

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

MISC. CIVIL APPLICATION NO.101 OF 2023

*(Arising from the Ruling and Order of the High Court delivered on 23^d
September, 2022 Hon. J.L. Masabo, J in Civil Case No.113 of 2021)*

**MINISTRY OF HEALTH, COMMUNITY DEVELOPMENT,
GENDER, ELDERLY AND CHILDREN.....1ST APPLICANT
THE ATTORNEY GENERAL.....2ND APPLICANT**

VERSUS

**ELIREHEMA ELIAS MUNUO.....1ST RESPONDENT
NEEMA MICHAEL MTINANGE.....2ND RESPONDENT
ICEA LION GENERAL INSURANCE COMPANY
COMPANY (T) LIMITED.....3RD RESPONDENT**

RULING

11/07/2023 & 11/8/2023

POMO, J

Under section 11(1) of the Appellate Jurisdiction Act, [Cap. 141 R.E.2019] the Applicants have moved this court praying for extension of time within which to lodge notice of appeal to the Court of Appeal out of time. It is supported by the affidavit deposed on 9th March, 2023 by Ms. Debora Mcharo, learned State Attorney.



The background, albeit briefly, to the matter herein can be stated as follows. On 22nd July, 2021 the Applicants commenced a suit against the respondents claiming, *inter alia*, for Tshs 31, 161,091/- as specific damage in terms of costs of repairing motor vehicle STL 7628 make Toyota Landcruiser the property of the 1st Applicant which was damaged by the 2nd Respondent's Car when it was recklessly driven by the 1st Respondent and insured by the 3rd Respondent. The suit was on 23rd September, 2022 struck out by this court, Hon. J.L. Masabo, J on the strength of preliminary objection raised against it by the 1st and 2nd Respondents to the effect that it was prematurely file, the other avenues available having not been exhausted. That is to say, referring the dispute to insurance ombudsman as the value in dispute was below Tshs 40,000,000/-.

As hinted earlier on, the ruling was delivered on 23rd September, 2022 and the Applicants are aggrieved hence this Application seeking indulgence of the court to extend time for them to initiate appeal process to file Notice of Appeal to the Court of Appeal out of time

The Application is strenuously contested, **firstly**, by the 1st and 2nd Respondents through counter affidavit filed on 17th May, 2023 which is deponed by Mr. Eric Mwanri, learned advocate, and **secondly**, by the 3rd

Respondent through counter affidavit filed on 11th May, 2023 deponed by Julius Lazaro Manjeka, learned advocate.

When the Application came for hearing on 25/5/2023, I ordered it be argued by way of written submissions. Both sides have complied the scheduled orders of filing the respective submissions. I am grateful to the learned minds for the parties.

Submitting for the Application, Ms. Debora Mcharo, learned State Attorney, having adopted the affidavit supporting it, argued that, per paragraph 4 of the affidavit, the High Court ruling striking out the Applicants' suit was delivered on 23rd September, 2022 and the Applicants didn't file Notice of Appeal to the Court of Appeal due to late supply of the copy of ruling by this court, which was until on 4th November, 2022 despite their several follow-ups, citing paragraph 5, 6, 7 and 8 of the affidavit.

That, upon being supplied with the ruling, promptly filed an application for extension of time, Misc. Civil Application No.528 of 2022, which came to be struck out for its defects in form.

Again, Ms. Debora argued that the ruling intended to be appealed against is tainted with illegality as demonstrated under paragraphs 9 and 10

of the affidavit. In her contention, the illegality complained of is the findings that the high court lacks jurisdiction to entertain insurance disputes in which the amount claimed is below Tshs 40,000,000/-. In support of illegalities as good a use for extending time, she cited to this court the case of **Principal Secretary, Ministry of Defense and National Service versus Devram Valambhia** [1992] TLR 182; **Kashinde Machibya versus Hafidhi Said**, Civil Application No.48 of 2009 CAT, and lastly, **Kalunga and Company, Advocates versus National Bank of Commerce Limited** [2006] TLR 235 (CAT).

Elaborating, Ms. Debora argued that section 124(1) of the Insurance Act No.10 of 2009 regarding pecuniary jurisdiction of the court was wrongly interpreted as against regulation 6(1)(a) of the Ombudsman Insurance Regulations, 2013 and basing on such interpretation the Applicants' suit was wrongly struck out, on the ground that the suit was prematurely filed. Arguing further, Ms. Debora submitted that since the issue of jurisdiction of the court is crucial and is in dispute then the Court of Appeal should be allowed to clear it. To bolster, she cited the case of **Vodacom Tanzania Limited versus Innocent Daniel Njau**, Civil Appeal No.60 of 2019 CAT at Dar es Salaam; **The Attorney General versus Emmanuel**

Marangakisi (as Attorney of Anastansious Anagnostou) and 3 Others, Civil Application No.138 of 2019 CAT at Dar es Salaam; **Lyamuya Construction Company Ltd versus Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No.2 of 2010 CAT at Dar es Salaam, (All unreported). In the end she prayed the application be granted

Responding, Mr. Eric Aggry Mwanri, learned counsel for the 1st and 2nd Respondents, in rebuttal argued that the Application was filed on 13th March, 2023 the former, Misc. Civil Application No.528 of 2022, having been struck out on 27th February, 2023 Hon. H.R. Mwanga, J. hence fifteen (15) days are not accounted for. That, the allegations on follow-ups of the ruling are not supported with the Applicants' letter to the court requesting for the same. Also lack of affidavit of the court clerk whom the Applicants contacted during follow-ups is another quagmire as lack of it makes the affidavit supporting the Application becomes a hearsay one, Mr. Eric stressed. In support, he cited the case of **Elias Kahimba Tibenderana versus Inspector General of Police and Another**, Civil Application No.388/01 of 2020 CAT at Dar es Salaam (unreported) and **Lyamuya Construction Company Ltd** case cited (supra) by the Applicants. To that end, Mr. Eric argued that the

Applicants have failed to account for each day of delay from 23rd October, 2022 when time for lodging notice of appeal lapsed to 18th November, 2022 when the former struck out, Misc. Civil Application No.528 of 2022, was filed.

As to failure to procure the affidavit of the court clerk, Mr. Eric cited to this court the case of **Sabena Technics Dar Limited versus Michael J. Luwunzu**, Civil Application No.451/18 of 2020 CAT at Dar es Salaam (Unreported) where the Court of Appeal at page 11 stated that an affidavit which mentions another person is a hearsay unless that other person swears as well.

Lastly, regarding the illegality of the decision complied of, Mr. Eric submitted that such illegality is not there arguing the Applicants have an avenue to refer their disputes to the insurance ombudsman. He then asked the court to dismiss the applicants' application for failure to advance sufficient reasons to warrant this court grant the extension of time sought.

On the side of the 3rd Respondent, Mr. Julius Manjeka, learned advocate argued that the reasons advanced by the Applicants as grounds for extension of time are untenable. The affidavit does not mention the name

of the court clerk of this court from whom follow-ups for the impugned ruling were made by the Applicants, nor is there any affidavit by such court clerk.

Arguing further, Mr. Manjeka submitted that filing Notice of Appeal to the Court of Appeal does not require attaching ruling intended to be challenged. That, a simple perusal of the case file suffices to make decision as to whether to appeal or not.

As to the Applicants' illegality of the decision complained of, Mr. Manjeka argued that what this court decided in the Applicants' Civil Case No. 113 of 2021 is in line with uncountable Court of Appeal decisions with similar position. He cited the case of **Parin A. A. Jaffer and Another versus Abdulrasul Ahmed Jaffer and Others** [1996] TLR 110; **Heritage Insurance Company Limited versus Abihood Michael Mnjokava**, Civil Case No.1 of 2020 High Court at Shinyanga (Unreported). Following the above, he argued the court to find out that there is no illegality against the decision intended to be challenged

Concluding, Mr. Manjeka prayed the Application be dismissed for want of merit.

I have considered the rival submissions by the parties; affidavits for and against the application and the court record. Now, the issue for determination by this court is whether the Application is merited.

From the Affidavit supporting the Application and the Applicants' submissions, it is vivid that the grounds of extension of time sought are two ways fold. **One**, delayed supply to the Applicants by the court the copy of ruling intended to be appealed against. And **two**, presence of illegality to the decision intended to be challenged.

Beginning, the the law giving powers the High Court to hear and determine Application for extension of time to lodge out of time Notice of Appeal to the Court of Appeal is S.11(1) of the Appellate Jurisdiction Act, [Cap 141 R.E.2019]. It provides thus: -

*"s.11(1) – Subject to subsection (2), **the High Court** or, where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned, **may extend the time** for giving notice of intention to appeal from a judgment of the High Court or of the subordinate court concerned, **for making an application for leave to appeal** or for certificate that the case is a fit case for appeal, notwithstanding that the time for giving the notice or making the application has already expired". [**Emphasis in bold supplied**]*

The excerpt of the law above is louder, in that granting or refusing the Application for extension of time to file notice of appeal is within the discretionary power of this court which has to be exercised judiciously. In **Omary Shabani Nyambu versus Dodoma Water and Sewerage Authority**, Civil Application No.146 of 2016 CAT at Dar es Salaam (Unreported) the Court of Appeal, at page 6, had this to state:

*"It is significant to emphasize that **the Court's discretion in deciding whether or not to extend time must be exercised judiciously and not arbitrarily or capriciously, nor should it be exercised on the basis of sentiments or sympathy.** Fundamentally, the said discretion must aim at avoiding injustice or hardships resulting from accidental inadvertence or excusable mistake or error, but should not be designed at assisting a person who may have deliberately sought it in order to evade or otherwise to obstruct the cause of justice".*

[See also: **Nyabazere Gora versus Charles Buya**, Civil Appeal No.164 of 2016 CAT at Mwanza; **Oswald Masatu Mwizarubi versus Tanzania Fish Processing Ltd**, Civil Application No.225 of 2014 CAT (Unreported), (both unreported)]

Now back to the first limb of the Applicants' ground for extension of time. From the Applicants' own affidavit, have asserted that the impugned ruling against their suit, Civil Case No. 113 of 2021, was supplied to them by the on 4th November, 2022 and on 15th November, 2022 did file Misc. Civil Application No.528 of 2022 seeking extension of time to lodge Notice of Appeal to the Court of Appeal against it. This is evident under paragraph 7 and 12 respectively of the affidavit. From the date of receiving, to that of filing Misc. Civil Application No.528 of 2022, took them an interval of eleven (11) days, yet, reading the Affidavit, nowhere in it one can find explanations for delay of the said eleven days.

Again, under paragraph 14 and 15 of the affidavit, the Applicants have stated that the former extension of time Application, Misc. Civil Application No.528 of 2022, was struck out by this court on 27th February, 2023 and ruling thereof supplied to them on 6th March, 2023 and this Application came to be filed on 14th March, 2023 being after eight days. Also, these eight days of delay has no explanations in the affidavit.

On this, the Respondents have submitted that the Applicants have failed to account for the days of delay above pointed out and cited to this court the case of **Elias Kahimba Tibenderana versus Inspector**

General of Police and Another, Civil Application No.388/01 of 2020 CAT at Dar es Salaam (unreported) where the Court of Appeal at page 7 stated thus: -

"The above reinforces the well-established principle that a litigant who wishes the Court to extend time has an obligation to explain away each day of delay [See also: Ngao Godwin Losero versus Julius Mwarabu, Civil Application No.10 of 2015 (Unreported)]".

I would add, in **Nyabazere Gora versus Charles Buya** (supra), the Court of Appeal, at page 9, similarly stated as follows: -

"It is settled position of the law that, in an application for extension of time, the Applicant has to account for every day of the delay".

The above excerpts explain the first among the four formulated guidelines for extension of time application listed in **Lyamuya Construction Company Ltd versus Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application

No.2 of 2010 CAT at Dar es Salaam(unreported) where, at page6 last paragraph, the Court of Appeal listed down the said guidelines as follows: -

- (a) *The Applicant must account for all the period of delay*
- (b) *The delay should not be inordinate***
- (c) *The Applicant must show diligence, and not apathy, negligence or sloppiness in prosecution of the action that he intends to take*
- (d) *If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged”.***

Therefore, in my considered view, I agree with the respondents that the Applicants have failed to account for some of the days. That is to say, from 4th November, 2022 the date of receiving the impugned ruling to 15th November, 2022 the date of filing the former struck out extension of time Application, Misc. Civil Application No.528 of 2022 an interval of eleven (11) days; also, eight (8) days from 27th February, 2023 when the order striking out Misc. Civil Application No.528 of 2022 was supplied to the Applicants to 6th March, 2023 the date of filing this Application.

Nevertheless, my scrutiny of the Applicants' affidavit, paragraph 9 and 10 in particular, read together with the ruling intended to be appealed against, in my considered view, depict and raises a serious legal issue which need to be settled by the Court of Appeal hence a good ground for extending time. On this, I am guided by **Principal Secretary, Ministry of Defense and National Service versus Devram Valambhia** (supra) where it was observed by the Court of Appeal 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 to matter and the record right**".*

Mindful of not falling into discussing what is to be discussed before the Court of Appeal, in case the intended appeal sails through that stage, I will not discuss the arguments advanced by the respondents on the issue of illegality of the decision intended to be challenged. This is because, the same are centered on what is to be canvased before the court of appeal, equally so, the cited case laws

In the upshot, I find the application to be merited and thus allow it. Time is hereby extended to the Applicants to file Notice of Appeal to the Court of Appeal within fifteen (15) days of this decision. I make no order as to costs

It is so ordered

Dated at Dar es Salaam this 11th day of August, 2023

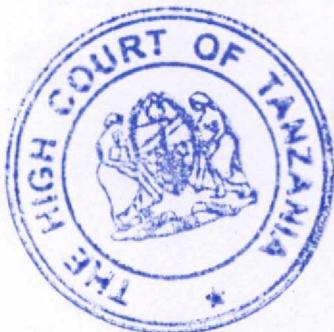



MUSA K. POMO

JUDGE

11.08.2023

Ruling delivered in presence of Ms. Victoria Lugendo, learned State Attorney for the Applicants. Mr. Agustino Mahela Masanja, learned advocate appeared holding brief for Mr. Eric Aggrey Mwanri, learned advocate for the 1st and 2nd Respondent and Mr. Julius Manjeka, learned advocate for the 3rd Respondent




MUSA K. POMO

JUDGE

11.08.2023