

**IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA**

**DODOMA DISTRICT REGISTRY**

**AT DODOMA**

**MISC. CIVIL APPLICATION NO. 40 OF 2022**

(Originating from DC. Civil Appeal No. 15 of 2016 of the High Court of Tanzania at Dodoma and Civil Case No. 25 of 2004 of the District Court of Dodoma at Dodoma)

**SADALLAH IBRAHIM SADALLAH ..... APPLICANT**

**VERSUS**

**OMARY MSAFIRI ..... RESPONDENT**

**RULING**

5<sup>th</sup> April & 3<sup>rd</sup> July 2023

**KHALFAN, J.**

The Applicant, SADALLAH IBRAHIM SADALLAH, filed this Application under Section 11 (1) of the Appellate Jurisdiction Act, [CAP. 141 R.E 2002] supported with Affidavit sworn on 27<sup>th</sup> day of August 2022 for orders that this Court be pleased to grant an order for extending time within which to file the Notice of Appeal against the Ruling of this Honourable Court in (DC) Civil Appeal No. 15 of 2016 delivered on 16<sup>th</sup> June 2017. The Applicant also prays for costs and other incidental orders as this Court shall deem fit and just to grant.

The Applicant has adduced two grounds for his application to be granted whereas the first ground is that his delay is technical one



considering that his appeal in first place was successfully lodged to the Court of Appeal of Tanzania with Civil Appeal No. 338 of 2020 but on 1<sup>st</sup> June 2021 the same was struck out on a technical ground for being time barred. The reason for holding as such was due to the fact that the time within which the Applicant was applying for leave to appeal to the Court of Appeal was not removed in counting the 60 days of filing an appeal.

The second ground is that there is a point of law of crucial importance which the intended appeal seeks the indulgency of the Court of Appeal to resolve, that is, whether the High Court acted legally when it raised an issue that was not an issue in the Appeal *suo motu* and deciding on it without affording the parties an opportunity to be heard.

At the hearing of this application on 5<sup>th</sup> April 2023, the Applicant was represented by Mr. Cheapson Kidumage, Learned Advocate and the Respondent had the services of Ms. Josephine Mnzava, Learned Advocate.

Mr. Kidumage started his submission by adopting the chamber summons and the Applicant's affidavit and stated that the Applicant's notice of appeal appears to be out of time because of technical delay. He said the Court of Appeal struck out the Civil Appeal No. 338 of 2020 on the ground that it was time barred while the applicant filed his notice of appeal in time as it appears in annexure A3 of the affidavit considering



that the impugned decision of this court was delivered on 16/6/2017 and the notice was filed on 21/6/2017.

He went on to say that despite of the fact that the alleged Notice of Appeal was filed within time the same got a natural death after the appeal filed subject to such Notice of Appeal was struck out by the Court of Appeal on 1<sup>st</sup> June 2021.

The counsel for the Applicant cited the case of **Fortunatus Masha vs. William Shija & Another** [1997] TLR 154, to concretize his argument, where the Court of Appeal urged the court to grant extension of time where a delay is based on technical ground. For that reason, he insisted that the court should consider the delay of the Applicant to file his appeal to the Court of Appeal to be technical and distinguish the same from real delay where the Applicant is supposed to explain in detail the reasons of his delay.

Mr. Kidumage in expounding the ground of illegality of the decision of this court, he contended that the alleged illegality is based on the act of this Court to raise *suo moto* a ground which was not among the grounds for appeal and gave decision without the parties being given the right to be heard. He referred the case of **Kalunga and Company, Advocates vs. National Bank of Commerce Limited** [2006] TLR 235, where the



Court demonstrated that position by stating that if what is intended to be challenged is the illegality of the decision then itself constitute the main reason for the Court to grant extension of time as the rationale behind is to correct such decision and to make it appropriate. For that reason, he prayed the Court to consider this application.

Ms. Josephine Mnzava, for the Respondent on her side prayed to adopt the Counter Affidavit sworn by the Respondent and argued that for the Applicant's application to be granted, each day of delay has to be accounted for, as provided in the case of **Onesmo Oscar vs. Mkurugenzi Mkuu Nyehunge Express**, Misc. Civil Application, No. 136 of 2021, where the High Court at Mwanza stated that:

*'It is settled principle for an application of extension of time to be granted, the Applicant should account for each day of delay, this means that even a single day has to be accounted for.'*

She therefore insisted that the Applicant did not state sufficient reasons for delay as required and also, he did not account each day of his delay.

She further distinguished the case of **Fortunatus Masha vs. William Shija & Another** (supra) from the matter at hand because the

delay in this matter is real delay and not technical delay as contended by the Applicant.

Ms. Mnzava went on to argue that, the Applicant's allegation that there was an illegality in the impugned decision of this court cannot be considered because the contended illegality has not been explained in detail by stating which provisions of the law have been offended to constitute illegality. Therefore, she maintained her argument that the Applicant had not adduced sufficient reason for his application to be granted.

In rejoinder, Mr. Kidumage, reiterated what he submitted earlier and insisted the court to grant the Applicant's application for the reason that the delay was technical considering that the counsel for the Respondent did not object their submission that the Notice of Appeal was filed on time which however got a natural death as submitted in chief.

In determining this application, I am considerate of the decision of the Court of Appeal in the case of **Lyamuya Construction] Company Ltd vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 02 of 2010, CAT at Arusha in which the Court of Appeal, in granting the application for extension of time, considered the following grounds:



1. *The applicant must account for all the period of delay.*
2. *The delay should not be inordinate.*
3. *The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.*
4. *If the Court feels that there are other sufficient reasons, such as the existence of point of law of sufficient importance; such as the illegality of the decision sought to be challenged.*

In this application, the Applicant's reasons for extension of time is based on the technical delay and illegality on the decision of this court in DC. Civil Appeal No. 15 of 2016.

I will start with the ground of illegality on the decision of this Court as alleged. It is trite law that where there is an allegation of illegality in the impugned decision the Court is required to grant extension of time as it was stated in the case of **Lyamuya Construction Company Ltd** (supra). See also the case of **Principal Secretary, Ministry of Defence; and National Service vs. Devram Valambhia** [1992] TLR 185, which stated that:

*'In our view when the point at issue is one alleging illegality of the decision being challenged, the court has a duty, even if it means extending the time for the purpose, to ascertain the point and, if the alleged illegality be established, to take*



*appropriate measures to put the matter and the record right.'*

The Applicant has contended that this Court raised *suo moto* a ground which was not among the grounds for appeal and gave its decision without the parties being given the right to be heard. It is settled principle of the law that whenever there is an allegation that right to be heard has been denied, the Court must intervene to ensure the protection of the same. See the case of **Laurent Simon Assenga vs. Joseph Magoso and 2 Others**, Civil Application No. 50 of 2016 where the Court of Appeal at Dar es Salaam had the following to say:

*'In the present case, the Applicant has averred that, a decision has been passed by the lower courts against his interests without him being heard. This is a serious allegation of illegality in the impugned decision. It needs to be investigated by this court.'*

This also aligns with the matter at hand where there is a claim of denial of right to be heard as such this Court is commended to grant extension of time to enable the Court to examine if there was such denial as contended by the Applicant.

Therefore, I find that the ground of illegality as alleged by the Applicant has constituted a sufficient cause to move this Court to grant the application. For that reason, I find no reason to ascertain another





ground for the grant of extension of time as indicated above. In the result, the Applicant is given 30 days to file his appeal. No order as to costs. It is so ordered.

**Dated at Dodoma** this 3rd day of July, 2023.



A handwritten signature in blue ink, appearing to read "F. R. Khalfan", is written over the printed name.

**F. R. KHALFAN**  
**JUDGE**