

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM SUB DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 123 OF 2023**

(Arising from Civil Appeal No. 84 of 2021 from Kinondoni District Court at Kinondoni before Hon. E.A. Mwakalinga -SRM, Originating from the decision of Magomeni Primary Court in Civil Case No.46 of 2021)

**PRO SHARE CAPITAL LIMITED..... 1<sup>ST</sup> APPLICANT**

**KOTI BROTHERS COMPANY LIMITED.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**FREDY USWEGE.....RESPONDENT**

**RULING**

Date of last Order: 30/05/2023

Date of Ruling: 16/06/2023

**E.E. KAKOLAKI, J.**

The applicant has moved this Court pursuant to Rule 3 of the Civil Procedure (Appeals in Proceedings originating in Primary Courts) Rules, GN No. 312 of 1964 and any other enabling provisions of the law, to extend him time within which to appeal to this Court out of time against the decision of the District Court of Kinondoni at Kinondoni in Civil Appeal No. 84 of 2021 dated 18<sup>th</sup> February, 2022. Supporting the application is an affidavit of Maulid Marjeb by the principal officer of the applicants which in essence explains one reason

as to why this application should be granted, being late supply of the copies of the judgment and decree in Civil Appeal No. 31 of 2022 before the High Court.

The application is strongly opposed by the respondent who filed counter affidavit to that effect contending that, the copies of judgment were available in time and even if the same were obtained lately, the said document had nothing to do with the appealing processes as the applicant is appealing against the decision of the District Court and not the decision of the High Court. Hearing took the form of written submission in which the applicants' submissions were prepared by Ms. Tatu Ally while those of respondent were prepared by Mr. Godfrey F. Alfred, both learned advocates.

In her submission in support of the application while adopting applicants' affidavit and its annexures to form part of her submission, Ms. Ally laid down the factual background of the matter and what bred the instant application. It was her averment that, the applicants timely filed their first appeal to this Court in Civil Appeal No. 31 of 2022, the appeal which unfortunately was struck out on 02/09/2022 for want of competence. Being time barred to re-file a fresh appeal as required by law, they made follow up of the copies of judgment and decree of this court as evidenced in the letters in annexures

PCL1 and PCL2 to the affidavit for purposes of reference in this application, the documents which were availed to them on 02/02/2023, 153 days passed. Relying on the case of **Lyamuya Construction Company Ltd vs Board of Registered Trustee of Young Women's Association of Tanzania**, Civil Application No.2 of 210 (unreported) stating grounds under which time can be extended for performance of a certain action or function, Ms. Ally submitted that, the applicant has managed to advance good cause for delaying in filing the appeal. She added the striking out of their appeal for want of competence amounted to technical delay as the applicants were in the court corridors pursuing their rightly only to find their appeal incompetent hence its striking out. To fortify her argument she referred the Court to the case of **Bank M (Tanzania) Limited vs Enock Mwakyusa**, Civil Application No. 520/18 of 2017 CAT-Unreported) which cited with approval the case of **Fortunatus Masha Vs. William Shija and Another** (1997) TLR 154, on technical delay as one of the ground for grant of extension of time. She was of the view therefore that, applicants acted diligently in the whole process of seeking to re-file an appeal afresh and that, it is in the interest of justice, extension be granted to avail them with the right to address before this Court serious legal issues in the intended appeal,

and further that, there are overwhelming chances of success of the appeal if application for extension is granted as if not they will suffer irreparable loss, greater hardship, damages and mischief. She thus implored the court to consider the reasons adduced and grant this application.

In response, Mr. Alfred prayed to adopt the respondent's counter affidavit to form part of his submission and submitted that, while it is in the Court's discretion either grant the application or not the same must be exercised judiciously upon the Court satisfying itself that, there are genuine and tangible reasons for granting the same. In the present matter he contended, applicants totally failed to adduce good cause for this Court to grant them time as prayed since in their affidavit and submission the only reason advanced for delay in filing the appeal timely is late supply of copies of judgment and decree in Civil Appeal No. 31 of 2022, in which according to him are irrelevant as they had in possession already the necessary copies of judgment and decree of the District Court of Kinondoni in Civil Appeal No. 84 of 2021 which are subject of the present application. According to him, the claimed technical delay would be acceptable if the applicants were appealing against the decision in Civil Appeal No. 31 of 2022. In his submission, since applicants had enough time to appeal against the decision

in Civil Case No. 84 of 2021, but opted to misuse their time by filling incompetent appeal which was finally struck out by this Court due to their ignorance, they should not be allowed to benefit from their own wrong.

The learned counsel argued, though the judgment in Civil Appeal No. 31 of 2022 is immaterial still the same was made available in time, thus it is not true that the documents were delayed. In concluding he submitted that, applicants have failed to adduce sufficient reasons for this Court to grant its application, hence the same be dismissed.

In rejoinder, Ms. Ally relying on a maxim that, he who comes to equity must come with clean hand, submitted that, applicants' appeal was struck out for want of competence, hence annexing such striking out order to this application was important for them to prove the technical delay, the ground which does not amount to ignorance as the respondent would want this Court to believe. She explained that, filing of incompetence appeal was not meant to misuse their time as both parties to Civil Appeal No. 31 of 2021, never came into knowledge of such incompetence before until when the same was raised by the court suo mottu. In her view filing of this application for extension of time by the applicants soon after securing the necessary records in Civil Appeal No. 31 of 2021 demonstrates their diligence and

efforts to refile the appeal. Otherwise she reiterated her submission in chief and the prayers thereto.

I have taken time to examine and consider the affidavit, counter affidavit and submissions in support and against this application. As can be depicted from the chamber summons, this application is brought under Rule 3 of the Civil Procedure (Appeals in Proceedings originating from Primary Courts) Rules GN NO. 312 of 1964. The same states that:

*3. Applications for leave to appeal out of time*

*An application for leave to appeal out of time to a district court from a decision or order of a primary court or to the High Court from a decision or order of a district court in the exercise of its appellate or revisional jurisdiction shall be in writing, shall set out the reasons **why a petition of appeal was not or cannot be filed within thirty days after the date of the decision or order against which it is desired to appeal,** and shall be accompanied by the petition of appeal or shall set out the grounds of objection to the decision or order:*  
(Emphasis supplied)

Guided with the above provision, it is apparent that, this court has discretion to extend time, upon the applicant demonstrating sufficient reason that delayed him filing the appeal within 30 days for the decision of the Court.

There is also a plethora of Court decisions in support of that stance including the cases of **Tanga Cement Company Limited vs. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001 (CAT-unreported, **CRDB (1996) Limited Vs. George Kilindu**, Civil Appeal No. 162 of 2006 (CAT -unreported) to mention few. Further, each day of delay must be accounted for. See the case of **Sebastian Ndaula Vs Grace Rwamafa**, Civil Application No 4 of 2014 (CAT-unreported) where the Court of Appeal had this to say on the applicant's duty to account for the delayed days:

*"...even a single day delay has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken."*

Having that position in mind, the issue for determination by this Court is whether the applicant has advanced good or sufficient cause to warrant this Court exercise its discretion in granting the prayer for extension of time. Deducing from the record, the Judgment sought to be impugned was delivered on 18/02/2022 and as per Rule 3 of the Civil Procedure (appeals in proceedings originating from Primary Courts) Rules GN NO. 312 of 1964 and section 25(1) (b) of the MCA, the appeal was supposed to be filed within 30 days of the date of decision or order sought to be appealed against, thus

the same ought to be filed on or before 20/03/2022. This application for extension of time was filed on 23/03, 2023 which is more than 365 days late.

In discharging his duty of advancing reasons for the delay in filing their appeal in time or any other grounds warranting this Court grant them extension of time, applicants in affidavit raised one ground, which is a delay in receiving copies of Judgment and decree in Civil Appeal No. 31 of 2022 which allegedly were received on 02/03/2023.

Notably, applicant has to account for the delayed period from 21/03/2022 to 23/03/2023 and as per their affidavit in paragraph 2,3,47,8 and 9 the time from 21/03/2022 to 02/03/2023, when the copies of judgment and decree were obtained has been accounted for. I so find as the first appeal was filed in time before it was struck out on 02/09/2023, due to its incompetence and therefore obtaining of copies of Judgment and decree of Civil Appeal No. 31 of 2022 was necessary as rightly submitted by Ms. Ally for the applicants to prove technical delay that, at all-time were in court of law pursuing their right until when the said documents were availed to them. Nevertheless, I find the period of 49 days from 02/02/2023 when the said copies of the Judgment and decree of Civil Appeal No.31 of 2022 were obtained by the applicant to 23/03/2023, the time when the instant application was filed,



were not accounted for. As earlier on alluded, each day of delay must be accounted for. Since the applicant failed to account for more than 49 days, thus the contention by the applicants that, the delay was caused by delay in receiving copies of judgment and decree in Civil Appeal No. 31 of 2021 lacks basis.

Notably, this being the application for extension of time to appeal, the court has to consider whether there are other sufficient reasons for extending the time apart from the reasons which delayed to the applicant to appeal timely. See the case of **Republic Vs. Yona Kaponda and others** [1985] TLR 84 (CAT). However, I have been unable to identify any.

In view of the above, I am convinced as correctly submitted by Mr. Alfred that, applicants herein failed to advance sufficient cause to trigger the Court's discretion and grant the prayers sought.

Consequently, the application fails and it is dismissed with costs.

It is so ordered.

Dated at Dar es Salaam this 16/06/2023.



E. E. KAKOLAKI

**JUDGE**

16/06/2023.

The Ruling has been delivered at Dar es Salaam today 16<sup>th</sup> day of June, 2023 in the presence of Mr. Godfrey Francis, advocate the respondent, Ms. Asha Livanga, Court clerk and in the absence of the applicants.

Right of Appeal explained.



E. E. KAKOLAKI

**JUDGE**

16/06/2023.

