

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

MISC. CIVIL APPLICATION NO. 11 OF 2021

*(Originating from the District Court of Mbeya District, at Mbeya in Civil Case
No. 24 of 2019)*

NATIONAL MICROFINANCE BANK PLC.....APPLICANT

VERSUS

FRANSIS ANDONGWISYE t/a.....RESPONDENT

MBOTTEY GENERAL BUSINESS

RULING

Date of Last Order: 28.04.2022

Date of Ruling: 03.06.2022

Ebrahim, J.

The instant application is made under **section 14 (1) of the Law of Limitation Act, Cap. 89 R.E 2019 and section 95 of the Civil Procedure Code, Cap. 33 R.E 2019**. The applicant, National Microfinance Bank Plc (NMB) is seeking for the order of this court to grant an extension of time within which to file an appeal against the decision of the District Court of Mbeya District made in Civil Case No. 24 of 2009. The application is supported by the affidavits sworn by Simon Mwamfupe the applicant's principal officer and Steward Ngwale, learned advocate.

This matter traces its history in 2009 when the respondent, Francis Andongwisye Mbottey successfully sued the applicant for payment of a sum of Tshs. 98,750,000/= for loss of profit. The matter was decided on 16th June 2020 and the decree was issued. Dissatisfied, the applicant appealed to this court vide Civil Appeal No. 17 of 2020. The appeal was however struck out for being accompanied with the defective decree. The decree was titled the Resident Magistrate Court of Mbeya instead of the District Court of Mbeya. Therefore, the applicant became out of time to appeal again, hence the present application.

The application was protested through a counter affidavit sworn by the respondent.

At the hearing of the application, the applicant was represented by Mr. Isaya Mwanri, learned advocate whereas the respondent was represented by Mr. Emmanuel Mwampaka, also learned advocate. Application was orally argued.

Supporting the application, Mr. Mwanri prayed to adopt the affidavits supporting the application. In essence the affidavits and Mr. Mwanri's arguments are to the effect that, the applicant's reasons are of two folds; the technical delay and illegality.

As to the technical delay Mr. Mwanri contended that the applicant was delayed in prosecuting civil appeal No. 17 of 2020 which was timely filed in the court but was struck out on 5th March 2021 for it was accompanied with a defective decree. According to him, the decree was titled with the court name different from the court which issued it. It was the District Court which issued but, the same was titled in the Resident Magistrate Court. For the principle of technical delay as the reason for extending time, he relied on the case of **Vedasto Protace v. John Joseph Mugango**, Misc. Land Application No. 115 of 2021 CAT at Dar es Salaam (unreported) and the case of **Vodacom Tanzania Public Co. Ltd v. Commissioner General (TRA)**, Civil Application No. 465/20 of 2019 CAT at Dar es Salaam (unreported).

He also argued that the applicant was not negligent since she promptly requested the amendment of the decree on the same day (i.e on 5th March 2021); and on 18th March 2021 she lodged the instant application.

Regarding the illegality, Mr. Mwanri argued that the District Court of which its decision is intended to be challenged had neither pecuniary jurisdiction nor territorial jurisdiction. According

to him the same complaint was among of the grounds of appeal in the struck-out appeal. He referred to the case of **Hamisi Mohamed v. Mtumwa Moshi**, Civil Application No. 407/17 of 2019. He thus prayed for the court to grant the application.

In response, notwithstanding the fact that the respondent filed a counter affidavit, Mr. Mwampaka did not object the application. He told the court that, appeal is the right to the appellant. He thus, urged this court to exercise its discretionary powers in granting the application.

I have considered the applicant's affidavits, the counter affidavit and the submissions by the parties. Indeed, as rightly averred by Mr. Mwampaka, granting or refusing to grant extension of time is absolutely the court's discretion. Nevertheless, the same has to be judiciously exercised upon sufficient cause being shown. See the case of **Benedict Mumello vs Bank of Tanzania**, Civil Application No. 12 of 2012 CAT (unreported). The issue for determination therefore, is whether the applicant has established sufficient cause to warrant this application?

What amounts to "sufficient/good cause" is not defined. It is based on the discretion of the court which in most cases depends

on the circumstances of the case which are to be determined judiciously. Thus, in the case of **Tanga Cement Company Limited v. Jumanne D. Massanga and Another**, Civil Application No. 6 of 2001 (unreported), the Court had this to say:

"What amounts to sufficient cause has not been defined. From decided cases a number of factors have been taken into account including whether or not the application has been brought promptly, the absence of any valid explanation for delay\ lack of diligence on the part of the applicant."

Yet, in the case of **Lyamuya Construction Company Limited v. Board of Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), the Court expounded the following principles to be taken into consideration when considering extending time:

"(a) That, the applicant must account for all the period of delay.

(b) The delay should not be inordinate.

(c) The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.

(d) If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged.

In the application at hand, the applicant has advanced two grounds for this court to grant the extension of time; **one** is technical delay in prosecuting Civil Appeal No. 17 of 2020, and **two** is illegality.

The principle "technical delay" was described in the case of **Furtanatus Masha vs, William Shija and Another** [1997] TLR 154, in the following words:

*"... A distinction should be made between cases involving real or actual delays and those like the present on which only involve what can be called **technical delays** in the sense that the original appeal was lodged in time but the present situation arose only because the original appeal for one reason or another has been found to be incompetent and a fresh appeal has to be instituted."*

Thus, in law a technical delay is excusable in opportune circumstances and constitutes a sufficient reason for granting the extension of time. The principle of technical delay applies where

the previously struck out matter had been filed timely nonetheless, is subject to the fact that, the affected party/applicant promptly moves the court upon the striking out order being made. See **Elly Peter Sanya v. Ester Nelson**, Civil Appeal No. 151 of 2018 CAT at Mbeya (unreported) and **Vedasto Protace v. John Joseph Mugango** (supra).

In the application at hand, it is undisputed that the applicant had previously filed the appeal at the prescribed time. It is also undisputed that the same was struck out on 5th March 2021 for being accompanied with a defective decree. It can nevertheless be noted that the applicant was not the one who made the mistake i.e titled the decree with the name of the court different from the court issued it.

Notwithstanding the above facts, the applicant promptly made the request for correction of the mistake on the decree on the same day the appeal was struck out i.e 5th March 2021. The applicant has further stated in her affidavit that she made physical follow up in order to be availed with a proper decree. Then, she managed to file the present application on 18th March 2021.

In my settled estimation, the trend by the applicant as shown herein above justifies the application of the principle of technical delay. It is also my considered view that the applicant has accounted for each day of delay as the law requires.

Additionally, the applicant under paragraph 16 of the affidavit claimed illegality of the District Court's decision. She stated that it has no jurisdiction, both territorial and pecuniary. It is trite law that where an illegality is claimed, the court should readily grant the application. See the decisions in the cases of **Principal Secretary, Ministry of Defence and National Service vs. Devram Vallambia** [1992] TLR 185, **Lyamuya Construction case** (supra) just to cite a few.

The applicant referred this court to the memorandum of appeal which was previously filed in the court, that was appended to the affidavit as NMB-01. In that appeal she complained that the District Court has no jurisdiction, both territorial and pecuniary. In the circumstance the claimed illegality, in my opinion needs the attention and determination in the appeal.

In that regard, I hereby grant the application. The applicant shall file an appeal within 30 days from today. Costs to be in the main cause.

Ordered accordingly.



Mbeya
03.06.2022

A handwritten signature in blue ink, appearing to read "R.A. Ebrahim".

R.A. Ebrahim
JUDGE

Date: 03.06.2022.

Coram: Hon. A.E. Temu - DR.

Applicant: Absent

For the Applicant: Absent

Respondent: Present

For the Respondent: Absent

B/C: P. Nundwe.

Court: The matter is coming for ruling today.

The ruling delivered in open chamber court in the presence of respondent only.



A.E. Temu

Deputy Registrar

03/06/2022

DEPUTY REGISTRAR
HIGH COURT OF TANZANIA
MBEYA