

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM SUB DISTRICT REGISTRY)**  
**AT DAR ES SALAAM**  
**MISC. CIVIL APPLICATION NO. 184 OF 2020**

**KHALFAN HAMZA..... APPLICANT**  
**VERSUS**

**FLAVIAN KAMUZORA..... RESPONDENT**  
(Arising from Civil Appeal No.179/2017 in the High Court of Tanzania at Dar es salaam)

**RULING**

*Date of Last Order: 03/08/2022*

*Date of Ruling: 02/09/2022*

**E.E. KAKOLAKI, J.**

This is an application for enlargement of time within which to file a Notice of Appeal in order to challenge the decision of this court to the Court of Appeal. The applicant has moved the Court under Rule 83(1) and (2) of the Tanzania Court of Appeal Rules, 2009, Section 14(1) of the Law of Limitation Act, [Cap. 89 R.E 2002] (the LLA) and section 95 of the Civil Procedure Code, [Cap. 33 R.E 2002] (the CPC), supported by affidavit dully affirmed by the applicant. Briefly, the applicant lost his case in Civil Case No.123 of 2011, before the District Court of Ilala, before he unsuccessfully preferred an appeal to this court vide Civil Appeal No.179 of 2017, as for reasons not relevant to this ruling, that appeal was dismissed by this Court on the 31/12/2020 in absence of both parties until when it came into his knowledge

11<sup>th</sup> March 2020, when he wrote a letter requesting for copies of judgment and decree. Deduced from his affidavit in support of the application, the applicant who claims to be a layman thought the said letter he wrote asking for a copy of judgment was enough to institute the appeal but was later on advised to file a notice of appeal first before taking any measure to file an appeal. Since the time within which to file the said notice of appeal had lapsed the applicant preferred this application seeking an enlargement of time as alluded to above. When the application was served to the respondent he filed his counter affidavit in contest and the notice of preliminary objection challenging the competency of the application in that, **one**, the application is preferred under wrong provision of the law hence the Court is improperly moved and **second**, the application is incurably defective for being supported by the defective affidavit.

When the matter was called for hearing the Applicant appeared unrepresented and prayed the Court to proceed by way of written submissions the result of which the Court scheduled orders for submission filing. To the Court's dismay, the respondent failed to either file the written submission in chief in support of the preliminary objection or any reply to the submission in chief in relation to the applicant's prayer of extension of

time. As a result when the matter came before this court on 03/08/2022 for mention with a view of ascertaining as to whether the parties had adhered to the scheduling order, it came to the Court's attention that, only the applicant had filed the submission hence the Court proceeded to schedule the ruling date.

In the matter at hand as alluded to above, the respondent failed to comply with court orders. And when the matter was scheduled for mention he did not enter appearance in court so as to explain the reasons for his failure to comply with the said court's order or apply for extension of time to file the same. Therefore, this court had no other remedy to him than to proceed considering the applicant's submission only and determine the application on merit.

Before venturing into determination of the application on merit, I find myself enjoined to address first the issue of this Court's jurisdiction to entertain the matter. When moving the Court to grant him extension of time to file a notice of appeal to the Court of Appeal, the applicant cited Rule 83(1) and (2) of the Tanzania Court of Appeal Rules, 2009, Section 14(1) of the LLA and section 95 of the CPC. What is noted is that, none of the said provisions empowers this Court to grant the orders sought. However, it is a settled legal

stance now that, none or wrong citation of the law is not fatal in as long as the Court has the requisite powers to entertain the matter. The Court of Appeal in the case of **Joseph Shumbusho Vs. Mary Grace Tigerwa and 2 Others**, Civil Appeal No. 183 of 2016 (CAT-unreported) had this to say:

*"...we still hold the same position of the law that the citation of superfluous provisions of the law in the chamber application does not make the application incompetent."*

From the above position of the law what matters is whether the trial court is clothed with the jurisdiction to entertain such matter before it. In this application since the applicant cited unnecessary provisions of the law not moving the Court to grant the order sought, and since this Court under section 11(1) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2019] is clothed with powers to entertain the application for extension of time as prayed by the applicant, I invoke the principle of oxygen and proceed to entertain the application under section 11(1) of AJA.

It is to be noted however that, in applications of this nature the applicant has to advance good cause warranting the court to exercise its jurisdiction whether to grant it or not. As to what amounts to good cause there is no hard and fast rule as that include any reasonable reason that prevented the

applicant from performing or pursuing his action within the prescribed time. From the decided cases a number of factors have been taken into account, including whether or not the application has been brought promptly; the absence of any or valid explanation for the delay; lack of diligence on the part of the Applicant. See the cases of **Tanga Cement Company Limited Vs. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001 and **Oswald Masatu Mwizarubi Vs. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010 (All CAT-unreported). Further to that, it is also one of the factor for consideration whether the applicant has accounted for each and every day of his/her delay as it was stated in the cases of **Bushiri Hassan Vs. Latina Lukio, Mashayo**, Civil Application No. 3 of 2007 (CAT-unreported). See also the case of **Ondiek Nundu Vs. Wilson Kasuku Saronge**, Civil Application No. 539 of 2020 (CAT-unreported), where the Court quoted with approval the case of **Mohamed Athuman Vs. R**, Criminal Application No.13 of 2015 (unreported) where it was stated that:

*"It is now trite law that the applicant has to account for each of the delayed days."*

In this matter the applicant in his affidavit has raised one ground to substantiate his delay in filing the notice of appeal. The decision he intends to challenge was delivered on 31/12/2020. As per Rule 83(2) of the Court of Appeal Rules, 2009, the notice of appeal by the applicant was supposed to be filed within 30 days from the date of the decision sought to be appealed against, in which in this case was to be filed on or before 30/01/2021. This application was filed on 16/04/2021, which is 74 days out of time. Accounting for such inordinate delay in his averment in paragraphs 4,5 and 6 of the affidavit, the applicant deposed that, the decision sought to be impugned was delivered by this court in his absence and without notice as he only became aware of its existence on the 11/03/2021, the date when he applied for copies of the judgment and decree, only to be supplied with the decree only on 13/03/2021. He deposed further in paragraph 8 of the affidavit that, lay as he is he thought the letter requesting for copies of judgment and decree would serve purpose of notice of appeal before he was later on informed that it would not and advised to file a notice of appeal. Since he was unaware of the judgment which was delivered in his absence then this court be pleased to find it as a good ground for extension of time, the applicant stressed and prayed.

I have taken into consideration the ground raised by the applicant. I however, find the same to be lacking in merits as the applicant in his submission did not state as to whether he was not present in court lastly when the matter was set for judgment so as to require the Court to notify him as per the provisions of Order XX Rule 1 of the Civil Procedure Code, [Cap. 33 R.E 2019]. That aside as party to the case was duty bound to make a follow up of his case, as failure to so do infers nothing than negligence and lack of diligence in prosecuting his case, which act has never been good cause for extension of time. It was held by the Court of Appeal that, one of the factors to be considered when determining whether to grant extension of time or not is whether the applicant has shown diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take. See the case of **Julius Francis Kessy and 2 Others Vs. Tanzania Commissioner for Science and Technology**, Civil Application No. 59/17 of 2018 (CAT-unreported). In this matter not only that the applicant acted negligently and without diligence in prosecuting the matter he is seeking extension of time to appeal against, but also he was ignorant of procedural law that, lodging the letter requesting for documents for appeal purposes does not amount to issuance of the notice of appeal, which in law is not an

excuse and again does not constitute good cause for extension of time. It is the law that, inadvertence and apparent ignorance of law and its attendant rules of procedure by the applicant has never been accepted as sufficient reason or good cause for extension of time. See the case of **Hadija Adam Vs. Godbless Tumbe**, Civil Application No. 206/06 of 2020 (CAT-unreported).

The above advanced reasons apart, in his submission the applicant dwelt much on discussing illegality of the decision sought to be impugned as the ground for extension of time instead of canvassing the ground raised in the affidavit. He argued that, the decree and judgment sought to be impugned are tainted with illegality as they do not tally hence contravened the provisions of Order XX Rule 7 of the CPC, providing that, the decree shall bear the date on which the judgement was delivered. With that submission, the applicant implored the Court to allow the application based on that ground illegality. With due respect to the applicant, I am not prepared to fall into the trap of discussing that ground for one good reason that, it was not raised in his affidavit as a ground for extension of time hence an afterthought. It is the law that, the submission being a summary of arguments cannot be used as a platform to adduce evidence as the applicant



is trying to do. That legal stance finds refuge in the case of **Tanzania Union of Industrial and Commercial Workers (TUICO) at Mbeya Cement Company Ltd Versus Mbeya Cement Company Ltd and National Insurance Corporation (T) Ltd** [2005] TLR 41, where it was held:

*“It is now settled that a submission is a summary of arguments. It is not evidence and cannot be used to introduce evidence. In principle all annexures, except extracts of judicial decisions or textbooks, have been regarded as evidence of facts and, where there are such annexures to written submissions, they should be expunged from the submission and totally disregarded.”* [Emphasis supplied]

In this case since the applicant’s submission were based on the ground not forming part of the affidavit and since the affidavit is the substitute of oral evidence, therefore the arguments therein cannot constitute evidence for this court to act on to determine whether the same constitute good cause for extension of time to the applicant.

In view of the above discussion, I am satisfied that the applicant has failed to account for the delay of 74 days which I find to be inordinate or advance any good cause warranting this Court exercise its jurisdiction to grant him

the sought prayer. To that end, I find the application is devoid of merit and proceed to dismiss it as I hereby do.

Each party to bear its own costs.

Order accordingly.

Dated at Dar es Salaam this 2<sup>nd</sup> day September 2022.



E. E. KAKOLAKI

**JUDGE**

02/09/2022.

The ruling has been delivered at Dar es Salaam today 02<sup>nd</sup> day of September, 2022 in the presence of the applicant in person, Mr. Heavenlight Mlinga, advocate for the respondent and Ms. Asha Livanga, Court clerk and in the absence of.

Right of Appeal explained.



E. E. KAKOLAKI

**JUDGE**

02/09/2022.