

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

MISC CIVIL APPLICATION No. 08 OF 2022

*(C/f Arumeru District Court, civil appeal No. 25 of 2016 – Original Enaboishu Primary
Court civil case No. 57 of 2016)*

BETWEEN

LEONARD KARAINÉ..... APPLICANT

AND

LOY ELIAS.....RESPONDENT

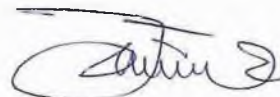
RULING

1st & 29th July 2022.

TIGANGA, J

In this application, the applicant, one Leonard Karaine lodged this application under section 25(1), (b) of the Magistrates' Courts Act, [cap 11 R: E 2019], and Rule 3 of the Civil Procedure (Appeal in Proceedings Originating in Primary Courts) Rules, 1963 G.N No. 312 Published on 29 /05/ 1964. The application was preferred by way of chamber summons supported by the affidavit sworn and filed by the applicant himself. In the chamber summons, he made the following two prayers;

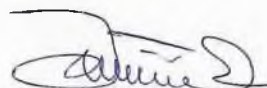
- i. That, the applicant be granted extension of time within which to file his appeal to this Honourable Court against the decision of Arumeru District Court, Civil Appeal No. 25 of 2016 dated 22nd February 2017.
- ii. Costs be in the cause.



The application was opposed by the respondent by the counter affidavit sworn by the applicant, which was also replied to by the applicant by filing the reply. For the sake of brevity, I will not reproduce them in this ruling, but I will be referring to them as the need arises.

At the hearing which was conducted orally, the applicant was represented by Ms Sarah Lawena, while the respondent was represented by Mr. Elibariki Maeda, both learned counsel. In the submission in chief, Ms Lawena traced the historical background of the matter that, the matter started at Enaboishu Primary Court in Civil Case No. 57/2016 in which the applicant was aggrieved by the decision of the trial Primary Court, she decided to appeal before the District Court of Arumeru vide Civil Appeal No. 25/2016. The decision of Arumeru District Court also aggrieved him, hence he decided to appeal before this Court vide Pc Civil Appeal No. 13/2017. When an appeal before this court was called for hearing, the Counsel for the other party raised an objection that the name of the Court was incorrect, then an appeal was struck out on 28/07/2017.

After the appeal was struck out, then he applied for time enlargement to file it afresh, the said application was granted on the 24th May 2019 and he filed his petition of appeal before the District Court of Arumeru but he was told that, the appeal records are missing. He further stated that

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he was told by Anna a Court Clerk, that, they had no copy of his previous petition of appeal and that he should give them a copy of it. He also submitted that he gave them that copy of petition of appeal but later on he was told by Anna the Court clerk that there was an instruction from the Resident Magistrate In-charge of Arusha District Court that, he had to prepare a fresh petition of appeal.

He continued to submit that, on the 20th January 2020 he was served with summons through S.J. Lawena, Advocate and realized that his appeal was registered as Pc Civil Appeal No. 1 of 2020 which shows that, the particular appeal was filed on the 9th January 2020. However, on the 23rd March 2020, his Pc Civil Appeal No. 1 of 2020 was struck out for being time bad.

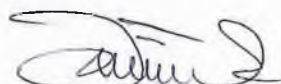
It is his further submission that, he filed again an application for extension of time within which to file his appeal to this Court, but when the matter came for hearing the Counsel for the respondent objected his affidavit in support of the application that an affidavit was defective because the verification clause doesn't reflect the contents of the verified paragraphs hence the Court sustained the objection and on the 3rd September 2021 his application was struck out.

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The applicant also submitted that, on the 6th September 2021 he wrote a letter applying for a copy of ruling and proceedings but he was informed that those copies were not ready for collection. He further submitted that, on the 15th November 2021, he was served with the said copy of the ruling, he concluded his submission by insisting this Court to enlarge the time for him to file his appeal.

The counsel for the respondent made a reply submission, he stated that, he concedes to the fact that the respondent filed an application for extension of time before Honourable Mzuna J, but there is no proof of filing an appeal to the High Court through the District court which could be an affidavit of the registry officer, he further submitted that the exchequer receipt which the Applicant tendered in support of his application proves the filing of an appeal before the District court not the High court.

The Registry officer has not proved that, and there is also no proof that Anna, the Court Clerk has ever communicated to the applicant, it is a common practise that, persons who are mentioned in affidavits to have given certain facts, should also swear affidavits proving the same. In his view, on account of what was going on, the delay in lodging the appeal and application was a result of the applicant's negligence.

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After the respondent's reply, the applicant made the rejoinder where he reiterated the submission in chief which I find not necessary to analyse so as to avoid unnecessary repetitions. Respondent's reiterations marked the end of Parties' submissions.

Having passed through both Parties' submissions, the issue raised by this court is whether this application has merit

In deliberating upon facts adduced by both parties, I find it necessary to highlight several failures of the applicant in moving the courts in several attempts of filing his appeal in the High court. Since it is a settled principle that parties are bound by their own pleadings, I wish to point out the failures as admitted by the applicant himself in his affidavit, at paragraph 4 of his affidavit the applicant admits to have made a first attempt to file a Civil Appeal No. 13 of 2017 and the said appeal was struck out following the respondent's objections which were sustained by the court on the 28th July 2017

The second attempt to file the same appeal was on the 4th September 2017, he admits at paragraph 7 that under the guidance of his learned Counsel he applied for extension of time vide Misc. Civil Application No. 103 of 2017, the said application was heard on the 14th May 2019, an application was granted on the 24th May 2019 by

Honourable Mzuna Judge. Following that grant, on the 9th January 2020 the applicant managed to file the same appeal which was struck out as Pc Civil Appeal No. 1 of 2020 but the same was struck out on the 23rd March 2020 following the respondent's objection that the matter was time bad. The reason that the applicant raised is that, he was not served with the records of appeal on time by the Registry officers.

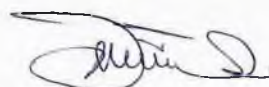
The Applicant's third attempt to file the same appeal was on the 20th April 2020 as he stated under paragraph 17 of his affidavit, he applied for extension of time vide Misc. Civil Application No. 37 of 2020 to file the same appeal which was struck out on the 23rd March 2020, this application was also struck out following an objection by the respondent that the affidavit in support of the application was incurably defective because the verification clause did not reflect the contents of the verified paragraphs.

It is clearly shown on records, that this is a fourth attempt by the applicant to file the same appeal which was previously struck out. At paragraph 20 he stated to have requested for the copy of the ruling which struck out the said appeal on the 23rd March 2020. At paragraph 23 of his affidavit, he told this court that his delay was not caused by negligence or sloppiness.

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It is a trite law that, he who alleges must prove, this court subscribes to the Respondent's Counsel view that the only way an applicant had to prove the allegations that among the reasons that caused delays to file his appeal was due to failure of the Registry officers to serve him with copies of rulings, is by way of affidavits of those persons because he has stated that they have been telling him that the copies were not ready for collection.

The principle governing the grant or refuse of extension of time is well elaborated in the case of **Lyamuya Construction Co. Ltd vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), in which the first principle established in that case is that, for extension of time to be granted, the applicant must account for each day of delay. For the court to grant the same, it should be satisfied that, the delay is inordinate and that, the applicant must show that he has been diligent in prosecuting the action he intends to take. That, he has not been negligent, apathy and sloppy in taking action. Lastly it may also grant the same where there are other reasons like illegality of the decision intended to be challenged.

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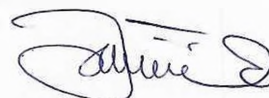
In line with the above findings, this court relies on principle established in the case of **Bushiri Hassan vs Latifa Lukio Mashayo**, Civil Application, No.3 of 2007 in which the Court held that;

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

It is my considered view that, an applicant has failed to account for the whole period of delay to file his intended appeal against the respondent. Even the alleged failures by the Registry officers to supply him with copies of the ruling on time as stated earlier are unjustifiable because there is no evidence submitted to support the allegation.

In my view, there was negligence on the part of the applicant, any reasonable person could expect a due diligence on the part of the applicant as it is evidenced by the records that an applicant was represented by a Learned Counsel, the total of 4 attempts with failures to file the same appeal prove that there is lack of seriousness on the part of the Applicant.

In law and reading a plethora of the authorities, in extension of time, it is a must that, the applicant account all days delayed. It is only where the complaint of illegality of the decision sought to be impugned

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is raised. On my scanning of the affidavit filed in support of the application, I find no point of illegality raised which would have excused the applicant to account all the days of delay.

The delay which has not been accounted was the delay from 15th November, 2021 when the applicant admits in paragraph 22 of the affidavit that he was served with the ruling, up to 24th January 2022 before he submitted this application for extension of time. In my view the applicant has not said what prevented him, from filing the application immediately after he was supplied with the copy of ruling on 15th November, 2021. Without a word on why he failed to file the same immediately. Leaves this court with only one conclusion that, the applicant has failed to account a total of 39 days from 15th November, 2021 up to 24th January 2022. That being the case, the applicant is taken to have no good cause for this court to exercise its power and grant the extension of time. That said, this application is hereby dismissed for lack of merit.

Order accordingly.

DATED at ARUSHA on this 29th day of July 2022



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J.C. TIGANGA

JUDGE.