

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

MISC. CIVIL APPLICATION NO. 10 OF 2022

*(Arising from District Court of Masasi at Masasi in Civil Appeal No. 14 of 2021 dated 16.03.2022. Originating from Shauri la Madai No. 71 in the Primary Court of Lisekese, at Masasi dated 22.10.2021)*

**Chama Cha Msingi Mshikamano .....APPLICANT**

**VERSUS**

**Azizi Hakika Katani..... RESPONDENT**

**RULING**

*Date of last Order: 09.03.2023*

*Date of Ruling: 22.03.2023*

**Ebrahim, J:**

The Applicant herein has made the instant application under the provisions of **section 25(1)(b) of the Magistrates' Courts Act, Cap 11 RE 2019 and Rule 3 of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules, GN No. 312 of 1964.**

The Applicant is praying for the court to extend time so that she can appeal against the judgement and orders of the District Court of Masasi at Masasi in Civil Appeal No. 14 of 2021. As required by the law, the application is supported by an affidavit sworn by Robert K. Dadaya, counsel for the applicant.

Going by the averments of the applicant in her affidavit, she contended that after the decision of the District Court which was delivered on 13<sup>th</sup> March 2022, the applicant's counsel timely filed PC Civil Appeal No 5 of 2022 at this court on 13<sup>th</sup> April 2022. However, the same was struck out by the court on 4<sup>th</sup> July 2022 following the preliminary objection raised by the counsel for the respondent that the appeal is incompetent as it was not attached with the copy of a decree. Therefore, counsel for the applicant lodged a letter to the district court on 5<sup>th</sup> July 2022 requesting for a copy of ruling and a drawn order. Nevertheless, it was until 30<sup>th</sup> August 2022 that counsel for the applicant became aware that the preliminary objection was a misconception as there is no requirement of attaching a copy of judgement and decree on appeal originating from the primary court. He thus attributed the delay to the technical delay which was caused by an oversight by the court and both parties in consideration of the fact that the appeal was promptly filed. She lightly mentioned that there is illegality which needs to be cured in an appeal.

The respondent through his legal counsel one Hussein Mtembwa who affirmed the counter affidavit; save for the paragraphs of the affidavit of the applicant that he noted, contended that it was counsel for the

applicant who conceded to the preliminary objection raised and prayed for the appeal to be struck out. He contended further that counsel for the applicant confused the court by filing the appeal at the High Court instead of the District Court of Masasi. He contended also that the remedy available for the applicant was to seek review of the order so that the error can be rectified. He added also that the applicant's affidavit does not account for the delay between 4<sup>th</sup> July 2022 to 6<sup>th</sup> September 2022.

When this application was called for hearing, the applicant was represented by advocate Robert Dadaya; whilst the respondent preferred the service of advocate Hussein Mtembwa who was assisted by advocate Rose Ndemereje.

Submitting in support of the application, advocate Dadaya firstly adopted the contents of the affidavit in support of the application to form part of his submission.

He began by reiterating the story of struck out appeal for none attachment of the copy of judgement and decree of which he termed it as a human error on part of the bench and the bar. He insisted that initially the appeal was filed timely save for the struck out order which is a technical error. He invited this court to seek guidance from the

principle illustrated by the Court of Appeal cases of **Constantine Victor John Vs Muhimbili National Hospital**, Civil Application No. 214/18 of 2020 at page 10; and **Fortunatus Masha Vs. William Shija and Others** [1997] TLR, 154 – which discussed technical delay against real or actual delay being a good reason to extend time where the case was filed on time but found to be incompetent.

He submitted also that they could not apply for review because they realised that the appeal has been wrongly filed at the High Court instead of the District Court. He prayed for the application to be allowed.

Responding to the arguments by the counsel for the applicant, advocate Mtembwa, counsel for the respondent vigorously resisted the application and contended that the confusion was caused by the Applicant by filing the matter at the High Court instead of the District Court. He said also that it was the applicant's counsel who on 4<sup>th</sup> July 2022 conceded to the preliminary objection and prayed for the appeal to be struck out and the court accordingly struck out the same with costs. He argued therefore that counsel for the applicant ought to have filed an application for review as there is a discovery of the new issue instead of filing the instant application. Speaking of the issue

raised by the counsel for the applicant on the incompetence of the appeal for having filed the same at the High Court instead of the District Court, advocate Mtembwa resisted such a reason because it is coming from the bar. He further referred to their counter affidavit where they challenged the fact that the applicant has not accounted for each day of delay from 4th July 2022 to 6th September 2022 which is more than 63 days. He urged me to visit the case of **Ngao Godwin Roseto Vs Julius Mwarabu**, Civil Application No. 10/2015 which insisted that the delay must be accounted for.

He also distinguished the cited case of **Constantine John (supra)** on the basis that the confusion occurred is not a technical error. He thus prayed for the application to be dismissed with costs.

In brief rejoinder, advocate Dadaya challenged the proposed route of review or appeal as suggested by the counsel for the respondent on the reason that once the matter is struck out it is none existent in law. Therefore, the court cannot act on a vacuum. Therefore, the correct route is to apply for extension of time and no confusion would occur as the applicant is starting afresh. Referring to para 13 and 14 of the affidavit, advocate Dadaya said he came to know late about the

mistake done of striking the appeal. He thus repeated his earlier prayers.

Verily, on an application for extension of time, the law is settled that for a court to exercise its judicial discretion to extend time, the applicant must establish reason for the delay.

The requirement of showing reasons for the delay is so provided under **Rule 3 of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules, GN No. 312 of 1964** where it is stated as follows:

*"An application for leave to appeal out of time to a district court from a decision or order of a primary court or 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..."*.

The case law expounded further that the applicant must not only set out the reasons but it should be good reason(s)/good cause for the delay. This position has been illustrated in a plethora of authorities including the case of **Hamisi Mohamed (as an administrator of the estate of the late Risasi Ngawe) Vs. Mtumwa Moshi (as administratrix of the estate of the late Moshi Abdallah)**, Civil Application No. 407 of 2019; and the cited case of **Ngao Godwin Rosefo Vs Julius Mwarabu (supra)**.

It is again the cardinal principle of the law that in application of this nature, the applicant must also account for each day of delay -

**Constantine Victor John Vs Muhimbili National Hospital** (supra).

I have carefully followed the reasons for the delay advanced in the applicant's affidavit and the countered reasons as to why the same should not be granted, as well as the rival submissions thereof.

What I learnt is that the applicant's counsel placed the blame to the bench and the bar for having mistakenly struck out the timely filed appeal which originated from the Primary Court for not having attached a copy of the judgement and decree. He is certain that it is a technical delay. He has also raised an issue that the said appeal was again mistakenly directly filed at the High Court whilst it was supposed to be filed at the District Court.

The principle "**technical delay**" was defined in the case of **Fortunatus Masha vs, William Shija and Another** [1997] TLR 154, in the following words:

*"... A distinction should be made between cases involving real or actual delays and those like the present on which only involve what can be called technical delays in the sense that the original appeal was lodged in time but the present situation arose only because the original appeal for one reason or another has been found to be incompetent and a fresh appeal has to be instituted."*

Thus, in law a technical delay is excusable in opportune circumstances and constitutes a sufficient reason for granting the extension of time and it applies where the previously struck out/dismissed matter had been filed timely but found to be incompetent. Hence, necessitating the filing of a fresh appeal/application for that matter.

Incidentally, in this application the filed appeal was struck out for having been found to be incompetent before this court for not being accompanied with a copy of judgement and decree. Both parties agree that it was an oversight as procedurally, there is no requirement to attach a copy of judgement and decree on an appeal originating from the Primary Court. Since it is not disputed that the previous appeal was lodged in the High Court timely, I hasten to agree with the counsel for the applicant that the delay in that aspect was technical – see the cited case of **Constantine Victor John (supra)**.

Another issue that cropped up is that the applicant did not account for the delay from 4<sup>th</sup> July 2022 to 6<sup>th</sup> September 2022 when this application was filed.

Going by the affidavit of the applicant's counsel, he stated at para 5 of the affidavit that after the struck out order of 4<sup>th</sup> July 2022, he wrote a letter on 5<sup>th</sup> July 2022 (annexure RD-6) requesting for a copy of



judgement and decree at the District Court of Masasi. However, it is not known when he was availed with the same though the same was certified on 28<sup>th</sup> March 2022. Applicant's counsel said he came to realise that the matter was struck out erroneously on 30<sup>th</sup> August 2022 and decided to take the instant route of starting afresh. He pointed out that he has also realised that the appeal was filed at the wrong court hence seeks to start with the correct procedure. On the other hand, counsel for the respondent is strongly resisting the same on the reason that the issue of wrong court is not stated in the affidavit and it is a submission from the bar. He also suggested that the applicant ought to have filed the review.

While I agree that the issue of wrong court comes from the bar, still, as correctly argued by the counsel for the applicant, once the matter is struck out, the applicant is afforded with a fresh and correct start without reservations unless otherwise.

As for accounting for each day of delay, I invoke the rules of wisdom and justice in considering this case on its peculiar circumstances on the reason that the instant stage has been reached following a misconception of the counsel for the respondent of raising an irrelevant preliminary objection. The raised objection had domino effect which at

the end found the court issuing a struck out order. I would not want to contemplate the court order or decision if the issue of wrong court was raised by then, still the escalated result began with the counsel for the respondent and of course accelerated by the counsel for the applicant by praying for the struck out order after concession of the preliminary objection.

It is therefore my concerted views that this is one of the cases that this court has to invoke rules of reasoning and justice and consider the application on its peculiar circumstances and in so doing accommodating the delay between 4<sup>th</sup> July 2022 to 6<sup>th</sup> September 2022.

I am inspired by the holding of the Court of Appeal in the case of **Israel Malegesi and Francis Maingu VS Tanganyika Bus Services**, Civil Application No. 172/08 of 2020 pg 12 (unreported) where the court invoked its wisdom and emphasised on consideration of the good cause to grant or refuse extension of time on the peculiar facts and circumstances of each case where need arise. The Court held as follows:

"The term "good cause" is not defined in the Rules. Nonetheless, the Court has stressed that in assessing whether there is "good cause", each case has to be considered on its own peculiar facts and circumstances and the court must **always be guided by the rules of reasons and justice, and not according to private opinion, whimsical inclination or arbitrarily**".

Inspired by the above wisdom of the Court of Appeal, I am equally inclined by parity of reasoning and guided by the rules of justice and equity to allow this application following the fact that each party had a contribution to the reached stage so that the applicant could be availed opportunity to pursue her right of appeal.

It is on the above explained reason, I allow the application. The applicant is availed with thirty (30) days from the date of this ruling to file the intended appeal. Costs shall be in the main cause.

Accordingly ordered.



A handwritten signature in blue ink, appearing to read "R.A. Ebrahim".

**R.A. Ebrahim**

**JUDGE**

**Mtwara**

**22.03.2023**