

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO.490 OF 2022

(Arising from Civil Revision No.11 of 2019 Temeke District Court,

Original Civil Case No.313 of 2019 Mbagala Primary Court)

SHADA RAMADHANI MSANGIAPPLICANT

VERSUS

FESTO BURCARD HAULE.....RESPONDENT

RULING

Date of last Order: 12/12/2022

Date of Ruling: 17/2/2023

POMO, J

This Application was lodged on November 2nd, 2022 by the Applicant applying for extension of time to appeal out of time against the decision of Temeke District Court in Civil Revision No.11 of 2019, the decision which was delivered against his favour on 28/2/2020 Hon. M.B. Ndelwa, RM. The Application is preferred under **section 25(1)(b) of the Magistrate's**

Courts Act, [Cap 11 R.E.2019]; section 14(1) of the Law of Limitation Act, [Cap 89 R.E. 2019] and section 95 of the Civil Procedure Code, [Cap 33 R.E. 2019] and is supported by the affidavit deposed by Shada Ramadhani Msangi the Applicant herein.

Subsequent to the filing, the Court set 1/12/2022 to be the hearing date. When the Application came on 1/12/2022 for hearing the Respondent didn't appear despite being served on 22/11/2022 with summons for hearing the summons he refused signing it. The Respondent didn't file the counter affidavit. In proving service of summons to the Respondent, the affidavit by Adulaziz Omari Mbagha who is the court process server was on 22/11/2022 sworn by him to that effect and filed in court. Basing on such proof of service, this court, on the said hearing date ordered for *ex parte* hearing of the application against the Respondent. It was further ordered that the hearing be by way of written submission the order which the Applicant dully complied with.

The Applicant enjoyed the legal representation of Mr. Barnaba Luguwa, the learned advocate

Arguing the application, the learned counsel, advanced the reason for delay by the Applicant to appeal timely against the decision in Civil Revision No.11 of 2019 Temeke District Court to be attributed by the court as the court did not supply him timely the impugned decision. That while the said decision was delivered on 28/2/2020 and having applied for the same on 4/3/2020 followed by reminder letter on 15/3/2020 the decision came to be supplied to him on 27/3/2020 but again with clerical error which came to be rectified on **2/4/2020**. This is per paragraphs 3; 4; 5; 6 and 7 of the affidavit in support of the application.

That, having obtained the rectified decision of the district court in the said Civil Revision No.11 of 2019, the Applicant lodged in High Court Civil Appeal No.116 of 2020 the appeal which ended up being withdrawn for being time barred (see paragraph 8 and 9 of the affidavit supporting the Application). According to the said high court order, the said appeal was withdrawn on **31/8/2022** Hon. L.J. Itamba, J. the order which got supplied to the Applicant on **10/10/2022** (see paragraph 10 of the affidavit).

In the end, the Applicant prayed the Application be granted on the ground that delay in filing an appeal to this court against Civil Revision No.11

of 2019 Temeke District Court have been accounted for by the Applicant in the manner above alluded.

I have given due consideration of the affidavit; the arguments in support of the Application together with the lower courts record and that of the High Court in Civil Appeal No.116 of 2020. As it is stated under paragraph 2 of the Affidavit in support of the Application, the origin of this dispute is from Mbagala Primary Court in Civil Case No.3013 of 2019 the suit which was challenged by the Applicant herein by way of revision to Temeke District Court as Civil Revision No. 11 of 2019 but ended up being decided against his favour.

Extension of time to file an appeal to this court in matters originating from Primary Court is a discretionary power vested in the court under **section 25(1)(b) of the Magistrates' Courts Act, [Cap 11 R.E.2019] (MCA) and Rule 3 of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules, GN No.312 of 1964.** The said section 25(1) of the MCA provides as follows: -

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

(a) N/A

*(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.** End of quote*

And the said **Rule 3 of the said Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules** provides thus: -

***"Rule 3 – An application for leave to appeal out of time to the High Court from a decision or order of a district court in the exercise of its appellate or revisional jurisdiction shall be in writing, shall set out the reasons why a petition of appeal was not or cannot be filed within thirty days after the date of the decision or order against which it is desired to appeal, and shall be accompanied by the petition of appeal or shall set out the grounds of objection to the decision or order".** End of quote*

On the other hand, the Applicant, apart from citing section 25(1)(b) of the MCA has also cited section 14(1) of the Law of Limitation Act, [Cap 89 R.E. 2019] and section 95 of the Civil Procedure Code, [Cap 33 R.E. 2019]

as enabling provisions. These two laws, the Law of Limitation Act and the Civil Procedure Code Cap 33 R.E. 2019 do not apply in matters originating from the Primary Courts henceforth they are wrongly cited.

As to the merit of the application or otherwise, the ground for extension of time relied upon , as can be discerned from the affidavit in support of the Application, is that he was late in being supplied the court documents, that is to say, the drawn order in respect of the Civil Revision No.11 of 2019 Temeke District Court of which got to be supplied to him on 2/4/2020 (see paragraphs 3; 4; 5; 6 and 7 of the Affidavit) and the order of this court withdrawing Civil Appeal No. 116 of 2020 which was filed by the Applicant upon being issued the drawn order of the aforesaid district court which was supplied to him on 10/10/2022 (see paragraphs 10 and 11 of the affidavit).

Contrary to the requirement set by the law for an application for extension of time to appeal out of time as per the above reproduced **Rule 3 of the said Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules** GN No.312 of 1964, this application is neither accompanied by the grounds of appeal nor stated in the affidavit the grounds

of objections the applicant has against the impugned decision of the district court. The non-compliance has denied the court to weigh out if the intended appeal has arguable point or otherwise. Being the case, the only material furnished to this court, as alluded above, is the averment that he was late in being supplied with the court orders both of the district court and that of the High Court.

Following the above, the issue for determination in this Application is whether those facts stated in the affidavit supporting the Application amount to sufficient cause to warrant this court to grant the extension of time sought?

Much as it is understood and settled, the affidavit is nothing but evidence taken under oath/affirmation. Reading the Applicant's affidavit, paragraph 10 in particular, the applicant stated that he was on **10/10/2022** supplied the order of the High Court withdrawing Civil Appeal No.116 of 2020. That, while he was supplied with the said order on **10/10/2022** he filed the herein Application on **November 2nd, 2022 being twenty-one (21) days from the date he was supplied the same.** There is no explanation given in his affidavit accounting for the days 21 days, that is to say from 10/10/2022 up to 1/11/2022. In other words, the twenty one (21)

days reckoned from the date the Applicant received from the High Court the said order withdrawing Civil Appeal No.116 of 2020 to 2/11/2022 when this application was filed are days which are un accounted for.

The position of the law is settled in that each day of delay by the Applicant seeking extension of time has to be accounted for. In a similar scenario facing the Court of Appeal in **Safari Petro Vs Boay Tlemu, CAT Application No.320/17 of 2017 CAT at Arusha (Unreported)** at page 5 the Court of Appeal had this to state:-

"In his affidavit in support of the notice of motion, there has never been a mention of the said 232 days in all the eight paragraphs of the affidavit.

***The position of law is that, where there has been a delay in doing any act in compliance with the requirement of law, each day of delay has to be accounted for**".* End of quote

See also, **Selemani Juma Masala Vs Sylvester Paul Mosha and Another, Civil Application No.210/01 of 2017 CAT at Dar es Salaam (Unreported) pp. 11-12** and **Sebastian Ndaula Versus Rwamafa (Legal Personal Representative of Joshwa Rwamafa) Civil Application No.4 of 2014 CAT at Dar es Salaam (Unreported) at p.8**

Guided by the above settled position of the law, the Applicant have failed to account for the twenty one days of delay from 10/10/2022 when he was supplied the order of this court withdrawing Civil Appeal No.116 of 2020 to 2/11/2022 when he filed this application in this court

Yet there is again another pertinent issue that need to be resolved in this application. That, the matter being one originating from the primary court; was there any need by the Applicant to await to be supplied the impugned decision of Temeke District Court in Civil Revision No. 11 of 2019 before he could appeal to the High Court? The answer is certainly No. This is because **section 25 of the MCA** which caters for appeal in matters originating from the primary court do not require one appealing to annex the decision appealed against in his petition of appeal. Suffice to file the grounds of appeals only. Nowhere enjoin one to accompany the copy of ruling or drawn order. Facing the scenario similar to this, in **Patrick Muga Versus Cornel Tehingia, Misc. Civil Application No.47 of 2005 High Court at Dar es Salaam (unreported)** at pp. 3 – 4 where this court had this to state:-

*"There is nowhere in the law provided that a copy of judgment is mentioned to be attached to the petition of appeal. **So, if the applicant delays to file his petition of appeal due to his ignorance, so as to wait for the***

copy of judgment, the court can not hold it as a good reason for the grant of the application. No application will be granted because of ignorance. To go further, even if the learned counsel for the applicant wanted to read the judgment of the district appellate court, he could, with minimum fees paid, be allowed to read the court proceedings in the supervision or seeing of a court official”

This court went further by stating thus:-

*“On those reasons, **the grant of leave to appeal out of time has no merit for the reasons already stated**”.* End of quote

I wholly subscribe to the findings above reached by my learned brother Hon. A.R. Manento, J.K (as he then was).

In the upshort, I hereby dismiss the Application for being devoid of merit. I dismiss it with no order as to costs. It is so ordered.

Right of Appeal explained.

Dated at **Dar es Salaam** this 17th day of February 2023.



MUSA K. POMO

JUDGE

17/02/2023

