

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MWANZA SUB-REGISTRY
AT MWANZA

MISC. CIVIL APPLICATION No. 79 OF 2022

(Arising from High Court Civil Probate and Administration Cause no. 03 of 2017
before Rumanyika, J.)

SABINA MASALU MHALAGANI----- APPLICANT

VERSUS

JULIUS MASALU-----1st RESPONDENT

MONICA MASALU----- 2nd RESPONDENT

JULIANA MASALU-----3rd RESPONDENT

MAYUNGA CHRISTOPHER-----4th RESPONDENT

ALOYCE MASALU-----5th RESPONDENT

RULING

Last order: 13.12.2022

Ruling date: 16.12.2022

M. MNYUKWA, J.

The applicant filed this application by the way of chamber summons supported by an affidavit deposed by SABINA MASALU MHALAGANI the applicant. The application before this Court emanates from the Ruling of the High Court of Tanzania at Mwanza, Hon. Rumanyika, J. who dismissed the Probate and Administration Cause no. 03 of 2017. The instant

application is brought under section 5(1) of the Appellate Jurisdiction Act, Cap.141 [R.E 2019]. The applicant seeks this court to extend time within which to file a Notice of Appeal.

At the hearing, the applicant was represented by Mr. Kisigiro advocate and the respondent afforded the service of Mushobozi Learned Advocate. Mr. Kisigiro prayed the applicant's affidavit to be adopted and form part of his submissions. Referring to paragraphs 3-9 of the affidavit, he avers that the notice of appeal was lodged within time after the decision of this court and appealed to the court of appeal. He went on that the appeal before the Court of Appeal was struck out on 15.07.2022.

He went on that, immediately after the Ruling by the Court of Appeal, this present application was filed which was signed by the applicant on 21.07.2022 as he was in Dar es Salaam and this application was filed online on 23.07.2022 and admitted on 24.07.2022. He went on that, they technically delayed for this application was filed after the appeal before the Court of Appeal was struck out which was initially brought within time. He went on that, from 15.07.2022 to 23.07.2022, the applicant was delayed for 8 days and it was his submissions that the application was brought promptly after the appeal was struck out by the court of appeal. Supporting his arguments, he cited the case of **Wiliam**



Shija vs Fortunatus Masha 1997 TLR 213 and the case of **Adolf France Ndibalema vs Bukoba Municipal Council** Misc. Civil Application No. 31 of 2022 that the court extended time for the reasons of the technical delay. He also added the case **of Mwatex (2000) Limited vs the Registered Trustee of KKKT**, Misc. Land Application Case No 206 of 2014 and **Emanuel Makamba vs Bodi ya Wadhamini Jimbo Kuu la Mwanza** Civil Application No. 423/08 of 2001. In conclusion, he prays this court to allow the application and each party to bear its own costs.

Replying to the applicant's submissions Mr. Mushobozi opposes the application and inline prays for his counter affidavit to be adopted and form part of his submissions. He claims that, there are no reasons advanced by the applicant as to why this court should extend time. He avers that, the applicant failed to account for every day of delay and since his application is for leave to file notice, he was required to account from 10.05.2019 the date the decision of this court was delivered to 23.07.2022 when he filed this application.

Reacting to paragraph 5 of the applicant's affidavit, he claims that reasons advanced contradict the Ruling of the Court of Appeal. He avers that while the applicant stated that the appeal was stuck out for the



reason that the letter was served out of time prescribed by the Rules of the Court of Appeal, the ruling is clear that it was struck out for being time-barred. He insisted that the applicant was required to account from the date the judgment of this court was delivered that's on 10.05.2019 to the date of filing this application on 23.07.2022. Supporting his argument he cited the case of **D.N.Bahram Logistics Ltd & Another vs National Bank of Commerce Ltd & Another**, Civil Reference no 10 of 2017 CAT which he insisted that the court held that when the appeal is struck out for being time-barred the same cannot be called a technical delay. He insisted that the delay from 05.05.2019 to 15.07.2022 was not a technical delay and was required to be accounted for it is an actual delay.

He went further that, in order for the reason to be a sufficient reason it has to be stated on the affidavit, referring to paragraph 5 of the applicant's affidavit, he claims that the affidavit did not provide for the activities undertaken by the applicant from 15.07.2022 when the appeal was struck out to 23.07.2022 when the application was filed. He added that the assertion that the applicant was out of Mwanza is an afterthought for there is no supplementary affidavit to that effect. To bolster his argument he cited the case of **Muse Zongoni Kisere vs Richard Kisika Mugendi & 2 Others**, Civil Application No. 244/01 of 2019 CAT where



the Court insisted that, an application which is even one day barred, is to be dismissed regardless of the magnitude of the delay. In conclusion, he prays this application to be dismissed with costs.

Rejoining, Mr Kisigiro learned advocate insisted that the applicant accounted for every time of delay as they filed the initial notice on time and they were waiting for the decision of the Court of Appeal. he went on that, as from 17.07.2022 to 23.07.2022, the affidavit depicts that it was signed in Daresalaam and he managed to account for every day of delay. He maintains his prayers the application be granted with no orders as to costs.

After the parties' submissions and as I went through the applicant's application, the impugned Judgment sought to the challenged as well as the submissions of both parties, the issue for consideration and determination before me is whether the application is merited.

The application before me is for an extension of time and it is the settled position of the law that when it comes to granting an order for an extension of time to appeal, the court has the discretion to grant it but the discretion has to be exercised judiciously. The applicant has to show good cause and normally based on the circumstance of each case on establishing that the delay was with a sufficient cause where the applicant



is required to account for every day of delay or else there was a point of illegality that impedes justice.

As it stands in the records, this application is for an extension of time to file a notice of appeal in respect of the decision of this court in Probate and Administration Cause No. 03 of 2017 which was delivered in 10.02.2019. The applicant appealed to the Court of Appeal vide Civil Appeal No. 268 of 2019 which was on 15.07.2022 was struck out for being time-barred. Before this court, the applicant avers that from the time when the decision of the Court of Appeal was delivered, he delayed only for 8 days which he used to prepare this application and from 10.02.2019 to the date the court of appeal decision was delivered that is on 15.07.2022 he was prosecuting the appeal and that is a technical delay. The respondent opposed the applicant insisting that the applicant did not account for every day of delay from the date the decision of this court was delivered to the date he filed this application and what he submitted was not stated in his affidavit and that the delay was not a technical delay rather than an actual delay that need to be accounted for.

On the first aspect it is a settled position of law that in the application for extension of time, the applicant is duty-bound to account for every day of delay. The principle has been repeatedly emphasized as



in the case of **Bushfire Hassan vs. Latina Lucia Masanya**, Civil Application No. 3 of 2007 when addressing the issue of delay the Court of Appeal held that: -

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

(See also **Mustafa Mohamed Raze vs. Mehboob Hassanali Versi**, Civil Application No. 168 of 2014, **Wambele Mtumwa Shahame vs Mohamed Hamis** Civil Reference No. 8 of 2016.

In the records, the applicant accounted for the delay from the date the Ruling was delivered by the Court of Appeal and insisted that from the time the decision of this court was delivered on 05.05.2019 to the time the court of appeal struck out the appeal was a technical delay. The question is whether the first segment of delay was sufficiently shown to be a period of a technical delay. To answer the question I have to find out whether the first appeal was filed on time and what the reason was for struck out the first appeal. In the Ruling of the first appeal that is Civil Case No. 268 of 2019, on page 2 of the Ruling, the court stated:-

"On our part, having perused the record of appeal, we accede to the prayer made by both learned counsel for the

parties as indeed the appeal was lodged out of prescribed time...”

From the excerpt above, the reason for the appeal to be struck out was time-barred and prudence is that the applicant was required to account from the time he was barred from statutory time of 60 days in accordance with Item 21 Part III of the First Schedule of the Law of Limitation Act, Cap.89 [RE: 2019]. As stated in the case of **D. N. Bahram Logistics Ltd & Another vs National Bank of Commerce Ltd & Another**, Civil Reference no 10 of 2017 CAT.

“If the said appeal was struck out on account of being time-barred the delay involved would be actual or real and on that basis, it would require being fully accounted for”

From the above-stated decision of the Court of Appeal, it is indeed that from the time the applicant's statutory time ended after the decision of this court on 05.05.2019 to the time when the Ruling was delivered it was not a technical delay as claimed by the applicant but an actual delay and required to be fully accounted for.

On the other hand, the applicant learned counsel submitted by accounting for 8 days of delay from the date the Ruling was delivered to the date this application was filed. He avers that immediately after the Ruling by the Court of Appeal, this present application was filed which was

signed by the applicant in Dar es salam on 21.07.2022 and this application was filed online on 23.07.2022. Mr. Mushobozi opposed the applicant learned counsel submissions for the reason that, what he submitted is not reflected on the applicant's affidavit and for the reason that submissions are not evidence, the applicant failed to account for the delay.

I agree with Mr. Mushobozi that Submissions by an advocate are not evidence but arguments based on the available evidence and the governing law. The principle was reiterated in **Registered Trustees of the Archdiocese of Dar es Salaam vs. The Chairman Bunju Village Government** Civil Appeal No. 147 of 2006

"With respect, however, submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence."

See also **Shadrack Balinago vs. Fikiri Mohamed @ Hamza and 2 Others**, Civil Application No.25/8 of 2019. **Rutakyamirwa vs. Petro Joseph** [1990] T.L.R 49]. **Republic vs. Donatus Dominic @Ishengoma & 6 Others**, Criminal Appeal No. 262 of 2018

Going to the records, I agree with Mr. Mushobozi that what is submitted by Mr. Kisigiro learned advocate is not reflected in the



applicant's affidavit and the submissions cannot be treated as evidence therefore, it is my findings that the second segment of delay that from the date of the Ruling was delivered by the Court of Appeal to the date of filing this application was not accounted for as required.

I am settled with the principle stated by the court of Appeal in the case of **Benedict Mumelo vs. Bank of Tanzania** [2006] 1 EA 227 that;-

"It is trite law that an application for extension of time is entirely in the discretion of the Court to grant or refuse it, and that extension of time may only be granted where it has been sufficiently established that the delay was with sufficient cause."


I, therefore, hold that the applicant failed to account for every day of delay to move this court to exercise its unfettered discretion to extend time to file a notice of appeal as prayed. I, therefore, proceed to dismiss the application with no order as to costs.

It is so ordered.




M.MNYUKWA
JUDGE
16/12/2022

Court: Ruling delivered on 16th December 2022 in the presence of the 1st, 3rd and 5th respondents and in the absence of the applicant.



**M.MNYUKWA
JUDGE
16/12/2022**