

**IN THE NHIGH COURT OF TANZANIA
(MAIN REGISTRY)
AT DAR ES SALAAM
MISC. CIVIL APPLICATION NO. 12 OF 2022**

HENRY ZEPHYRINE KITAMBWA APPLICANT

VERSUS

THE PRESIDENT OF THE UNITED

REPUBLIC OF TANZANIA AND 2 OTHERS1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

NATIONAL AUDIT OFFICE.....3RD RESPONDENT

RULING

18/7/2022 & 22/8/2022

MZUNA, J.:

The Applicant herein has approached this court under section 11(1) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 (AJA) praying for "*extension of time within which to file a notice of appeal out of time against the decision of this Court in Misc. Civil Application No. 33 of 2018.*" There is an affidavit of one Richard Karumuna Rweyongeza supporting the application and a counter affidavit deponed by Alice E. Mtulo, Senior State Attorney for and on behalf of all the three respondents.

Parties were duly represented, Mr. Protace Kato Zake, the learned Counsel appeared for the applicant whereas Ms. Alice Mtulo, the learned State Attorney represented the 1st 2nd and 3rd Respondent. Hearing proceeded by way of written submissions.

Factual background giving rise to this matter as per the deponed affidavit is that: The applicant was also the applicant in Misc. Civil Application No. 33 of 2018 wherein the applicant was applying before the High court to quash the decision of the 1st respondent dated 26th December, 2017 under prerogative orders of certiorari after being terminated on account of embezzlement of public funds. The applicant who was earlier on employed as a State Attorney before being seconded to the National Audit Office, lost but sought to lodge his appeal to the Court of Appeal. He filed the notice however due to some technicalities, the appeal was struck out for being incompetent.

The main issue for determination is "Whether the applicant has adduced sufficient cause to grant the sought extension of time?"

Let me say right from the outset, that the name of the applicant had been amended as requested by Mr. Zake under section 97 of the Civil Procedure Code, Cap 33 RE 2019 a request which was not objected by the respondents, to read **Henry Zephyrine Kitambwa** instead of **Henry Zehayrine Kitambwa**.

In his submission, the learned counsel prayed to adopt the affidavit as part of his submission on the ground that the same tells the whole story. He said that the counter affidavit does not challenge the reason that have

been advanced for the delay, save for the 3rd paragraph which allege negligence of advocate in handling the appeal. However, particulars of the said negligence were not provided.

He went on saying that, immediately after application for orders of certiorari had been dismissed, the applicant took all necessary steps and filed Civil Appeal No. 114 of 2020. When the Court of Appeal called the matter for hearing, noted that there was no letter calling the applicant to collect the proceedings therefore the appeal was found incompetent and subsequently struck out. Knowing that the duty to call the appellant to collect the proceedings is vested in the court vide Registrar of the High court, the same was not done. The letter by the Registrar of the High Court with Ref. No. Misc. Civil App. No.33/2018 of 28 March 2022 where the Registrar admitted absence of letter informing the appellant that the proceedings were ready for collection. Instead, the applicant was called by phone and collected the proceedings.

He submitted that it was an error by the court for which litigants cannot be penalised for it and in the circumstance does not result into miscarriage of justice. He cited the case of **William Getari Kegege vs Equity Bank and Another**, Civil Application No. 24/08 of 2019 CAT at Mwanza (Unreported) and said that where there is an error by the court

that *Ipsa facto* constitutes sufficient cause for the court to grant extension of time. The learned counsel referred further to the case of **TANESCO and Two Others vs Salim Kabora**, Civil Application no. 68 of 2015 CAT at Dar es Salaam (unreported) to emphasise on issue of illegality of the decision being challenged as a ground upon which the court can extend time.

The counsel submitted that the irregularity by the Registrar in failing to write to the appellant inviting him to collect the documents and instead handing over the documents to the appellant informally followed by issuing a certificate of delay that was of no effect constituted sufficient cause for this court to grant the application.

Again the learned counsel has advanced the ground of denial to be heard which in his view is a sufficient ground to extend time. The court was referred to annexure to the affidavit in support of this application which is a Memorandum of Appeal in Civil Appeal No. 114 of 2020 where paragraph 4 of the memorandum the applicant is complaining of the denial to be heard and said where there is complaint on the right to be heard, that constitute a good cause for the court to extend time. Reference was also made to the case of **Chadha and Company**

He concluded that this ground suffices to constitute sufficient cause for this court to extend time to the applicant to file a notice of appeal.

On their part, the Respondents resisted the submission by the applicant's counsel and prayed to adopt the counter affidavit to be part of the submission. The counsel averred that in order for the court to exercise its discretionary power to extend time, sufficient reason for the delay has to be shown by the applicant. The learned State Attorney said that the yard stick of the circumstances under which extension of time can be granted are stated in the case of **Republic vs Yona Kaponda and 9 others**, [1985] TLR 84 and re stated in **Lyamuya Construction Company vs Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 CA and **Wankira Benteel vs Kaiku Fóya**, Civil Reference No. 4 of 2000 Court of Appeal at Dar es salaam.

She went on saying that the appellant was entitled to get a letter notifying that the documents are ready for collection but such right goes hand in hand with a duty to make follow up or request on the letter after finding out that there is no letter informing him on the availability and

collection of the proceedings or any missing documents therein. The applicant was duty bound to request for letter notifying him that the proceedings are ready for collection immediately after a call and the counsel for the applicant was duty bound to check the completeness of the documents before going to the Court of Appeal as he did. Failure by the counsel to do so means he did not do the assignment well thus amount to negligence which is not a sufficient ground for extension of time.

Further that having a certificate of correctness in the record of appeal means that the applicant's counsel was sure that all the necessary documents for the record are complete thus cannot come back and blame the Registrar of the High court for the missing letter of which he had all the rime to obtain only if he could have been keen enough to check the record.

In addition to that she submitted that the averment in paragraph 4 and 5 of the applicant's affidavit states that the request of the copy of proceedings was done by the counsel and left to the applicant to make follow up without any reason for so doing while he is not versed in time limitation or even know the importance of the documents. This according to her constitutes negligence and lack of seriousness on the part of the

counsel for the applicant. She cited a case of **Kambona Charles (as the Administrator of the estate of the late Charles Pangani) vs Elizabeth Charles**, Civil application No. 529/17 of 2019 CAT at Dar es salaam.

The learned State Attorney distinguished the case of William **Getari Kagege vs Equity Bank and Ultimate Auction Mart**, CAT Mwanza (Unreported) that the court was discussing how "the slip rule" applied to correct clerical mistakes and accidental slip or omission by officers of the court in judgments, decrees or orders which is quite different from the case at hand.

As for the question of illegality as brought by the applicant, Ms Alice submitted that illegality is among the grounds for extension of time as it was stated in number of cases such as **Kambona Charles case** Supra, **Principal Secretary, Ministry of Defence and National Service vs Devram Valambia** (1992) TLR 185 and **Lyamuya's Case** Supra. She added that illegality itself must be apparent on the face of records as it was held in **Omary Ally Nyamalage (as the administrator of the estates of the late Selemeni Ally Nyamalage) and 2 Others vs Mwanza Engineering Works**, Civil Application no. 94/08 of 2017 CAT

at Mwanza, and that as per records the applicant was afforded right to be heard.

That, the allegation of right to be heard are not apparent on the face of records. The one he refers are seen on the copy of the records of appeal which do not exist as they were struck out by the Court of Appeal in **Henry Zephyrine Kitambwa vs The President of the United Republic of Tanzania**, Civil Appeal No. 114 of 2020.

Also, she explained that the submission of illegality that the applicant was convicted on the offence which he was not charged was not pleaded in the Applicant's Affidavit rather it is the counsel's submission from the bar which is not part of the evidence. The cases of **Tuico at Mbeya Cement Company Limited vs Mbeya Cement Company Limited and another** [2005] TLR 41, **Farida F. Mbaraka and Another vs Domina Kagaruki and 4 others**, Civil reference No. 14 of 2019, and **Karibu Textile Mills Limited vs Commissioner General Tanzania Revenue Authority**, Civil reference 21/2021 CAT at Dar es salaam were cited to emphasize a point that "the submission from the bar is not part of the evidence".

Based on the above submissions, the learned counsel urged this court to dismiss this application with costs.

Re-joining his submission, the counsel for applicant underlined the duty of Registrar to inform the litigant of the availability of documents ready for collection by letter. If failure to confront the Registrar is found to be lack of diligence, he prayed to refer the case of **Kambona Charles** (Supra) as cited by the respondent which provide for the position in the circumstances. He insisted that the case of **William Getari Kagege** cited by the applicant shows the correct position of the law depicted by the Highest Court in our jurisprudence as regard the error by the court for which litigant should not be penalised for. Failure by Registrar to issue a letter informing the applicant to collect documents had contributed to a big extent to delay the applicant from filing his appeal of which reason the Court of Appeal had struck out the same and now the application seeks for extension of time to file the notice of Appeal.

As far as the question of illegality is concerned, the counsel re-joined that the learned State Attorney is misleading that illegality is not enough and must be apparent on the face of records the position applicable in the cases of Review. However, the illegality is apparent on the face of record looking on page 4 of the ruling dismissing the applicant's application as subject to the intended appeal which the Court of Appeal had to put the records in order. He averred that paragraph 6 and 12 of the affidavit

contains facts which constitute illegality as the applicant was denied the right to be heard.

After taking into consideration what has been stated in the deponed affidavit and counter affidavit filed by both the applicant and respondents respectively, as well as the submissions by Counsels, the question remains, is there sufficient cause for extension of time?

Section 11 (1) of the Appellate Jurisdiction Act, to which this application relates provides on discretionary powers of this court to extend time ***"...notwithstanding that the time for giving the notice or making the application has already expired"***.

Factors which the court in exercise of its discretionary powers which however has to be exercised judicially, has to consider includes existence of *"sufficient cause."*

As rightly submitted by the counsel for the applicant, Civil Appeal No. 114 of 2020 before the Court of Appeal was firstly filed well on time. It is when the Court of Appeal called the matter for hearing noted that there was no letter calling the applicant to collect the proceedings therefore the appeal was found incompetent and subsequently struck out. Bringing back a fresh appeal couldn't be possible as time had already lapsed hence the

applicant has to file the instant application for extension of time to file a notice of appeal out of time.

This is what is correctly referred to as illegality as one of sufficient cause to extend time. It was held in the case of **Fortunatus Masha Vs. William Shija and Another [1997] TLR 154** that: -

"A distinction should be made between cases involving real or actual delays and those like the present one 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. In the circumstances, the negligence if any really refers to the filing of an incompetent appeal not the delay in filing it. The filing of an incompetent appeal having dully penalized by striking it out, the same cannot be used yet again to determine the timeousness of applying for filing the fresh appeal. In fact, the present case, the applicant acted immediately after the pronouncement of the ruling of this Court striking out the first appeal."

This position gives a distinction between technical and actual delay and my finding here is that the applicant faced technical delay. It cannot be said that he acted negligently in pursuing the matter. Thus, denial of this application will be contrary to the fundamental principle of natural justice as the applicant will be denied of his right to be heard his case on merits.

The learned State Attorney attacked the counsel for the applicant that failure to procure letter calling the applicant to collect the proceedings was prompted by lack of diligence hence the same cannot be used to justify the delay to file application within time. This position was strongly challenged by Mr. Zake who said irregularity by Registrar who failed to write to the appellant inviting him to collect the documents and instead handing over the documents to the appellant informally followed by issuing a certificate of delay resulted into alleged delay and that should not be used to penalise the applicant.

The applicant was informed through a phone call and as submitted by the counsel for applicant after communicating with the Registrar whether there was such a letter, it was confirmed that there was no such letter directed to the applicant. Therefore, it is internal affairs of the court in which applicant is not to blame. This should not be used as a sword against the innocent applicant. This was discussed in the case of **Juma Selemani Nyati vs TANESCO**, Civil Case Number 102 of 1996 (unreported) where Juma, J (as he then was) ruled out that the situation constitutes sufficient reason for this court to grant the applicant's prayers contained in the chamber application.

Again I have been asked to base my findings on records of Memorandum of Appeal in Civil Appeal No. 114 of 2020 where ground 4 of the appeal states:-

"THAT, having regard to the fact that the appellant was found liable on the charges for which he had not been charged, the Learned Judge misdirect herself in fact and in law in failing to hold that the appellant was deprived a right to defend himself."

My findings in relation to the above quotation is that I cannot indulge myself into the averment that will be considered by the Court of Appeal. Suffice to say there exist illegality as above stated not on the basis of the filed Memorandum of Appeal. I join hands with the submission by respondent that illegality on point of law like denial of right to be heard, must be visible on the face of record and determination of it should not involve long drawn process of argument. This criteria was stated in the celebrated case of **Lyamuya Construction Company Ltd. v. Board of Registered Trustees of Young Women's Christian Association of Tanzania** (Supra).

Again there are factors to be considered in granting leave to file notice or application or even appeal out time like *"the length of delay, the reason for the delay...and the degree of prejudice"* This position was stated by the Court of Appeal in **Zuberi Nassor Moh'd Versus Mkurugenzi**

Mkuu Shirika la Bandari Zanzibar, Civil Application No. 93/15 of 2018

which quoted the position in **Samwel Sichone v. Bulebe Hamisi**, Civil Application No. 8 of 2015 (unreported) that;

*"The discretion of the Court to extend time under rule 10 is unfettered, but it has also been held that in considering an application under the rule, the courts may take into consideration, such factors as the length of delay, the reason for the delay, the chance of success of the intended appeal and **the degree of prejudice that the respondent may suffer if the application is not granted.**"*

(Underscoring mine).

Looking at the nature of the application I see no prejudice which the respondent will suffer if this application is granted.

In the upshot, the applicant has adduced sufficient cause/reasons for the prayer to extend time. I proceed to grant the applicant's application to extend time within which to file a Notice of Appeal out of time. The same be filed **within 14 days** from the date of this ruling.

Order accordingly.




M. G. MZUNA,
JUDGE.
22/08/2022