

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

AT DAR ES SALAAM

CONSOLIDATED MISC. CIVIL APPLICATION NOS. 438 & 440 OF 2022

*(Arising from Misc. Civil Appeal No. 19 of 2018, Dar es Salaam, District Registry at
Dar es Salaam dated 6th March, 2019)*

EVELINE J. NDYETABULA APPLICANT

VERSUS

STAR GENERAL INSURANCE (T) LTD RESPONDENT

RULING

11th & 25th November, 2022

MWANGA, J.

Miscellaneous Civil Application Nos. 438 and 440 of 2022 were filed in this court for extension of time within which the applicant can lodge a notice of appeal and extension of time to file an application for leave to appeal to the Court of Appeal against judgement and decree of the High Court in Civil Appeal No. 19 of 2018.

The applicant was represented by a team of three learned counsels led by Elinihaki Kabura, assisted by Janet Shayo and Anna

Amon. The respondent was represented by Ms. Juliana Douglas, the learned counsel.

Brief background of the matter is that; the applicant herein filed a Civil Case No. 319 of 2016 at Kisumu Resident Magistrate's Court and judgment was issued in her favour. The respondent being dissatisfied with the decision, appealed to the high court in Civil Appeal No. 19 of 2018. Consequently, the applicant lost the case at appellate stage, hence she appealed to the court of appeal.

As required by law, the applicant herein applied and obtained leave of appeal to the Court of Appeal and a certificate of delay. She then prepared a record of appeal and filed Civil Appeal No. 189 of 2019 to the court of appeal. However, the appeal met with a serious blow as it was struck out for being incompetent because it was time barred.

It followed that, the applicant filed current application Nos. 438 and 440 of 2022 supported by affidavits of Advocate Ms. Joyce Sojo sworn on 6th October, 2022.

The said advocate raised two contentions at paragraph 17 & 18 of her affidavits. **One**, that applicant was at no fault in delaying to lodge notice of appeal to the court of appeal as the time delayed was utilized

in pursuing the appeal to the court of appeal. **Two,** it was the High Court Registrar who failed to inform the applicant or his advocate, through a letter, that the requested documents are ready for collection, hence it was not the applicant's negligence.

During the hearing Mr. Elinihaki Kabura, learned counsel submitted that; **Firstly,** absence of a letter of the registrar of the High Court in the record of appeal was a technical issue which resulted to a technical delay and such kind of delay should not deprive the applicant rights. **Secondly,** on account for each day of delay i.e from 8th September to 6th October, 2022 the learned counsel showed sequence of events that:-

- i. the appeal before Court of Appeal was registered as Civil Appeal No. 189 of 2019 and ruling in respect of the appeal was delivered on 7th September, 2022;
- ii. the applicant made follow up via letter of 8th September, 2022 to obtain certified copies of the ruling;
- iii. certified copies of the ruling were received on the same day i.e 8th September, 2022; and time spent on reviewing the ruling of the court; advising the client on the way forward; obtaining instructions from the client, preparing legal documents; and filing the present application.

It was his contention further that, the applicant Ms. Evaline Ndyetabula resides in one of the villages in Musoma Region, hence it required more time to reach her, make communication and obtain her instructions. He alluded further that, given the applicant financial situations, which depended assistance from her family, she could not obtain fees on the spot as she is economically incapacitated.

Thirdly, it is a common sense that preparing a case, under normal circumstances, needs time and an advocate cannot act automatically without obtaining instructions and fees from the client. Hence, there was no need for those facts to be raised in the affidavits of the applicant.

The application was vehemently opposed by the learned counsel for the respondent through her counter affidavits sworn on 3rd November, 2022. She deposed at paragraph 6 of the counter affidavits that the present application filed on 6th October, 2022 was unreasonably delayed. She replied further at paragraph 7 that the applicant had a duty of making sure that the registrar's letter, which in essence lack of it led to the truck out of the appeal, is included in the record of appeal.

According to her, application for extension of time for the applicant is his rights, however the same shall be granted on a good cause. The learned counsel cited the case of **Attorney General Vs Tanzania**

Ports Authority and Another, Civil Application No. 467 of 2016 TZCA, at page 11 where it was held that a good cause includes whether the application has been brought promptly, absence of valid explanation for delay and negligence on the part of the applicant.

Learned counsel pointed out further that, the affidavits contain no any valid explanation for the delay. In support of her contention, she cited the case of **Lyamuya Construction Company Ltd Vs Board of Registered Trustee of Young Women Christian Association of Tanzania**, Civil Application No. 2/2010 CA, delivered in Arusha at page 6 and 7 of the typed judgement. It was her argument further that, lack of diligence on the part of the applicant cannot be a good cause for extension of time.

Further to that, applicant had failed to account on each day of delay for the 28 days since the date of the ruling of the court of appeal to the date of filing the present application. In her submission, the delay was inordinate or negligence on the part of the applicant and, as such, negligence cannot be sufficient reasons for granting the prayer sought.

Indifferently, she also refuted the assertions raised by his fellow learned counsel that the delay for 28 days were used to review ruling of the court, communicate with the client and advised her what to do,

engagement of the client, and seeking fund for to pursue the applications. It was her considered view that, those assertions were new facts not on oath as the same were not pleaded or included in the two affidavits of the applicant, hence they should be disregarded.

It was her pleasure again to cite the case of **Zuberi Nassoro Mohamed Vs Mkurugenzi Mkuu Shirika la Bandari Zanzibar**, Civil Application No. 93/2015 of 2018 CA (unreported) which emphasized that each day of delay has to be accounted for.

Responding to the argument whether such delay was a technical delay, learned counsel indicated that the same was raised at the court of appeal and it was ruled out that a letter from the registrar was not in the records of appeal. It was her observation further that, the matter in the court of appeal was therefore adjourned so that appellant can go back to the high court to ask for a letter and state why the registrar did not issue her such letter. She argued that, the applicant did not follow up the letter due to negligence on her part. Consequently, the appeal was struck out.

She deposed further that, applicant cannot be allowed to shift blame to the registrar because it was the applicant who failed to include a letter of registrar in the record of appeal. On this point, the learned

counsel for the applicant submitted that adjournment of the matter by the court of appeal was in respect of lack of exhibits which were not included for in the record of appeal and not in respect of letter from the registrar.

Having gone through deposed facts in the affidavits and submissions by the parties, the issue is whether applicant has advanced good cause to warrant extension of time to file an application for leave to appeal to the court of appeal and extension of time for the applicant to lodge notice of appeal.

It is a well-established principle that, a court has discretion to grant order of extension of time in favour of the applicant to prevent injustice. However, such discretion can only be exercised where good cause has been shown. That was the decision in **Zuber Nassoro Mohammed Vs Mkurugenzi Mkuu Shirika la Bandari Zanzibar**, Civil Application NO. 93/15 of 2018(Unreported).

Furtherance to that, in **Airtel Tanzania Limited Vs Misterlight Electrical Installation Co. Ltd &Another**, Criminal Application No.37/01 of 2020; TZCA (Unreported), the court held that a good cause can be ascertained by considering: -

'Length of delay involved, the reasons for delay, degree of prejudice (if any), how each party stand to suffer depending on how the court exercise discretion, the conduct of the parties and need to balance the interest of the party who has the decision in his favour against the interest of a party who has a constitutionally underpinned rights of appeal'.

Now, what then constituted a 'good cause' that prevented the applicant in this application from taking prompt measures to apply to the court for extension of time. The learned counsel for the applicant submitted that the delay was caused by; **one**, the time spent when the matter was being pursued by the court of appeal and **two**, in the course of preparations to file the current application.

To begin with deliberation on the second point. The learned counsel for the respondent strongly opposed it because the reasons advanced by the applicant were new facts as the same were not included or raised in the affidavits. I am of the considered view that, the learned counsel was right on this point. Submissions relating to preparations of the case were new facts equally to submission or evidence from the bar. In the case of **Registered Trustee of the Archdiocese of Dar es salaam Vs Bunju Village Government & 4 Others**, Civil Appeal NO. 147 of 2006TZCA, (Unreported) it was held that *evidence must be given in the affidavit not in submission.*

On the basis of the authority above, I ignore and disregard such submissions.

Having arrived at such conclusion, and pursuant to the applicant averments in her affidavits, the applicant is left two issues to be resolved by the court. **One**, time spent in pursuing the appeal and; **two**, faults of the High Court Registrar who did not issue a letter that the requested documents by the applicant were ready for collection. Pursuant to Section 21(2) of the Laws of Limitation Act, Cap 89 R.E 2022 such time spent in pursuing an appeal is liable to be excluded by the court in the applications of this nature. However, under the circumstances, such exclusion does not discharge the applicant to account for each day of delay from the dated the ruling was delivered on 8th September to the date of filing the present application on 6th October, 2022, which makes a total of about 28 days.

In the case of Bushiri Hassan Vs Latifa Lukio Mashayo, Civil Application NO.3 of 2007(Unreported)TZCA it was emphasized that a person seeking extension of time must account for each day of delay.

'Delay, of even a single day has to be accounted for otherwise there would be no point of having rules prescribing periods withing certain steps have to be taken.'

From the authority cited above, considering affidavits of the applicant and submissions of the learned counsel; there is no good cause shown by the applicant justifying the delay of 28 days. The cited authority does not pose any requirements to use common sense on matters which requires proof. This is a court of law; it only deals with matters or issues submitted to it in compliance with established legal principles.

As for the applicant shifting blame to the High court Registrar for not issuing a letter of reply that the documents were ready for collection, I am inclined to borrow the words of the court of appeal in its ruling that, the applicant ought to be supplied with a letter by a person who is statutorily mandated for that. However, it has to be noted that being issued with a letter by the registrar and attaching the same in the record of appeal are two different things. It is my considered contention that the duty remained to the applicant to collect a letter and ensuring that the same is attached in the record of appeal.

Echoing on the same note, the court of appeal had this to say;

'The essence of adjourning hearing of the matter on 11th July, 2022 for four days was to facilitate procurement of authentic information from a reliable source, but to the contrary what was presented to the court on 15th July,

2022 were unsupported oral contentions from the bar. There was nothing credible in writing from the Registrar. There was not even a complaint that the Registrar refused to put anything in writing. There was no evidence that the appellant collected the documents from the High Court in the normal course of business. In our view, had that being the case, there would be presented to court at least a receipt acknowledging payment of court fees in respect of the documents received. This did not happen even after we had granted the adjournment. If collection of the copy of the proceedings was an authentic process, evidence in that respect, would have been availed to court’.

From the above contentions, the applicant cannot be heard to say that the delay was actuated by a technical delay. She has been inordinate and, so to say, negligence on her party.

On the basis so explained, the application cannot stand as there is no material upon which the court can exercise its discretion in favour of the applicant. It is undoubtly that she has failed to account for each day of delay as required by law. Therefore, the application has no merits and it is hereby dismissed with costs.


It is so ordered.


H. R. MWANGA

JUDGE

25/11/2022

ORDER: Ruling delivered in Chambers this 25th day of November, 2022
in the presence of both learned counsels for the applicant and
respondent.


H. R. MWANGA

JUDGE

25/11/2022

