THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE DISTRICT REGISTRY OF ARUSHA]

AT ARUSHA

MISC. CIVIL APPLICATION No. 77 OF 2022

(Arising from the District Court of Arusha at Arusha Civil Appeal No. 48 of 2020, Originated from Arusha Urban primary court at arusha Probate Cause No. 387 of 2020)

HAMADI HUSSEIN NGATIRA..... APPLICANT

VERSUS

MARIAM RAJABU.....RESPONDENT

RULING

02nd & 24th November 2022

TIGANGA, J.

This is an application for extension of time filed by the applicant to be allowed to file an appeal to challenge the decision of the District Court of Arusha in Civil Appeal No. 48 of 2020. The application has been brought under Sections 14(1) of the Law of Limitation Act, [R.E 2019] and 95 of the Civil Procedure Code, [Cap. 33 R.E 2019]. It is made with chamber application supported by the affidavit sworn by the applicant himself. The application was counteracted by the respondent who filed the counter affidavit to such effect.

The background of the application started way back in 2020 when Probate and Administration Cause No. 382 of 2020 was filed before the Arusha Urban Primary Court in which the respondent was appointed the Administrator of the estate of the late Hussein Ngatira. The application before that court was objected by the applicant herein, but it was overruled by the trial Primary Court. Following that decision, the applicant filed Civil Appeal No. 48 of 2020 before the District Court of Arusha at Arusha to challenge the decision of the Primary Court. That appeal was also decided in favour of the respondent. Again, unsatisfied with such decision, the applicant intended to appeal to the High Court but found himself time barred. As a matter of law, he was to file this application to first apply for the enlargement of time for him to lodge the appeal.

Notwithstanding anything that might be in the application, arguments for and against, the court is enjoined and compelled to find legal solution to whatsoever call mouthing louder to its attention. In this application, the parties were represented by the legally trained minds. Whereas the applicant had the service of Ms. Veneranda Joseph, Learned Advocate, Mr. Godluck Michael, also Learned Advocate appeared for the respondent. With leave of the court and consent of the

parties, the hearing was conducted by way of written submissions. The counsel filed their respective submission as scheduled.

In support of the application, Ms. Veneranda, adopted the affidavit and asked the same to form part of her submission. The strength of her submission is hinged on paragraph 6 of the applicant's affidavit which deposes that:

> *"That, the applicant has to adhere with court (sic) filing this application (sic) taking into account the delay to file (sic) appeal was out of applicant (sic) as started in paragraph 3 above that (sic) he requested to be supplied with appeal documents (sic) on time but the delay was within court (sic) jurisdiction and once (sic) the appeal counting from the dates of (sic) supplied with judgments and proceedings."*

Beefing up on the above quoted paragraph Ms. Veneranda in her submission in chief argued that, the applicant applied for the impugned decision and proceedings on 10th May, 2022 and he was issued with the same on 27th June, 2022 while the time for filing an appeal had already expired. This simply means that, the delay is allegedly to have been caused by the first appellate court for not issuing the copies of judgment and proceedings on time. She also said that, despite various attempts and efforts to secure copies of the said documents, the applicant could

not be able to exhibit correspondences in this court to prove the attempts and efforts done.

Appreciating the necessity of the said documents in preparing the sound grounds of appeal, Ms. Veneranda cited the case of **Mary Kimaro versus Khalfani Mohamed** (1995) TLR 202 in which it was held inter alia that; A copy of proceedings and a copy of judgment are necessary for the purposes of framing a sound memorandum of appeal; It is from the time of supply of both such documents that the limitation of time for appeal begins to run.

The Advocate submitted further that, the applicant being a layperson he could not be able to keep the record of correspondences he made with the first appellate court in regard to the following-up of the issuance of the impugned documents. Briefly, the Advocate contended that the blame should not be thrown to the applicant for not proving that he had been making efforts and follow ups in obtaining the judgment and proceedings. But rather, he should be excused for being a lay person. Fortifying the reasons, the Advocate cited the case of **Mobrama Gold Corporation versus Minister of Energy & Minerals and 2 Others** (1998) TLR 425.

Ms. Veneranda argued on another reason she considers strong to warrant extension of time that the intended appeal has overwhelming chance of success. On this point a support was sought from the case of **Samson Kishosha Gabba versus Charles Kingongo Gabba** (1990) TLR 133 in which it was held inter alia that; In determining whether or not to allow an application for leave to appeal out of time the court has to consider reasons for the delay as well as the likelihood of success of the intended appeal. She in the end asked for the court to grant the application with costs.

Arguing against the application, Mr. Gudluck who also adopted the contents of the counter affidavit sworn by the respondent for the same to form part of his submission, he contended that, the submission by the applicant's Advocate that the applicant was not issued with the copies of the decision and orders in time is false. That the applicant after writing the letter requesting the said documents on 10th June, 2020 he acted negligently to correct the same because the said documents were ready for collection before that date. That the respondent collected the certified copy of judgment on 1st June 2022 because the judgment was ready for collection since a day it was delivered. That after collecting the judgment the respondent moved the first appellate court to return the

file to the trial court for execution after realising that, there was no appeal pending. Mr. Gudluck went on submitting that, there was no efforts made by the applicant for obtaining copies of judgment and proceedings that is why even the applicant's Advocate consented that he was not able to bring correspondences in substantiating the same. He cited a legion of authorities which provide for the guiding principle set by the Courts of record which are to guide the court in determining good and sufficient causes for enlarging time within which the appeal should be filed. These cases are **Ngao Godwin Losero versus Julius Mwarabu**, Civil Application No. 10 of 2015, **Eliakimu Swai & Frank Swai versus Thobias Karawa Shoo**, Civil Application No. 2 of 2016, **Lyamuya Construction Company Limited versus Board of registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (all unreported).

That the applicant has failed to adhere the principles laid down in the above cited case laws. Thus, he acted negligently, slopy and in apathy for not collecting the judgment and proceedings on time as they were ready for collection earlier that is why the respondent through her Advocate was able to collect them. Mr. Gudluck went on distinguishing the cases of **Mobrama Gold Corporation versus Minister of Energy**

& Minerals and 2 Others and **Samson Kishosha Gabba versus Charles Kigongo Gabba** (supra) as no longer good laws because they were overruled by the case of **Lyamuya Construction Company Limited** (supra).

Lastly, the advocate asked the court to disregard this application owing to the reason that, the applicant has miserably failed to account for each day of delay and therefore the application be struck out with costs.

In rejoinder Ms. Veneranda reiterated the submission in chief. However, she added that the contention by Mr. Gudluck that copies of judgment and proceedings were ready for collection and he received them on 1st June, 2022 is not substantiated by evidence. That the copies might have been collected by the respondent's Advocate after the court has discovered the error on the dates written on the judgment (delivering date). That the applicant went to collect the said copies of documents but he was told by the Court Clerk that, they are ready but they have a defect to be rectified. That the applicant was told that the judgment is written that it was delivered on 06th June, 2022 instead of 06th May, 2022. That after the defect was rectified the court clerk called the applicant to collect the copies. Thus, she argued that the delay for

collecting those impugned documents was not articulated by the applicant's negligence, sloppiness and or apathy but the first appellate court.

Ms. Veneranda contended further that in a normal circumstance no one can be expected to account for each day of delay mathematically without considering the circumstances and nature of the delay. That expecting the applicant to account for each day of delay is as good as compromising and affecting the legal interests of the applicant.

On the issue of overwhelming chance of success, Ms. Veneranda was of the view that, so long as the first appellate court concluded the matter of probate which was not done by the trial court, that is an illegality on the face of record to be determined in appeal.

That marked the arguments by the parties in support and opposition of appeal. I have passionately passed through the submissions filed by both Advocates together with the enclosed respective affidavits, singling therefrom, the issue calling for determination is whether this application is meritorious.

At the outset, and before labouring much on submissions by parties, I would like to state the current and the obvious known

thresholds and standards set out by the Court of Appeal of Tanzania, in order for the court to enlarge time within which to file the appeal out of time. These conditions or rather guidelines were set in the case of **Lyamuya Construction Company Limited versus Board of Registered Trustees of Young Women's Children Association of Tanzania,** Civil Application No. 02 of 2010 (all unreported) must be fulfilled. That is to say;

(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 there are other sufficient reasons, such as the existence of point of law of sufficient important, such as the illegality of the decision sought to be challenged."

Without fulfilling those above stated conditions, it remains certain that the application sought cannot be granted in favour of the applicant. The question that follows is whether, the conditions or criteria set herein above were fulfilled by the applicant for him to be entitled the grant of

the application? In resolving this question, I will test each and every condition to the circumstance of the instant case.

The days which the applicant has delayed to file the appeal are 23. This means that the last day to file the appeal was on 6th June, 2022 which is a working day. This application was admitted in court after payment of court fees on 29th June, 2022. The requirement of the first condition stipulated above is whether the applicant has managed to account every day of delay. This means that, basing on the principle in the first condition, the applicant needs to account for 23 days showing exactly, why for each day of delay he did not file the appeal. Authorities on this requirement are plethora contrary to what Ms. Veneranda wants this court to believe. Apart from those cited by Mr. Gudluck, others are;

Karibu Textile Mills Limited versus Commissioner General, Tanzania Revenue Authority, Civil Reference No. 21 of 201, **Airtel Tanzania Limited versus Misterlight Electronic Installation Co. Limited and Another**, Civil Application No. 37/01 of 2020 **and Juma Shomari versus Kabwere Mambo**, Civil Application No. 330/17 of 2020 (all unreported). In the former case law, the court of appeal of Tanzania in respect of accounting for each day of delay held that:

"With respect, we think that, despite the phrase "good cause" under Rule 10 of the Rules requiring a lesser degree of proof it is too plain for argument that an applicant for enlargement of time under the aforesaid rule must account for each day of the delay involved so as to allow the Court to determine the degree of the delay involved, the party's diligence in the pursuit of the matter, the soundness of the reason for the delay as well as whether the applicant acted expeditiously."

Thus, the above cited authorities refute the contention and the position by Ms. Veneranda which she argued that it is not expected for the applicant to be required to account for each day of delay. Standing on them, the applicant need account for all those 23 days of delay, the requirement which he has failed to undertake.

In the above cited case law of **Karibu Textile Mills Limit.ed versus Commissioner General, Tanzania Revenue Authority** (supra) the Court of Appeal of Tanzania refused to interfere with the decision of the single Judge of the same Court which rejected to extend time whereby the applicant had delayed for only thirty days (30). The basis of that refusal was that, the applicant had failed to account for each day of delay. Thus, those thirty days within the interpretation of the law were considered to be inordinate.

In the instant application, the applicant has delayed for 23 days. He has also failed to account for each day of delay as shown above. Therefore, within the meaning of the interpretation of the law given by the Court of Appeal in the above relied upon case law, 23 days remain to be inordinate for that matter and thus, cannot save the application from being so condemned as such.

It is the contention by Mr. Gudluck that failure to make neat follow up by the applicant on the impugned judgment and proceedings deserves nothing than being equated to negligence, sloppiness and apathy. That, the said documents were ready for collection as soon as the first appellate court delivered its decision. That he, himself being the Advocate of the respondent collected the same documents on 1st June, 2022 and because of that on 14th June, 2022 he requested the record to be returned to the trial court for execution after being satisfied that no appeal or revision is preferred by the applicant. Probably after a certain set of time has elapsed, if I may assume so. To hummer on the nail, he attached to the counter affidavit the letter requesting the return of the record to the trial court for continuation of the matter from where it ended. The said letter was received in the first appellate court's registry on 15th May, 2022.

However, Ms. Veneranda dismissed this argument as of no weight and evidential value to properly and justifiably unpack the contention made by her. That, the applicant made various efforts to be issued with the impugned documents in vail for the faults of the first appellate court delaying issuing the documents. But Ms. Veneranda assented that, the applicant after going to the first appellate court registry to collect the judgment he was told by the court clerk that, the judgment had defects to be rectified by the magistrate for that matter. That the defect was that the date appearing on the judgment which is 06th June, 2022 was an error and therefore the rectification was to be done for writing the correct date which is 06th May, 2022, the date when the judgment was delivered. That, the applicant was called later on to pick the judgment which he took on 27th July, 2022, Ms. Veneranda rested the arguments.

In my settled opinion, the contention by Ms. Veneranda is not purchased and cannot save the application from being misfit on the following reasons. **One,** she first agrees that the copy of judgment was issued on time but due to errors could not be collected on time which made the applicant to find him self out of time. Unfortunately, this fact was not made in the affidavit. It would have been expected the applicant to state when he was told by the court clerk that the judgment

is erroneously dated and when he was called for collecting the rectified copy. He did neither of all. **Two,** because the applicant and his Advocate are relying on the information by the third party, the court clerk, that the date on the judgment was erroneously written and was to be rectified, in my considered view, the law requires that person who is alleged to have give such information to swear or affirm as the case may be, an affidavit stating the alleged facts. This is in line with the rule set by the Court of Appeal of Tanzania, in the recent case of **Cats Net Limited versus Tanzania Communication Regulatory Authority, Civil Application No. 526/01 of 2020** where it was observed:

> ***"Two,*** *if really Mr. Kansara came to the Court and if having gone to the wrong venue he was directed and informed by a court staff that the hearing was being conducted at the High Court in Court Room No. 2 and also if upon getting at the High Court he was informed that the application had already been heard, as it is claimed by the applicant, then affidavits of the said court staff were necessary to supplement and support the assertion that he really came to Court. Short of that, his assertion is far from being believed and relied upon."*

In the case at hand, there is no affidavit of such court clerk filed to supplement and support the assertion that, the applicant was not supplied with the said judgment because the same was to be rectified.

It must be clearly known that mentioning another person's statement whether in the affidavit or somewhere else remains hearsay unless that said person swears or affirms an affidavit to such effect. I am alive that, the statement said by Ms. Veneranda did not appear in the affidavit but appeared in her submission. In the event therefore, she was duty bound to secure the affidavit of the Court Clerk to supplement and support what the Advocate has said in her submission as required by the principle stated herein above. In that regard, the Court of Appeal of Tanzania in the case of **Sabena Technics Dar Limited versus Michael J. Luwunzu,** Civil Application No. 451/18 0f 2020 at Dsm held that:

> *"Likewise in Benedict Kimwaga it was observed that if an affidavit mentioned another person, that other person must swear an affidavit, otherwise it will be hearsay"*

In this case, as already shown these facts were not even in the affidavit filed in support of the application, they featured in the submission made by the Advocate. It is trite law that, submissions are

not evidence but a mere statement from the bar which have no evidential value. Even if we assume for the sake of arguments that the submission contained sufficient information to be relied upon, yet borrowing the binding wisdom in the above cited case, without an affidavit sworn by the Court Clerk, the information in the submission becomes nothing but hearsay. It becomes more of hearsay because it was not even said by the person who was told, by the Court clerk, i.e the applicant, but it was deposed by the Advocate, who was also was told by the applicant who was told by the Court Clerk. It is therefore a third hand information. Thus, failure to meet the said standards above it is equally interpreted that the applicant has also failed to meet the requirement of law provided under paragraph (c) of the case of **Lyamuya Construction Company Limited** (supra). It stands apparent that the applicant was negligent, sloppy and apathy in prosecuting the intended action.

The last one is paragraph (d) in the Lyamuya's case. Frankly speaking this condition is somehow broad. It gives the court a wide pitch for determination as to what it feels sufficient reason for granting the application for extension of time. But in my settled opinion, such broad discretion must be exercised judiciously. Of course, the court

should be limited to those reasons only submitted before it by the applicant. Under this part the applicant's Advocate has submitted that the intended appeal has overwhelming chance of success. That the first appellate court closed the matter which was not closed by the trial court. However, Mr. Gudluck remained mute on this argument. He did neither counter argue nor support it. Constructively, he left the issue for the court to consider.

It is a trite law that for the point of illegality to be considered as good cause to warrant extension of time, it must be apparent on the face of record. And if I may add, it must first be pleaded in the affidavit. It should not be the one ascertainable on a long drawn evidential inference. Otherwise, it suffers no consideration. See the case of **Elias Masija Nyang'oro and 2 Others versus Mwananchi Insurance Company Limited,** Civil Application No. 555/16 of 2019 CAT at DSM 9unreported)

The applicant did not exactly say what is the illegality she considers to be. The fact that the first appellate court applied the case of **Melisiana Christopher Nikaga versus Catherine Rudovick Kamala**, Probate and Administration Appeal No. 14 of 2016, HC of Bukoba (Unreported) substantiating its reasoning that the matters which

have been deliberated upon cannot be re-opened as it becomes functus officio could not be termed as illegality apparent on the face of record. This could be depicted from the submission by Ms. Veneranda. Saying otherwise is turning the said authority illegal which is neither the intention nor the mandate of this court. In the case of **Omari R. Ibrahim versus Ndege Commercial Service Ltd**, Civil Application No. 38/01 of 2020 on the issue of illegality the Court of Appeal stated:

> *"The law is settled that, when a claim of illegality is raised in an application for extension of time, the same is considered as good cause to grant extension as stated in various decisions of the Court. However, with respect, I wish to state at the outset that, the error complained of herein in the judgment and decree, as evidenced by annexure ORI-4 to paragraph 8 of the supporting affidavit is not and cannot be termed as illegality."*

As said above, the complained illegality cannot be worthy of whatsoever name be called so. In the event, it remains redundant. For the foregoing reasons, the applicant has failed to fit himself in the principles establishing thresholds set forth by the court in the case of **Lyamuya Construction Company Limited** (supra). Therefore, this court finds the application devoid of merits. It is hereby dismissed with costs.

It is ordered accordingly.

DATED at **ARUSHA**, this 24th day of November, 2022

J.C. TIGANGA

JUDGE