

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 551 OF 2022

(Arising from the decision of the District Court of Kibaha at Kibaha in Civil Appeal No. 4 of 2022 and Originated from the Judgement of Mkuza Primary Court of Kibaha at Mkuza in Civil Case No. 34 of 2022)

FLORIAN FRANCIS RUTAHINDURWA.....APPLICANT

VERSUS

FC KASHINA HARDWARERESPONDENT

RULING

14th March, 2023 & 21st April, 2023

POMO, J.

The applicant herein intends to challenge the decision of the District Court of Kibaha at Kibaha in *Civil Appeal No. 4 of 2022* by way of appeal to this Court, however, as the contents of this application depicts, the applicant delayed to lodge his appeal timely and therefore vide the instant application, he is seeking for an extension of time to lodge his appeal out of time.

Apparently, the application was heard *ex-parte* against the respondent after the respondent's failure to either lodge her Counter affidavit nor enter

appearance in Court despite the efforts made by the process server to effect service to her.

Essentially, the impugned decision of the Lower Court was delivered on 10th August, 2022 of which the District Court of Kibaha was entertaining an appeal which originated from Primary Court of Mkuza. As deposed, the applicant ought to have lodged his appeal within 30 days of the decision. Technically, the applicant was supposed to lodge the said appeal not later than 9th August, 2022 but until to date the same has not been filed. It is apparent that, the applicant did lodge this application on 30th November, 2022 which is 112 days from the date of the decision. This is equivalent to 82 days delay after expiration of 30 days from the date of the decision.

Supporting the application is the affidavit sworn by the applicant himself, Florian Francis Rutahindurwa, grounds on which the application is based are set out. The applicant's contention is that, the delay was triggered by his advocate whom he entrusted to pursue the said appeal timely but ended up disappointing him. It has been further deposed that, the applicant's advocate assured him on progress of his appeal but regardless the same, the applicant took trouble to make follow ups and on 25th November, 2022 got acquainted with the fact that, the said advocate who

had Roll No. 2270 was barred from practicing as he had not renewed his practicing certificate. For that reason, he promptly decided to lodge this application on 28th November, 2022 online

Besides, the applicant has also contended that, there is illegality on the decision of the lower Court on the ground that, the Court had erred to rule out that, the Law of Limitation Act, Cap 89 is not applicable in Primary Court.

When afforded opportunity to submit in support of application, Mr. Mafuru Mafuru, learned advocate for the applicant argued that, the delay was caused by a fault of the applicant's advocate who had the conduct of the matter whom had assured the applicant on the progress while the process was still legally tenable and within time, but failed to perform his obligations.

Mr. Mafuru went on to state that, the law preferred by the applicant empowers this Court to extend the time upon giving sufficient reason for the delay. To cement the point, he cited the cases of **Lyamuya Construction Co. Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, CAT at Arusha, Civil Application No. 10 of 2010

(unreported) and **Tanzania Posts Authority vs. Ms. Pembe Flour Mills Ltd**, Civil Application No. 48 of 2009, CAT at Dar es salaam (Unreported)

Regarding illegality, the view held by Mr. Mafuru 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 **Moto Matiko Mabaga vs. Ophir Energy PLC and 2 Others**, Civil Application No. 463 of 2017, CAT at Dar es Salaam (unreported). He went on to state that, the illegality deponed in the applicant's affidavit is in respect to the point that in the lower Court's decision that, the law of limitation Act, Cap 89 R.E 2019 (herein after LMA) isn't applicable in Primary Court. This was premised on the argument fronted in one of the grounds of appeal which in essence the applicant (appellant by then) was claiming that the matter was time barred basing on LMA but the lower Court decided that, the applicable law was not LMA but rather, the **Magistrate Court Act (Limitation under Customary Law) rules**. From this point, the applicant's advocate argues that, it was an illegality.

Having heard the submissions by the applicant, the single question to be resolved is whether the reasons advanced by the applicant are worth enough to warrant extension of time sought.

At the outset, grant of extension of time is a discretionary power of the court exercisable judiciously. It entails carrying a proper analysis of the facts, and application of law to the facts. It is only upon satisfaction that the applicant has presented a credible case that the said discretion is triggered. In other words the party seeking to have the remedy, should adduce sufficient cause for such delay. This position has been restated in a multitude of decisions in this court and the Court of Appeal. In **Nicholaus Mwaipyana vs. The Registered Trustees of Little Sisters of Jesus of Tanzania**, Civil Application No. 535/8 of 2019, CAT at Dar es Salaam (unreported), the Court held that at page 7 that:

"The power to extend time given under this provision is discretionary, but such discretion must be exercised judicially, meaning the making of a logically sound decision based on rules of the law. That requires the attention of the court to all the relevant factors and materials surrounding any particular case. These factors include the length of the delay, the reason for the delay, and whether or not there is an arguable case, among others."

Besides, it is the cardinal principle of law that each case be judged according to its own circumstances. In the present application, the applicant has demonstrated that, the delay was caused by negligence of his previous advocate and also is relying on illegality in the impugned decision.

As for negligence, the applicant is contending that his advocate failed to file the appeal within the prescribed time negligently, but again the said advocate was unqualified as he had not renewed his practicing certificate. The applicant gave account on how he made follow ups and his efforts went in vain, as well as how he came lately to discover that his advocate was unqualified to present the said appeal in Court.

Generally, negligence or lack of diligence of an applicant's advocate does not constitute good cause to grant extension of time. However, in **Yusufu Same and Hawa Dada vs. Hadija Yusuf**, Civil Appeal No. 1 of 2002, CAT at Dar es Salaam (Unreported), the Court of Appeal, relying on its earlier decision of **Felix Tumbo Kisima v. TTC Limited and Another**, Civil Application No. 1 of 1997 (unreported) at page 10 articulated that; -

"But there are times, depending on the overall circumstances surrounding the case, where extension of time may be granted even where there is some element of negligence by the applicant's advocate ..."

Guided by the above, in the instant application, the applicant had done all he could by leaving the matter to the hands of the advocate who acted negligently and who again had concealed the fact that he was unqualified.

The circumstances of the case, in my view, calls for the applicant to be given an opportunity to pursue his cause to its finality. This can only be done by granting the order sought in the instant application.

Reason for taking that path is supported by the decision of this court in the case of **Africa Engineering & Construction Co. Ltd vs. The Registered Trustees of the Diocese of Central Tanganyika**, Misc. Commercial Cause No. 4 of 2020, HCT, Commercial Division at Dar es Salaam (Unreported) where it was held that;

*"...In my view, Mr. Masinga appeared as a representative of a client (the respondent) who in bonafide hired him knowing that he was a qualified advocate. **In view of this, should the sins of Mr. Masinga be allowed to visit the innocent client? I think not. In the interest of justice, the rights of an innocent client need to be secured.**"* [Emphasis is added]

(See also the case of **Marco Elias Buberwa vs. Agnes Kokushekya Elias Buberwa**, Misc. Civil Application No. 253 of 2020, HCT at Dar es Salaam (Unreported).

That said and done, 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 appeal. No orders as to costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 21st day of April, 2023.



MUSA K. POMO

JUDGE

21/04/2023

Ruling delivered in presence of Ms. Sia Ngowi, learned counsel for the Applicant and in absence of the Respondent.



MUSA K. POMO

JUDGE

21/04/2023

