

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF ARUSHA)
AT ARUSHA**

PC. CIVIL APPEAL NO. 23 OF 2022

*(C/F Misc. Civil Application No. 30 of 2022, originating from Arusha Urban Primary Court
Civil Case No. 160 of 2020)*

DIDAS NARSIS MUSHI.....APPELLANT

VERSUS

KAUNDA ASSENGA RESPONDENT

JUDGMENT

21/2/2023 & 21/04/2023

GWAE, J

Before Arusha Urban Primary Court (hereinafter trial court), the respondent, Kaunda Assenga instituted a civil suit claiming Tshs. 13, 000, 000/= against the appellant, Didas Narsis Mushi. The appellant admitted liability to the extent of Tshs. 500,000/=. In its conclusion, the trial court gave its verdict awarding the respondent a sum of Tshs. 7,400,000/= out of Tshs. 13, 000,000/=.

Seemingly, the appellant desired to appeal against the decision of the trial court delivered on **28th day of May 2021**, he knocked the doors of Arusha District Court with a view of appeal. However, he was out of the prescribed period of thirty days from the date of pronouncement of

judgment or making of an order to the date of filing his appeal. This legal requirement provided under section 20 (3) of the Magistrate Court Act, Cap 11 Revised Edition, 2019 (the Act) within which an appeal for a matter originating from a primary court may be preferred. He thus filed an application for extension of time in the Arusha District Court under section 20 (4) of the Act on **27th July 2021**.

Upon hearing the appellant's application for extension of time, the District Court, on **23rd February 2022** delivered its ruling dismissing it. The basis for the dismissal as depicted in the ruling is that the appellant did not account for the delay of 29 days that is from when the time for appealing lapsed and that issue of illegality alleged in the submission was not supplicated in the appellant's affidavit.

On 16th March 2022, the appellant manually presented this appeal for by way of petition of appeal containing four grounds however in essence there are three grounds of appeal namely;

1. That, the District Court erred in law and fact for not considering the appellant's reasons for delay
2. That, the appellant erred in law and fact for failure to consider appellant's points of law in his application for extension of time

3. That, the appellant erred in law and fact for considering extraneous matters contrary to what had been submitted by the appellant

On the 15th day of December 2022 when this appeal was called on for hearing, the appellant who appeared unrepresented. Therefore, he sought leave to dispose of the appeal by way of written submission in order to legally assisted. Mr. Mitego Methusela, the learned advocate who appeared representing the respondent offered no objection to the appellant's prayer. Consequently, the parties duly filed their respective submission in conformity with the order.

The appellant in his written submission decided to combine the above grounds of appeal into one ground. He argued that he managed to timely file his appeal however as he was not aware of the newly introduced E-filing system in our judiciary. He met one Idrissa who disallowed him from manually filing his appeal and advised him to file it electronically. He referred this court to the decision of the Court of Appeal in **Benecdict Shayo vs. Consolidated Holding Corporation as Official Receiver of Tanzania Film Company Limited**, Civil Application No. 366/01/2017 (unreported) where it was held;

"The court must consider factors such as length of delay, reasons for delay, the decree prejudice, the respondent stands to suffer if the is extended, whether the applicant

was diligent, whether there is point of law of sufficient importance such as illegality of the decision sought to be challenged and the overall importance of complying with the prescribed timelines.”

Submitting on the ground of illegality, the appellant stated that the trial court decision is tainted with several irregularities especially in the amount of money awarded and the evidence adduced by the respondent

Arguing against the appeal, the respondent's counsel stated there is no material fact to prove if the appellant met the said Idrissa and is his appeal was rejected until it is electronically. He thus asked the court to disregard this reason for lack of proof. According to Mr. Metusela, the appellant was to account for the delay of 29 as correctly found by the District Court. He added that there is apparent point of law demonstrated by the appellant in the decision intended to be appealed.

He also urged this court to exercise its discretion according to rules of reason and justice and not according to private opinion or randomly. He then asked the court to consider the following factors, length of delay, account for all day of delay, exhibition of diligence and not apathy, negligence or sloppiness in the prosecution of an action that he or she intends to take. He referred the judicial decision of the Court of Appeal in

Lyamuya Construction Company Limited vs. The Board of

Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No 2 of 2010 (unreported).

That is what transpired before the trial court, District Court and in this court on appeal. The noble duty of the court is now to ascertain, if the applicant had given sufficient cause including days of delay and whether there is a point (s) of law apparent on the face of the record demonstrated by the appellant before the District Court.

As the trial decision was delivered on **28th day of May 2021**, the appellant's appeal was to be filed by 27th June 2021 and not 28th June 2021. Therefore, on 29th June 2021 when he met Mr. John Shirima, the learned advocate he was already late for two days. That means his appeal would not be electronically processed /admitted as was the case before the District Court.

That, being the case, though an affidavit of one Idrissa was vital to support the appellant's version in his application for extension (see **Hemedi Saidi v. Mohamedi Mbilu** (1984) TLR 113)). However, in my considered view, that since the time for filing an appeal had already lapsed for one day to file his appeal and the fact that, on the following day the appellant met Mr. Shirima for legal facilitation particularly electronically filing the appeal on 29th June 2021. The appellant was therefore required to account for the day of his delay from when he instructed Mr. Shirima

(from 30th June 2021) to when he was informed that the appeal was time barred (12th July 2021) and when he filed his application for extension of time that is on 27th day of June 2021.

Assuming that the period when the appellant instructed his counsel on 30th June to 12th July 2021, is the laziness or sloppiness of his counsel. Therefore, he should be exempted for the negligence of the advocate who might not be familiar with the electronic filing system or a way forward promptly. It is therefore worthwhile if I subscribe the decision of the Court of Appeal in **Zuberi Mussa v. Shinyanga Town Council**, Civil Application No. 3 of 2007 (unreported) where it was correctly stated;

“Advocates are human and they are bound to make mistakes sometimes in the course of their duties whether such mistakes amount to lack of diligence is a question of fact to be decided against the background and circumstances of each case if, for instance the advocate is grossly negligent and makes the same mistakes several times, that is lack of negligence. But if he makes a minor lapse or oversight only once and makes a different one next time that would not, in my view, amount to lack of diligence”

In our instant case, it is not disclosed as what made the appellant of his failure to close follow up the progress of his appeal from 30th June 2021 to 12th June 2021. If he had no phone number. However, in the

circumstances of this case, the advocate may be excused from being condemned of negligence since he might have not been instructed to file an application for lack of instruction or an application would involve payment of court's fees without undue regard to an intent and eagerness to pursue an application by the applicant.

Worse still the appellant did not account for his delay from 12th July 2021 when he was formerly informed that he had to file an application for extension of time within which to file an appeal as period for filing the appeal was no longer in his favour to 27th July 2021. A further delay of 14 days. Examining, the applicant's sworn affidavit filed in the District Court, nowhere the appellant accounted for the delay of fourteen (14) days. In that premises, the District Court cannot frivolously be faulted for the alleged undermining of the appellant's reasons for it is clear that the appellant did not account for each day of his delay. Failure to incorporate reason for delay in an affidavit is fatal in application for extension. The position of the law was judicially emphasized in **The Registered Trustees of the Archdiocese of Dar es salaam vs. The Chairman Bunju Village Government**, Civil Appeal No 147 of 2006 (unreported) and had the following to say;

"To start with, it is not in dispute that no reasons for the failure to appeal in time were given in the affidavit in

support of the application before the High Court. Since, as correctly submitted by Mr. Mhango, an affidavit is evidence we think it was expected that reasons for the delay would be reflected in the affidavit. In the absence of reasons, it occurs to us that there was no material evidence upon which the judge could determine on merit the application before him. We appreciate Mr. El Maamry's point that a political settlement out of Court was given in the written submissions as a reason for the delay. With respect however, submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered."

See also unreported decision of the Court of Appeal in **Bushiri Hassan v. Latifa Mashayo**, Civil Application No. 2 of 2007; **Bariki Israel v. Republic**, Criminal Application No. 4 of 2011. Others are **Crispian Juma Mkude v. Republic**, Criminal Application No. 34 of 2012 and **Sebastian Ndaula v. Grace Rwamafa (Legal Representative of Joshwa Rwamafa)**, Civil Application No. 4 of 2014.

In this present matter, the appellant had not accounted for the 12 days followed by 14 days which remain uncounted for.

Now coming to the issue of illegality or point of law, the appellant endeavored to show that the award of Tshs. 7,400,000/= is not consistent with the evidence adduced before the trial court. It is my considered view

that an issue relating evidence does constitute a point of law or illegality that requires intervention in an intended appeal, therefore not good cause for extension of time. Complaints on evaluation of evidence cannot therefore be a basis of extension of time but error or illegality which is not only apparent on the record but also of the sufficient importance. Therefore, I agree that issue of illegality constitutes sufficient reason for extension of time as was held in the case of **VIP Engineering and Marketing Limited and Two Others vs. Citibank Tanzania Limited**, Consolidated Civil Reference No.6, 7 and 8 of 2006 (unreported-CAT) but not alleged failure of analysis of evidence. Therefore, this ground of appeal is also dismissed for lacking merit.

Consequently, the appeal is dismissed. The Decision of the District is therefore upheld. The appellant shall bear the costs of appeal

Ordered accordingly

Dated at **ARUSHA** this **21st day of April, 2023**




M. R. GWAE
JUDGE