IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 454 OF 2022

(Arising from the decision of the High Court of Tanzania at Dar es salaam in Civil Appeal No. 10 of 2019 by Hon. Mlyambina J, dated at 21st October, 2019)

TUWAHA SAMSON MUZE ..... APPLICANT

VERSUS

MAIMUNA RAJABU SOKA .....RESPONDENT

RULING

5th December, 2022 & 09th February, 2023

POMO, J.

The applicant, a losing party in Civil Appeal No. 10 of 2019, seeks to re-ignite his quest for challenging the decision of this Court (Hon. Mlyambina, J) by way of appeal to the Court of Appeal. The latest effort follows the applicant's first attempt that saw the Notice of appeal struck out by the Court of Appeal for the applicant's failure to take essential steps to prosecute his appeal.

In the instant application, the prayer is for extension of time within which to institute a Notice of Appeal, signaling the applicant's desire to appeal against the impugned decision.

Supporting the application is the affidavit sworn by the applicant himself, Tuwaha Samson Muze, grounds on which the application is based are set out. The main contention by the applicant is that the delay to lodge Notice was due to mis-communication between him and his advocate and Covid 19 pandemic challenges on movements. Besides, the applicant stresses in his averments that the impugned decision carries some illegalities committed by the trial Court that must be brought to the attention of the Court of Appeal through the impending appeal.

The respondent is valiantly opposing the application. Through her counter affidavit, the whys and wherefores of the applicant's delay have been rebuffed. In the respondents' view, there was no lock down in Tanzania that would have restricted the applicant from making physical movements to allocate his lawyer. As well, there were no illegalities in the proceedings and decision of the lower Court.

At the hearing of the application, the applicant enjoyed the services of Mr. Alexandre Mzikine, learned counsel, whilst the respondent enlisted the services of Mr. Onesmo Kinawari, learned counsel. The matter was agreed to be argued by way of written submissions to which the parties have filed their respective submissions however, I have observed a fascinating aspect

to which I see it apt to take it into board before even I proceed with determination of this application on merit. Basing on the Court's record, when the matter stood for determination on 5th December, 2022, it was the parties' consensus prayer that the matter be disposed by way of written submissions. Upon the Court sanctification of their prayer, it made an order to which, the applicant's submission in chief was to be filed on or before 14th December 2022, respondent's reply submission on or before 21st December 2022, rejoinder (if any) on or before 27th December 2022 and Ruling on 9th February, 2023.

Upon keen perusal to the records, contrary to the afore mentioned order, I have noticed that the rejoinder by the applicant was filed on 9th January, 2023. This Court and the Apex Court have time without number underscored compliance to Court orders. The settled position is that a party's failure to abide by the court order for filing written submissions is taken to be akin to failure by such to prosecute their cases. See; **Tanzania Harbours Authority v. Mohamed R.** [2002] TLR 76; **Patson Matonya v. Registrar Industrial Court of Tanzania & Another**, CAT-Civil Application No. 90 of 2011; and **Geofrey Kimbe v. Peter Ngonyani**, CAT-Civil Appeal No. 41 of 2014 (DSM-unreported).

In **TBL vs. Edson Dhobe**, Misc. Civil Application No. 96 of 2006, this Court had this to say: -

> *"Court Orders should be respected and complied with. **Courts** Court should not condone such failures. To do so is to set bad precedent and invite chaos. This should not be allowed to occur…"*

Besides, in the earlier decision of **Olam Tanzania Limited v. Halawa Kwilabya**, HC-(DC.) Civil Appeal No. 17 of 1999 (unreported), the Court adopted the following stance:

> *"Now what is the effect of a court order that carries instructions which are to be carried out within a pre-determined period? Obviously, such an order is binding. Court orders are made in order to be implemented; they must be obeyed. If orders made by courts are disregarded or if they are ignored, the system of justice will grind to halt or it will be so chaotic that everyone will decide to do only that which is conversant to them. In addition, an order for filing submission is part of hearing. So, if a party fails to act within prescribed time he will be guilty of in-diligence in like measure as if he defaulted to appear …. This should not be allowed to occur. Courts of law should*

always control proceedings, to allow such an act is to create a bad precedent and in turn invite chaos."

Basing on the above, the fact that the applicant had decided to file his rejoinder out of time contrary to the order of this Court without leave of the Court, I therefore proceed to expunge the applicant's rejoinder from the record. Thus, I will only consider the submissions filed timely by the parties.

Embarking to the merit of the application, in his laconic submission, Mr. Mzinine highlighted that this Court has requisite jurisdiction to grant the prayers sought under the chamber summons by virtue of section 11 (1) of the Appellate Jurisdiction Act, [Cap 141 R.E: 2019] and Rule 47 of the Court of Appeal Rules of 2009. The learned brother also accentuated that, once an appeal or a notice of appeal has been struck out, if the appellant or applicant wishes to refile the same, he or she has to seek for extension of time as the applicant did vide this application. To buttress his preposition, he cited the cases of **A Caste Corporation vs. The Board of Trustees of the Public Service Security Fund**, Civil Application No. 288/16 of 2021 (CAT-Dar es Salaam) and **Mwaitenda Ahobokile Michael vs. Interchick Ltd**, Misc. Labour Application No. 364 of 2020, High Court of Tanzania Labour Division-Dar es Salaam (Both Unreported).

Mr. Mzikine went further to acknowledge that this extension of time can be granted where the applicant adduces sufficient reasons. In this respect, he had three reasons pointed out under paragraphs 5,6,7,8 and 9 of the applicant's affidavit. Firstly, that the applicant was facing a criminal case instituted by the respondent herein to which the applicant was arrested in 2019 arraigned, charged, prosecuted and eventually convicted and sentenced by the Resident Magistrate Court of Dar es Salaam at Kisutu to serve an imprisonment term of 3 years and 6 months. Secondly, that due to COVID 19 pandemic there was restriction of movement thus he couldn't make a follow up to allocate his advocate.

Thirdly, that the trial Court proceedings are tainted with illegality which is premised on the point that, the trial Court had allowed receipt of additional documents after closure of the petitioner's case in Matrimonial Cause No. 66 of 2017. According to him, the said list was admitted on 19th April 2018 to wit page 34 of the typed proceedings, and subsequently the document was admitted in evidence as exhibit DE3 which can be observed at page 49 of the typed proceedings. Another point of illegality pleaded and argued was that, the respondent was awarded compensation by the trial Court which she did not plead and sought.

In the rebuttal submission, Mr. Kinawari stiffly resisted that the cited cases by the applicant's counsel are distinguishable to the circumstances of this case. He pointed out that, in the case of **Caste Corporation** *(supra)* , the applicant therein had taken necessary steps after lodging an appeal but it was the registry which had failed to furnish the respondent with the necessary documents. And, in **Mwaitenda Ahobokile** case *(supra)* , there were issues of technical delay and advocate negligence while in our case the applicant is the one who is negligent and has failed to attach an affidavit of proof of the fact that his advocate had shifted and he was unaware of his advocates whereabouts.

Mr. Kinawari further explicated that, the grounds of delay stated in his chamber application resemble to those stated by him before the Justices of appeal in the Court of Appeal when he had failed to prosecute his appeal and the upper bench was not convinced with them, eventually struck out the same.

Concerning the issue of COVID 19, it was Mr. Kinawari's contention that the applicant ought to have accountable for each day of delay. To support his argument, he cited the case of **Abuu Tungaye vs. Orica Tanzania Ltd,** Misc. Labour Application No. 01 of 2020 (Unreported).

According to him, the applicant has failed to account for the delay of 17 months, that is to say from 19th November, 2019 when he lodged the Notice of Appeal to the Court of Appeal until March 2021 when he was served with an application for failing to take necessary steps. The learned counsel also argued that, during COVID 19 pandemic there was no lock down and thus it is not a good reason for extension.

As to the criminal case, Mr. Kinawari succumbed that the same was filed against the applicant and his father who conspired to commit forgery of a sale agreement in respect of matrimonial house of the parties. According to him, this cannot constitute a good reason as the applicant was bailed out.

Regarding illegality, the view held by Mr. Kinawari is that illegality can only serve as a ground if it is apparent on the face of the record and not by a long drawn argument or process as was held in **Pambano Malekana Pambe vs. Benard Makala @ Sebastian & another,** Misc. Civil Case No. 2/2020 (unreported). He contended that what the applicant considers as an illegality will require long drawn arguments to discover it. Again, he insisted that the arguments fronted by the applicant do not constitute the illegality on point of law as for the same to be established, the court will have to ascertain from the facts which is contrary to the principle of illegality.

In finality, Mr. Kinawari accentuated that the reasons for delay must be given in a way that the applicant to account for each day of delay even where the illegality as been pleaded. In support to that preposition, he cited the decision of this Court in **George Timoth Mwaikusa vs. National Microfinance Bank PLC,** Misc. Application No. 41 of 2020 (Unreported).

Having heard the rival contentions, the singular question to be resolved in this application is whether this application has what it takes to be meritorious.

Let me preface my analysis by stating that grant of an extension of time is discretionary, and that such discretion is equitable, exercised judiciously (See: ***Nicholaus Mwaipyana v. The Registered Trustees of Little Sisters of Jesus of Tanzania***, CAT-Civil Application No. 535/8 of 2019 (unreported)). Exercise of such discretion must entail carrying a proper analysis of the facts, and application of law to facts. It is only upon satisfaction that the applicant has presented a credible case that the said discretion is triggered. The foregoing position was articulated by the East African Court of Appeal in **Mbogo v. Shah** [1968] EA 93. Subscribing to this position is the Supreme Court of Kenya which held in **Nicholas Kiptoo Arap**

Korir Salat v. IEBC & 7 Others, Sup. Ct. Application 16 of 2014, as follows:

> *"Extension of time being a creature of equity, one can only enjoy it if [one] acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that [one] was not at fault so as to let time lapse. Extension of time is not a right of a litigant against a Court, but a discretionary power of courts which litigants have to lay a basis [for], where they seek [grant of it]."*

True to the counsel's view, grant of extension of time is discretionary, and the Court can only exercise such discretion judiciously if the party seeking to have that remedy adduces sufficient cause for the delay as alluded. Some of the preconditions for such grant were underscored in the famous case of **Lyamuya Construction Co. Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, CAT-Civil Application No. 10 of 2010 (unreported) to include the following:

> *"(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 he intends to take.*

(d) If the Court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as illegality of the decision sought to be challenged."

In the instant matter, the applicant has advanced several grounds and one being the illegality in the impugned decision and proceedings of the trial Court.

My entry point in this discussion is firstly, an evaluation of illegality as a ground. The trite law is that illegality can only constitute good cause if the same is of sufficient importance. This was discussed in the **Lyamuya Construction Company Limited v. Board of Trustees of YWCA** *(supra),* wherein it was held:

> *"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in* ***Valambia's case****, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one.* ***The Court there emphasized that such point of law must be that of sufficient importance and, I would add that it must also be apparent on the face of record, such as the question of jurisdiction; not one that***

would be discovered by a long drawn argument or process." [Emphasis added]

See also: **The Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] TLR 185; **Paulo Juma v. Diesel & Autoelectric Services Ltd & 2 Others**, CAT-Civil Application No. 54 of 2007; **VIP Engineering and Marketing Limited & 2 Others v. Citibank Tanzania Limited**, CAT-Consolidated References Nos. 6, 7 and 6 of 2006 (both unreported).

What is cited as an illegality in this case is ***one,*** the admission of a list of additional documents upon closer of one party' case and admission of such documents as exhibits later on the course of proceedings. And ***two,*** granting of an order of compensation while the same was not pleaded.

It is unhidden truth that as to the 1st point of illegality, it revolves fleeting through the proceedings and come out with the answer. However, the 2nd point of illegality is vividly on the face of the record. This is because, it is the settled position that the Court can only grant the prayers sought by the party and that no relief should be granted without being pleaded, the question is whether, in the impugned decision that was the case. An answer to that question will involve leafing through the pleadings, evidence and come up with an answer. That, however, is not the task of this Court, at this

stage. It is a matter that is in the ambit of the appellate Court when the matter gets to that level. The duty of the Court is to state if that is an illegality and, if so, whether such illegality is of any sufficient importance as stated in **Lyamuya Construction Company Ltd v. Board of Trustee of Young Women's Christian Association of Tanzania** *(supra).*

In my unflustered view, the illegality alleged to exist is of sufficient importance as it touches the jurisdiction issue of the trial Court to grant prayers not embodied in the pleadings, the illegality is apparent and would not require any long-drawn argument to discover.

The respondent has taken a serious exception that time has not been accounted for. Whilst the respondent's contention may be plausible, the settled position is that, where illegality is successfully advanced as a ground, all other factors such as accounting for days of delay, at best, play second fiddle. They become less significant and cannot hold the usual way that they would, had they been left to stand on their own. This explains why, in the case of **Peter Mabimbi v. The Minister for Labour and Youths Development & 2 Others**, CAT-Civil Application No. 88/08 of 2017 (unreported), the Court of Appeal of Tanzania condoned time and allowed

that proceedings be instituted after the lapse of 13 years and 8 months from the date on which the cause of action arose.

Therefore, in my unflustered view, there is a worthwhile point of illegality that may be cited as the basis for extension of time in the instant matter. Having accepted this as a ground, I do not consider the other grounds as of any more significance to this matter. I choose not to consider them.

In sum, I hold that this application has met the legal threshold set for the grant of extension of time and, accordingly, I grant it. The applicant is granted ten (10) days within which to file his Notice of appeal.

No orders as to costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 09th day of February, 2023.

MUSA K. POMO

JUDGE

09/02/2023