IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA SUB-REGISTRY)

AT ARUSHA

MISC. CIVIL APPLICATION NO. 67 OF 2021

(C/f the District Court of Arusha in Civil Appeal No. 51 of 2020; Originating from Arusha Urban Primary Court, Civil Case No. 138 of 2020)

OLDEAN NGORONGORO MOUNTAIN LODGE ..... APPLICANT

Versus

GUEST SUPPLIES ..... RESPONDENT

RULING

08/12/2022 & 15/12/2022

KAMUZORA, J.

This application has been taken out under the provision of section 14 of the Law of Limitation Act, Cap. 89 [R.E 2002], whereas the Applicant is moving this Court to extend her time to file appeal in this Court against the decision of the District Court of Arusha (henceforth 'the district court'), in Civil Appeal No. 51 of 2020 which was delivered on 26/05/2021. The application is supported by affidavit sworn by Mr. Asubuhi John Yoyo, learned advocate for the Applicant who also represented her at the hearing of the application. The Respondent contested the application in a

counter affidavit deponed by Mr. Mohamed Raza Hussein, the Respondent's Principal Officer.

Brief background of the case leading to this application as can be gleaned from the affidavits and annexes thereto, goes as follows: The Respondent successfully sued the Applicant in Arusha Urban Primary Court (henceforth 'the trial court'), vide Civil Case No. 138 of 2020. The suit arose out of breach of contract, whereas the Respondent supplied various goods to the Applicant worth TZS 10,389,900/=. The Applicant paid only TZS 8,655,000/= leaving the balance of TZS 1,734,900/= unsettled. The Respondent instituted a case before the primary court seeking to be paid the balance aforementioned. The Applicant admitted to have been supplied with the goods worth TZS 8,655,000/= which she fully paid, denying to be owed any balance by the Respondent.

After full trial, the trial court found out that the case was proved to the required standard. In its judgment delivered on 22/07/2020, the trial court ordered the Applicant to pay the claimed amount of TZS 1,734,900/= and in addition, the Applicant was ordered to pay TZS 200,000/= as damages for breach of the contract.

The Applicant was dissatisfied by that decision, preferred appeal in the district court, which dismissed the appeal upholding the decision of

the trial court. Still aggrieved, the Applicant intends to appeal to this Court, but she found herself out of time prompting this application.

Mr. Yoyo prayed to adopt his affidavit in support of the application so as to form part of his submission. Submitting in support of the application, Mr. Yoyo contended that the delay was prompted by the delay to be supplied with the mandatory documents for appeal purpose. He relied on paragraphs 5, 6 and 7 of affidavit in support of the application stating that as soon as the impugned decision was delivered, he wrote a letter requesting to be supplied with the copies of proceedings, judgment and decree without any success despite several reminders. That, he was supplied with the said documents on 03/09/2021. That, the Applicant could not pursue the appeal without annexing the copy of the decree to be appealed against, and at the time she secured the same, time to appeal had already lapsed.

The Applicant's counsel referred this Court to myriad decisions which ruled out that application for extension of time may only be granted upon a party showing sufficient cause for the delay. The relied cases include: **Regional Manager, Tanroad Kagera vs Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007, **Tanzania Fish Processor vs Christopher Luhangula**, Civil Application No. 161 of 1994, **John Mosses & 3 Others vs Republic**, Criminal Appeal No. 145

of 2006, **Felix Tumbo Kisima vs TTC Limited & Another**, Civil Application No. 1 of 1997 (all unreported). As to what amounts to sufficient cause, Mr. Yoyo referred the Court in the ancient case of **Mgogo Vs Shah** (1968) 93 E.A.

It was Mr. Yoyo's further contention that the delay was not prompted by laxity, but failure to be supplied with the necessary documents for appeal. To show that the Applicant was not idle, he referred the three reminder letters addressed to the court seeking to be supplied with the said documents.

Another ground put forth by the learned counsel for the Applicant is that there are illegalities in the impugned decision that need to be addressed in the intended appeal. Referring paragraph 9 of the sworn affidavit, Mr. Yoyo pointed out the illegalities in the impugned decision to include; lack of essential ingredients constituting oral contract, lack of formality needed for sale of goods in question, lack of sufficient consideration which needs to be addressed by this Court in the intended appeal. He reinforced that illegality amounts to sufficient reason for the delay referring the Court of Appeal decision in **Anche Mwedu Ltd & 2 Others vs Treasury Registrar (Successor of Consolidated Holding Corporation)**, Civil Reference No. 3 of 2015 (unreported). He concluded by urging the Court to allow the application.

On his part, Mr. Raza who entered appearance for the Respondent adopted the counter affidavit to form part of the Respondent's submission. At the outset, the Respondent challenged the competency of the application stating that it was brought under wrong provision of the law. According to the Respondent, the application was brought under section 14 of the Law of Limitation Act, Cap. 89 [R.E 2019] instead of the specific provision which is section 25(1)(b) of the Magistrates' Courts Act, Cap. 11 [R.E 2019]. He insisted that the Court is wrongly moved rendering the application incompetent and untenable.

Submitting on the merits of the application, the Respondent contended that the reason that the Applicant was unable to file the appeal on time because she was not supplied with the necessary documents of appeal is untenable because attachment of copies of decree and judgment is not mandatory requirement in appeals originating from the district court in the exercise of its appellate or revisional powers. He relied on section 25(1)(b) of the MCA which does not require copies of decree and judgment as mandatory documents to be attached in the appeal. The Respondent also referred the case of **Gregory Raphael Vs. Pastory Rwehabula** [2005] TLR 99, which has the same spirit. He insisted that the appeal ought to have been lodged within 30 days notwithstanding the fact that the Appellant was supplied with the decree and judgment or not.

According to the Respondent, the decision was delivered on 26/05/2021 and the instant application was filed on 13/09/2021, therefore the Applicant delayed for 102 days, which were not accounted for. In the Respondent's view, the delay was inordinate and the Applicant did not account for each day of the delay. He relied on the case of **Elinazani Matiko Ng'eng'e vs Republic**, Criminal Appeal No. 29/01 of 2017 (unreported) which stress on accounting for each day of the delay.

Regarding the issue of illegality of the impugned decision, the Respondent submitted that such ground was not featured in the affidavit in support of the application. That, it was raised in the submission making it an afterthought. According to the Respondent, not every illegality shall be taken to constitute sufficient reason for extending time, referring to the case of **Finca (T) Limited & Another vs Boniface Mwalukisa**, Civil Application No. 589/12 of 2018 (unreported). The Respondent was of the view that the pointed-out illegalities in the impugned decision do not fall within the ambits of those which constitute sufficient cause. It was his further submission that, if the application is granted, it is the Respondent who stands prejudiced because the decisions of both lower courts ruled in his favour but the decretal amount is not paid to date. He prayed that the application be dismissed with costs.

I have examined the affidavits for and against the application, as well as the competing submissions from Mr. Yoyo and that of the Respondent. The main issue for consideration is whether the Applicant has furnished sufficient cause for the delay to extend her time to file appeal out of time.

Before indulging in the determination of the application on merits, I feel dutiful to say a word on the preliminary objection raised by the Respondent in his reply submission regarding competence of the application. The Respondent submitted that the application is preferred under wrong provision of the law (section 14 of the Law of Limitation Act) while the proper section is section 25(1)(b) of the MCA, therefore the Court is not properly moved. Despite the fact that the Applicant's counsel was given time to respond to the said concern, for reasons kept abreast, he remained mute.

As pointed out correctly by the Respondent that the proper provision to move this Court to grant the orders sought is section 25(1)(b) of the MCA, which is specific provision. I am alive that where there is specific provision providing for extension of time, section 14 of the Law of Limitation Act which is a general one, seizes to apply. I hold this view because under section 43(f) of the Law of Limitation Act, entails that

where there is specific law prescribing limitation of time, the provisions of the Law of Limitation seize to apply. The section provides:

"43. This Act shall not apply to .....

(f) any proceeding for which a period of limitation is prescribed by any other written law, save to the extent provided for in section 46."

As pointed out by the Respondent, the relevant provision providing for extension of time and power of the Court to extend time to a party, is section 25(1)(b) of the MCA. Since the Applicant preferred this application under section 14 of the Law of Limitation, I subscribe to the Respondent's submission that the Court is not moved properly to exercise its jurisdiction. The Courts times in number have maintained that a party who seeks certain orders from the Court must ensure that the Court is properly moved by citing the specific provision of the law. This stance was restated by the Court of Appeal in the case of **Bahadir Sharif Rashid & 2 Others Vs. Mansour Sharif Rashid & Another,** Civil Application No. 127 of 2006 (unreported), where it was held:

"Needless to say, there is a specific provision under which an applicant can move the Court for an order of stay of execution in civil proceedings, namely Rule 9(2) (b) of the Court of Appeal Rules, 1979. The Court should not be made to go on a fishing expedition pouring over sections, rules and the like in order to ascertain whether or not

it has jurisdiction to make the particular order. This should be self-evident from the Notice of Motion."

Therefore, since the Applicant did not prefer the application under section 25(1)(b) of the MCA which is the specific provision providing for extension of time in cases originating from the primary courts, the Court is not properly moved. This renders the application incompetent.

Having sustained the objection regarding the competence of the application, I would have proceeded to strike out the application, which would then end the matter. That notwithstanding, in considering that this point of objection was raised by the respondent in his reply submission and not responded to by the applicant, I find it pertinent to address the merits of the application for the interest of justice.

It is trite law that a party seeking time to be extended must adduce sufficient reasons for the delay. The Court of Appeal in its numerous decisions has insisted on this. For example, in the case of **Tumsifu Kimaro (The Administrator of the Estate of the Late Eliamini Kimaro) Vs. Mohamed Mshindo**, Civil Application No. 28/17 of 2017 (unreported) it was held inter alia that:

"Before dealing with the substance of this application in light of the rival submissions, I find it apposite to restate that although the Court's power for extending time under rule 10 of the Rules is both

broad and discretionary, it can only be exercised ***if good cause is shown****. Whereas it may not be possible to lay down an invariable definition of good cause so as to guide the exercise of the Court's discretion under rule 10, the Court must consider factors such as the* ***length of the delay, the reasons for the delay, the degree of prejudice the Respondent stands to suffer if time is extended, whether the Applicant was diligent, whether there is point of law of sufficient importance such as the illegality of the decision sought to be challenged.****"*(Emphasis supplied).

The question is whether the Applicant's application can be sufficiently covered by the "good cause" circumstances above explained. As pointed out above, extension of time may only be granted where it has been sufficiently established that the delay was with sufficient cause. In this application the Applicant's main reason for the delay as stated under paragraphs 5, 6, 7 and 8 of the Applicant's affidavit in support of the application and the submission that there was delay to be supplied with copies of judgment, proceedings and decree.

The provision governing time limit for appealing against the decision of the district court in the exercise of its appellate or revisional jurisdiction is section 25(1)(b) of the MCA. The provision provides:

"25.- (1) Save as hereinafter provided-

(a) in proceedings of a criminal nature, any person convicted of an offence or, in any case where a district court confirms the acquittal

of any person by a primary court or substitutes an acquittal for a conviction, the complainant or the Director of Public Prosecutions; or (b) in any other proceedings any party, if aggrieved by the decision or order of a district court in the exercise of ***its appellate or revisional jurisdiction may, within thirty days after the date of the decision or order, appeal there from to the High Court;*** *and the High Court may extend the time for filing an appeal either before or after such period of thirty days has expired."* (Emphasis added).

According to Rule 4(1) and (2) of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules, G.N No. 312 of 1964 attachment of the copies of judgment and decree in the petition of appeal is not mandatory requirement in appeals to the High Court. That position was reaffirmed by the Court of Appeal in the case of **Sophia Mdee Vs. Andrew Mdee and 3 Others**, Civil Appeal No. 5 of 2015 (unreported), where it was held:

"From the foregoing ***it is clear that attachment of a copy of judgment along with the petition of appeal is not legal requirement in instituting appeals originating from Primary courts.****"*(Emphasis added)

From the foregoing, as pointed out correctly by the Respondent, the contention that the reason for the delay was perpetrated by the delay to be supplied with the copies of judgment, decree and proceedings, finds no legal justification. Since it is not the requirement of the law that appeals

from the district court in the exercise of its revisional or appellate jurisdiction be attached with copies of decree, judgment and proceedings, the Applicant's contention finds no shelter to lean on. I hold this view considering the fact that the Applicant ought to have filed her appeal without attaching copies of the requisite documents because she was represented by an advocate who is conversant with court procedures. Therefore, the ground that the delay was due to failure to be supplied with copies of judgment, decree and proceedings on time, is without any justification. The delay was therefore without any sufficient cause.

The second ground relied on by the Applicant is the presence of illegality in the impugned decision. The pointed-out illegalities according to Mr. Yoyo are; lack of essential ingredients constituting the oral contract in question, lack of formality needed for sale of goods in question and lack sufficient consideration. On his part, the Respondent was of the view that such ground was not pleaded in the affidavit. Having perused the affidavit in support of the application, I go along with Mr. Yoyo that it was pleaded under paragraph 9 that there are serious and contentious matters of law and fact hence has overwhelming chances of success.

That notwithstanding, in order for illegality in the impugned decision to constitute sufficient cause for the delay, such illegality must be apparent on the face of record and must be such of sufficient importance.

This was the holding of the Court of Appeal in the case of **Samwel Munsiro Vs. Chacha Mwikabe**, Civil Application No. 539/08 of 2019 (unreported); where the Court stated:

> *"As often stressed by the Court, for this ground to stand, the illegality of the decision subject of challenge must clearly be visible on the face of record, and the illegality in focus must be that of sufficient importance."*

In the application under scrutiny what the Applicant's counsel purports to point out as points of law in the impugned decision worth determination in the intended appeal are not self-explanatory. They do not amount to illegality of sufficient importance. They focus on evaluation of evidence, hence do not qualify as illegality worth to be relied on to grant the extension of time sought. In other words, the pointed-out illegality is not apparent on the face of record. That being the case, the second ground of illegality in the impugned decision finds no justification.

In the final result, the Applicant has failed to adduce sufficient cause for the delay to warrant extension of time sought. The application is devoid of merits. It stands dismissed in its entirety with costs.

DATED at **ARUSHA** this 15th December, 2022.

D. C. KAMUZORA

JUDGE