

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT MWANZA**

MISC. APPLICATION NO. 19 OF 2023

(Arising from Civil Appeal No. 12 of 2022 before Geita District Court and from Civil Case No. 207 of 2021 before Nyankumbu Primary Court)

MKURUGENZI YERUSALEM SECURITY CO. LTD APPLICANT

VERSUS

FRANCIS MATHEO TUYAGA RESPONDENT

RULING

23rd March and 13th June 2023

ITEMBA, J.

This is an application for an extension of time whereas an applicant wants to file his appeal out of time. It is made under **section 25(1)(b) of the Magistrates Courts Act Cap 11 R. E 2019**. The applicant herein is aggrieved by the decision of the District Court of Geita issued by Hon. S. Maweda on 16th September 2022.

His application is supported by the affidavit of one Obedy Petro Ngeze a director and shareholder of Yerusalem Security Company Limited whereas the grounds for application are found between paragraphs 6 and 9.

The respondent has filed a counter affidavit opposing the application. Before the court, both parties were present and they were also represented

by learned counsels namely Messrs Einhard Mshongi and Beatus Emmanuel for the applicant and respondent respectively.

The main ground for application submitted by the applicant's counsel is illegality in the trial court decision. He submitted that the defendant was sued at the Primary Court as the Director of a Security Company but section 15 of the Companies Act states that the company has a legal personality and can be sued under its name and that section 186 of the same Act requires for at least 2 directors to form a company. He argued that, the said Director who was sued, his name was not even mentioned hence even execution of Primary Court's order which was approved by District Court is not possible.

The learned counsel added that another illegality is on the respondent's capacity to be sued. He referred the contract between **Jerusalem Security Ltd and Namwashi Poshomill** as parties but at the at the same time the respondent has signed as a witness. That, the respondent did not have *locus standi* to do any execution. That, the respondent executed a different contract produced as **BPA 3** and filed a case at Nyankumbu Primary Court Civil Case No. 27/2021. That, as per the principal of privity to contract it was unlawful for the respondent to

execute the contract as he was just a witness therein. He finalized by stating that this illegality cannot be left in record.

In reply Mr. Emmanuel opposed the application. He stated that it is not true that one Obedi Petro Genze was not supposed to be sued. He referred paragraph 6 of the counter affidavit where the deponent mentioned the documents which were signed by the director, a contract dated 21.11.2020 where the Director could be the responsible person and a handwritten letter dated 20.11.2020 where he is citing himself as an Executive Director of Jerusalem Security Company. That, based on these documents Obedi Petro Genze committed himself as the Director. He cited Rule 14 of the Magistrate Court Rules. GN 310/1964 stating that Obedi Petro Ngenze was one of the Trustee and he was sued as an individual before the Primary Court. He added that, at the Primary Court, Corporate bodies are not sued as corporate but as individual and sections 15 and 186 of the Companies Act are not applicable.

In respect of the *locus standi*, he argued that the respondent had *locus standi* as per attachment BPA 4, because there are 2 parties. That, there might be some typing errors on the names of the parties but there is no dispute that the respondent was client of the applicant.

The learned counsel insisted that the delay is almost five months. That, the applicant has not accounted for any delay and illegality by itself is not enough. In this, he referred the case of **Fatuma Ally Hakim and 3 others Versus Ahmad Selemani** PC Civil Appeal No. 9/2022. High Court at Songea at page 6.

In his brief rejoinder, Advocate Mshongi stated that the Director of Company is an employee of a company and signing a document do not give him right to sue or be sued. He also stated that Rule 14 of Primary Court Civil Procedure Rules is not applicable because the company Director is neither a Trustee, an executor nor administrator.

In respect of the *locus standi*, he stated in the exhibit BPA4, the contract mentions Namwali PoshoMill as party and not Francis Matheo Tuyaga and that page 3 is just a standard form and Matheo Tuyaga has signed as a witness. He maintained that the illegality is on face of record and it suffice as a reasonable ground for extension based on different court decisions which he did not cite.

Based on the submissions from both parties, the issue is whether the applicant has successful established reasonable grounds for this court to

issue an extension of time to file an appeal out of time. Section 25(1)(b) of the Magistrates Courts Act states that:

25.-(1) Save as hereinafter provided-

*(b) in any other proceedings any party, if aggrieved by the decision or order of a district court in the exercise of its appellate or revisional jurisdiction may, within thirty days after the date of the decision or order, appeal there from to the High Court; and the High **Court may extend the time for filing an appeal either before or after such period of thirty days has expired.***
(Emphasis supplied).

In the Court of Appeal of Tanzania in **Ngao Godwin Losero v. Julius Mwarabu**, CAT-Civil Application No. 10 of 2015 (ARS- unreported) it was stated as follows:

"To begin with, I feel it is instructive to reiterate, as a matter of general principle that whether to grant or refuse an application like the one at hand is entirely in the discretion of the Court. But, that discretion is judicial and so it must be exercised according to the rules of reason and justice."

An extension of time will be granted on court's discretion and upon the appellant showing a good cause for the delay. There are factors which the court considers when determining whether a good cause has been established, as introduced by various decisions. These factors though not exhaustive are such as;

- (i) the length of the delay;
- (ii) the reasons for the delay;
- (iii) the degree of prejudice the respondent stands to suffer if time is extended;
- (iv) whether the applicant was diligent; and
- (v) whether there is point of law of sufficient importance such as the illegality of the decision sought to be challenged.

These factors are found in the decisions in the cases of **Dar es Salaam City Council vs Jayantilal P. Rajani**, Civil Application No. 27 of 1987 and **Lyamuya Construction Company Limited vs Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No.2 of 2010** (All unreported), among others.

The only ground raised by the applicant is illegality on the face of records. I have gone through the copy of the relevant Judgment of the Primary Court (BPA1) and the parties therein read Francis Matheo Tuyaga and Mkurugenzi Yerusalemu Security CO. Ltd. The first paragraph of the said judgment states that *'the plaintiff is suing the respondent on the loss of TZS 15,000,000/= which was lost by the guards of the respondent's company'*. Here, it did not require any efforts to note that the respondent was 'Mkurugenzi Yerusalemu Security Co. Ltd' which means the director of Yerusalem Security Company Ltd. This is reflected on the face of records where the names of the parties appear. One of the old legal principle is that a company has an independent legal personality with its rights and liabilities separate from its shareholder. See: **Salomon v A. Salomon & Co. Ltd** (1896) UKHL 1, [1897] AC 22. Therefore, the respondent in the impugned ruling had no capacity to be sued as an individual. It was the company itself which ought to be sued. I agree with the applicant that it was unlawful for the respondent to sue a party which was a stranger. See also **CRDB Bank PLC (Formerly CRDB 1996) LTD vs George Mathew Kilindu** Civil Appeal no. 110 of 2017 CAT Dar es salaam. In other words, this case was incompetent before the court as it was the wrong party

which was sued. I am of the firm findings that this kind of illegality is of sufficient importance to be considered and cannot be left in court records.

Based on this explanation, I find that the applicant has shown a good cause for this court to extend the time to file an appeal. I therefore, grant the applicant extension of time within which to file an appeal out of time. The said appeal should be filed within 30 days from date of delivery of this ruling.

It is so ordered.

DATED at **MWANZA** this **13th** day of June, 2023.



L.J. ITEMBA

JUDGE