected by an Order of the High Court of the United Republic of Tanzania at Arusha pin Misc. Civil Application No. 82 of 2018 (Hon. Justice I. Maige J) dated 29/10/2018 as well as the time fixed by Rule 84 (1) of the Tanzania Court of Appeal Rules, 2009 G.N No. 368 of 2009 for serving copies of the said Notice of Appeal to all the other interested parties in the intended appeal.*
- b) *The time limited by Rule 90 (1) of the Tanzania Court of Appeal Rules, 2009 G.N No. 368 of 2009 in the application for a copy of the proceedings in the High Court in order to institute an appeal against the Judgment of the High Court of the United Republic of Tanzania, Arusha District Registry (Hon. Justice madam S. C. Moshi, J) dated 23^d day of October, 2015 in Civil case No. 6 of 2005 as corrected by an Order of the High Court of the United Republic of Tanzania at Arusha in Misc. Civil Application No. 82 of 2018 (Hon. Justice I. Maige, J) dated 29/10/2018 as well as serving copies of the Application to the other intended parties in the intended Appeal be extended;*
- c) *The costs of this Application be in the course.*

The application was supported by an affidavit sworn by **Ms. Consesa Malley Holm**, Senior Officer of the applicant herein and

resisted by a counter affidavit sworn by **Mr. John Sikay Umbulla**, learned counsel for the respondent.

The applicant deposed that, having been dissatisfied with the Judgment of the High Court, Arusha Registry in Civil Case No. 6 of 2005, he appealed to the Court of Appeal of Tanzania. The appeal was struck out for citing a party who was not mentioned in the High Court Judgment. Thereafter, he moved the High Court successfully to correct the mistakes appearing in its judgment through an order dated 29/10/2018 vide Misc. Application No. 82 of 2018.

Still desirous of pursuing his appeal against the corrected judgment of the High Court but out of the prescribed period of appeal, the applicant filed a Notice of Motion to the Court of Appeal in Civil Application No. 123/17/2019 seeking extension of time to lodge a written Notice of Appeal against the Judgment of the High Court in Civil Case No. 6 of 2005 as well as the extension of time fixed for serving copies of the Notice of Appeal to all the other interested parties in the intended appeal and the extension of time for the application for a copy of the proceedings. However, she decided to withdraw the said application on 25/3/2020 in order to file this application at the High Court in accordance with the law.

When this matter came up for hearing at this Court, the applicant was represented by Consesa Malley Holm, senior officer of the applicant whereas the respondent was represented by Method Kimomogoro, learned counsel. At the request of parties, the court ordered parties to proceed with hearing by filing written submissions.

Submitting in support of this application, the applicant stated that, she withdrew Civil Application No. 123/17/2019 from the Court of Appeal of Tanzania in order to comply with the requirement of law that before applying for extension of time by way of Notice of motion to the Court of Appeal, the Applicant has to apply first to the High Court. Hence this application.

She submitted that, the applicant was supplied with copies of the order in civil application No. 123/17/2019 on 31/3/2020 and she sent the said copies on the same day to her advocate Mr. Nyangarika who resides in Dodoma. On 6th April 2020, the advocate having prepared the application returned the application to her and she received the documents on 7th April 2020 which was a public holiday. She presented the application for filing on 8/4/2020 and was informed that the application was not yet admitted through electronic system. It was until

21st day of April, 2020 when the application was admitted and on 22nd day of April, 2020 the application was stamped by the Court.

She argued that, there was no inordinate delay in filling of this application as contended by the respondents in their counter affidavit, the applicant was not guilty of lashes negligence, mistakes, inaction and lack of due diligence in pursuing the matter and therefore the applicant is entitled to extension of time under the law. She cited the case of **Rutagatina C.L vs The Advocates Committee and Glavery Mtindo Ngalapa**, Civil Application No. 2 of 2011 to support her argument.

She submitted further that, the applicant through her affidavit managed to establish the period of delay and actions taken as well as the reasons for the delay. Further to this, if the application is granted the respondent will not be prejudiced in any way. Therefore, she prayed for this application to be granted for the interest of justice.

Opposing this application, counsel for the respondent firstly, submitted on the validity of the submission of the applicant. He argued that, having gone through the submission of the applicant it obvious that it was prepared by a lawyer/an advocate. He stated that, this is evidenced at page 3 of the applicant's written submissions where the document reads that *"pursuant to the above ordered schedule the Applicant's*

Advocate makes written submission in support of the Applicant's application as hereunder".

He maintained that the excerpts above proves that the submissions by the applicant were prepared by a lawyer who opted to conceal his identity and professional qualification. He argued that, the Advocates Act, Cap. 341 prohibits anyone from drawing an instrument for use in any proceeding without indicating his name and address therein.

He submitted further that the Legal Aid Act, No.1 of 2017 was enacted to accord additional protection of the society from the acts of unqualified practitioners. She made reference to section 24 of the Act. Thus, the applicant's written submissions whose drawer has held his name and address should not be acted upon as to do so would amount to condoning acts of unqualified persons.

Coming to the merit of the application, he submitted that, the Court of Appeal having struck out Civil Appeal No. 132 of 2016, the applicant filed application No. 65 seeking extension of time to file application for correction of clerical errors which was granted by the court on 29.10.2018. Thereafter, the applicant filed Civil Application No. 123 of 2019 in the Court of Appeal of Tanzania seeking for extension of time to file a fresh appeal against the judgment of the High Court which was delivered by

Hon. S.C Moshi, J on 23.10.2015. when the application was fixed for hearing the applicant decided to withdraw it because such application ought to have been filed in the High Court first. The said prayer was granted by court on 25.3. 2020.

He submitted that, the respondent is opposing this application on the following reasons: Firstly, the reason for striking out the previous appeal by the applicant was due to the record of appeal falling short of annextures to the amended plaint and page 4 of the judgment thus making it incomplete which rendered it incompetent and eventually struck out.

Secondly, the applicant's appeal having been struck out by the Court of Appeal, the applicant filed two unnecessary applications, Misc. Civil Application No. 65 of 2018 and Misc. Civil Application No. 82 of 2018. He argued that, correction of errors in a judgment is not subject to the law of limitation and referred the Court to the Court of Appeal decision in the case of Jewels & Antiques (T) LTD vs National Shipping Agencies Co. Ltd (1994) TLR 107 where the Court held that:

- (i) *As per section 96 of the Civil Procedure Code, 1966 clerical mistakes may be corrected at any time; application to correct the same, therefore are not subject to any limitation of time.*

He argued that considering the position of the cited case, counsel for the applicant ought to exercise minimum diligence before filing the application for extension of time to file an application for correction of errors in the judgment of this court.

Thirdly, it was unnecessary for the applicant to file a formal application for correction of errors in the judgment since a letter to the Registrar would have been sufficient to move the court to correct the errors in its judgment.

Fourthly, the filing of the application for extension of time in the Court of Appeal of Tanzania before filing it at the High Court was another example of lack of diligence on the part of the learned counsel. He referred the court to the case of **Godwin Ndewesi & Karoli Ishengoma vs Tanzania Audit Corporation** [1995] TLR 200 where the Court of Appeal held that:

"an oversight on the part of the counsel does not constitute sufficient cause for the exercise of the court's discretion in his favour".

He submitted further that, the same position was followed by the Court in the case of *Umoja Garage vs National Bank of Commerce* (1997) TLR 109 where it was held that:

"It seems plain to me that in the instant case, lack of diligence on the part of the counsel, or an oversight as Mr Lukwaro calls it, would be even devoid of merit as a plea for the extension of time. In the result therefore, I am of the view that no sufficient cause has been disclosed for enlarging the time as prayed".

He argued that, the applicant and her advocate were careless in their approach to this issue. It took them 21 months to file a proper application from the moment the Court of Appeal struck out their incompetent appeal. In between the applicant filed incompetent and unnecessary applications. Thus, the respondent prays for this application to be rejected with costs.

In a brief rejoinder, responding on validity of the submissions allegedly prepared by an advocate who didn't disclose his name or address, the applicant argued that the submissions were prepared by herself and not at the instance of any advocate.

Submitting on the merit of this application, the applicant admitted the reasons for striking out of the Civil Appeal No. 132/2016 as stated by the learned counsel for the respondent and proceeded to reiterate the points raised in her submissions in chief.

Having considered the submissions of both parties to this application, I am will now make a determination on the merit of this

application. This Court is aware that application of this nature will only succeed if the applicant demonstrates sufficient cause for the delay. In the case of **Benedict Mumello vs Bank of Tanzania**, Civil Appeal No. 48 of 2014 (unreported) it was held that;

"It is a trite law that an application for extension of time is entirely in the discretion of the court to grant or refuse it, and that extension of time is where it has been sufficiently established that the delay was with sufficient cause."

The question before me at this stage is whether, the applicant has shown sufficient cause for the delay to warrant this court to exercise its discretion to grant an extension.

The affidavit in support of this application, recounted the events which happened from the decision of this Court in the main case, Civil case No. 6 of 2005, up to 25th March, 2020 when the applicant withdrew her application for extension of time filed at the Court of Appeal and preferred this application. It concluded by stating that it is in the interest of justice that the applicant be given the extension of time as the delay was not out of the inaction of the applicant and the applicant has shown good cause for the delay.

While the applicant stated that the delay did not come out of her inaction, it is apparent that, the present application was filed on 22/4/2020 which is more than 27 days from the date of withdrawal of her application from the Court of Appeal of Tanzania on 25th March, 2020. The law is very clear in respect of accounting for the days of the delay, every day of delay has to be accounted for. In the case of **Bushiri Hassan vs Latifa Lukio Mashayo**, Civil Application No.3 of 2007 and in **Karibu Textile Mills V. Commissioner (TRA)**, Civil Application No.192/20 of 2016 by the Court of Appeal that; -

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


In the present application, the grounds for the delay from 25th March, 2020 to 22nd April, 2020 when the present application was filed before this court were not accounted for. I have noted some explanations given by the applicant in her written submissions that, the delay from 25th March, 2020 up to 22nd April, 2020 was due to preparations done by his previous advocate who was residing at Dodoma which is very far from Arusha. However, the said explanations do not feature anywhere in her affidavit supporting the application. Hence, this Court has to restrain itself

from the temptation of relying on mere words introduced by submissions as opposed to the required evidence. (See **TUICO at Mbeya Cement Company Ltd Vs. Mbeya Cement Company Ltd and Another** (2005) TLR 41).

Based on the reasons advanced herein, this Court finds that the applicant failed to adduce sufficient cause for the delay to enable this Court to grant the prayers sought. Consequently, I see no merit in this application and I hereby dismissed it with costs.

Ordered accordingly.




K.N. ROBERT
JUDGE
3/9/2021