

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MOSHI SUB REGISTRY)
AT MOSHI**

MISC. CIVIL APPLICATION NO.18 OF 2022

(Originating from Civil Case No. 1 of 2022 before Moshi- RM's Court)

**SALVATORY NICHOLAUS MBISHI.....APPLICANT
VERSUS
TANZANIA REVENUE AUTHORITY..... RESPONDENT**

RULING

Last Order: 31st March, 2023

Date of Ruling: 5th May, 2023

MASABO, J.:-

The applicant being aggrieved by a decision of the Court of the Resident Magistrate for Moshi in Civil Case No. 1 of 2022, is desirous of appealing to this court. As the time within which to file the appeal has lapsed, he has moved this court for leave to file his appeal out of time. The application is accompanied by an affidavit he has personally deposed in which the following background to the application and the reasons thereto are discerned. That, his suit was dismissed on 11/8/2022 after the court upheld a preliminary objection raised by the respondent asserting that the court was not clothed with jurisdiction to entertain the suit. After the dismissal of the appeal, he was not timely furnished with a copy of the ruling and drawn order. In spite of several followups, he was not furnished with the same until on 8/11/2022. By then, the duration within which to lodge an appeal to this court had lapsed hence the present application which is premised on only

one ground, namely delay in being furnished with the ruling and drawn order. The respondent, through a counter affidavit deposed by one Marcelly Costantine Kanoni who is identified as its legal counsel, contested the application and put the applicant to strict proof.

Hearing of the application proceeded in writing. Convincing the court to hold in the applicant's favour, Ms. Justus, the applicant's counsel, submitted that the application is well founded as there is a good cause within which to enlarge the time for filing the appeal. The applicant is not to blame for the delay as he was diligently pursuing his right and the delay was wholly occasioned by the trial court as it delayed in furnishing him with the ruling and drawn order even after close follow ups. As a result, there was nothing that he could do in pursuit of his right timely. In fortification of her point, Ms. Justus cited the case of **Transcontinental Forwarders Ltd vs Tanganyika Motors Ltd** [1997] T.L.R 328, **Mohsin Mohamed Taki Abdalla vs Tariq Mirza & Others**, Civil Application No. 100 of 2019, CAT at Dar es Salaam (unreported) in which it was held that all what the applicant had to do was to request for the copy of ruling/order and it was not his duty to remind the registry. He further cited the case of **Ngoni-Matengo Cooperative Marketing Union Ltd v Alimohamed Osman** [1962] 1 E.A1 where the court held that the applicant should not be condemned by a mistake done by the registry which supplied him with a wrongly dated decree. Based on these authorities, she prayed that the application be allowed and the leave be granted.

In his reply submission, Mr. Brian William Magoma, learned State Attorney, referred the court the decision of the Court of Appeal in **Lyamuya Construction Company Ltd v Board of Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, where it stated the factors for consideration in determining an application for extension of time. He proceeded that section 14 of the Law of Limitation Act [Cap 89 RE 2019] vests this court with discretion in enlargement of time but the discretion need be judiciously exercised. He then referred this court to the provision of section 19(2) of the Law of Limitation Act which provides for exclusion of the duration during which the applicant was waiting to be furnished with a copy of the ruling and argued that, when this period is excluded, it will follow that, only 15 days had lapsed when the applicant instituted this application. Impliedly, therefore, the time within which to file the appeal had not lapsed when this application was filed. Fortifying this point, he cited decisions of the Court of Appeal in **Mohamed Salimin v Jummane Omary Mapesa**, Civil Appeal No. 345 of 2019, **Alex Senkoro & Others v Elimbuya Lyimo**, Civil Appeal No. 16 of 2017 and **Methusela Enoka v National Microfinance Bank Ltd**, Civil Appeal No. 266 of 2019 all of which held in favour of automatic exclusion of the time within which the applicant was waiting to be furnished with the ruling and drawn order. However, he argued that the present application should not be granted as it was filed prematurely and the applicant has wasted his time in pursuit of the current application which was unnecessary.

In rejoinder, the applicant's counsel, cited a decision of this court in **Tanzania Assurance Co, Ltd & Another vs Richard Augustine Zuberi**, Civil Appeal No. 129 of 2019 and argued that, the exclusion of time under section 19 (2) is not automatic. Hence, it was crucial for him to seek for leave for extension of time

I have considered the submissions by both parties. The application being for extension of time has only one issue for determination, namely whether there is a good cause for extension of time. Before I address this issue, I will start with a preliminary issue raised in the submissions. In her submission in chief, the respondent's counsel has prayed that the affidavit should be expunged from the record as it appears to have been filed in Dar es Salaam. With much respect to the learned State Attorney, I will not entertain this issue as it was improperly raised in the course of written submission. Besides, even if it was properly raised, it would definitely fail as it appears to be a mere clerical error curable by the principle of overriding objective enshrined under section 3A and 38B of the Civil Procedure Code [Cap 33 RE 2019].

Having resolved the above issue, I now turn to Mr. Magoma's submission as regards whether this application was properly filed. The learned State Attorney has argued that, the present application was prematurely filed because the duration within which to appeal to this court had not lapsed when the applicant filed the present application in court. Cementing his argument, he has argued that, the duration within which to appeal from the Court of the Resident Magistrate to this court is 30 days. He has further, in

fortification, cited the provision of section 19(2) of the Law of Limitation Act which provides for exclusion of the days within which the applicant was waiting to be furnished with the copy of the ruling. Based on this provision he has argued that, when the days within which the applicant was waiting to be furnished with the ruling are excluded, it will follow that, the duration of 30 days had not lapsed when this application was filed. Thus, the application was improperly filed as the applicant was within time and needed not to file the present application.

In my considered view, the submission by Mr. Magoma resonates well with the law as it currently stands. As the submissions prominently exhibit, both parties are at one that, the ruling sought to be challenged was delivered on 11/8/2022 but its copy was furnished on the applicant on 8/11/2022 and 6 days later on 14/11/2022, he instituted the present application. Section 19(2) of the Law of Limitation Act which Mr. Magoma has cited in support of submission states thus;

19.-(2) In computing the period of limitation prescribed for an appeal, an application for leave to appeal, or an application for review of judgment, the day on which the judgment complained of was delivered, and the period of time requisite for obtaining a copy of the decree or order appealed from or sought to be reviewed, shall be excluded.

The essence of this provision can be easily understood when it is read in conjunction with the provisions of Order XXXIX Rule 1 of Civil Procedure Code [Cap 33 RE 2019], which mandatorily requires that appeals from subordinate courts (district courts and courts of resident magistrate) be

accompanied by a copy of the decision appealed against. It is in this context, section 19(2) of the Law of Limitation Act is coined to protect the appellant who would otherwise be wrongly condemned for a delay wholly occasioned by the court's failure to furnish him with the copy of judgment, ruling, decree or drawn order, as the case in point. Interpreting the above provision in **Alex Senkoro**, the Court of Appeal stated that;

"We entertain no doubt that the above sub-sections expressly allow automatic exclusion of the period of time requisite for obtaining a copy of the decree or judgment appealed from the computation of the prescribed limitation period. Such an exclusion need not be made upon an order of the court in a formal application for extension of time."

Also, the Court took the same stance in **Methuselah Enoka** (supra), where it did not only acknowledge the automatic exclusion but also stated that there is no need for a separate application nor according any attachment to a memorandum of appeal.

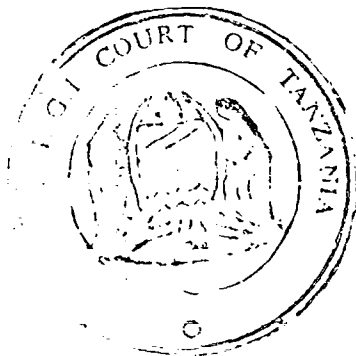
In the instant application, both parties agree that the ruling sought to be challenged was delivered on 11/8/2022 but its copy was furnished on the applicant on 8/11/2022 and 6 days later on 14/11/2022, he instituted the present application. Therefore, there can be no doubt that, as correctly submitted by the learned State Attorney, when these facts are applied to the authorities above, it becomes too obvious that this application was prematurely filed as at its institution, only 6 days had lapsed from the date of the obtainment of the copy of the ruling, a date from which the duration within which to appeal is reckoned. The present application was therefore

superfluous considering also that the decision sought to be challenged is a decision of the Court of the Resident Magistrate exercising its original jurisdiction whose time limit is within the realm of item 1 of the Part II of the Schedule to the Law of Limitation Act which provides for a time limit of 90 days which reckoned from 8/11/2022 lapsed on 5/2/2023.

Mr. Magoma has argued me to hold that, the applicant has lost the opportunity to file his appeal as he has wasted his statutory time loitering in court in pursuit of a superfluous application. Much as it is true that the time within which to file the appeal has lapsed and the said time was spent while pursuing the present application, it will be unjust to condemn and punish the applicant who has been diligently prosecuting the present application mistakenly believing that, he was legally obliged so. It is in my considered view that the delay occasioned while pursuing this application is a technical one and excusable as he has diligently pursued his right in this court.

Accordingly, the applicant is granted a leave of 20 days within which to appeal against the ruling of the trial court. The costs are to be shared by each of the parties shouldering its respective costs.

DATED at DELIVERED at MOSHI this 5th day of May 2023.



A handwritten signature in black ink, consisting of a stylized, cursive script that appears to read "J.L. MASABO".

J.L. MASABO
JUDGE