

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)
AT DAR ES SALAAM
MISC.CIVIL APPLICATION NO. 431 OF 2021**

MATHIAS EPHRAIM HANAI..... APPLICANT

VERSUS

CDH FINANCE COMPANY LTD.....1ST RESPONDENT

SENSITIVE AUCTION MART CO.LTD

& COURT BROKER.....2ND RESPONDENT

RULING

Date of last order: 28/06/2022

Date of Ruling: 05/08/2022

E.E.KAKOLAKI,J.

The applicant herein preferred this application under section 14(1) of the Law of Limitation Act, (Cap 89 R. E 2019), Section 78 and Order XLII (I) of the Civil Procedure Code, [Cap 33 R.E 2019]. It is for the orders that:-

- a) This Court be pleased to extend time for the applicant to file review out of time.
- b) Upon extending time proceed to review its ruling delivered on 13th April, 2021, in Civil Appeal No. 141 of 2020.
- c) Costs.
- d) Any other relief(s) this Honourable court deem just to grant.

The application is supported by affidavit duly sworn by Samwel Shadrack Ntabaliba, applicant's advocate. The same however did not meet a smooth

reception as it encountered strenuous resistance from the respondents who file their joint counter affidavit deposed by Yesaya David Shumbi and Abdallah Makatta, both principal officers for the respondents. Hearing proceeded by way of written submission and both parties were represented as the applicant hired the legal services of Mr. Samwel S. Ntabaliba while the respondents enjoyed services of Mr. Desidery Ndibalema, both learned counsels.

The facts leading to this application as garnered from the Applicant's affidavit and Counter Affidavit can be briefly narrated as follows, on 30th June, 2020, in Civil Appeal No. 141 of 2020, the Applicant filed a memorandum of appeal to this Court challenging the decision of the District Court of Kinondoni handed down on 22/06/2016, in Misc. Civil Application No. 87 of 2016 and duly certified by Hon. Kiswaga on 08/06/2020. When the matter came for mention on 13th April, 2021 before Honourable Justice Kulita, both parties were called to address the Court on competence of the said appeal in which the applicant was represented by Mr. Goodluck Charles Luiza and the respondents by Mr. Yasaya David Shumbi, director for the 1st respondent. After being heard ruling was delivered on the same date whereby the appeal was struck out for being filed out of time without obtaining first a leave of

this Court to file it out of time. Discontented with the said decision but having being out of time to challenge it, the applicant has filed this application carrying two prayers as highlighted above, on two grounds that, **first**, the applicant's advocate had travelled to Kigoma to attend funeral of his father hence delayed to file the application, **second**, that, the decision is tainted with illegality.

To start with the first prayer this court has unfettered discretionary powers to extend time upon good cause shown by the applicant. What amounts to good cause there is not hard and fast rule as it depends on the reasons or materials placed by the applicant before the Court for consideration to justify the delay or warranting the Court grant him such extension of time. See the cases of **Oswald Masatu Mwizarubi Vs. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010, (CAT-unreported) and **Jumanne Hussein Bilingi Vs. Republic** (Criminal Application 2014 [2015] TZCA 65 (16 July 2015); www.tanzlii.org.tz). In assigning reasons, the applicant has also to account for each and every day of delay as it was stated in the case of **Bushiri Hassan Vs. Latina Lukio, Mashayo**, Civil Application No. 3 of 2007 (CAT-unreported) and **Alman Investment Ltd Vs. Printpack**

Tanzania and Others; Civil Application No. 3 of 2003 (Unreported).In the case of **Bushiri Hassan** (supra) the Court had this to say:

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

Likewise this Court has powers to entertain the second prayer for review of its decision upon the applicant satisfying it in either of the following, **one**, that the decision sought to be reviewed was obtained by fraud, **secondly**, the party was wrongly deprived of his right to be heard and **third**, there is a manifest error on the record resulting into miscarriage of justice. See also the case of **Chandrakant Joshubhai Patel V R** [2004]T.L.R 218.

Under part III, item 3 of the schedule to the Law of Limitation Act, [Cap 89 R.E 2019] the time limitation within which to file an application for review is 30 days. In this matter the decision of this Court sought to be review upon extension of time to the applicant was delivered on 14/04/2021 and this application was filed on 27/08/2021, meaning more than four months from the date of the decision. Thus application for review if any was supposed to be filed on or before 13/05/2021, hence the same is out of time for more than three (3) months which to me is an inordinate delay. The applicant is

therefore duty bound to account for each and every day of delay for such inordinate delay. In a bid to so do, in paragraphs 9,10 and 11 of the affidavit in support of the application the applicant's advocate deposed that, he had travelled to Kigoma to attend funeral of his father and that, he had to await for family meetings and arrangement of the process for administration of estate. Thus when he came back the time for filing this application had already elapsed. Mr. Ntabaliba in his written submission skipped arguing on this ground. However the ground was responded by the respondents whereby Mr. Ndibalema submitted that, the applicant has failed to account for each day of delay as the advocate did not state the date when he travelled to Kigoma and when he came back before he collected the requisite documents for filing this application. He relied on the case of **Lyamuya Construction Company Vs. Board of Registered Trustees of Young Women and Another**, Civil Application No. 2 of 2010 (Unreported – CAT) where the Court of Appeal insisted on the need to account for all period of delay.

In his brief rejoinder, Mr. Ntabaliba for the applicant insisted that, he travelled to Kigoma hence the respondent's argument that he failed to account for the delayed days is unfounded. I think this ground need not

detain me much as I shoulder up with Mr. Ndibalema's proposition that, the applicant has failed to account for the delayed days of more than three (3) months. I so hold as absence of the applicant's advocate in court cannot in anyway justify the delay by the applicant in performing the necessary action. There ought to be applicant's affidavit in person stating the reasons as to where was he when his matter was struck out, the same being supported by his advocate's affidavit and not to rely solely on the advocate's affidavit who is not the party to the application, therefore unable to depose in some of the facts. For example by advancing the reason of travelling to attend his father's burial ceremony at Kigoma the applicant's advocate turned himself into applicant to account for the delay, which locus he does not possess. This tells me that, the applicant was not keen in following up his matter in Court. I hold that view for one good reason that, if he had attended Court session on the 13/04/2021 or wanted to know what transpired on that date, he would have noted the striking out of his application in the absence of his lawyer and took immediate and necessary action timely, which duty he failed to discharge. I thus find both applicant and his advocate acted negligently in pursuing this matter in Court, hence disregard this ground.

Next for determination is the ground of illegality in which I subscribe to Mr. Ntabaliba's submission that, illegality alone if established constitute sufficient ground for extension of time. It is however to be noted that, the alleged illegality must be apparent on the face of record and not one drawn from long argument or process. See the cases of **Lyamuya Construction** (supra), **Ngao Godwin Losero Vs. Julius Mwarabu**, Civil Application No. 10 of 2015 (CAT-unreported) and **Moto Matiko Mabanga Vs. Ophir Energy PLC and 2 Others**, Civil Application No. 463/01 of 2017 (CAT-unreported). It was held in the **Ngao Godwin Losero** (supra) that:

"...the illegality of the impugned decision should be visible on the face of record."

In this matter the applicant in paragraph 16 of the affidavit complains that, the appeal was dismissed by this Court without according the applicant's advocate with the right to be heard as he had travelled to Kigoma. Again this is a shocking averment as the right to be heard could not be denied to the applicant's advocate as if he was appearing in person as the applicant and not for the applicant. I so view as it is on record that, on 13/04/2021, the applicant was represented by advocate Goodluck C. Luiza holding brief of the said Mr. Samwel S. Ntabaliba, who undoubtedly had full instruction to

proceed as he conceded to the preliminary points of objection raised by the 1st respondent, hence striking out of the appeal. As stated above illegality if any must be visible on the face of record, which is not the case in this matter as the record not only indicate the applicant was represented but also speaks loud that, he was accorded of his right to heard through his advocate. Thus this ground has no merit too.

Before I pen off, I wish also to comment on the rest of the submission made by Mr. Ntabaliba. Instead of concentrating on establishment of the reasons for the delay in filing the present application, he exerted much efforts on justifying the delay in filing the appeal which is not the subject matter here nor does it constitute good ground for extension of time. I say so as the Court's act of either dismissing or striking out the appeal does not constitute the ground for review in which if extension of time to review the impugned decision is granted the same would be considered, rather it is the ground of appeal which is not part of the subject of this application. For that matter, I see no need of wasting court's time deliberating on the said submission as that is an academic exercise. As there is no good grounds for extension of time advanced by the applicant to justify the first prayer, the second prayer for review of the impugned decision dies a natural death.

That said and done, this court finds the application is devoid of merit.
Henceforth, the application is accordingly dismissed in its entirety with costs.

Dated at Dar es salaam this 05th day of August, 2022



E. E. KAKOLAKI

JUDGE

05/08/2022.

The Ruling has been delivered at Dar es Salaam today 05th day of August, 2022 in the presence of Mr. Yesaya D. Shumbi, Director for the 1st Respondent and Mr. Asha Livanga, Court clerk and in the absence of the for the applicant and the 2nd respondent.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

05/08/2022.