

**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**MBEYA DISTRICT REGISTRY**

**AT MBEYA**

**MISC. CIVIL APPLICATION NO. 33 OF 2022**

(From the decision of the High Court of Tanzania at Mbeya in Civil Appeal No. 12 of 2019 and Original Resident Magistrates' Court of Mbeya in Civil Case No. 46 of 2018)

**TWALIB LUBANDAMO..... APPLICANT**

**VERSUS**

**MACHEMBA TANGIMU GAMANO.....RESPONDENT**

**RULING**

Date of last Order: 12/07/2023

Date of Ruling: 23/08/2023

**NDUNGURU, J.**

The applicant seeks extension of time within which to lodge a notice of appeal and leave to appeal to the Court of Tanzania against the decision of this Court delivered on 13<sup>th</sup> day of October 2020 in Civil Appeal No. 12 of 2019. The application has been made under the provisions of section 11

(1) of the Appellate Jurisdiction Act (Cap 141 R.E. 2019). It is supported by an affidavit deposed by the applicant himself. The application is opposed by the respondent vide counter affidavit.

On the date of the hearing of the application, the applicant was represented by Mr. Chapa Alfredy, learned advocate whereas the respondent enjoyed the service of Ms. Jalia Hussein, learned advocate. Upon the parties request the Court allowed this application be disposed orally.

In support of the application, Mr. Chapa commenced his address by fully adopting the affidavit as part of the applicant's oral submission. He said that the reasons for the delay are only two namely; first, is the technical delay and second, is illegalities. As regards, technical delay. He clarified that, the first application was filed on time as provided at paragraph 4 of the affidavit. He also stated that, paragraph 5 of the affidavit provided for the fact that the application was found incompetent thus was struck out. He went on to submit that, then issued a letter to the Court of Appeal to withdraw the notice to the Court of Appeal as it had shortcoming.

He also stated that, in paragraph 9 it is provided that they were notified that their letter to withdraw the notice was received at the Court of Appeal. He further submitted that, in paragraph 11 of the affidavit the Court of Appeal notified them about the withdraw of notice then next date they filed the present application. To buttress this proposition, Mr. Chapa referred the Court to the decisions of the Court of Appeal in **National Housing Corporation & 3 others v Jing Lang Li**, Civil Application No. 432/17 of 2017 and **Tanzania Breweries Ltd v Leo Kobelo**, Civil Application No. 64/18 of 2020 (both unreported).

On the ground of illegalities, Mr. Chapa argued that, the impugned decision is marred with illegalities which the Court of Appeal must address. These illegalities have been pointed out in paragraph 14 and 15 of the supporting affidavit, he submitted. He added that, where there is an illegality in the decision sought to be challenged, that by itself constitute good cause for extending time. To buttress his contentions, counsel for the applicant referred the Court to the cases of **Msesule Village Council & another v Mahalala Irrigation Corporative Society**, Misc. Land Application No. 36 of 2019, HC at Mbeya, and **Costantine Victor John v**

**Muhimbili National Hospital**, Civil Application No. 214/18 of 2020, CAT at DSM (both unreported). Having so said Mr. Chapa implored me to allow the application and grant the orders sought.

The respondent resisted the application with some force. Speaking through Ms. Jalia and having adopted the counter affidavit as part of her oral arguments, she submitted that, the applicant failed to demonstrate the reason of illegalities and has as well failed to account from 13<sup>th</sup> day of September 2022 when judgment was delivered of withdrawing the notice of appeal up to 20<sup>th</sup> day of September 2022 when he filed this application. She added that, the applicant has failed to account for 8 days of his delay from 13<sup>th</sup> day of September 2022 to 20<sup>th</sup> day of September 2022.

To cement her arguments, Ms. Jalia referred the Court to the decisions of the Court Appeal in **Elius Mwakalinga v Domina Kagaruki & 5 others**, Civil Application No. 120/17 of 2018 and **Omary R. Ibrahim v Ndege Commercial Services Ltd**, Civil Application No. 83/01 of 2020 (both unreported). She further argued that, it is due to the negligence of the applicant which led the application for leave to be struck out. She

added that, the applicant has not shown any sufficient cause for delay to lodge Notice of Appeal and application for leave.

More so, as regards to illegalities, there are some elements which must be adhered to. Such as lack of jurisdiction, right to be heard, it must be time barred. She referred this Court to the case of **Ibrahim Twahil Kusundwa & another v Epimaki S. Makoi & another**, Civil Application No. 437/17 of 2022, CAT (unreported) to support her contentions. In conclusion, she prayed the Court to dismiss this application with costs.

In brief rejoinder, Mr. Chapa submitted that, they got the order on 19<sup>th</sup> day of September 2022 and lodged the present application on 20<sup>th</sup> day of September 2022. He also argued that, the cited case of **Ibrahim Twahil Kusundwa & another** (supra) does not talk about the conditions of illegalities as submitted by the learned counsel for the respondent. He added that, counsel for the respondent does not dispute on the illegalities. He further argued that, as regards to technical delay counsel for the respondent has not traversed it. Finally, he prayed the Court to grant the application.

Having considered the opposing submissions from the parties, the Court's record and pleadings filed in this Court, the pertinent issue for determination is whether the applicant has demonstrated good cause to warrant the Court to exercise its judicial discretion.

In the first place, I wish to state that, it is settled law that, in an application for enlargement of time, the applicant has to account for every day of the delay involved and that failure to do so would result in the dismissal of the application. See the cases of **Bariki Israel Versus Republic, Criminal Application No. 4 of 2011, CAT** and **Crispian Juma Mkude Versus Republic, Criminal Application No. 34 of 2012, CAT (both unreported)**.

Also, it is settled law that, in order for the Court to exercise its discretionary power in extending time, good cause for the delay must be shown by the applicant. However good cause has not been defined. It is therefore upon the applicant to sufficiently convince the Court that good cause exists. That, this position is well stipulated in the case of **Fares Munema Versus Asha Munema, Civil Application No. 122 of 2015, CAT (unreported)** where the Court stated that:

*"The applicant has not advanced a reason or reasons to explain away the decision in filing the intended reference within time. It will therefore follow that no reason (s) let alone sufficient reason (s) has/have been shown to warrant the exercise of the Court's discretion any power under Rule 8."*

This application for extension of time to file Notice of Appeal and an application for leave to appeal to the Court of Appeal of Tanzania out of time basically hinges on two limbs namely; firstly, an allegation of technical delay, and secondly, complain that the impugned decision tainted with illegalities.

With regard to the first limb of the application, there is no doubt that prior to this application, the applicant was in this Court pursuing Misc. Civil Application No. 58 of 2020 which was struck out for being incompetent as result on 9<sup>th</sup> day of March 2021 the applicant was filed notice to withdraw Notice of Appeal in the Court of Appeal. And on 19<sup>th</sup> day of September 2022 the applicant received an order which show that the said Notice of Appeal is marked withdrawn, then he was lodged the present application on 20<sup>th</sup> day of September 2022.

It is my finding that, the entire period from 4<sup>th</sup> day of March 2021 when that Misc. Civil Application No. 58 of 2020 was struck out up to 19<sup>th</sup> day of September 2022 when the Notice of Appeal is marked withdrawn by the Court of Appeal constitutes an excusable technical delay. On that regard, the applicant promptly and diligently re-approached the Court on 20<sup>th</sup> day of September 2022, to launch the present pursuit for extension of time after his initial efforts prove futile. I therefore find that the entire period of delay has been duly accounted for.

In the case of **Victor Rweyemamu Binamungu Versus Geoffrey Kabaka & another, Civil Application No. 602/08 of 2017** (unreported) where the Court of Appeal of Tanzania sitting at Mwanza inter alia stated that;

*"The period thereafter to 4<sup>th</sup> December 2017 when the application for revision was struck out, constitutes technical delay which should not be blamed on the applicant. The applicant lodged this application on 11<sup>th</sup> December 2017, barely seven days later".*



Also, see the case of **Emmanuel R. Maira v The District Executive Director Bunda District Council**, Civil Application No. 66 of 2010, CAT (unreported). In addition, I have taken into account that, it does not appear that the respondent is likely to suffer any prejudice if time is extended. Since the foregoing conclusion sufficiently disposes of this matter, I find no need to consider the second limb of the application.

On the foregoing, I am satisfied that the applicant has given valid explanation for the purported delay. I accordingly grant leave and extend the period of instituting an application for leave to appeal to the Court of Appeal and to lodge Notice of Appeal out of time. The applicant is given 14 days (fourteen days) from the date of this Ruling within which to lodge Notice of Appeal and application for leave to appeal to the Court of Appeal. In the circumstances of the case, I make no order as to costs.

It is so ordered.



  
**D.B. NDUNGURU**

**JUDGE**

**23/08/2023**