

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

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 190 OF 2021

(Originating from the High Court of Tanzania, Dar Es Salaam District Registry in Civil Case No. 12 of 2008)

TANZANIA OCCUPATIONAL HEALTH SERVICES..... APPLICANT

VERSUS

MRS. AGRIPINA BWANA..... 1ST RESPONDENT

MR. JULIUS BWANA..... 2ND RESPONDENT

RULING

05/12/2022 & 02/02/2023

BWEGOGGE, J.

The applicant herein namely, Tanzania Occupational Health Services, has filed an application for an extension of time to file notice of appeal out of time in respect of the judgment and decree in Civil Case No. 12 of 2008, entered by the above mentioned subordinate court on 05th November, 2014.

The application is made under s. 11(1) of the Appellate Jurisdiction Act, [Cap. 141 RE 2019]

The facts deponed in the affidavit supporting the application herein are as follows: In February, 2008 the respondents herein filed a suit against the applicant for payment of equitable compensation and damages. The respondents were successful and the judgment was delivered on 05th November, 2014 whereas the trial court ordered the payment of general damages at the tune of Tshs. 100,000,000/= against the 1st respondent. The applicant herein being dissatisfied with the decision, lodged notice of appeal within time and on several occasions had requested the court to supply her with necessary documents to prepare records of appeal.

Further, it is deponed that it was until 22nd June, 2016 that the applicant was aware of the letter of the registrar dated 02nd June, 2016 notifying the applicant that the requested documents were ready for collection. Eventually, the documents were immediately collected and the applicant applied for a certificate of delay as the time to appeal had already lapsed. The certificate of delay was issued on 12th July, 2016 excluding the time from 10th November 2014 until 27th June, 2016. Upon receipt of the certificate of delay, the applicant lodged her record of appeal and memorandum of appeal

on 26th August, 2016, believing the same was timely filed as per certificate of delay. However, the said appeal was struck out by the court of appeal on 01st April, 2021 on technical grounds related to the certificate of delay issued by this court. The said ruling was collected by the applicant's previous counsel whereas the same was not communicated to the applicants until 19th April 2021. It was then that the counsel representing the applicant was engaged to take further action.

Messrs Ezekiel Ephraim Fyandomo and John Kamugisha, learned advocates, represented the applicant and respondents respectively. The application herein was argued by way of written submissions which are briefly recounted hereunder.

In his submission, Mr Fyandomo, counsel for the applicant, reiterated that the applicant lodged notice of appeal well within time and requested the court documents. And upon receipt of certificate of delay, the applicant promptly filed the appeal in the court of appeal within the time frame prescribed in the certificate of delay. Unfortunately, to the dismay of the applicant, the appeal was struck out on the ground of technicality based on the certificate of delay issued by this court

That the applicant has been diligent in pursuing her case after being aggrieved by the decision of this court. That the record herein glaringly depicts that the applicant did not sleep on her right, instead she was prompt enough to show her intention of appealing against the said judgment and eventually took action to that effect. Unfortunately, the counsel submitted, the certificate of delay acted upon by the applicant herein was found with defect by the superior court, consequently, the preferred appeal was struck out.

The counsel invited this court to draw a difference between circumstances where a notice of appeal is given on time but the appeal was struck by the court of appeal on the reason of technicalities found on the certificate of delay issued by this court and the situations where the applicant does not at all do anything. The counsel cited the case of **Zuberi Musa vs Shinyanga Town Council**, Civil Application No.3 of 2007, CA (unreported) to make a point that sometimes the advocate's mistakes caused by minor lapse or oversight may be tolerated based on the fact that the advocates, as humans, are bound to err (*errare humanum est*).

Further, the counsel for the applicants, in persuading this court to grant extension sought herein, contended that this court should consider illegality

as sufficient cause for grant of this application even if the applicant would fail to account for each day of delay. The counsel cited a litany of cases to buttress his point, among others, **The Principal Secretary, Ministry of Defense and National Service vs. D.P. Valambhia** (1992) T.L.R 185; **TANESCO vs Mufungo Leonard Majura and 14 Others**, Civil Application No. 94 Of 2016, CA (Unreported) and **Bahati Musa Hamisi Mtopa vs. Salum Rashid**, Civil Application No.112 Of 2018, CA, (Unreported)

In his conclusive argument, the counsel submitted that, the delay in filing the notice of appeal was purely technical as the applicant pursued her case which was later struck out by the court of appeal. That the applicant provided good cause warranting this court to exercise its discretion to grant this application with costs.

In rebutting the above submission, the counsel for the respondents argued that despite the fact that the counsel of the applicant has given the correct exposition of the law relating to the grant of extension of time by citing various cases to be taken into consideration by this court, but he has failed to fit the facts of this case to the law and circumstances enunciated in the cited cases. The counsel opined that the pertinent issue for consideration in

the application of this nature is whether the applicant has shown good cause to warrant this court to extend time within which to lodge a notice of appeal.

The respondent's counsel charged that there are some gaps of days which were not accounted for, for instance, four 4 days of delay to institute the record of appeal in the court of appeal. Further, the counsel charged that the appeal lodged at the superior court was struck out on the ground that the appeal was lodged out of time, not on a purported defect on the certificate of delay as intimated by the applicant. That it is apparent the appeal was struck out not because of technicalities but because it was lodged beyond the statutory sixty days by four 4 clear days which the applicant is bound to account for in substantiating this application. The counsel cited the cases namely, **Moto Matiko Mabunga vs Ophir Energy Plc and Others**, Civil Application No. 463/01 Of 2017 CA (Unreported) and **Bushiri Hassan vs Latifa Lukio Mashayo Civil Application.03 of 2007 CA (unreported)** to underscore the principle that, "*delay of even a single day has to be accounted for.*"

In tandem with the above, the counsel for the respondent charged that the applicant has also failed to account for another 19 days of delay between the 1st of April 2021, when the original appeal was struck out, and the 22nd

of April,2021 when this application was lodged for extension of time. That though the applicant blames the previous advocate who conducted the matter, arguing that he never communicated and, or secured copies of the ruling and proceeding until 19th April, 2021, yet there is no evidence to support this assertion.

In the same vein, the counsel opined that for it to be a technical delay the original appeal should have been lodged in time, which is not the case in the present application. The case of **Yara Tanzania Limited vs DB Shapriya &Co Limited**, Civil Application No.498/16 of 2016 (unreported) was cited to bring home the point.

In respect of the allegation of illegality, the counsel for the respondent countered that the applicant has failed to articulate the alleged illegality, let alone the fact that the plea of illegality was not deponed in the applicant's affidavit. Hence, opined the counsel, the alleged illegality is an afterthought.

The counsel concluded that the applicant has failed to advance the good cause to justify the grant of extension of time. Hence, the application herein should be dismissed with costs.

The issue for determination is whether the application herein is merited.

The grant of extension of time is the discretion of the court in consideration of the sufficient cause furnished by the applicant establishing that the delay was justified. And what amount to sufficient cause depends on the circumstances of the case whereas several factors have to be taken into account; including whether or not the application has been brought promptly, the absence of any or valid explanation for the delay, and lack of diligence on part of the applicant. See in this respect the cases namely, **Tanga Cement Company Limited vs Jumanne D. Masangwa and Amos A. Mwalwanda** - Civil Application No. 6 of 2001 (unreported) **Benedict Mumello vs Bank of Tanzania,[2006]** TZCA 12.

Having anxiously gone through the record of this case, I agree with the counsel for the applicant in that for there to be a technical delay there must be evidence that the original appeal has been lodged in time. This principle is lucidly elaborated in the case of **Fortunatus Masha vs. William Shija and Another** (1997) TZCA 14 cited in the case of **Yara Tanzania Limited vs DB Shapriya & Co. Limited** (supra) whereas the court said:

"..... a distinction should be made between cases involving real or actual delays and those like the present one which can be called technical delays in the sense that the original appeal was lodged in time but the present situation arose only because the

original appeal for one reason or another has been found to be incompetent and a fresh appeal has to be instituted. In the circumstances, the negligence if any really refers to the filing of an incompetent appeal, not the delay in filing it. The filing of an incompetent appeal having been duly penalized by striking it out, the same cannot be used yet again to determine the timeousness of applying for filing the fresh appeal.”

The above opinion notwithstanding, I am of the view that the applicant's misfortune, in respect of the proceedings struck out by the superior court, was partly contributed by this court whereas the certificate of delay had extended excluded days beyond the prescribed period, though the counsel for the applicant ought to have discerned the defect earlier. Thus, the applicant shouldn't be called to account for the period taken in pursuit of the appeal, notwithstanding it was filed out of time and eventually struck out.

However, as well observed by the counsel for the respondent, there is a period of twenty days from the date the appeal was struck out, on 01st April, 2021 to the date of filing of this application, on 22nd April, 2021. I am on all fours with the respondents' counsel in that the applicant's explanation that her previous counsel withheld information pertaining to the superior court's decision until 19th April, 2021 cannot be validated. It is apparent that there

is no way this explanation can be ascertained by this court. Thus, it may be taken as an afterthought attempt to justify the alleged delay.

Based on the above, I am of the considered opinion that the days elapsed before the institution of the current application were not accounted for, taking into consideration that each day of delay should be accounted for. See **Bushiri Hassan vs. Latifa Lukio Mashayo** (supra) and **Moto Matiko Mabanga vs. Ophir Energy Plc and Two Others**(supra).

At this juncture, I am obliged to attend the point of law advanced by the applicant's counsel. The counsel asserted that this court should consider illegality as sufficient cause for grant of this application even if the applicant would have failed to account for each day of delay.

It is now a settled law that where it is found that the decision sought to be impugned by the applicant there is a point of law involved, extension of time is normally granted to enable the alleged point of law to be addressed by the appellate court. See in this respect, **Elizabeth Timothy Ballali vs Mrs Zainabu Riziki Bakilana and Three Others**, Civil Application No. 568/17 of 2018 CA (unreported), **Lyamuya Construction Co. Ltd. vs the Board of Registered Trustees of Young Women's Christian Association of**

Tanzania, Civil Application No. 02 of 2010 **the Attorney General vs. Holding Corporation and Another**, Civil Application No. 26 of 2014), CA (unreported), **Tropical Air (Tanzania) Limited vs. Godson Eliona Moshi**, Civil Application No. 09 of 2017 (unreported) and **VIP Engineering and Marketing Limited and Two Others vs. Citibank Tanzania Limited**, Consolidated Civil Reference No. 06, 07 and 08 of 2006 (unreported), among others.

I subscribe to the submission made by the counsel for the respondents in that the applicant has failed to articulate the alleged illegality on the face of the record of the trial court, let alone the fact that the alleged illegality was not deponed in the applicant's affidavit. Without particulars to that effect, the allegation of illegality on the trial court record cannot be ascertained. Thus, the point of law advanced by the applicant's counsel is without basis. In this respect, I am obliged to borrow a leaf from the decision in the case of **Elizabeth Timothy Ballali vs Mrs Zainabu Riziki Bakilana and Three Others** (supra):

"It is worth pointing out here that, for the question of illegality to constitute a ground for enlargement of time, it is not a matter of just being mentioned, but it has to sufficiently be shown that it does indeed exist."

In the same vein, it was observed in the case of **Lyamuya Construction Co. Ltd. vs the Board of Registered Trustees of Young Women's Christian Association of Tanzania** (supra) as thus:

".....it cannot in my view be said that in Valambia's case, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law, should as of right, be granted extension of time if he applies for one. The Court there emphasized that such point of law, must be that of sufficient importance on the face of the record such as, the question of jurisdiction and not one that would be discovered by a long drawn argument or process."

With the above cited principles in mind, I am of the considered view that the point of law raised by the applicant herein without being substantiated was misconceived.

Based on the above premises, it suffices to point out that the applicant has failed to show good cause to justify the granting of extension of time in which he may lodge the notice of appeal against the impugned decision of the lower court.

In fine, this court finds the application herein without merit. The application herein is hereby dismissed. The respondents shall have their costs.

Order accordingly.

DATED at **DAR ES SALAAM** this, 02nd of February, 2023.



A handwritten signature in blue ink, appearing to read "O.F. Bwego", with a long horizontal stroke extending to the right.

O.F. Bwego

JUDGE