IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 377 OF 2022

MUHIMBILI NATIONAL HOSPITAL ..... APPLICANT

VERSUS

ANITA KAVEVA MARO ..... RESPONDENT

(Arising from the decision of this Court in Civil Case No. 21 of 2016)

RULING

28th February & 6th April, 2023

KISANYA, J.:

By Chamber Summons preferred under section 11(1) of the Appellate Jurisdiction Act, Cap. 141, R.E. 2019 (the AJA) and section 95 of the Civil Procedure Code, Cap. 33, R.E. 2019, the applicant, Muhimbili National Hospital prays for extension of time within which to lodge notice of appeal to the Court of Appeal against the judgment and decree of this Court (Mutungi, J) dated 20th October, 2019 in Civil Case No. 21 of 2016. Supporting the application is an affidavit deposed by Eneza Msuya, Senior Legal Officer of the applicant.

According to the supporting affidavit, a brief background of this matter is that, the respondent sued the applicant in this Court through Civil Case No. 21 of 2016. She won the case. In its judgment dated 20th October, 2019, the Court ordered the applicant to pay the respondent damages of TZS 50,000,000/=. Not amused, the applicant timely lodged a Notice of Appeal to

the Court of Appeal on 28th November, 2017. It turned out that the applicant did not take necessary steps to institute her appeal. Therefore, on 9th April, 2021, the respondent moved the Court of Appeal to strike out the notice of appeal for want of leave to appeal by the applicant and failure to take the necessary steps to institute the appeal. The said application was registered as Civil Application No. 164/01 of 2021. The applicant conceded to the application. In the end result, the notice of appeal was struck out by the Court of Appeal on 16th August, 2022. It is deposed that, on the same day, the applicant noticed legal issues or illegalities of the impugned judgment as follows:-

a. *Whether the trial High Court was correct in law to make an Order for payment of Tsh. 50,000,000/= to the Respondent without considering and ascertaining the extent of the purported general damages sustained by the Respondent.*
b. *Whether the trial Court was correct in law to rule out that the Respondent suffered damages without specifically pointing out the kind and nature of damages that the Respondent is said to have suffered to warrant for an order for payment of Tsh. 50,000,000/= as compensation in lieu thereof*

Thus, on 31st August, 2022, the applicant decided to lodge the instant application. It is contested by the respondent, vided an affidavit deposed by her counsel, Mr. Evold Mushi.

At the hearing of the application, the applicant was represented by Mr. Stanely Mahenge, learned State Attorney, whereas the respondent had the legal services of Mr. Adolph Temba, learned advocate.

Submitting in support of the application, Mr. Mahenge started by adopting the supporting affidavit to form part of his submission. Elaborating on the reasons for delay, he asserted that the impugned decision is tainted with illegalities as deposed in paragraph 8 of the supporting affidavit. The learned counsel was mindful of the settled position that this Court has discretion to grant extension of time and that the applicant is duty bound to show a sufficient cause for the delay. He went on to submit that illegality is a sufficient cause for extension of time. To support his argument, Mr. Mahenge cited the case of **Principal Secretary, Ministry of Defence & National Service v. Devram Valambhia** [1992] T.L.R 185, cited in **Attorney General vs Emmanuel Malangakis (As Attorney of Anastansious Anagnostou) and 3 Others**, Civil Appeal No. 138 of 2018, CAT at DSM (unreported), where it was underscored that:

> *"Where, as here, the point of law at issue is the illegality or otherwise of the decision being challenged, that is of sufficient importance to constitute "sufficient reason within the meaning of rule 8 (now rule 10) of the Rules for extending time."*

On that account, the learned State Attorney urged the Court to grant the application basing on the ground of illegality deposed in the supporting affidavit.

In his response, Mr. Adolph started by adopting the contents of the counter-affidavit. The learned counsel submitted that, the applicant did not do due diligence as the issue of illegality was discovered after the notice of appeal against the impugned decision had been struck out by the Court of Appeal.

On the issue of illegality, he submitted that there was no illegality in the impugned decision and that the points of law deposed in the supporting affidavit are grounds of appeal in the intended appeal. Making reference to the case of **Attorney General vs Emmanuel Malangakis (As Attorney of Anastansious Anagnostou) and 3 Others** (supra), he argued that the illegality in the case at hand is not on the face of the record.

Further to the above, the learned counsel argued that the applicant had not accounted for the delay from 16th August, 2022 to 31st August, 2022.

That said, he prayed the application to be dismissed with costs for want of merit.

In his brief rejoinder, Mr. Mahenge reiterated that the grounds deposed in paragraph 8 of the supporting affidavit raise the issue of illegality.

Having considered the contending submissions, the issue for determination is whether the application is meritorious or otherwise.

My starting point in respect of this application will be section 11(1) of AJA. The said provision empowers this Court to extend time for giving notice of intention to appeal. That being a discretionary power, it must be exercised

judiciously. In so doing, the Court is duty bound to consider whether sufficient cause for delay has been established by the applicant. It is a principle of law that sufficient cause is determined based on the circumstances of each case and by considering various factors such as reason for the delay, length of the delay, explanation accounting for such delay or existence of a point of law or illegality of sufficient public importance of the impugned decision. For instance, in the case of **Attorney General vs Emmanuel Malangakis (As Attorney of Anastansious Anagnostou) and 3 Others** (supra) relied upon by both parties, the Court of Appeal underlined that:

> *"The Court has, in various decisions, stressed that the applicant should show good cause before time can be extended for him to do a certain act. These decisions include those in the cases of* ***Abdallah Satanga & 63 Others v. Tanzania Harbours Authority****, Civil Reference No. 08 of 2003 at Dar es Salaam and* ***Sebastian Ndaula v. Grace Rwamafa****, Civil Application no. 4 of 2014 (both unreported). However, what constitutes good cause has not been codified, although this Court has in various instances stated a number of factors to be considered. These include; whether or not the application has been brought promptly; the absence of any or valid explanation for the delay; the lack of diligence on the part of the applicant, the applicant be able to account for the entire period of delay and existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged."*

In the instance case, the applicant has raised the ground of illegality of

the impugned judgment. It is settled position of law that illegality of the decision sought to be challenged is a sufficient ground for extension of time regardless of whether or not reasons for delay has been given. This stance is derived from the case of **The Principal Secretary Ministry of Defence and Notional Service vs. Devram Valambia** (supra) when the Court of Appeal held that:

> *"When the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and the record right"*

However, the law is settled, as held in the case of **Lyamuya Construction Limited v. Board of Trustees of Young Women's Christian Association of Tanzania,** Civil Application No. 2 of 2010 (unreported), that not every error on a point of law constitutes an illegality. It must be established that the court acted illegally for want of jurisdiction, or for denial of right to be heard or that the matter was time barred. See also the recent decision of the Court of Appeal in the case of **Charles Richard Kombe vs Kinondoni Municipal Council**, Civil Reference No. 13 of 2019 (unreported), where the it was stated that:

> *"... it is our conclusion that for a decision to be attacked on ground of illegality/ one has to successfully argue that the court acted illegally for want of jurisdiction, or for denial of right to be heard or that the matter was time barred. **In***

Chunila Dahyabhai v. Dharamshi Nanji and Others, *AIR 1969 Guj 213 (1969) GLR 734, which we find persuasive, the following paragraph was quoted from the decision of the Supreme Court of India in AIR 1953 SC 23:-*

> *"…the words 'illegally' and 'material irregularity' do not cover either errors of fact or law. They do not refer to the decision arrived at but to the manner in which it is reached. The errors contemplated relate to material defects of procedure and not errors of either law or fact after the formalities which the law prescribes have been complied with".*

As stated earlier, the applicant fronted two points of illegality to the following effect; one, the Court erred in law to make an order for payment of TZS 50,000,000/= without considering and ascertaining the extent of the purported general damages sustained by the respondent; two, the Court erred in law in holding that the Respondent suffered damages without specifically pointing out the kind and nature of damages to warrant compensation of TZS 50,000,000/=. It is my considered view that both points do not constitute illegality of the judgment to be challenged. This is so when it is considered that the learned State Attorney did not elaborate on how the said points constitute illegality.

Reverting to the requirement of accounting for each day of delay, I agree with Mr. Temba that the applicant has not accounted for the delay from 16th August, 2022 when the notice of appeal was struck out by the Court to 31st

August when the present application was lodged in this Court. Since the applicant deposed to have noticed the alleged illegality on 16th August, 2022, she was expected to act promptly to file the application.

In the upshot of the above, I find no merit in this application and I dismiss it with costs.

DATED at DAR ES SALAAM this 6th April day of 2023.

S.E. KISANYA
JUDGE