

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)
AT DAR ES SALAAM**

MISC. CIVIL APPLICATION NO. 487 OF 2021

(Originating from Civil Appeal No.274 of 2018)

JOSEPH JUMA BIGAZI.....APPLICANT

VERSUS

NASIBU JUMA.....1ST RESPONDENT

KIMBUSHI BUILDERS COMPANY LIMITED.....2ND RESPONDENT

RULING

18th August, 2022 & 23rd Sept, 2022.

E. E. KAKOLAKI, J.

Joseph Juma Bigazi the applicant herein is seeking an extension of time within which to file a Notice of appeal out of time on the ground of illegality of the decision of Madam Justice Masabo, J, dated 20th June 2019, in Civil appeal No. 274 of 2018. The same is preferred under section 11(1) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2019] supported by the applicant's affidavit. Upon being served with the chamber summons the Respondents, filed a joint counter affidavit in opposition of the application which was replied by the applicant too.

Parties were granted with leave of the Court to dispose the application by way of written submission. The applicant proceeded unrepresented although

retained Ms. Mary Peter Milali, advocate for drawing of his submission while the respondents enjoyed the service of Mr. Innocent Tairo, learned advocate. For the sake of discussion which is going to take place soon, I find it imperative to narrate albeit brief the historical background leading to this application. The applicant filed a civil case before resident Magistrate court of Dar es salaam at Kisutu, Civil case No.261 of 2012 against the respondents in which the judgment and decree were in favour of the respondents. Dissatisfied he preferred an appeal to this Court, Civil Appeal No.274 of 2018 which later on was struck out by Hon. Masabo J, on 20th June 2019 for being time barred. On 27th June 2019 he requested for the copy of the ruling which was supplied to him late on 30th October, 2019. From 30th October to 26th November 2019, he was seeking advice from the advocate who then prepared and filed in this Court Misc. Application No.640 of 2019 on 27th November, 2019, seeking extension of time to file an appeal challenging the decision of Kisutu Resident Magistrate court in Civil Case No.261 of 2012. In the course of preparing the written submission in support of that application, his advocate became aware that the proper course to pursue the matter was to file an appeal challenging the decision made in Civil Appeal No.274 of 2018 and not to refile the appeal, hence prayed to withdraw the said

application though the ruling was yet to be pronounced up to the date of filing this application. Since there was several adjournments of the ruling while the respondents moving on with their intention to execute the decree, the applicant preferred this application for filing the notice to appeal to the Court of Appeal out of time against the ruling of this Court in Civil Appeal No.274 of 2018 which was struck out for being time barred.

I have had ample time to peruse the affidavit, joint counter affidavit and reply to counter affidavit duly filed by the parties as well as the submission in support and against the application. This Court has unfettered discretion to grant the applicant upon good cause established by the applicant. As what amounts to good cause there is no fast and hard rule as it depends on the materials advanced by the applicant justifying the delay to perform the action required to do on the prescribed time limit or any other sufficient cause as to why the sought application should be granted. See the cases of **Regional Manager, Tanroads Kagera Vs. Ruaha concrete Company Ltd**, Civil Application No 96 of 2007 and **Osward Masatu Mwizarubi Vs. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010 (all CAT-unreported)

The reasons for the delay advanced by the applicant in his affidavit at

paragraphs 6, 7, 8, 10 and 11 are technical delay, error by the advocate to file improper application and illegality of the ruling.

Amplifying on the technical reasons he submitted that, although he wrote a letter requesting for a copy of ruling seven days after its delivery by the court, the same was not supplied to him until 30th October, 2019, before he went on seeking advice from the advocate who prepared and filed in this court Misc. Application No.640 of 2019 on 27th November seeking extension of time to appeal against the judgment delivered at Kisumu. That the said application was withdrawn for being improperly filed vide the written submissions made by his advocate though the withdrawal order is yet to be issued to date. The applicant therefore urged this court to consider and exclude the time spent in making follow up of the copy as well as the time spent in prosecuting Misc. Application 640 of 2019. To support his stance he relied on the case of **Fortunatus Masha Vs. William Shija and another**[1997] TLR 154, **Bharya engineering & Contracting Co. Ltd Vs.Hamoud Ahmed Nassor**, Civil Application No.342/01 of 2017 (unreported), **Vodacom (T) PLC Vs. Commissioner General** (TRA),Civil Application No.101/20 of 2021(unreported) at page 10 and the case of **Bahati Mussa Hamisi Mtopa Vs. Salum Rashid**, Civil Appeal No.112 of

2018, (CAT-unreported) relied in persuasive decision made in the Kenyan's case of **Githere Vs. Kimungu** [1976-1985]EA 101, where it was stated that, technical delays are explicable and excusable in application for extension of time.

Submitting on the reason of illegality as stated in paragraph 11 of his affidavit, it was his submission that, the ruling in Civil Appeal No. 274 of 2018, subject of the intended appeal was struck out for the reason of being time barred instead of being dismissed. The law is very clear that the proceedings instituted after the period of limitation prescribed shall be dismissed as provided under section 3 of the law of Limitation Act, [Cap 89 R.E 2019]. Another point on illegality submitted on by the applicant is the trial judge's failure to consider that, the applicant was availed with copies of judgment and decree on 15th October 2019, hence the rule of exclusion of time applicable to him as provided under section 19(1)(2) of the law of limitation Act, [Cap 89 RE 2019]. Also the applicant contended that, the judge declined to determine and consider the proper provision in consideration of time limitation within which to file the appeal from District Court to the High Court. In his view since the Civil Procedure Code, [Cap 33 RE 2002 does not specifically prescribe for the time limitation within which

to appeal from the District Court when exercising its original jurisdiction to the High Court, then the time of limitation ought to have been 90 days as per the Law of Limitation Act, [Cap 89 RE 2019] Part II of the schedule. He argued, being an appeal from the original decree of the District Court, the decision by the Hon. Judge that it ought be lodged within 45 days after the date of judgment was in infraction of the law hence illegality of the decision. To fortify his stance on point of illegality to be considered as the reason for extension of time, the applicant cited the case of **Lyamuya Construction Company Limited Vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No.2 of 2010 (CAT-unreported), which set the guidelines for the factors to be considered by the court in the exercise of its jurisdiction whether to extend time or not. He also cited the case of **Principal Secretary, Ministry of Defence and National Service and Marketing Limited and Three Others versus Citibank Tanzania Limited**, Consolidated Civil Reference No.6,7 and 8 of 2006, CAT(unreported).

On the strength of what he has submitted above, the applicant prayed the application to be granted and then be given time within which he can file the notice of appeal to the Court of Appeal.

In reply submission Mr.Tairo adopted the counter affidavit jointly deposed by Nasibu Juma and Abuu Sadiki Lema, and went on to submit that, after the Honourable judge had struck out the appeal, the Applicant filed Misc. Civil Application No. 640 of 2019, praying for a leave to appeal out of time against the decision of the Resident Magistrate Court of Kisutu. On his own the applicant withdrew the application the prayer which was granted by honourable Judge Itemba J, on the 13th December 2021 with leave to refile within 30 days but nothing was filed. Mr.Tairo argued further that after Hon. Masabo had struck out Civil Appeal No.274 of 2018, the applicant filed a notice of appeal to the Court of Appeal which was lodged on 16th day of July 2019 but nothing was done thereafter. In his view, the applicant is abusing the court process and deploying delaying tactics to deny the respondents to enjoy the fruit of the judgment and decree of Kisutu Magistrate Court in Civil Case No.261 of 2012. He went further to state that they oppose the prayers as negligence on the part of the applicant and his advocate to appeal to the Court of Appeal in time is not sufficient reason warranting for the prayers sought as the applicant had already issued a notice of appeal as indicated in the copy of the Notice attached but negligently failed to pursue his right in time as required by the law hence the remedy is to dismiss the application.

Responding on the cited case of **Lyamuya Construction** (supra), he submitted that, the respondents do not find any guiding principle which is in favour of the applicant as the applicant failed to account for the period of delay, the delay which is inordinate and has shown no diligence than full of negligence by filing hopeless application and withdraw it after more than a year as being represented at both levels, after striking out of the appeal by this Court the only remedy was to appeal against the decision instantly. On the premise of what he had submitted on, Mr. Tairo implored the Court to dismiss the application with costs.

Having keenly considered both parties' fighting submissions, the issue for determination by this Court is whether the reasons stated by the applicant constitute good cause warranting this Court to grant the application.

The time limit within which to file a notice of appeal to the Court of Appeal is stipulated under Rule 83(1) and (2) of the Court of Appeal Rules, 2009 to be thirty (30) days. The said provisions of Rule 83(1) and (2) of the Rules provide thus:

83.-(1) Any person who desires to appeal to the Court shall lodge a written notice in duplicate with the Registrar of the High Court.

*(2) Every notice shall, subject to the provisions of rules 91 and 93, be so lodged **within thirty days** of the date of the decision against which it is desired to appeal. [emphasize added].*

Applying the above provision of the law in the matter at hand, it is deposed by the applicant that was availed with a copy of ruling on 30th October 2019. Counting 30 days from 30th October 2019 the notice of appeal was supposed to be filed on 29th November 2019, unfortunately he did not file the notice rather opted to file an application for extension of time to challenge the decision of the RM's court at Kisutu. It was until 24th September, 2021 when this application was filed whereby the applicant had delayed for more than 300 days. Counting from those days this court finds that the delay is inordinate. I distance myself from the applicant's argument that the time he spent in prosecuting the improper application should be excluded. In my considered view, this reason is short of any substance as relied on Misc. Civil Application 640 of 2019 by the time of filing this application on 24th September, 2021, was still under prosecution for being withdrawn under order of Hon. Itemba, J on 13th December, 2021 after the present application was filed. Thanks to God no objection was raised by the respondent on applicant's act of riding two horses at the same time before the withdrawal

of Misc. Civil Application 640 of 2019. Hence the applicant cannot rely on prosecution of that application to convince this Court to exclude from him the period in which he spent while prosecuting the same since this application was filed before its conclusion. At any rate the delay in filing this application is attributed to negligence and lack of diligence by both the applicant and his advocate hence all cited authorities in support of this ground by the applicant are inapplicable under the circumstances. It has been stated by this Court and Court of Appeal in times without numbers that, advocate's negligence has never been sufficient reason for extension of time. See the cases of of **William Shija Vs. Fortunatus Masha** (1997) TLR 213 (CAT), **Tanga Hardware & Auto Parts Limited and 6 Others Vs. CRDB Bank Ltd**, Civil Application No. 114 of 2005 (CAT-unreported), **Safi Msafiri Mtumbi @Mama Simba Vs. Evans Frank & 2 others** (Land Application 262 of 2021)[2022] TZHC Land D 344 (31 May 2022); www.tanzlii.org. **Julius L. Lyimo Vs. Dainess A.Kawishe & Another** (Misc.Land Application No.31 of 2021) [2022] TZHC 10303 (26 May 2022); www.tanzlii.org and **Director of Public Prosecutions Vs. Lilian Chengula**, Misc. Criminal Application No.49 of 2020 (unreported). It was held in the case of **Tanga Hardware & Auto Parts Limited and 6 Others**

(supra) on negligence of advocate not to constitute good cause where the Court observed that:

"...this Court should not allow an advocate to plead oversight wherever there is a transgression of the rules or of directives of this Court its decisions. After all, it has been said up-teen times, needing no citation of authority, that an error of an advocate is not sufficient cause for extending time. I dare say that an oversight of an advocate is not sufficient cause for this Court to waive a requirement that has been observed religiously like this one."

Similarly in the case of **Lilian Chengula** (supra) this Court quoted the Court of Appeal decision made in the case of **Yusufu Same and Hawa Dada vs. Hadija Yusuph**, Civil Appeal No.1 of 2002, where it was said that;

"Generally speaking, an error made by an advocate through negligence or lack of diligence is not sufficient cause for extension of time."

Coming to the reason of illegality raised as the ground for extension of time, submitting on this point the applicant faulted the ruling entered by this Court (Masabo, J) where the judge struck out the appeal on account of being time barred instead of dismissing it as provided under section 3(1) of the Law of

Limitation Act, [Cap 89 RE 2019] (the LLA). Section 3(1) of LLA provides that:

3.-(1) Subject to the provisions of this Act, every proceeding described in the first column of the Schedule to this Act and which is instituted after the period of limitation prescribed therefore opposite thereto in the second column, shall be dismissed whether or not limitation has been set up as a defence.

Gleaned from the above cited provision of the law, it is without doubt that, the law demands all proceedings instituted after the period of limitation to be dismissed and not otherwise. In this matter the applicant laments that this Court having found the appeal was filed out of time ought to have dismissed it instead of striking it out hence illegality of the decision. I am aware that in application of this nature the role of the Court is not to determine the illegality but rather to be satisfied that the applicant has managed to establish its existence so that he is granted with an opportunity to knock the higher court's door for its remedy.

Having so noted I am satisfied that the applicant in this matter has managed to establish existence of illegality of the decision sought to be impugned in Civil appeal No.274 of 2018, the ground warrants this court to grant his

prayer. Henceforth, I grant the application by extending the time to the applicant within which to file a notice of appeal to the Court of Appeal in respect of Civil Appeal No. 274 of 2018. He has to file the same within 21 days from the date of this ruling.

Costs to follow the event.

It is so ordered.

Dated at Dar es salaam this 23rd day of September, 2022.



E. E. KAKOLAKI

JUDGE

23/09/2022.

The Ruling has been delivered at Dar es Salaam today 23rd day of September, 2022 in the presence of Hundo Jeremiah (son) representing the applicant, Mr. Innocent Tairo, advocate for the 1st and 2nd respondents and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

23/09/2022.

