

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA**

CIVIL APPEAL NO. 89 OF 2022

*(Arising from Misc. Civil Application No. 19/2019 of the District Court of
Nyamagana District)*

AMANI MAFURU ----- APPELLANT

VERSUS

SHIBIDE LUGOBA ----- RESPONDENT

JUDGMENT

Nov. 9th & Dec. 8th, 2022

Morris, J

The parties herein have been in court since December 2018. It was the respondent who started the litigation-race first. She successfully instituted Civil Case No. 179 of 2018 before the Mkuyuni Primary Court. She won a monetary decree of TZS 23,000,000/=. The dissatisfied appellant appealed to the Nyamagana District Court (DC) out of time. On discovery of such time-bar, he withdrew the appeal. He then applied for extension of time in the DC vide application number 19 of 2019. He was unsuccessful. Still aggrieved, he preferred the instant appeal against the DC's ruling.

Seeking this Court to quash the DC's decision, set aside orders therein and grant other discretionary relief(s); the appellant has advanced three (3) grounds of appeal, that;

- i. The trial court erred in law and fact by deciding that the appellant did not advance good cause for extension of time to appeal against Civil Case No. 179/2018 of Mkuyuni Primary Court.
- ii. That, the trial court erred in law and fact by dismissing the appellant's application without considering the illegality in Civil Case No. 179/2018 of Mkuyuni Primary Court.
- iii. That, the trial court erred in law and fact for not considering the affidavit and submissions of the appellant.

When the matter came for hearing, the Court ordered the same to be argued by way of written submissions. The filing schedule was complied with. The appellant enjoyed the services of Advocate Lilian Lyimo while the respondent appeared in person without a legal representation.

In respect of the first ground of appeal, it was the submission of the appellant that the law requires an applicant to advance sufficient cause for the delay when praying for extension of time. Such cause moves the court to exercise its discretionary power to extend the same or not to. According to his counsel, the appellant advanced sufficient cause before the District Court under three limbs. **Firstly**, he had shown that he was not given the copy of the trial court judgement on time. **Secondly**, he

was denied leave to peruse the court file. Hence, he failed to lodge the appeal timely as the judgement was partially read to the parties by the Primary Court. **Thirdly**, the appellant indicated that he initially lodged his appeal before the District Court which was withdrawn on legal ground. Therefore, to him, he was not negligent in taking action to lodge the appeal but rather he is was prevented by technical error as enunciated in the case of ***Fortunatus Masha v William Shija and Another*** [1997] TLR 154.

Further, the counsel for the appellant submitted for the second ground of appeal that the District Court did not consider the fact that the appellant was not employed by the respondent but by one Rehema Kassim. Consequently, it would have extended the time to appeal basing on illegality of want of respondent's *locus standi*. To the counsel, illegality constitutes a good ground for extension of time per ***Paul Juma v Diesel & Auto-electric Services Ltd and 2 others***, CAT Civil Application No. 54/2007 (unreported) and ***Principal Secretary Ministry of Defence and National Service vs. Devram Valambia*** [1992] TLR 389.

Regarding the third and last ground of appeal, the counsel for the appellant faulted the District Court for failure to consider the affidavit and the submissions by the appellant herein. She argued that had the DC considered the aspects raised in such proceedings; especially the fact that

the respondent was not the employer of the appellant; it would have found merits in the application before it. In the final analysis, she prayed that the appeal should be allowed on the basis of three grounds argued above.

In her reply, the respondent submitted from the outset that, the appellant herein raises two new grounds at this stage which were not matters for consideration at the District Court. The new matters, according to the respondent, are the argument that the Primary Court's judgement was partially read and that the respondent was not his employer.

She then embarked on the grounds of appeal. Regarding the 1st ground, she replied that being late in getting the copy of judgement is not a reason for failure to appeal on time as the appellant and/or his advocate had a chance to peruse court file. Further, she argued that the appeal which was withdrawn before the District Court was, too, not timely filed therefore. To her, the authorities cited by the appellant's counsel are either irrelevant to this case or are distinguishable.

The respondent also submitted against the 2nd ground. She stated that the appellant was employed by the group of women who were engaged in aquaculture with which he had signed the contract (with Rehema Kassim, the chairman of the said group – to be precise).

Accordingly, she sued on behalf of the said group as it was in criminal case No. 582 of 2018 which she had earlier on pursued in the same capacity.

As to the 3rd ground of appeal, the respondent submitted that the affidavit by the appellant contained lies as he was the employee of the group and she was suing on behalf of the said group. Consequently, she prayed for the appeal to be dismissed with cost.

Having read parties' submissions, I hastily wish to comment on one unfamiliar aspect from the respondent. She has appended on her submissions, the trial court's decisions. Whatever her motive was, it suffices to state that submissions are not evidence. They are, instead, meant to sum-up the evidence already adduced; or to address grounds raised on appeal in line with or with reference to the applicable law. Hence, exhibits cannot be annexed to submission as stated in the case of ***Vocational Education Training Authority v Ghana Building Contractors and Another***, HC Civil Case No. 198 of 1995 (unreported).

Back to the appeal at hand, I am of the view that this Court is being invited to resolve one issue. That is, *if, before the District Court, the appellant advanced sufficient cause for extension of time to appeal against the decision of Mkuyuni Primary Court.* Before addressing the issue, I wish to give two crucial observations. One, this being the first

appeal, it takes a form of rehearing. Two, the Court is not supposed to interfere with discretionary powers of the court below save if doing so falls within parameters of the law.

The first appellate court has mandate to re-appraise, re-assess and re-analyse the evidence on the record before it arrives at its own conclusion. See the case of ***Paulina Samson Ndawavya v Theresia Thomasi Madaha***, CAT Civil Appeal No. 45 of 2017 (unreported); ***Diamond Motors Limited v K-Group (T) Ltd***, CAT Civil Appeal No. 50 of 2019 (unreported); and ***Kaimu Said v R***, CAT Crim. Appeal No. 391 of 2019 (unreported). In ***Kaimu's case***, the Court of Appeal stated at page 7 that;

'We understand that it is settled law that the first appeal is in form of a re-hearing as such the first appeal court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own finding of fact, if necessary'

Being guided by the same principle, this court on reaching to its findings as to whether the appellant advanced sufficient cause for extension of time or not, will re-evaluate the evidence on record. The appellant herein filed his application for extension under rule 3 of the ***Civil Procedure (Appeals in Proceedings Originating in Primary Court) Rules***, 1963 and section 20 (4) (a) of the ***Magistrates' Courts Act***, Cap

11 R.E. 2022. According to Section 20 (3) of **this Act**, appeals from Primary Courts should be filed within 30 days. The District Court may, however, extend such period either before or after expiration of such period under section 20 (4) (a) of **the Act**.

The powers to extend the time is discretionary. It is also cardinal principle that the court cannot interfere with the exercise of discretion by lower court unless it is satisfied that the decision by lower court was clearly wrong. That is, because the lower court misdirected itself or acted on matters on which it should not have acted; or because it failed to take consideration matters which it should have taken into consideration. In consequence, it should have arrived at a wrong or illegitimate decision. Reference is made to the case of **Mbogo and Another vs. Shah** [1968] EA 93 at page 94.

Further, in **Kirisa v Attorney General and Another** [1990-1994]1 EA 258 it was held, *inter alia*, that;

"...the trial court has discretion to allow or refuse an application for adjournment. This discretion must be exercised judiciously and an appellate court would not normally interfere with exercise of discretion unless it has not been exercised judiciously...Discretion simply means the faculty of deciding or determining in accordance with the

circumstances and what seems just, fair, right, equitable and reasonable in the circumstances...”(emphasis added).

Moreover, it is the principle underlying the exercise of discretion that judicial powers in such connection must be exercised judiciously as opposed to personal whims, sympathy or sentiment. See ***Bakari Abdallah Masudi v. Republic***, CAT Criminal Application No. 123/07 of 2018 (unreported).

Regarding the matter at hand, the appellant faults the trial court for not exercising its discretion to extend the time to appeal against the Primary Court decision. He argues further that the DC wronged for he had managed to show sufficient cause to attract extension order from the said court. On her part, the respondent is of the view that no sufficient cause was advanced.

I have had an opportunity of going through the record before me, including the parties’ affidavits. The aim was to find out whether or not the appellant ever exhibited sufficient cause. Out of such record, about three (3) reasons for the delay are evident. First, the delay in being supplied with the copy of judgement. Secondly, appellant’s filing of the appeal on 24/4/2019, which was withdrawn for being filed out of time. Thirdly, that the respondent was not legally justified to commence legal proceedings against him in Primary Court(irregularity/illegality).

The counter affidavit of the respondent is somewhat evasive. It simply denied facts stated in the affidavit. It was, thus, less helpful. In the case of ***East African Cables (T) Ltd vs. Spencon Services Limited***, HC Misc. Application No. 61/2016 (HC-unreported); my learned brother, Mruma J. holds that, "when a fact is stated on oath it has to be controverted on oath and this gives the court an opportunity to weigh which fact is probably true than the other".

The information gathered from the counter affidavit is that the question of respondent's *locus standi* to sue was discussed and fully determined in criminal case No. 582/2018 of Mkuyuni Primary Court and no appeal has been preferred against the same. Further, it is stated that the appellant has no sufficient cause to justify his averment and that he failed to account every day of delay.

As rightly argued by parties to this appeal, it is cardinal principle that an applicant for extension of time must show '**sufficient cause**'. What constitutes sufficient cause normally depends on the circumstances of each particular case. Various case laws have, however, pointed out factors to consider on ascertaining whether the applicant has shown sufficient cause. In the case of ***Lyamuya Construction Company Ltd vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania***, CAT Civil Application No. 2/2010

(unreported), the court of appeal said the factors to be considered on whether sufficient cause has shown are that;

- i. The applicant must account for all the period of delay.
- ii. The delay should not be inordinate.
- iii. The applicant must show diligence and not apathy negligence or sloppiness in the prosecution of action that he intends to take.
- iv. If the court feels that there are other sufficient reasons, such as the existence of point of law of sufficient importance; such as the illegality of decision sought to be challenged.

Also, in the case of the ***Registered Trustees of Archdiocese of Dar es Salaam vs. The Chairman Bunju Village Court and eleven others***, CAT Civil Appeal No.147 of 2006 (unreported) it was held the term "sufficient cause" as ground to appeal means a party must have good case on the merits in their intended appeal.

Back at the appeal at hand, the Court considered the factors stated by the applicant in the affidavit in line with the submissions of both parties. Starting with the factor that the copy of the judgement was not availed to the applicant in time, it was the submission of the appellant that this factor was the reason for his delay to file the appeal. That the judgement of the Primary Court was partially read therefore he could not

prepare grounds of appeal. On her part, the respondent was of the view that, lack of copy of judgement was not a good reason as the appellant or his advocate could have perused court's file for their necessary action.

This reason need not detain the Court for long. It has been pronounced, in a number of authorities, that lack of copy of impugned judgement can only be reason for extension of time if attaching the same in the petition of appeal is required by the law. See ***Gregory Raphael v Pastory Rwehabula*** [2005] TLR 99; ***Sophia Mdee v Andrew Mdee and 3 others***, CAT Civil Appeal No. 5 of 2015; and ***Isack Kahwa vs Bandora Salum***, HC (Pc) Civil Appeal No. 6/2020 (both unreported).

It was the appellant's submissions that the judgement of the Primary Court was partially read to the parties and that he was not permitted to peruse court file. These two pieces of facts were not clearly deposed in the affidavit of the appellant. For instance, it is not revealed as to of how much time was spent in the follow up; and/or who denied him to peruse the court file plus the reasons thereof. If need be, he should have produced the affidavit of the person who actually denied him such opportunity.

In law, if a third party is said to be the source of information or evidence, he should depose as such. See cases of ***Narcis Nestory v Geita Gold Mining Ltd***, Misc. Lab. Appli. No. 13 of 2020; ***NBC Ltd v***

Superdoll Trailer Manufacture Co. Ltd., Civ. Appli. No. 13 of 2002; and (Originating from Land Case No. 27 of 2018) ***Awadh Abood (As Legalpersonalrepresentative of the Estate Ofthe Late Sklehe Abood Salehe) v Tanroads and AG***, Misc. Land Appli. No. 53 of 2020 (all unreported).

Further, it has been stated in numerous cases that submissions are not evidence. See the case of the ***Registered trustees of Archdiocese of Dar es Salaam (supra)***. That is, a matter of facts cannot be proved by an advocate in the course of making submissions in court. See also, ***Ison BPO Tanzania Limited vs Mohamed Aslam***, CAT Civil Application No. 367/18 of 2021 (unreported). Therefore, the reason that the appellant was not timely availed with copy of judgement and/or did not know its full contents is unmerited.

Regarding the fact that the appellant filed the appeal on 24/4/2019, which was withdrawn for being filed out of time. It was submitted by the counsel for the appellant that the delay to file the intended appeal was a matter of technical delay as he has been in court prosecuting the withdrawn appeal. The respondent, however, submitted that the withdrawn appeal was too filed out of time.

Guided by the case of ***Fortunatus Masha (supra)*** cited by the appellant, I am inclined to refuse this ground as the sufficient cause for

extension of time because, as rightly argued by the respondent, issue of technical delay only arises when the original appeal was lodged in time but had been found to be incompetent for other reasons. The mere fact that the purported appeal was filed out of time, is barefaced indicator that the appellant was labouring in a whirl of negligence.

It is also a cardinal principle that, the fact that the applicant for extension of time was prosecuting other cases cannot be relied upon solely without proving other factors like accounting for every day of delay. The Court of Appeal in ***Mathew T. Kitambala v Rabson Grayson and Another***, Criminal Appeal No. 330 of 2018 (unreported) considering 3 days which were not accounted for, stated at page 16 and 17 as follows;

'We agree with Mr. Msumi that a technical delay is excusable and the Court, in a string of its decisions, has overlooked it and extended time sought by an applicant. We did so in a number of our decisions including Diamond Motors (supra), cited by the learned counsel for the appellant. Other decisions are: Fortunatus Masha v. William Shija [1997] T.L.R. 154 and Salvand A. K. Rwegasira v. China Henan International Group Co. Ltd, Civil Reference No. 18 of 2006 (unreported) cited in Diamond Motors (supra) and Bharya Engineering & Contracting Co. Ltd v. Hamoud Ahmed Nassor, Civil Application No. 342/01 of 2017 (unreported). However, we do not think Mr. Msumi has succeeded in expounding this principle as well. What he has brought to the fore is a mere allegation that the appellant has

*been busy in the court corridors in search for his rights on the same matter. **He has not accounted for each day of the delay during which he was busy in such endeavors. We expected him to tell us the time frames in which he delayed to file the intended appeal.** He did not do that and the Court cannot do it on his behalf”* (bolding rendered for emphasis).

In view of the above holding and considering that the appellant in his affidavit has failed to account for the 27 days. That is, from 27/03/2019 when the judgement of the Primary Court was ready for collection (see certification by the Primary Court) until 24/4/2019 when he filed the withdrawn appeal and 5 days from 22/5/2019 when the appeal was withdrawn to 27/5/2019 when he filed the application subject of this appeal. Pursuant to ***Hamis Babu Bally v The Judicial Officers Ethics Committee and 3 Others***, CAT-Dar Es Salaam, Civ. Application No. 130/01 of 2020 (unreported); each day of the delay must be accounted for. Consequently, I also do not find merit in this ground.

On the last ground, consideration is whether the Primary Court judgement is tainted with illegality which the appellant wished to cure by appealing. It was the submissions of the appellant that the respondent herein lacked *locus standi* to sue the appellant in Primary Court. That is, she was not legally authorized by other group members and that she was

not the employer of the appellant herein. The respondent counter-submitted that the appellant was employed by the group and to which she was the secretary. Further, that she instituted criminal case against the appellant in the subject capacity. To her, the outcome of the criminal case stands unchallenged by way of appeal or otherwise, to date.

As stated above, irregularity can be sufficient cause for extension of time. A plethora of authorities, in addition to the ones cited by the applicant's advocate, includes: ***Khalid Hussein Muccadam v Ngulo Mtiga (As A Legal Personal Representative of the Estate of Abubakar Omar Said Mtiga)*** and Another CA-Dar Es Salaam, Civ. Appl. No. 234/17 of 2019; ***Shabir Tayabali Essaji v Farida Seifuddin Tayabali Essaji***, CA-Dar Es Salaam, Civ. Appl. No. 206/06 of 2020; ***Hassan Ramadhani v R.***, CA- Tabora, Crim. Appeal No. 160 of 2018; ***Eqbal Ebrahim v Alexander K. Wahyungi***, CA-Dar Es Salaam, Civ. Appl. No. 235/17 of 2020; ***Ngolo S/O Mgagaja v R***, CA- Tabora, Crim. App. No. 331 of 2017; ***Lyamuya Construction Co. Ltd. v Board of Trustees of Young Women's Christian Association of Tanzania***, Civ. Appl. No.2 of 2010, CA-Arusha; ***Lycopodium (T) Ltd v Power Board (T) Ltd and Others***, Comm. Appl. No. 47 of 2020, HC-Dar es Salaam (all unreported); and ***Chandrakant Joshubhai Patel v R*** [2004] TLR 218.

However, this rule does not apply automatically. There are other underlying principles to be considered to arrive to such a conclusion. For instance, in ***Sabena Technics Dar Limited v Michael J. Luwunzu***, CAT Civil Application No. 451/18 of 2021 (unreported) the Court referred to the case of ***Iron and Steel Limited v Martin Kumaliya and 117 Others***, Civil Application No. 292/18 of 2020 (unreported) which held, *inter alia*, at page 18, that;

'...illegality is not a panacea for all applications for extension of time. It is only in situation where, if extension sought is granted, that illegality will be addressed...'

I am also mindful that the Court should not discuss the issue of illegality in detail for the subject point constitute the domain of appeal. It is, however, a settled law that the illegality complained must be on face of record. See cases of ***Lyamuya Construction Company Limited*** (*supra*); ***Ntiga Gwisu vs R***, CAT Criminal Appeal No. 428 of 2015; and ***Harrison Mandala and 9 others vs the Registered Trustees of the Archdiocese of Dar es Salaam***, CAT Civil Application No. 482/17 of 2017 (all unreported).

I had ample time to peruse the record. In his affidavit, the appellant alleges that the respondent had no relationship with him to warrant the former to institute the case. As an example, paragraph 5 of the affidavit

partly states that the impugned decision was unfair and unjust because it was "delivered without considering the documentary inexistence (sic) of any relationship between the applicant and the respondent". It is not clear as to what specific relationship the appellant is pointing out. Relationships take vast and diverse types, nature and durations. It might be contractual, fiducial, marital, political, statutory or else. That is, for one to establish with certainty the kind of relationship aimed at; a lot of protracted exchange of evidence or proof is necessary.

Further, as observed earlier, in her affidavit the respondent avers that the matter was already discussed in criminal case No 582/2018 between the parties herein and no appeal was preferred thereafter. That means that, the other records of the court would be necessary to prove or disprove the allegations. In other words, the alleged illegality is not apparent on the face of the record.

In the cases of ***Fatuma Hussein Sharif v Alikhan Abdallah & Three Others***, CAT Civil Appeal No. 536/17 of 2017; and ***Musa Manyaka v AG and Another***, HC Misc. Civil Application No. 32 of 2021 (both unreported) are relevant in this regard. According to the holdings therein, the alleged illegality must be a point of law and not that which would be discovered after a long-drawn argument or process. Further, such illegality should be clearly deposed in the affidavit supporting the

application. I am further subscribing to the wise *ratio decidendi* of ***The Commissioner of Transport v The Attorney General of Uganda*** (1959) EA 329 that "in some cases a point of law may be of sufficient importance to warrant extension of time while in others it may not." The present case, in my considered view, squarely falls in the latter category.

In the upshot, I hold that the appeal lacks merits. The District Court was justified to find as it did. The application before it did not adequately exhibit sufficient ground to warrant extension of time. This appeal is accordingly dismissed. Considering the nature of the case, I make no order as to costs.

It is so ordered.


C.K.K. Morris
Judge

December 8th, 2022

Judgement delivered this 8th day of December 2022 in the absence of parties.


C.K.K. Morris
Judge

December 8th, 2022

