

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM SUB DISTRICT REGISTRY)**  
**AT DAR ES SALAAM**  
**CIVIL APPEAL NO. 305 OF 2021**

*(Originating from Misc. Civil Application No.2 of 2021 - Mkuranga District Court)*

**SALUM OMARY AMIRI.....APPELLANT**

**VERSUS**

**HABIBU SELEMANI HABIBU.....1<sup>ST</sup> RESPONDENT**

**COAST AUCTION MART COMPANY.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

*Date of last Order: 01/09/2022*

*Date of Judgement: 07/10/2022*

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

The appellant herein timely filed Misc. Civil Application No. 07 of 2020 before the District Court of Mkuranga moving for the Court to call, examine and revise the proceedings, records and decision of the Primary Court of Mkuranga in Civil case No.16 of 2019. The application faced the preliminary objection to the effect that, the affidavit in its support was defective hence struck out vide the Court ruling delivered on 29/03/2021. Not tired with the struggle to pursue his right but being time barred to refiled the application on 11/05/2021, forty two (42) days after striking out of the first application the appellant filed an application for extension of time to file an application for revision through Misc. Civil Application No.2 of 2021. However lucky was

not on his side as the same was dismissed for want of merits on 26/07/2021. Unpleased with that decision, he has knocked the door of this temple of justice asking for the court interference of the said dismissal order relying on one ground of appeal namely:

1. That the learned magistrate court erred in law for her failure to consider the technical delay as good cause to grant the extension of time.

On the strength of that ground, this court is prayed to allow the appeal, quash and set aside the decision of Mkuranga, and grant him with a leave to file the intended revision out of time and any other relief this court deem fit to grant.

Hearing of the appeal proceeded by way of written submissions. Both the appellant and respondents were represented as Mr. Faraji Ahmed, learned advocate prosecuted the appeal for the applicant, while Mr. Godfrey Namoto and Ms. Christina Mkundi, learned advocates representing the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively.

Submitting in support of the sole ground of appeal Mr. Ahmed said, each matter is determined on its peculiar facts. Relying on the case of **Yusufu and Another Vs. Hadija Yusuph**, Civil Appeal No. 01 of 2002, (CAT-unreported) argued that, it is trite law that, grant or refusal of an application

for extension of time is entirely in the discretion of the Court and that, the said discretion must be exercised judiciously the overriding consideration being existence of sufficient cause. In the present matter he contended the first application was struck out before the second one was dismissed. Since the first one was struck out then the delayed time to file the second one was due to technical delay which is sanctioned as the ground for extension of time. To fortify his stance the Court was referred to the case of **Fortunatus Masha Vs. William Shija and Another** [1997] TLR at page 154, where the Court held that, since the original appeal was found incompetent the freshly preferred appeal could be served under technical delay hence under the circumstances an extension of time ought to be granted. He submitted in this matter that ground of technical delay was not considered by the trial court. Since the delayed period is not inordinate and the appellant demonstrated good cause this the appeal has merit and stand to be allowed.

Retorting to Mr. Ahmed's submission, Mr. Namoto for the 1<sup>st</sup> respondent contended that, the ground of technical delay raised by the appellant was never raised by the appellant and canvassed by the trial Court, hence cannot be raised at this stage. He argued since the same was not raised before the District Court was denied with an opportunity to hear and determine it. It

was his submission that, since there is no decision of the Court on that ground, the appeal lacks merit and deserve to be dismissed with costs.

Ms. Mkundi for the 2<sup>nd</sup> respondent on her side made a very brief submission in reply. She however concentrated on the need of the applicant to account for the delayed period instead of concentrating with the appellant's submission on the ground of appeal on technical delay. Hence I find the submission to be out of context, the resultant effect which is to disregard it. In his rejoinder Mr. Ahmed reiterated what he had submitted in his submission in chief and the prayers thereto. Now basing on the above submission the question which this Court is called to answer is whether the appeal before it is meritorious.

I have actively considered the ground of appeal and the fighting submission from both parties as well as perused the affidavit, counter affidavit by the 1<sup>st</sup> respondent and the ruling of the trial court sought to be impugned. What is gathered from the appellant's affidavit and ruling is the fact that, the appellant never raised that reason/ground of technical delay either in his affidavit or in his submission in support of the application, though I am mindful of the legal stance that submission does not constitute evidence for being explanation of the already relied on evidence. See 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 and **Astepro Investment Co. Ltd Vs. Jawinga Company Limited**, Civil appeal No. 8 of 2015 (CAT-unreported). In **Astepro Investment Co. Ltd** (supra) the Court of Appeal had this to say:

*"It is the trite law that parties to a suit are bound by their pleadings."*

Applying the above principle to the present appeal and as rightly put by Mr. Namoto, since the ground of technical delay was never raised by the appellant nor determined by the trial court the same cannot be raised and determined at this appeal stage. My findings is based on legal stance that higher Court cannot deal with issues not raised before the trial court or the first appellate court. In the case of **Farida and Another Vs. Domina Kagaruki**, Civil Appeal No. 136 of 2006 (CAT Unreported), the Court of Appeal held that-

*"It is the general principle that the appellate court cannot consider or deal with issues that were not canvassed, pleaded and not raised at the lower court."*

In light of the above authority, in this matter since the issue or ground of technical delay was not raised by the appellant and decided on by the trial Court I hold this Court cannot deal with it at this stage. It is from that fact I find the sole ground of appeal by the appellant is destitute of merit. Henceforth, the appeal is hereby dismissed with costs.

It is so ordered.

Dated at Dar es salaam this 07<sup>th</sup> day of October, 2022.



E. E. KAKOLAKI

**JUDGE**

07/10/2022.

The Ruling has been delivered at Dar es Salaam today 07<sup>th</sup> day of October, 2022 in the presence of Mr. Faraji Ahmed, advocate for the appellant, who is also holding brief for Ms. Christine Mkundi, advocate for the 2<sup>nd</sup> Respondent, Ms. Caroline Mumba, advocate for the 1<sup>st</sup> respondent and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

**JUDGE**

07/10/2022.

