

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

AT IRINGA

MISC. LAND APPLICATION NO. 36 OF 2022

*(Originating from the Ruling of the High Court of Tanzania Iringa District Registry at
Iringa, in Review No. 1 of 2022)*

UMBUYA EDUCATION CENTRE LIMITED.....APPLICANT

VERSUS

MARWA ENOCK RANGE 1ST RESPONDENT

CHARLES K. MUTOKA2ND RESPONDENT

HIGHLANDS AUCTION MART LIMITED.....3RD RESPONDENT

RULING

Date of Last Order: 05.04.2023

Date of Ruling: 05.05.2023

A.E. Mwipopo, J.

This application for an extension of time to file a review in this Court was filed by Umbuya Education Centre Limited. The application is made by chamber summons supported by an affidavit sworn by Rutebuka Samson Anthony, the applicant's advocate. The applicant is praying for the following orders:-

- 1. That, this honourable Court be pleased to grant an extension of time to file an application for review out of time.*
- 2. Costs for this application may be provided for: and*
- 3. Any other relief(s) this Court may deem fit and just to grant.*

The 1st respondent filed a counter affidavit in opposition to the application. The 2nd respondent, who appeared in person and the 3rd respondent, represented by its principal officer, Martine Chaula, did not file their counter affidavit and informed this Court that they have no interest in the case. They prayed for the application to proceed in their absence.

On the hearing date, advocate Samson Lutebuka appeared for the applicant, whereas advocate Yuda Dominick appeared for the 1st respondent. The hearing proceeded in the absence of the 2nd and 3rd respondents.

It was the submission by the counsel for the applicant that the 1st respondent filed objection proceedings against the attachment of his plot No. 3 Title No. 11066, L.O. Number 187498/KLD/3 at Lundamatwe village, Kilolo District, in the execution case. The applicant was the 2nd respondent in that case. On 16.06.2022, the Deputy Registrar (DR) held in his decision that the applicant herein did not file a counter affidavit, while the applicant filed the same. The D.R. lifted the attachment of plot No. 3 Title No. 11066, L.O. Number 187498/KLD/3 at Lundamatwe village, Kilolo District. If the

Hon. DR had seen and considered the counter affidavit filed by the applicant, the decision would be different. On page 4 of the ruling, Hon. DR stated that the application for review was determined without a counter affidavit from the applicant and other respondents. This is a violation of natural justice to be heard. In the case of **Margwe and 2 Other vs. Moshi Bahalulu**, Civil Appeal No. 111 of 2014, Court of Appeal of Tanzania at Arusha, (unreported), it was held on page 4 of the judgment that natural justice, which includes the right to be heard is so fundamental that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, the violation is considered to be a breach of natural justice.

In the case of **NHC vs. Peter Kassidi and four others**, Civil Application No. 294/16 of 2017, Court of Appeal of Tanzania at Dar es Salaam, (unreported), it was held that the decision of the Court in objection proceedings is not appealable in terms of order XXI Rule 62 of the Civil Procedure Code Act (CPC Act). The applicant believes the only remedy for him is to apply for review. This Court, in the case of **ALAF Ltd vs. Said Ndyamukana**, Land Case No. 12 of 2015, High Court Dar Es Salaam Registry at Dar Es Salaam, (unreported), held on page 11 of the judgment that the suit was premature as the Court did not conduct an investigation

which would ascertain the rights of the party a decisive point in the objection proceedings. Based on the decision of the ALAF Ltd case (supra), the application for review was the only remedy available to the applicant.

The applicant said on 06.07.2022, he filed a memorandum of review in this Court. It was just 21 days from when the ruling of Hon. DR was delivered. The 1st respondent raised a preliminary objection under Order XXI Rule 62 of the CPC Act that the application was incompetent on the ground that the remedy where objection proceedings are dismissed is to institute a suit in the competent Court and not to file a review case. The Hon. DR suo motto struck out the application for review for failure to cite enabling provision on 03.11.2022. The parties were not afforded the right to address the Court on the issue. The ruling of the Court was supplied to the applicant on 07.11.2022, and this application was filed on 15.11.2022. It was just within 8 days from the date of receiving the ruling to the date of filing the present application. The time delayed was wasted while pursuing the review, and the applicant is technically out of time. This Court has the discretion to grant an extension of time if there are sufficient grounds, as it was held in the case of **Bank M Tanzania Ltd vs. Enock Mwakyusa**, Civil Application No. 520/18 of 2015, Court of Appeal of Tanzania at Dar Es Salaam, (unreported).

In his reply, the counsel for the 1st respondent submitted that the applicant is seeking to apply for review against the decision of this Court in Misc. Civil Application No. 9 of 2022. The Misc. Civil Application No. 9 of 2022 is objection proceedings. This Court finally and conclusively determined the objection proceedings. In the application for an extension of time, the Court does not look at the case's merits in which the extension of time is sought.

Order XXI rule 62 of the CPC Act provides clearly that the final determination of the case in objection proceedings is not subjected to any further proceedings. This position was stated in the case of **NHC vs. Peter Kasidi and 4 Others**, (supra), on page 8 of the judgment, where the Court of Appeal held that when an objection was preferred. The Court order is made under Rule 62 of Order XXI. The only remedy available to the party against whom that order is made is to institute a regular suit to prove the claim. The Court of Appeal went on to say that there is no room for revision or appeal. It includes a review by saying there is no room for appeal or revision. Where there is mismanagement of the pleadings in objection proceedings, as the applicant stated, the remedy is to appeal. As the decision of the Court in objection proceedings is not appealable, the remedy is to institute a fresh suit.

The counsel said the cited decision of **Magwe Ero and two others vs. Moshi Bahalulu**, (supra), is distinguishable to the present application as the High Court Suo motto struck out the case for being time barred without affording parties the right to address it. The case of **ALAF Ltd vs. said Ndyamukama**, (supra), is distinguishable as the plaintiff in the ALAF Ltd case prayed for a new suit since the objection proceedings were not determined on merits. The decision in the case of **Bank M (Tanzania) Ltd vs. Enock Mwakyusa**, (supra), is distinguishable as it discusses technical delay. In this case, there is seven days actual delay. The applicant is applying for an extension of time to file an unmaintainable application for review against the decision of this Court in objection proceedings. It is an abuse of the court process.

In his rejoinder, the counsel for the applicant emphasized that Order XXI rule 62 of the CPC Act is conclusive only where parties have been heard. Other remedies exist when parties are not heard, such as a review.

Having heard submissions from both sides, and as this is the application for an extension of time, the only issue for determination is whether the applicant has sufficient reason for the Court to extend the time to file a review out of time.

The law is settled that the Court has the discretion to grant an application for an extension of time with a good and sufficient cause. The discretion of the Court to extend time is provided under section 14(1) of the Law of Limitation Act, Cap. 89 R.E. 2019. In the case of **Tanga Cement Company vs. Jumanne D. Masangwa and Another**, Civil Application no. 6 of 2001, Court of Appeal of Tanzania, at Tanga, (Unreported), it held that:

".....an application for extension of time is entirely in the discretion of the Court to grant or refuse it. However, this unfettered discretion of the Court has to be exercised judicially, and the overriding consideration is that there must be sufficient cause for doing so. What amount to sufficient cause has not been defined. From decided cases, several factors have been considered, including whether or not the application was brought promptly; the absence of any valid explanation for the delay; lack of diligence on the applicant's part."

A similar position was observed by the Court of Appeal sitting at Tabora in the case of **Bharya Engineering & Contracting Company Limited vs. Hamoud Ahmed Nassor**, Civil Application No. 342/01 of 2017, (Unreported), that:-

"What amounts to a good cause cannot be laid by any hard and fast rules, but depends upon the facts obtained in each case, as we stated in Vodacom Foundation. V. Commissioner General (TRA), Civil Application No. 107/20 of 2017 (unreported): the case relied upon by the respondent, each case will be decided on its own merits taking into consideration the questions, inter alia, whether the application for extension of time has been brought promptly, whether every day of delay has been explained away as well as whether there was diligence on the part of the applicant".

From above cited cases, Courts have to consider several factors in determining the good cause for an extension of time, including if the application has been brought promptly, lack of diligence on the applicant's part, and every day of delay has been explained. Another factor to be considered is the presence of illegality as it was held in the case of **Efrasian Mjugale vs. Andrew J. Ndimbo and Another**, Civil Application No. 38/10 of 2017, Court of Appeal of Tanzania at Iringa, (unreported).

In the present case, the reasons stated by the applicants for the delay is that the application for review was filed in this Court within time and was registered as Review No. 1 of 2022. However, the application was suo motto struck out for incompetence on 03.11.2022. The copy of the ruling

was issued on 07.11.2022, and the applicant filed the present application for an extension of time on 15.11.2022.

The applicant's main reason for the delay is that he was in Court pursuing his review case, which was struck out for incompetence. The said delay is known as a technical delay. The Court is aware that technical delay is a good reason for extending time. This position was stated in several cases, including the case of **Fortunatus Masha vs. William Shija and another [1997] TLR. 154;** and **Bharya Engineering and Contracting Co. Ltd vs. Hamoud Ahmad @ Nassor,** (supra). In the case of **Fortunatus Masha and Another vs. William Shija and Another,** (supra), the Court of Appeal, while explaining the technical delay, held that:-

"A distinction has to be drawn between cases involving real or actual delays and those such as the present one, which clearly only involved a technical delay in the sense that the original appeal was lodged in time but had been found to be incompetent for one or another reason and a fresh appeal had to be instituted. In the present case, the applicant had acted immediately after the pronouncement of the ruling of the Court striking out the first appeal. In these circumstances, an extension of time ought to be granted."

This principle of technical delay applies in both criminal and civil proceedings. It guides where a party promptly files a matter in Court, but the Court strikes it out for incompetence. The ground is sufficient reason for extending the time to file a competent matter for the orders or remedies sought in the struck-out matter, provided that the party promptly moves the Court after the striking-out order was made.

I'm satisfied that the applicants have diligently pursued their intended review in this Court. He filed the first application for review within time, but the application was suo motto struck out for incompetence. The applicant said that he received the copy of the ruling on 07.11.2022 and filed this application for an extension of time on 15.11.2022. He used seven days to prepare the application. The time used to prepare and file this application after receiving the ruling of this Court is reasonable. Thus, the applicant has accounted for each day of the delay.

Both parties submitted the competence of the struck-out review application as it originated from the ruling of this Court in objection proceedings. I hesitate to take the invitation to determine the competence of the said review application as the same has to be decided on merits by the respective Court. The review was actually filed in this Court within time, and the issue of its competence for being filed against the decision of this

Court in objection proceedings was raised, and both parties made their submission. But, the matter was struck out suo motto for failure to cite a moving section. Parties were denied the right of hearing when the review was struck out for incompetence. Thus, the respective Court should determine the matter after the parties get a chance to submit on the matter.

Therefore, the application is granted, and the applicant has to file his proper application for review within thirty (30) days which starts to count today. Each party shall take care of his own cost. It so ordered accordingly.



A handwritten signature in blue ink, appearing to read "A. E. Mwipopo", is written over the printed name.

A. E. Mwipopo

JUDGE

05/05/2023