

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA  
DODOMA DISTRICT REGISTRY**

**AT DODMA**

**MISC. CIVIL APPLICATION NO. 1 OF 2021**

(Arising from an order of this court in (PC) Civil Appeal No. 27 of 2019)

**ELIBARIKI KIDAILA ..... APPLICANT**

**VERSUS**

**PETRO LYANGA.....RESPONDENT**

**RULING**

Last order 3<sup>rd</sup> August, 2023

Ruling: 14<sup>th</sup> August, 2023

**MASABO, J.:-**

In this miscellaneous application, leave is sought for enlargement of time within which the applicant can move this court to set aside its dismissal order in PC Civil Appeal No. 27 of 2019 which was entered after the applicant defaulted appearance. Bracing the chamber summons is an affidavit deponed by the applicant in which the grounds of application are deponed.

The abbreviated deposition made in the affidavit are to the effect that the applicant was an appellant in the above appeal which was dismissed by this court on 19/5/2020 owing to his default appearance. The reason for nonappearance, as deponed in paragraphs 2, 3 and 4 of the affidavits are that, after the appellant was aggrieved by the decision of the District Court of Iramba in Civil Revision No. 2 of 2019, he went back to the same court

and lodged his appeal well on time. He was thereafter advised by a registry officer to go home and wait for summons from this court notifying him that the appeal has been transmitted to this court. He went home and relaxed waited for the summons which were never served to him even after follow-ups at Iramba District Court. On 10<sup>th</sup> December 2020 he overheard that his rivalry, the respondent herein had gone for execution of the decree at the trial court. When he sent his advocate, one Chipson Chidumange, to follow up the matter, it was confirmed that indeed the appeal was dismissed and he thereafter, filed the present application.

Upon the application being filed, efforts to serve the respondent ensured without fruition. The court was that he changed his domicile and as a result of which this court made an order for substituted service, by which a summons was published in Nipashe Newspaper dated November 16, 2022 but still, the respondent did not enter appearance. Hence, an order for hearing of the application *ex parte* him.

Submitting in support of the application, Mr. Chipson Chidumange argued that the application has merit as the delay was not occasioned by the applicant's negligence. He argued that the court is sorely to blame as its procedures requires the appeal to be filed in the district court, a procedure which the applicant dutifully complied with and upon filing the appeal he was advised to wait for summons which did not come. Thus, he had no knowledge of the transmission of the appeal to this court let alone the fact that the appeal has been assigned to a judge and the proceedings were ongoing. By the time he became aware, the appeal had already been

dismissed and the duration of 30 days within which to file an application for setting aside the dismissal order had already lapsed. Immediately thereafter he filed the appeal. Thus, the applicant bears no blame and his prayer deserves a positive consideration.

I have carefully considered the learned counsel's submission alongside the chamber summons and its accompanying affidavit. As stated earlier, the leave for extension of time is sought in respect of a dismissal order dated 19/5/2020. By this order, the applicant appeal, PC Civil Appeal No. 27 of 2019, was dismissed for want of prosecution. Thereafter, the applicant took no action until on 18<sup>th</sup> January, 2021 when he filed the present application for extension of time. Just as in other applications of this nature, the enlargement of time is within the discretion of this court which need be exercised judiciously upon a good been demonstrated. Accordingly, the sole question for determination by this court is whether a good cause for enlargement of time has been demonstrated. The term good cause has no universal definition. What amounts to good cause depends on the peculiar circumstances of the case. As held in **Oswald Masatu Mwizarubi v, Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010, CAT (unreported):-

" What constitutes good cause cannot be laid down by any hard and fast rules. The term 'good cause ' is a relative one and is dependent upon the party seeking extension of time to provide the relevant material in order to move the Court to exercise its discretion."

In view of this and other precedents on this issue, it is now settled that, when determining whether or not a good cause had been demonstrated, the court should consider certain factors succinctly demonstrated by the Court of Appeal in the case of **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No.2 of 2010 (Unreported) where it was stated that, the factors to be considered are: -

- "(a) The applicant must account for all the period for delay;
- (b) The delay should not be inordinate;
- (c) The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take; and
- (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".

In the present application, the dismissal order sought to be challenged was pronounced on 19/5/2020 whereas this application was filed on 19<sup>th</sup> January 2021. The delay is inordinate as a period of 8 months had already lapsed when the applicant brought this appeal. Unless it is fully accounted for, this delay is inexcusable. From the applicant's affidavit, the above duration can be cluster into two. The first comprises of an approximate period of 7 months reckoned from the date of the dismissal order on 19/5/2020 and 10/12/2020 when he became aware of the dismissal order. For, this period, the applicant has pointed the finger to the court as the sole reason for the delay. Convincing this court to find the delay excusable and positively exercise its discretion in the favour of the applicant, his counsel, Mr. Chipson Kidumange has argued that, the applicant should not be condemned as the delay

occurred as a result of court procedures which require appeals originating from primary courts to be filed in the district court.

It is indeed true that as per Rule (3) of the Civil Procedure (Appeal is proceedings originating in Primary Courts Rules) appeal originating from primary courts are not filed direct at the High Court Registry. They are lodged at the district court whose decision is intended to be appealed against and the record is later transmitted to the High Court and the parties are summoned to appeal. Thus, it is not a farfetched fact that the communication of the transmission may be delayed and depending on the circumstances of a particular case, the benefit of doubt may be at the applicant's disposal. The immediate question to be answered is whether the circumstances of the present case warrant the enjoyment of the benefit of doubt by the applicant.

The record shows that the appeal was lodged before Kiomboi District Court on 30/8/2019. By November, the same year, the record had already been transmitted to this court. On 20/11/2019, the first summons calling upon the parties to appear in court on 2/3/2020 were issued. On 19/5/2020, the appeal was dismissed for nonappearance. The applicant has deposed that, for all this period he was unaware of the progress of his appeal as he had been told to wait. He only learnt of the dismissal order on 20<sup>th</sup> December 2020 when the respondent went back to the trial court for execution of his decree. His averment presupposes that for a period of 16 months reckoned from 30/8/2019 when he filed the appeal to 20/12/2020, the applicant had no clue of the progress of his appeal yet, he relaxed waiting to be summoned. I find it intriguing how a litigant can wait for all this period without taking

any step. In paragraph 3 of the affidavit, he has deponed that he used to make follow-ups at Kiomboi District court with no fruition, but apart from this deposition, there is nothing on record to support his averment. Even the name of the registry officer who was attending him during his follow ups is not disclosed an omission which raises a million questions as to the authenticity of this averment and suggests that that the applicant has a share of the blame.

The second part of the delay, constitutes the period of 37 days counted from 10<sup>th</sup> December 2020 when the applicant learnt about the dismissal order and 18<sup>th</sup> January 2021 when he filed the present application. Unlike the period above, this period has not been accounted for. All what the applicant has deponed in his affidavit is that after learning the existence of a dismissal order he asked his counsel to make follow up in court and later on, they filed the present application. It is trite that, in applications for extension of time, delay of even a single day must be accounted for. Addressing a similar issue in the case of **Kibo Hotel Kilimanjaro Ltd vs Treasury Registrar & Another** (Civil Application No. 502 of 2020) [2021] TZCA 80 [Tanzlii], the Court of Appeal held that;

“It is my considered view that the applicant ought to have accounted for the delay of 15 days after being supplied with the copy of the proceedings of the High Court. According to the applicant, he used the fifteen days to prepare for this application. The law is clear that in case of the delay to do a certain act, the applicant should account for each day of delay. The authorities of the Court to that effect are many, one of them include **Hassan Bushiri v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported) where the Court stated:

"Delay, of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken". [See also, **Lyamuya Construction Company Ltd** (supra), **Zitto Zuberi Kabwe and Others** (supra) and **Bariki Israel v. R**, Criminal Application No. 4 of 2011 (unreported)].

According to these authorities, each day of delay must be accounted for and the delay should not be inordinate. In the case at hand, the applicant only stated that he was preparing this application for fifteen days. It is my considered view that this line of reasoning is too casual because the applicant has not explained how he used the whole of fifteen days to prepare this application. I therefore find that the applicant has failed to account for the whole period of the delay. [emphasis added]

Needless to emphasize, the applicant here ought to have fully accounted how he spent the 37 days. The omission to fully account for this period was a material error and inhibit the positive exercise of discretion by this court. Thus, even if I were to agree with the applicant's averment that the court is solely to blame for the first period of the delay, the present application cannot sail as the second part of the delay has not been fully accounted for.

Accordingly, the application fails and is dismissed with no orders as to costs.

**DATED** at **DODOMA** this 14<sup>th</sup> day of August, 2023.

 **J. L. MASABO**  
**JUDGE**