

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

PC. CRIMINAL APPEAL NO. 07 OF 2021

(Arising from the decision of the District Court of Temeka at Temeke, in Misc. Criminal Application No. 02 of 2021, by Hon. Mwankenja J.H-RM dated 29th day of March, 2021)

DUNIA ALLY MVUGALO.....APPELLANT

VERSUS

MWANAHAMISI ALLY.....1stRESPONDENT

ASHURA NASSORO MFANO.....2ndRESPONDENT

SHOMARI HAMISI.....3rd RESPONDENT

MWAJUMA ABDALLAH.....4th RESPONDENT

MOHAMED JUMA.....5th RESPONDENT

JUDGMENT

12th August, 2022

ITEMBA, J;

The appellant herein one, Dunia Ally Mvugalo has preferred the instant appeal to challenge the decision made by the District Court of Temeke at Temeke in *Misc. Criminal Application No. 02 of 2021* in which the he unsuccessful applied for extension of time to appeal.

The dispute all began when the appellant was dissatisfied with the decision by the Mbagala Primary Court in Criminal Case No. 931/2018 which was decided in favour of the respondents. It is apparent that the appellant had timely appealed before the District Court of Temeke in Criminal Appeal No. 33 of 2020, however, his appeal was struck out on the technical point that some names of the respondents were never disclosed in the petition. The said ruling was delivered on 31st day of December 2020. The appellant, on 15th January 2021 filed an application for extension of time to file his appeal. The reason for extension as evidenced from the contents of the affidavit in support of application was on the point of illegality, that, the District Court's Magistrate (Hon. Mwankenja-RM) erred to struck out the petition as the defects were curable. That, the District Court's Magistrate ought to have ordered for amendment. On the other point, the appellant had averred that he had accounted for each day of delay as the whole time from when he had lodged the purported appeal he was in the Court, until the 5th January 2021 when he was availed with the copy of the said ruling. The application was contested by the respondents. Upon scrutiny, the trial Magistrate ruled out that the appellant had failed to account for each day of delay as the applicant failed to account for the period from 5th January 2021

when he procured the copy of the ruling to 15th January 2021 when the said application was filed in Court. As to the point of illegality, the learned trial Magistrate stressed that the same could not have brought before the Magistrate of the same hierarchy but only before the Appellate Court.

Disgruntled with the decision of the District Court of Temeke, the appellant lodged the instantaneously appeal raising three (3) grounds which I reproduce hereunder: -

- 1. THAT, the trial magistrate totally misdirected himself and injudiciously in denying and dismissing the Appellant's application for extension of time to appeal out of time by relying on technical error which do not occasion any failure of justice if could be rectified or amended.*
- 2. THAT, the trial magistrate grossly erred both in law and facts for exercising the discretionary powers vested on him injudiciously by holding the appellant being accountable for 5 days of his delay to appeal without considering that the appellant was in court prosecuting the said appeal which was filed in Court in Time, but failed to disclose the names of other 4 respondents the error of*

which caused the appellant's appeal be struck out without the appellant being given the time for refiling the intended appeal.

3. THAT, the trial magistrate erred also in law and facts for his failure to underscore the essence of order to struck out and impartiality in dispensation of justice once ordered or determined by courts of law.

At the hearing, the appellant was unrepresented, whereas, all five respondents were enjoying the *pro bono* service of Ms. Grace Daffa, learned advocate from Women's Legal Aid Centre (WLAC). It was agreed that the appeal to be disposed by way of written submissions, in which the parties had complied to the schedule.

The appellant on his part, in respect of the first ground, he submitted that the defect of failure to disclose the names of the respondents was curable, thus, he complained of the approach by the trial magistrate and insisted that he ought to have ordered for amendment and not to struck out the appeal. He further argued that for an extension of time to be granted, the applicant was expected to give sufficient reason. To bolster the same, he cited the cases which provides for such effect. The cases of **Lyamuya Construction Ltd vs. Board of Trustees of Young Women's Christian**

Association of Tanzania, Civil Application No. 2/2010 (Unreported) and the case of **Felix Tumbo Kisima vs. TTCL and Another** [1997] T.L.R 154. He then insisted that this was a sufficient reason for extension. According to him, the delay by the appellant was due to injudiciously struck out of his meritorious appeal filed in time for a minor error.

Again, the appellant insisted that, the delay from the date of procuring the certified copy of the ruling, that to say on 5th January 2021 to the filing of Misc. Criminal Application No. 02/2021, on 15th January 2021 is curable under the provisions of section 37 (2) and (3) (c) of the Magistrates' Courts Act, [CAP 11 R.E: 2019].

In respect of the second ground of appeal, the appellant reiterated what he had submitted in respect of the first ground and insisted that, **one**, the trial magistrate did not exclude the time spent in Court by the appellant in prosecuting the Criminal Appeal No. 33/2020. And **two**, the trial magistrate raised the issue to account for each day for delay without affording the appellant to address on the issue. He then cited unreported case without citation. Principally, he was supposed to supply the same but he opted not to do so, which for that reason, I tend to disregard such authority.

As to ground three, the appellant contended that the trial Magistrate erred to dismiss the application. According to the appellant, the trial magistrate could not dismiss the application which initially, it was a result of minor defected appeal which was supposed to have been amended. He insisted that the order of dismissing it, bars the appellant from applying again for extension which according to him, it is injustice. To cement on the effect of dismissal order, he cited the cases of **Ngoni Matengo Coopertave Union vs. Ali Mohamed Othman** [1959] EA at page 577-588 and **Fortunatus Masha vs. Willium Shija and Another** [1997] T.L.R 154. The appellant then concluded by praying for this Court to allow the appeal in reliance to the raised grounds.

On the other hand, Ms. Daffa, eloquently submitted in respect of the first ground that, there was no sufficient reason given by the appellant for his delay from the date of receiving a copy of the ruling to the date of filing an application of extension. She referred page 12 of the trial Court decision at paragraph 2 and page 8 where the trial magistrate stated *inter alia* that:-

Paragraph 2;

"the above said, as a result, the application is hereby dismissed since the applicant has not accounted the period of delay from 5th January 2021 to 15th January, 2021 when the present application was filed."

Coming to *Page 8*;

"The affidavit offers no explanation after 5th day of January, 2021 why the present entry was not filed much earlier. I expected the applicant to establish that he acted promptly and expeditiously to apply for extension of time after its initial petition of appeal was struck out. The applicant contented that he was supplied a copy of ruling which struck out his appeal on 5th January, 2021 but the supporting affidavit does not attempt to account for the period from 5th January, to 15th January, 2021 when the present application was filed in Court."

Ms. Daffa further insisted that the ruling of the trial magistrate was clear that the appellant did not account for each day of delay to file his appeal. She then rebutted the argument by the appellant that he never disclosed any sufficient reason as a requirement for extension of time as stipulated in the case which he cited of **Felix Tumbo Kisima** (*supra*). She further

emphasized that it was a right move for the trial magistrate to consider the issue of struck out an appeal instead of amendment.

In respect of the second ground of appeal, the learned counsel for the respondents accentuated that the trial magistrate unlikely the appellant's argument, he did excuse the time when the matter was in Court as being a technical delay. According to her, the reason for denial was the failure of the appellant to account for the days from 5th January, 2021 when he obtained copy of the ruling to 15th January 2021 when he filed the said application. She further submitted that the issue of being accountable for each day of delay, the respondents had raised it in their Joint counter affidavit. Thus, the appellant could have addressed the same in his submission but he did not.

Regarding the 3rd ground, she insisted that it was right for the trial Court to dismiss the application for extension of time as the appellant failed to be accountable for each day of delay. Thus, according to her the order was a right one.

In his rejoinder, he reiterated what he had submitted in chief and added that the respondents' advocate has failed to properly address the

grounds which he had raised. He concluded by praying that this appeal be allowed. He also prayed for costs.

I have dispassionately considered the grounds of appeal and submissions herein. Having so done, the central issue for determination by this court is ***whether this appeal is meritorious.***

I have also examined the records of the original file and I am convinced to enlighten the following which will muchly assist me to determine the raised issue as follows;

One, it is a trite law that parties' names to be disclosed unless they are represented and, in such circumstances, the leave has been procured. The Prime Court of the Land in **Juma Marumbo and 42 others vs Regional Commissioner and 3 others**, Civil Application No.242/2016 at Dar es Salaam, (Unreported) at page 7 had this to say:

"Having found above that the omission to disclose the 42 other applicants renders the application incompetent, the answer suffices to dispose of the matter."

Again, as the reasoning elucidated in the case of **Judicate Rumishael Shoo & 64 Others vs the Guardian Limited**, Civil Application No. 43 of

2016 (Unreported) that;

"All names of applicants must be mentioned in the notice of motion. They must all be identified by names. Reference to the rest as "others" is insufficient. The reasons are that it is significant that it be known who are those persons, by names, moving the court and who would bear the consequences in case the application is not successful, for example payment of costs, etc."

See also the case of **Othniel Ahia and 52 Others vs. LM Investment Limited**, Civil Application No. 2 of 2015 (Unreported).

Therefore, guided by the above position by the upper bench, it is an obvious fact that the omission to disclose the names of the parties is not a minor defect as contended by the appellant, but rather a fatal defect which subjects an appeal to be considered an incompetent one and should in either way be struck out.

The appellant had contended that the Trial Court was supposed to order the appellant to amend his petition of appeal and not to struck the appeal as it did. However, I wish to make it vibrant untainted that, the trial Court could have only allowed amendment of the petition for the appellant

to include the names of other 4 respondents if the appellant had prayed for an amendment. What transpires from the records is that the appellant did contest on the issue of non-disclosure of the respondents' names upon the issue being raised *suo motto* and he contended that it was a minor defect. The trial Court could have no other option rather than to struck out the incompetent appeal.

Furthermore, the order of struck out the appeal on the ground of non-disclosure of respondents' names was pleaded by the appellant as a point of illegality before the same Court (District Court of Temeke). Just as an additional and a free lecture to the appellant and public in general as far as academic and practice is concerned, the issue of illegality can properly be raised before the appellate Court and not before the same Court in which the alleged illegality had been occasioned. It therefore follows that, the claim of illegality as a ground of extension should be a subject of the intended appeal to which the appellate Court can foresee the worthiness of the intended appeal upon observation at first site.

Two, the appellant has argued that the trial Court did not exclude the time which was spent when the Criminal Appeal No. 33 of 2020 was in progress until the time when it was struck out. I find it so hard to buy his

argument since the records are very clear at page 8 of the impugned ruling, specifically under paragraph 2 when the trial magistrate ruled out that:-

"...I have no difficulty finding the delay up until 31st December, 2020 when the petition of appeal was terminated for its incompetence, as excusable technical delay"

From the above extract, it is unfolded truth that the trial magistrate did exclude the time which the appellant was prosecuting his appeal contrary to what has been contended by the appellant.

Again, from the records, the affidavit in support of the applicant's application for extension of time did not give reasons why he delayed from lodging the same from 5th day of January 2021 when he procured a copy of the ruling to 15th January 2021 when he finally files an application for extension. It is a well-entrenched position in our legal system, that extension of time, which is a discretionary remedy, is grantable upon laying down a ground for the delay. Such ground is what is known as sufficient or good cause. This discretionary remedy is granted upon the party's ability to present a credible case, that sufficiently convinces the Court that reasons exist for such grant. This position has been restated in a multitude of decisions in this and the apex Court. It therefore takes and burden the

applicant to have acted in an equitable manner. This persuasive subscription was accentuated by the Supreme Court of Kenya in **Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others**, *Sup. Ct. Application 16 of 2014*, in which it was observed:

*"Extension of time being a creature of equity, one can only enjoy it if [one] acts equitably: he who seeks equity must do equity. Hence, **one has to lay a basis that[one] was not at fault so as to let time lapse. Extension of time is not a right of a litigant against a Court, but a discretionary power of courts which litigants have to lay a basis[for], where they seek [grant of it]."** [Emphasis added]*

This, therefore, requires meeting key conditions some of which were enunciated in the landmark decision in **Lyamuya Construction Company Limited** (*supra*) one of them being that the applicant must account for all the period of delay. In principle, each day of delay must be justified by the applicant. In **Bushiri Hassan vs. Latifa Mathayo**, Civil Application No. 3 of 2007 (Unreported) the Apex Court had this to say;

*"...**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." [Emphasis is added]

Basing on the above, it therefore follows that, the appellant was duty bound to give reasons in his application to the Court why he did delay from filing the same from the 5th day of January 2021 to 15th January 2021, failure of which the trial Court proceeded to dismiss the application. The trial magistrate as evidenced at page 8 as argued by Ms. Daffa, which I opt to reproduce: -

"The affidavit offers no explanation after 5th day of January, 2021 why the present entry was not filed much earlier. I expected the applicant to establish that he acted promptly and expeditiously to apply for extension of time after its initial petition of appeal was struck out. The applicant contented that he was supplied a copy of ruling which struck out his appeal on 5th January, 2021 but the supporting affidavit does not attempt to account for the period from 5th January, to 15th January, 2021 when the present application was filed in Court."

Basing on the deficiency in the contents of the application by the appellant as indicated from the above excerpt, I believe the trial magistrate did exercise his discretion power judiciously when he denied to extend time for the appellant to appeal.

Besides that, the appellant has also argued that the trial magistrate ought not to have issued a dismissal order in Misc. Criminal Application no. 2 of 2021 as the order precludes him for lodging another application for extension. I doubt the acquaintance of the appellant on the matter. To put it lively, the fact that the application was heard and concluded, it was to be dismissed in its finality. Dismissing an application connotes that the application has been concluded. (See **Said Thomas Mhombe & Another, Consolidated Criminal Appeals No. 469 and 472 of 2019**, CAT at Iringa (Unreported) Hence, the order of dismissal was a correct one.

Three, the appellant had contended that the issue of accounting for each day of delay was raised *suo mottu* by the trial Court without affording him opportunity to address on it. Without wasting time here, from the records, as alluded earlier, the affidavit in support of the applicant's application for extension of time did not give reasons why he delayed from lodging the same from 5th day of January 2021 when he procured a copy of the ruling to 15th January 2021 when he lodged his application for extension of time to appeal. It is principle of law that parties are bound by their own pleadings. The appellant could not be allowed to explain the extraneous matters which were not encompassed in his application as, principally,

submissions are not evidence. In **Stella Ernest Nyanda vs. Antony Maguguli**, PC Probate Appeal no. 4 /2021, HCT at Mwanza (Unreported) my learned brother, Hon. Manyanda, J, had this to say to which I am embraced to subscribe fully;

"Submissions are not evidence their purpose is to explain the already admitted evidence."

Because affidavit contain evidence, if the appellant had evidential explanations, at all, pertaining the delay from the 5th day of January 2021 to 15th day of January 2021, they were to be averred in his affidavit in support of application which in this case he did not. Hence, his argument is non-meritorious.

Four, the appellant has admittedly that there was a delay from the date of procuring a certified copy of the ruling, on 5th day of January to 2021 to the date of filing Misc. Criminal Application No. 33 of 2020, on 15th day of January 2021. However, he contended that the trial Court could have been excused it by the provisions of section 37 (2) and (3) (c) of *the Magistrates' Courts Act (supra)* which entails about substantial justice to be done without undue regard to technicalities.

It should be noted here clear that, the issue of time limitation is a fatal.

It cannot be cured once violated. I am mindful of the Court's earlier decision in **John Cornel vs. A. Grevo (T) Limited**, Civil Case No. 79 of 2006 (unreported), where it was observed:

"However unfortunate it may be for the Plaintiff, the Law of Limitation on actions knows no sympathy or equity. It is a merciless sword that cuts across and deep into all those who get caught in its web."

The cited excerpt is in line with a canon of justice and the clear message here is that the question of time limitation is a fundamental jurisdictional issue. (See: **Hezron Nyachiya v. Tanzania Union of Industrial and Commercial Workers and Organisation of Tanzania Workers Union**, CAT-Civil Appeal No. 78 of 2001; **EastAfrican Development Bank v. Blue Line Enterprises Ltd**, CAT-Civil Appeal No. 101 of 2009; **MM Worl wide Trading Company Ltd & 2 Others v. National Bank of Commerce Ltd**, CAT-Civil Appeal No. 258 of 2017 (all unreported).

Basing on the above, I do not subscribe to the appellant's preposition that the delay is curable by the provisions of section 37 (2) and (3) (c) of *the Magistrates' Courts Act (supra)*.

In the event, basing on the four (4) rudiments which I have expounded

above, the issue is addressed in the negative, henceforth grounds 1, 2 and 3 of appeal are all dismissed for want of merit.

It is so ordered.



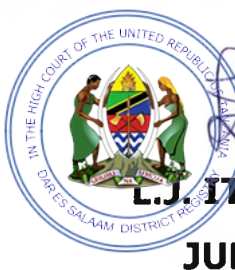
L.J. ITEMBA,

JUDGE

12th August 2022

Rights of the parties have been explained.

DATED at **DAR ES SALAAM** this 12th day of August 2022



L.J. ITEMBA,
JUDGE