

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

MISC. CIVIL APPLICATION NO. 45 OF 2021

(Arising from RM's Civil Case No. 07 of 2018)

AFRICAN BANKING CORPORATION..... APPLICANT

VERSUS

HERRY ELIUFOO CHRISTOPHER..... RESPONDENT

RULING

14/6/2022 & 20/7/2022.

SIMFUKWE, J

The applicant African Banking Corporation filed the instant application under **section 14 (1) of the Law of Limitation Acts, Cap 89 R.E 2019** seeking the following orders that:

- 1. The Honourable Court be pleased to grant the Applicants herein an Extension of time within which the said Applicants may Appeal against the Ruling and Orders of the Resident Magistrate's Court of Moshi at Moshi in RM Civil Case No. 07 of 2018 between the Applicants versus the Respondent that was decided by Hon. Mazengo, PRM on 1st November 2019. (sic)*



2. Any other relief the Honourable Court will deem just and fit to grant.

The application was supported by the affidavit of Mr. Peter Kibatala advocate for the Applicants.

The Respondent was not reachable thus, he was served through substituted service by publishing the summons in Mwananchi Newspaper dated 14th March 2022 at page 25. The application proceeded ex parte by way of written submission.

Mr. Omari Msemu learned counsel argued the application for the Applicant. He stated that **Civil Case No. 7 of 2018** was dismissed by the trial court on the ground that it had no pecuniary jurisdiction to determine the matter.

Mr. Msemu started his submission by praying to adopt the affidavit of advocate Peter Kibatala to form part of their submission. He went on to submit that time limit to file appeals from the Resident Magistrate's Court is 90 days. Thus, the applicant herein should have filed her appeal around 30th January 2020. That, as clearly stated in the supporting affidavit that the applicant could not appeal within a prescribed time because the essential documents (proceedings, Ruling and drawn order) accompanying Petition of Appeal were not availed on time despite tireless requests and follow ups. It was alleged by Mr. Msemu that immediately after delivery of the Ruling subject of this application, they wrote a letter requesting to be supplied with the copy of the Ruling, Orders and proceedings in order to file an appeal. The first letter is dated 05th November 2019, with reference No. TAL/BANCabc/2letter/Eliufoo/2019 and the same was received in Court on 06th November 2019. After several

follow ups, on 26th June 2020, they wrote another letter with reference number TAL/Banc ABC/3Letters/2020. It was also alleged that Advocate Kitali who operates in Moshi had been personally making follow up of the documents. He constantly received the general reply that the documents were not ready, the case file was misplaced and other responses of the similar nature. That, on 18th February, 2021 and 16th September, 2021 they wrote another reminder letters to the court in vain. That it was until 29th September 2021 that Mr. Kitali advocate was supplied with certified copies of the rulings, Order and proceedings which Mr. Kitali sent by bus on 30th September 2021. Immediately after receiving the said documents, they filed this application. However, it came to their surprise that the Ruling and proceedings were certified on 6th June 2021 while the ruling and proceedings in respect of **Misc. Civil Application No. 12 of 2018** were certified on 15th May 2020 while they had all long been constantly requesting for the same as aforesaid in vain.

Mr. Msemo contended that in their appeal they intend to pursue a point of illegalities in the manner the said court dismissed the suit for the alleged want of pecuniary jurisdiction. That, it is trite law that, dismissal implies jurisdiction properly invoked or the matter was disposed on merit. That, the ruling of the subordinate court was based on preliminary objection raised by the respondent concerning the jurisdiction of the court. Thus, having found that the court lacked jurisdiction to determine the matter before it, it was illegal for the trial Magistrate to dismiss the suit. He cited the case of **Cyprian Mamboleo Hizza versus Eva Kioso & Another, Civil Application No. 3 of 2010**, CAT at Tanga, at page 2-3 (unreported), where it was held that:



that no prejudice will be caused to the respondent if this court will grant the application.

Having considered submission of the learned counsel for the applicant and their supporting affidavit, of Mr. Kibatala the applicants' reasons for the delay to file appeal are two, the first is delay supply of copy of ruling, drawn order and proceedings as deponed at paragraph 7 of the affidavit of Mr. Peter Kibatala learned counsel. The second ground is illegality as found at paragraph 16 of Mr. Kibatala's affidavit which reads:

"That, we intend to pursue what we view as illegalities in the manner in which the Respondent was granted an extension of time, and also the manner in which the suit was dismissed for alleged want of pecuniary jurisdiction."

From the outset it is a trite law that granting extension of time is in the discretion of the court. Such discretion has to be exercised judiciously. Apart from the discretion of the court, in addition, the applicant should account for every day of delay. In the case of **Keroi Madule vs Mepukor Mbelekeni, Civil Application No. 13 of 2016 (CAT)** it was held that:

"As a matter of general principle, it is entirely in discretion of court to decide whether to grant or to refuse an application for extension of time. That discretion is however judicial and so, it must be exercised according to the rule of reason and justice. The deciding factors being showing "good cause" by the applicants, and good cause depend on variety of factors including the length of delay, the reason for delay, the chances of appeal succeeding if

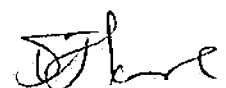


".....This court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive, and not a properly constituted appeal at all. What this court ought strictly to have done in each case was to "strike out" the appeal as being incompetent, rather than to have "dismissed" it: for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies there was no proper appeal capable of being disposed of."

The learned counsel for the applicant submitted further that it is trite law that, in order for the Court to exercise its discretion to extend the time, there must be sufficient reasons. Sufficient reasons must be established by exhibition of enough materials in court so that it can exercise the discretion judiciously.

In support of the point of illegality, Mr. Msemo referred the case of **Metro Petroleum Tanzania Limited & 3 Others versus United Bank of Africa, Civil Appeal No. 147 of 2019**, CAT, at Dar es Salaam at page 12-13 (unreported) where it was held that; the claim of illegality constitutes a sufficient reason for extension of time regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay. That the import of this decision is that, where there is a claim of illegality, the Higher Court is mandated to grant extension of time so as to put the records and law straight regardless of any other factors being established.

Mr. Msemo concluded that, having established existence of illegality and other impediment in lodging the appeal within time, they pray the court to grant this application so that they can file the intended appeal. He said



application is granted and degree of prejudice to the respondents, if the application is granted."

Also, **section 19 (1) (2) of the Law of Limitation Act, Cap 89 R.E 2019** provides that:

"In computing the period of limitation for any proceeding, the day from which such period is to be computed shall be excluded. In computing the period of limitation prescribed for an appeal..., the day on which the judgment complained of was delivered, and the period of time requisite for obtaining a copy of the decree or order appealed from ..., shall be excluded."

Starting with the first reason that the copies were lately supplied to the applicants, it is on record that the impugned ruling was delivered on 01/11/2019 and on 05/11/2019 the applicants through their advocate wrote a letter requesting for the copy of the ruling and proceedings. (Annexure TAL-3). The learned counsel reminded the court through the letters dated 18/02/2021 and 16/9/2021 (Annexure TAL-4).

It is undisputed fact that the applicants through their advocate made follow up of the required documents to institute the intended appeal within time. Also, as per paragraph 12 of the affidavit of Mr. Kibatala the copies were supplied on 29/9/2021 and on 22/10/2021 the applicants instituted the instant application. It is my considered view that this ground is sufficient to grant extension of time since the applicants accounted for the delay and their delay was not inordinate.

Concerning the second ground, the legal position is settled that whenever there is an allegation of illegality, then it is prudent to give an opportunity

to the party making such allegation to have the issue considered. In the case of **The Principal Secretary, Ministry of Defence and National Service v. Devram Valambia [1992] TLR 182** it was stated inter alia that:

"In our view when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty even if it means extending the time for the purpose of ascertaining the point and if the alleged illegality be established to make appropriate measures to put the matter and record right."

On the basis of the above decision, I am satisfied that the applicant deserves to be granted this application in order to ascertain the alleged illegality for interests of justice.

For the foregoing reasons, I find the applicants to have established good reasons for the delay. Therefore, I hereby grant 21 days from the date of being supplied with the copy of this ruling to the applicants, to file their appeal as sought. No order as to costs.

It is so ordered.

Dated at Moshi this 20th day of July 2022.



S.H. SIMFUKWE

JUDGE

20/7/2022