

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO.542 OF 2021

(Arising from the decision of this Court (Mihayo, J) dated 29th day of September, 2009 in Civil Case No. 426 of 2002)

MOHAMED IQBAL..... APPELLANT

VERSUS

ESROM M. MARYOGO.....RESPONDENT

RULING

Date of Last Order: 26/09/2022

Date of Ruling: 03/10/2022

Kamana, J:

This is an application for extension of time to file a notice of appeal to the Court of Appeal as filed by the Applicant Mohamed Iqbal whereby the Respondent is Esrom Maryogo. The said Application is by way of a chamber summons made under section 11(1) of the Appellate Jurisdiction Act, Cap. 141 [RE.2019], section 3A of the Civil Procedure Code, Cap. 33 [RE.2019] and any other enabling provisions. In supporting the Application there is an affidavit taken out by the Applicant. In the same vein, the Respondent has filed a counter affidavit opposing the Application.

The facts led to this Application are, albeit, briefly that on 23rd day of September, 2009, this Court (Mihayo, J., as he then was) decided in favour of the Respondent in Civil Case No. 426 of 2003. Being aggrieved by the decision of the Court, on the same day that is 23rd day of September, 2009, the Applicant, through the services of Ntonge and Company Advocates wrote a letter to the Registrar of the High Court

requesting for certified copies of judgment, decree, proceedings and other documents for the preparations of the next battle, the appeal. Six days later that is 29th day of September, 2009, the Applicant filed a notice of appeal signifying his intention to appeal against the said decision.

On 19th day of July, 2010, the Applicant managed to file an appeal in the Court of Appeal. Despite attaching a certificate of delay, the appeal was struck out by the Court of Appeal for being filed out of time. It was the position of the Court of Appeal that the said certificate of delay would only operate to exclude the days in which the Applicant was waiting for the requested documents from the High Court (29/09/2009) to 20/05/2010 if a copy of the requesting letter would have been served to the Respondent.

In making such ruling, the Court of Appeal was armed with the provisions of Rule 90(1) and (2) of the Tanzania Court of Appeals Rules, 2009 (now Rule 90(1) and (3) of the Rules). In such Rule, amongst other things, it is required to lodge an appeal within sixty days from the date when the notice of appeal was lodged. The Rule provides for an exception if an application for a copy of the proceedings is made within thirty days from the date of the decision against which an appeal is preferred, whereby in computing the sixty days, the time spent for preparations and delivery of the requested copies is certified by the Registrar to have been excluded. However, according to that Rule, reliance on that exception is accorded to an Applicant whose application for copies of proceedings is in writing and has been served to the Respondent.

Unfortunately, that was not the case with regard to the Applicant. Though he filed a notice of appeal within the time and he applied for the copies of necessary documents, he did not serve the Respondent with a copy of the letter requesting such documents. In that case, he could not be covered with the cited Rule.

Following the decision of the Court of Appeal, the Applicant is now applying for an extension of time to file a notice of appeal which when granted will pave the way for him to file his appeal.

At the hearing, the Applicant was represented by Ms. Yusta Kibuga, learned Counsel. On the opposite side, the Respondent had the services of Mr. Joseph Kipeche, Advocate.

Submitting in support of the Application, Ms. Kibuga prefaced by remarking that in an application for extension of time, an Applicant is required to establish sufficient reasons for delay. It was against that background, the learned Counsel submitted that the Applicant in the instant Application is armed with a reason which on the face of it warrants extension of time as applied for.

It was her submission that his client was diligently in pursuing his right to appeal by timely lodging his appeal before the Court of Appeal after receiving the necessary documents. She contended that his client's diligence was also evidenced by the fact that he filed this Application for extension of time on 26th October, 2021 being ten days after the decision of the Court of Appeal which struck out his appeal.

The learned Counsel submitted further that the Applicant, since the delivery of the impugned decision, has been consistently in court

corridors and rooms in the pursuance of his right to appeal. She was of the position that since the appeal was lodged within the time but was found to be incompetent, the delay accrued thereon should be taken to be a technical one. In bolstering her arguments, the learned Counsel referred this Court to the decision of the Court of Appeal in the case of **Robert Scheltens Vs. Badley Norataram Varma and other**, Civil Application No. 536/16 of 2018. In that case, it was submitted by the learned Counsel, that the Court of Appeal extended time to the Applicant on a second bite after finding that the technical delay was sufficient to extend the time to lodge a notice of appeal. She summed up her submission by requesting the Court to exercise its discretionary powers to grant the Application.

Replying, Mr. Kipeche strongly opposed the Application and prayed for the adoption of the Counter Affidavit. He contended that it is a settled law in an application for extension of time for an Applicant to account for each and every day of delay. To buttress this position of the law, the learned Counsel invited the Court to consider the case **of Zuber Nassoro Moh'd Vs. Mkurugenzi Mkuu wa Shirika la Bandari Zanzibar**, Civil Application No. 93/15 of 2018 in which the Court insisted that Applicants for extension of time should account for every day of delay. It was his submission that the Applicant has failed to account for every day of delay from when the Court delivered the judgment he is complaining of (23/09/2009) to 26th day of October, 2021 when he filed this Application.

The learned Counsel submitted further that the appeal was struck out by the Court of Appeal out of the negligence of the Applicant's Advocate

who is supposed to be well versed with the requirements of Rule 90(3). To him, negligence or inaction of the Applicant or his Advocate is not a sufficient cause of delay. He averred that even if it is assumed that the time between the time when the impugned judgment was delivered (23/09/2009) and the time when the appeal was struck out (25/10/2021) is excluded as a technical delay, still the Applicant has not accounted for the delay from 15th day of October, 2021 to 26th day of October, 2021 when he filed the present Application.

Mr. Kipeche also addressed the issue of illegality as pleaded in Paragraph 4 of the Affidavit. While he admitted that illegality with regard to a judgment is a sufficient cause for extension of time, he noted that such illegality should be apparent on the face of the record. To him, special damages awarded without proof, the judgment not being valid, judgment not assigning reasons and non evaluation of evidence as pleaded in Paragraph 4 of the Affidavit do not amount to illegality for purposes of extension of time. In this, he referred this Court to the decision of the Court of Appeal in the cases of **Ngao Godwin Losero Vs. Julius Mwarabu**, Civil Appeal No. 10 of 2015 and **Mega Builders Limited Vs. D.P.I. Simba Limited**, Civil Application No. 319/16 of 2020.

In conclusion, the learned Counsel remarked that the Applicant has failed to furnish good reasons for the delay particularly after the struck out of the appeal. He prayed for the dismissal of the Application with costs.

Rejoining, Ms. Kibuga insisted that the Applicant has established a technical delay on his part and in view of that such delay should not be

treated as a normal delay in counting day to day delay. With regard to negligence of the Applicant's Advocate, she submitted that if there was such negligence, the same should not be used to preclude the Applicant from exercising his right to appeal.

Lastly, she referred the Court to the case of **Mega Builders Limited (Supra)** which emphasized that in exercising its discretion to extend time, Court should take into account length of delay, the reason for the delay, existence of arguable case on the appeal and the degree of prejudice. She related these factors with the Application by arguing that the Applicant was diligent in pursuing his appeal and if the Application will not be allowed, he will be prejudiced as he will not be able to challenge the impugned judgment. To her, the ten days from the day when the appeal was struck out to the day the Application was filed is not a long delay as such period was used to prepare the Application.

Having carefully gone through the submission of both parties and their pleadings, the issue for my determination is whether this Application is meritorious. In reaching at that point, this Court is required to establish whether the Applicant has demonstrated sufficient cause for the delay.

As rightly put by Ms. Kibuga, powers to extend time are exercised by the courts in their discretion. Despite those discretionary powers, courts ought to exercise such powers judiciously. In exercising the powers judiciously, courts of law are guided by a number of principles developed by courts. These guiding principles are, in effect, safeguards for ensuring that the discretionary powers are not used capriciously. In the case of **Mselemu Kandili Vs. Waziri Thabiti**, Criminal Appeal

No.396 of 2019, the Court of Appeal accentuated the importance of exercising the powers of extending time judiciously by stating:

'That discretion however, we hasten to add, must be exercised judiciously upon sufficient reasons being demonstrated by the applicant. More importantly, the court has power under the law to grant an extension of time if sufficient cause has been shown for doing so.'

In exercising such powers, I am going to be guided by the established principles as lucidly elucidated in the case of **Lyamuya Construction Company Ltd vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Appeal No.2 of 2010 as follows:

- (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 intends to take;*
- (d) If the court feels that their other sufficient reasons, such as the evidence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged.'*

It was the contention of Ms. Kibuga that the delay was a technical one. In substantiating that position, the learned Counsel argued that the Applicant filed the notice of appeal and the appeal within the time except that the latter was struck out on account of a technical error which crumbles the former. In her view, the days from when he filed the notice to the day when the appeal was struck out are accounted for as they were used in pursuing that right. On the other hand, Mr. Kipeche countered that argument that the struck out of the appeal was mainly caused by the negligence of the Applicant's Advocate who failed to serve the Respondent with a copy of the letter which requests copies of necessary documents as per Rule 90(3) of the Tanzania Court of Appeal Rules, 2009. In that case, he was of the opinion that the extension of time should not be granted as the delay does not amount to a technical delay.

Given the circumstances of this case, I am convinced that the delay on the part of the Applicant was a technical one since the notice and the appeal thereon was filed within the time. Since the appeal was struck out on account of incompetency before the Court of Appeal, that fact does not negate the truth that the Applicant diligently pursued his appeal.

in arriving at that conclusion, I guided by the position taken by the Court of Appeal in the case of **Fortunatus Masha Vs. William Shija and Another, [1997] T.L.R.** where the Court of Appeal observed:

'A distinction had to be drawn between cases involving real or actual delays and those such as the present one which clearly only involved

technical delays in the sense that the original appeal was lodged in time but had been found to be incompetent for one or another reason and a fresh appeal had to be instituted. In the present case the applicant had acted immediately after the pronouncement of the ruling of the court striking out the first appeal. In these circumstances an extension of time ought to be granted.' (Emphasis added).

I am mindful of the arguments advanced by Mr. Kipeche that there was negligence on the part of the Applicant's Advocate which caused the appeal to be struck out. It is generally the position of the law that the Advocate's negligence cannot constitute a ground for extension of time. However, there are circumstances that the Court may consider to grant extension of time despite the Advocate's negligence. In the case of **Yusuph Same and Hawa Dada Vs. Hadija Yusuph**, Civil Appeal No. 1 of 2002, it was held by the Court of Appeal thus:

*'Generally speaking, an error made by an advocate through negligence or lack of diligence is not sufficient cause for extension of time. This has been held in numerous decisions of the Court and other similar jurisdictions. Some were cited by the appellant's advocate in his oral submission. **But there are times, depending on the overall circumstances surrounding the case, where extension of time may be granted even where***

there is some element of negligence by the applicant's advocate as was held by the Single Judge of the Court (Mfalila JA as he then was) in Felix Tumbo Kisima V. TTC Limited and Another - CAT Civil Application No. 1 of 1997 (unreported).' (Emphasis is added).

Deducing from the facts that led to this Appeal, it is undoubtful that the Applicant was diligent in pursuing his right to appeal which is demonstrated by acting within the time in filing a notice of appeal, requesting necessary documents for preparations of an appeal and lodging an appeal. Failure on the part of his advocate to serve the Respondent with a copy of the letter intended to request the necessary documents for institution of the appeal does not in any way convince me to hold that there was negligence to the extent of not extending the time to file a notice of appeal.

With regard to the delay from 15th day of October, 2021 to 26th day of October, 2021 when the present Application was filed, Ms. Kibuga in her rejoinder pointed out that in those days the Applicant, through his Advocate, was preparing the present Application. In my view, the delay of ten days in preparing and filing the present Application in the circumstances of this matter cannot be termed to be inordinate as the same has been accounted for. In concluding that, I am fortified by the decision of the Court of Appeal in the case of **Patrick Magologozi Mongella vs The Board of Trustees of the Public Service Pensions Fund**, Civil Application No. 1999/18 of 2018. In that case, the Court observed that twelve days were reasonable for the preparation of

the application and filing of the same. In the spirit of the cited case, I am of the settled mind that ten days were reasonable for the preparation and filing of this Application.

From the foregoing, I hold that this Application is meritorious as sufficient grounds for enlargement of time have been supplied which in essence allows this Court to exercise its discretionary judiciously. I do not see any reason to consider the issue of illegality since its determination has no effect to the position I have already taken.

I allow the application and order that the Applicant should file a notice of appeal within 14 days of pronouncement of this Ruling. Each party to bear its own costs.

DATED at **DAR ES SALAAM** this 3rd day of October,2022.



KS KAMANA

JUDGE



Delivered at Dar es Salaam in Chambers this 03rd day of October, 2022
in the presence of both Counsel for both parties.

