

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

**(DODOMA DISTRICT REGISTRY)
AT DODOMA**

MISC CIVIL APPLICATION NO. 33 OF 2020

(Originating from DC Civil Appeal No. 13 of 2013 of the High Court of Dodoma arising from Civil Case No. 47/2012 of the District Court of Dodoma)

NYANZA ROAD WORKS LTD APPLICANT

VERSUS

HUSSEIN BHAJI RESPONDENT

RULING

21/4/2022 & 24/5/2022

KAGOMBA, J

This is an application by NYANZA ROAD WORKS LTD (the applicant) seeking an order for extension of time to file notice of appeal out of time. The application is made under Section 11(1) of the Appellate Jurisdiction Act, [Cap 141 R.E 2019]. The application is by way of Chamber Summons supported by affidavit of BAKARI MUGINI, the Human Resource Officer of the applicant. The applicant also seeks an order of this Court to file an application for leave to appeal to Court of Appeal out of time and prays for costs of this application.

The supporting affidavit in paragraph 6, 7 and 8 states the reasons for the application. The applicant states that; she lodged Civil Appeal No. 349 of 2019 in the Court of Appeal, and the same was struck out for being filed out of time as she did not file certificate of delay which was caused by her failure to apply for the copy of proceedings in time. Also, it is stated that failure to file notice of appeal within time is not caused by applicant's negligence. According to the applicant, it is in the interest of justice for their application

to be granted since, if the same is not granted, the applicant shall suffer irreparable loss and her rights shall be prejudiced.

The respondent, HUSSEIN BAHAJI, in his counter affidavit disputed the reasons adduced by the applicant for being insufficient and that the applicant has failed to account for each day of her delay.

During hearing of the application, the applicant was represented by learned advocate, Joanitha Paul and the respondent was enjoying the service of learned advocate Francis Kesanta.

Before making her submission, Ms. Paul prayed this Court to adopt the affidavit of BAKARI MUGINI to be part of her submission. Ms. Paul in her submission she reiterated the same reasons adduced in the affidavit by stating that, the matter went to the Court of Appeal but was struck out for the reason that the applicant filed her appeal without obtaining a certificate of delay, hence the same was filed out of time.

The learned advocate stated further that the notice of appeal was filed in time but the applicant delayed to apply for proceedings. She argued that the delay was not due to negligence on the party of the applicant but due technical issues which caused the matter to be struck out. She prayed the Court to enable the case to be heard on merit. To cement her argument the learned advocate referred this Court to the case of **Lyamuya Construction Limited V. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), Page 6; to the effect that it is within the jurisdiction of this

Court to grant the application to render justice to the parties. She concluded her submission in chief by praying this Court to grant the application.

In his reply Mr. Kesanta for the respondent prayed to adopt the counter affidavit of the respondent as part of his submission. He challenged the applicant's affidavit for not stating reasonable cause to convince the Court grant extension of time. He quoted the case of **Finca (T) Ltd & Another V. Boniface Mwalukisa**, Civil Application 589/12 of 2018, Court of Appeal, Iringa on page 6; to the effect that an application for extension of time will be granted upon demonstration of sufficient cause for the delay.

Mr. Kesanta went further to submit stating that, the act of not applying for copy of proceedings in time showed clear negligence and was intentional because the applicant was represented by an advocate who ought to know that he was supposed to apply for copy of proceedings as it is the requirement of the law under rule 90(1) of the Court of Appeal Rules, GN No.368 of 2009. He argued therefore that lack of diligence to applicant's advocate cannot be sufficient cause for granting extension of time. To this end the learned advocate referred this Court to the case of **Calico Textile Industries Ltd V. Pyaraliesmil Premji** (1983) TLR 28 where the Court stated that, failure of party's advocate to check the law is not sufficient ground to allow an appeal out of time.

Mr. Kesanta further submitted that the applicant did not take immediate action to apply for extension of time after the matter was struck out by the Court of Appeal. Again, he referred to the case of **Finca (T) Limited** (Supra).

In addition to the above reply submission, Mr. Kesanta contended that the applicant was supposed to account for each day of delay as the matter was struck out by the Court of Appeal on 7/10/2020 while application before this Court was filed on 11/11/2020 being a delay of one month. The learned advocate supported his contention by the case of **Lyamuya Construction Limited** (Supra). He therefore prayed the Court to dismiss the application with costs.

In her rejoinder, Ms. Joanitha Paul maintained her submission in chief and added that the applicant should not be punished by mistake conducted by her advocate. She rejoined that after the matter was struck out by the Court of Appeal, immediate action was taken by filing this application online before 2/11/2020 and the hard copy were sent to Court later.

The learned advocate for the applicant concluded by pleading innocence of her client and maintained her prayer that the application be granted for justice to be done.

Having heard the rival submissions by the learned advocates and after scrutiny of the trial Court records, the issue which calls for this Court's decision is whether the applicant has adduced sufficient reason for the application to be granted.

The application has been preferred under Section 11(1) of the Appellate Jurisdiction Act, [Cap 141 R.E 2019], which provides this Court

with discretion to extend time for giving notice of intention to appeal to the Court of Appeal out of time.

However, it is well known that discretionary powers must be exercised judiciously. In doing so the applicant must adduce sufficient cause for his delay to ground the grant of the application.

In **Lyamuya Construction Company Ltd** (Supra) referred to this Court by Ms. Paul, the following guiding standards to grant extension of time were made. These criteria are;

- (i) The degree of the lateness.
- (ii) The reason for lateness.
- (iii) The prospect of succeeding in the intended appeal and obtaining the relief sought against the other party
- (iv) Whether there will be prejudice to the other party.

On the degree of lateness, the decision which prompted this application was made by the Court of Appeal on 7th October, 2020 while this application was filed in this Court on 11th November, 2020 which is a total of 35 days. It is now settled that a party seeking extension of time has to account for the delay as stated in **Finca (T) Limited** (Supra). There is a gap of 35 days which the applicant was required to count on them, but didn't. It is obvious that the applicant did not act diligently in attending the matter. Failure to account for the delay kills this application as it denies the Court grounds for granting it.

The reasons for delay adduced by the applicant have nothing to move this Court to grant extension of time. The applicant's appeal was struck out

by the Court of Appeal for it being time barred and the reason behind was a failure to apply for a copy of proceedings in time. In my opinion this was a lack of diligence on the part of the applicant. The applicant being a party who needed her right to be determined by the Court of Appeal was duty bound to timely follow proper procedures for appealing to the Court of Appeal. Since the applicant was represented by an advocate, she should have known that records of appeal were required as per Rule 90(1)(b) of the Tanzania Court of Appeal Rules.

Therefore, the delay was nothing but negligence and the same can not be termed as technical reason as a submitted by the learned advocate for the applicant. I would in this case like to buy the holding in the case of **Bazil Gerald Masha & 3 Others V. Ally Salimu** Civil Application No. 3 of 2012 (Unreported) where the Court of Appeal stated that the applicant should not be allowed to drag the respondent in and out of Court due to negligence.

Therefore, after considering the reasons adduced in the applicant's affidavit in light of the criteria set in the case of **Lyamuya Construction Ltd** (Supra) it is my finding that the reasons given are not sufficient to grant extension of time. The case of **Finca (T) Limited** (Supra) has also stated clearly that for the Court to grant extension of time, sufficient cause for delay has to be demonstrated. In this application, it was not.

Turning to the remaining criteria being the prospect of succeeding in the intended appeal and obtaining the relief sought against the other party, as well as whether there will be prejudice to the other party, the applicant's advocate has not argued on either of these two criteria. However, I find it


vital to state that it is the respondent who will be prejudiced if the matter is taken back to Court. This is because there is already an expiry of five years since the matter was determined in the High Court and the respondent has not been able to enjoy the decree made in his favour. Taking him back to Court to deal with the same matter is obviously prejudicial to him. and I shall be backstabbing the principle of law that litigation has to come to an end as reiterated in the case of **Stephen Masato Wasira V. Joseph Sinde Warioba** (1999) TLR 334.

Certainly, this Court would have granted the application if the applicant had not chosen to sleep on her own right and for good cause being shown.

It is therefore the findings of this Court that the applicant has not adduced sufficient reason for the application to be granted. I accordingly dismiss the application with costs. Ordered accordingly.

Dated at **Dodoma** this **24th** day of **May, 2022**.




ABDI S. KAGOMBA
JUDGE