

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(IN THE DISTRICT REGISTRY OF KIGOMA)**

**AT KIGOMA**

**MISC. CIVIL APPLICATION CASE NO. 06 OF 2022**

**FABIAN VICTOR MHAMILAWA.....APPLICANT**

**VERSUS**

**NAFTALI S/O MATHAYO .....1<sup>st</sup> RESPONDENT**

**MOHAMED S/O SAMSON BEGEGE.....2<sup>nd</sup> RESPONDENT**

**MASUMBUKO S/O MOSES SWEYA.....3<sup>rd</sup> RESPONDENT**

**BENJAMIN S/O MMANDEYE.....4<sup>th</sup> RESPONDENT**

**RULING**

10/8/2022 & 19/08/2022

**MANYANDA, J.**

The Applicant, Fabian Victor Mhamilawa, is moving this court for an order extending the time within which to file a notice of appeal for purpose of appealing to the Court of Appeal of Tanzania against a Ruling and Drawn Order of this Court in Miscellaneous Civil Application No. 11 of 2020 dated 11/08/2020.



The application is made under section 11(1) of the Appellate Jurisdiction Act (AJA), [Cap. 141 R.E. 2019]. It is against the Respondents namely, Naftali Mathayo, Mohamed Samson Begege and Benjamin Mmandeye.

The application is supported by an affidavit sworn by the Applicant Fabian Victor Mhamilawa it is countered by a counter affidavit sworn by Mr. Ignatus R. Kagashe, the Respondent's Counsel.

Hearing of the application was oral, at which Mr. Lwijiso Ndelwa, learned Advocate, represented the Applicant, and as said above Mr. Ignatus R. Kagashe, learned Advocate represented all the Respondent.

Arguing in support of the application Mr. Ndelwa adopted the chamber summons and the affidavit. He submitted reiterating the averments in the affidavit that the 1<sup>st</sup> Respondent instituted a Civil Case No. 2 of 2017 in the District Court of Kasulu against the Applicant and the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents for breach of contract. The said case was decided in favour of the 1<sup>st</sup> Respondent whereby the trial court ordered the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to pay him Tshs 15,000,000/= and Tshs 7,000,000/= respectively.

The 1<sup>st</sup> Respondent was dissatisfied by that decision hence appealed to the High Court in Civil Appeal No. 10 of 2019 which was decided ex-parte and allowed the appeal quashed the judgement and decree of the trial



court. It went further by substituting the orders by ordering that the Appellant to pay the 1<sup>st</sup> Respondent Tshs 22,000,000/= through the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents bank accounts. Also, it ordered the Appellant to pay the Appellant to pay general damages of Tshs 10,000,000/= and make good the loss of 13900 litres of fuel equivalent to Tshs 22,543,272.727 making a total of Tshs 54,543,272,729.

That the Appellant together with the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents unsuccessfully lodged an application in the High Court Misc. Civil Application No. 11 of 2020 to set aside the *exparte* judgement. This Court dismissed the application with costs after finding it void of merit. Hence the Applicant intends to appeal against the dismissal order, however, he found himself out of time to file the requisite notice, hence this application.

Mr. Ndelwa explained the grounds for delay and extension of time as being described under paragraph 6 (2) of the affidavit that the High Court acted on statement from the bar alleging the Applicant absented himself because he failed to pay fees and that his Counsel was at Kibondo without proof. On the other hand, the Counsel for the Respondent opposed the application. He adopted the counter affidavit and submitted further that the delay by the Applicant is of 20 months. He submitted that during that





period there were other several proceedings filed in court concerning the Applicant which includes taxation and execution proceedings in the main Land Appeal Case No. 10 of 2019 in which the Applicant has already paid Tshs 1,400,000/= in favour of the 1<sup>st</sup> Respondent.

The Counsel was of the views that the conduct by the Applicant is a delay tactic of denying the 1<sup>st</sup> Respondent's rights.

As regard to technicalities, the Counsel argued that the same are not on the face of the record, hence don't qualify as such because they need to be drawn from a long process of reasoning.

Mr. Kagashe assigned that the Applicant has not accounted for delay of 20 months delay which is in ordinate. He was of the view that if the application is granted the Respondents will be prejudiced especially the 1<sup>st</sup> Respondent as he is in execution stage.

In his rejoinder, Mr. Ndelwa for the Applicant argued that illegality is one of the good cause for extension of the time regardless of the duration of delay.

The law is settled in this land in matters of extension of time. That an applicant must establish good cause on which this Court may exercise its discretion to extend the same.

The term "*good cause*" is yet to be defined so far but in my understanding of the law the same constitutes reasons for delay and reasons for extending the time.

The Counsel for both parties has well addressed the position of the law in extension of time.

I agree with them as to the position of the law in extension of time to do an act where time limit is prescribed. That among the criteria looked at include, but not limited to, length of the delay, reasons for delay, the prejudice the opposing side is likely to suffer, likelihood of success of the matter for which the application is made and whether there are illegalities on the record.

There is plethora of authorities on this position of the law which including the famous case of **Lyamuya Construction Company Ltd Vs. Board of Registered Trustee of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (Unreported), where the Court of Appeal provided the following guidelines for the grant of extension of time:-

- a) The applicant must account for all the period of delay;*
- b) The delay should not be inordinate;*



*c) The applicant must show diligence and not apathy negligence or sloppiness in the prosecution of the action that he intended to take; and*

*d) If the court feels that there are sufficient reasons/such as the existence of a point law of sufficient importance such as the illegality of the decisions sought to be challenged.*

These guidelines were restated by Hon. Kahyoza, Judge, in the case of **Ryoba Msongore @ Marwa vs Republic**, Miscellaneous Criminal Application No. 17 of 2020 (unreported). See also the cases of **Maulid Swedi vs. Republic (supra)**, **Hussein Kisarawe vs Thomas Amir Jeuri and Another**, Misc. Land Application No. 865 of 2018 and **Royal Insurance Tanzania Limited vs Kiwengwa Strand Hotel Limited**, Civil Application No. 111 of 2009 (unreported).

In the latter case the tests were listed to be that; first, length of the delay; two, reason of the delay; three, degree of prejudice to the respondent if the application is granted; four, chances of appeal succeeding if the application is granted.

The question is whether the application meets the said tests. Starting with the first test that is the length of delay.





Mr. Ndelwa argued that the Applicant delayed to file the notice of appeal because he was bereaved of his parents and that he fell sick. This contention was strongly opposed by the Respondents giving examples of his appearance in various proceedings including taxation and execution proceedings in which the applicant paid part of the decreed amount.

I have read the affidavit and the records of this matter. I think Mr. Kagashe is correct in his argument that the Applicant has failed to account for the delay. I say so because in paragraph 9 of the affidavit the Applicant simply said that he was sick but didn't attach any single document to support him. Moreover, when it came to submission Mr. Ndelwa argued that the Applicant was bereaved of his parent. My perusal of the affidavit didn't reveal to me anywhere deposed by the Applicant that he was bereaved of his parent. I find these allegations to be mere blatant lie, hence unreliable.

As regard to reasons for extension of time Mr. Ndelwa argued that there are illegalities on the face of record. The illegalities he mentioned are that the court acted on statements from the bar. The statements mentioned by Mr. Ndelwa are two. One, the Applicant avoided attendance in court due to failure to pay court fee. This contention in my view was not the basis for this court to dismiss the application. Second, the Applicants



Counsel was at Kibondo. I have also read the impugned ruling, again this was not the basis for dismissal of the application. This Court dismissed the application because no sufficient reasons were given by the Applicants in that application to warrant it set aside the ex-parte judgement. The reasons shouldered by the Applicant were about travelling barriers due to two Covid -19 pandemic which the court found them untenable.

Another illegality alleged by the Applicant is about service of notices for hearing which are said to have been issued to his advocate who defaulted, not on him. His argument is therefore that this court punished him on mistake of his advocate. The Counsel for the Respondents has opposed this argument on grounds that this is an illegality because the advocate was the Applicant's agent and continued to act as such up to during execution proceeding proceedings.

In my view, the Counsel for the Respondents is right. The Applicant, apart from been represented in court by his advocate, owed a duty of following up his case. According to the record, hearing of the case was been adjourned several times followed with re-service of summonses. This court found that the absence of both the Applicant and his advocate were deliberate. Can such a finding be said to be an illegality on the face of the record. In my strong view the answer is in negative. I say so because



it is more a ground of appeal liable to be determined by examination of evidence than illegality.

In the case of **Ngao Godwin Lesero vs. Julius Mwarabu**, Civil Appeal No. 10 of 2015 it was held **inter alia** that illegality must be glary on the face of the record not one drawn from a long process of reasoning.

As regard to degree of prejudice, it was argued by the Counsel for the Respondents that the Applicant is applying delay tactics to deny the 1<sup>st</sup> Respondent's rights to execute his decree. The Counsel for the Applicant denied this contention in rejoinder because there are no annexures in support thereof.

My perusal of the counter affidavit I found averments in paragraph 10 show the facts about execution proceedings which are being carried out in Execution Case No. 2 of 2022. There is no reply affidavit to counter the averment in the counter affidavit. Facts deponed in an affidavit are evidence unless disbelieved. The Counsel for the Applicant invites this Court to disbelieve facts sworn in an affidavit from the bar without a reply affidavit disputing the same. I think, with due respect the Applicant's Counsel is not in a right track.

In absence of evidence disproving the fact of Existence of Execution and Taxation proceedings, this Court is made to believe that the 1<sup>st</sup>



Respondent is in the process of executing his decree. Hence, it will be prejudicial to curtail the process without reasonable course. After all cases must have an end.

It is on those reasons that make this court to find that this application has no merits.

Consequently, I do hereby dismiss the same in its entirety with costs. Order accordingly.

Dated at Kigoma this 19<sup>th</sup> day of August 2022.



  
**MANYANDA,**

**JUDGE**