

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

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 186 OF 2023

(Originating from Misc. Civil Application No. 688 of 2019 of the High Court of Tanzania
at Dar es Salaam)

HURUMA GIDEON NYAUPUMBWE.....APPLICANT

VERSUS

NMB BANK PLC..... RESPONDENT

RULING

Date of Last Order: 16/08/2023.

Date of Ruling: 25/08/2023.

E.E. KAKOLAKI, J.

In this application this court is called upon to grant extension of time within which to file Notice of Appeal to appeal to the Court of Appeal of Tanzania, against the ruling and drawn order of this Court in Misc. Civil Application No. 688 of 2019 handed down on 19th day of November 2020. Other reliefs sought are cost of the application and any other relief which the Court may deem fit to grant. The application is brought by way of chamber summons, preferred under section 11 (1) of the Appellate Jurisdiction Act [Cap. 141 R.E 2019], supported with the affidavit duly sworn by **Huruma Gideon**

Nyaupumbwe the applicant, stating mainly two grounds as to why this Court should grant his prayers, **one**, technical delay and **second**, illegality of the decision sought to be impugned.

Gathered from the affidavit it is the applicant's contention the respondent filed Civil Case No. 219 of 2017, without serving him with the summons to appear nor a copy of the plaint for him to file his defence against the said Civil suit before the Court proceeded to determine it ex-parte, as he became aware of it at the judgment stage through Mwananchi Newspaper. That, upon such information he unsuccessfully applied to setting aside the ex-parte judgment through Misc. Application No. 688 of 2019, as the same was dismissed on 19th November, 2020 for want of merit. Disgruntled but being out of time to challenge the said decision the applicant preferred application for extension of time to file notice of appeal out of time but the same was rejected for want of jurisdiction, before another application Misc. Civil Application No. 219/01 of 2021 was filed before the Court of Appeal of Tanzania, which ended up withdrawn on technical grounds.

According to the applicant the ruling in Misc. Civil Application No. 688 of 2019 is tainted with illegality as the trial judge after making the finding that

the application was time barred, he ought to have dismissed it and not to proceed on determining the same on merit and without jurisdiction to do so.

Another irregularity and/or illegality advanced by the applicant is the dismissal of his application basing on wrong provisions of the law, which to him is sufficient ground for grant of this application.

According to the applicant, the delay to file notice of appeal within time was not done deliberately rather the applicant was prosecuting other incompetent applications before this court and court of appeal of Tanzania hence the applicant found himself out of time thus the same constitutes technical delay. He further averred that, the period of 30 days from 16th February 2023 when Misc. Civil Application No. 219/01 of 2021 was withdrawn to 28th March, 2023 are justified as the applicant was searching fund to engage legal services in prosecution of this application as other eight (8) days were spent in preparation and filing the present application.

To him, unless the application is granted the record of this court in Misc. Civil Application No. 688 of 2019 will remain with illegalities and irregularities thus, prejudicing the right of the concerned parties. It is for that reason the applicant believes enlargement of time is necessary for him to file the Notice

of appeal out of time to the Court of Appeal of Tanzania challenging the said decision.

The application could not be let to lay peaceful before this Court as it met strong resistance from the respondent through the counter affidavit duly affirmed by one Sharifa Karanda, her principal officer avowing that, the applicant has failed to establish good cause warranting this Court grant the sought orders as the applicant's act of filling incompetent applications before the court amounts to negligence and a total abuse of the courts process. However, she admitted that the High Court Judge misdirected himself in referring the provisions of the law providing the time limit to apply to set aside an ex-parte judgment when dismissing the application under contest.

When the matter was fixed for hearing which took the form of written submission, applicant was represented by Mr. Ladislaus Rwekaza while the respondent had representation of Ms. Jamila Kassimu Athumani, both learned counsel.

Submitting in support of the application Mr. Rwekaza preceded his submission with a prayer to adopt the contents of applicant's affidavit to form part of his submission. He then repeated the factual background of the

matter as explained in the affidavit in support of the application and what bred the instant application.

On the ground of irregularities and illegalities of the sought to impugned decision Mr. Rwekaza submitted that, the High Court Judge after having made his finding that the said Misc. Application No. 688 of 2019 was time barred, he ought to have dismissed it and not proceed to further determine it on merit and without jurisdiction to do so, the fact which was admitted by the respondent in paragraph 9 of the counter affidavit. He supported his position by citing the case of **Shabir Tayabali Essaji Vs Farida Sifudini Essaji**, Civil Appeal No. 180 of 2017, (CAT-unreported). In his view the trial judge ought to have dismissed the application as it was already out of time, thus lacked jurisdiction to determine it on merit. He maintained that, where illegality in the impugned decision is raised, the court is required to extend time even if it means the applicant has failed to account for delayed period in performing the act in which an extension is sought for. He placed reliance on the case of **Principle Secretary, Minister of Defence and National Service Vs. Devran Valambia** (1999) TLR 189.

Concerning the issue of technical delay he argued that, the applicant was busy in court prosecuting Misc. Civil Application No. 219/01 of 2021 which

was withdrawn on technical ground right from 19th November, 2020 when the ruling in Misc. Civil Application No. 688/2019 was delivered to 16th February, 2023 when Misc. Civil Application No. 219/01/of 2021 was withdrawn at the Court of Appeal of Tanzania, hence the delay amounts to technical delay. On that legal stance he invited the Court to be guided by the decision in the case of **Fortunatus Masha Vs William Shija and Another** (1997) TLR 154 and **Salvanda KA Rwegasira Vs China Henan International Group Co. Ltd**, Civil Reference No 18 of 2006 where the court differentiated between actual delay and technical delay.

In conclusion Mr. Rwekaza submitted that the applicant has managed to sufficiently exhibit good cause to warrant this court to grant him the prayers sought in chamber summons. He thus prayed the Court to grant those prayers.

In rebuttal, Ms. Athumani argued that, for extension of time to succeed there are conditions to be fulfilled. He quoted the conditions as set up in the case of **Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (CAT-unreported) for constituting good cause for extension of time. According to her, the reasons for delay can be established

by looking into the nature of actions taken by the applicant immediately before or after been aware that delay may occur or it has occurred. She contended that, the reasons advanced by the applicant in his affidavit does not hold water and cannot be termed as sufficient cause for grant extension of time. She intimated that, after dismissal of Misc. Civil Application No. 688 of 2019, the applicant being dissatisfied with the decision could have appealed to the Court of Appeal against such dismissal. To her, the applicant's act of filing an application No. 219/01 of 2021 to the Court of Appeal to set aside judgment and decree of Civil Suit No. 219 of 2017 instead of doing so in this Court is a high degree of ignorance of the law and recklessness which cannot be excused and be used as ground of extension of time. To buttress her position, she cited to the Court the case of **Hamimu Hamisi Totoro @ Zungu Pablo and Others vs Republic**, Criminal Application No. 121/07 of 2018 (CAT-unreported).

In her further submission she contended that, as per the case of **Tanzania Coffee Board vs Rombo Millers Ltd**, Civil Application No.13 of 2015 (CAT-unreported), which cited with approval the case of **Bushiri Hassan vs Latifa Lukio Mashayo**, Civil Application No. 3 of 2007, the applicant has to account for each day of delay. She took the view that, applicant has failed

to account for each day of delay. According to her, the averment that the applicant spend 30 days in the process of engaging an advocate is baseless as in our jurisdiction, there are legal aid institutions helping people who cannot afford to engage advocates. She said, the applicant failed to account for each day of delay from 16th February, 2023 to 4th April, 2023 when the present application was filed.

Concerning the ground of illegality, Ms. Athuman countered that, the applicant cannot rely on it as a ground for extension of time. In this she relied in the case of **Mtengeti Mohamed Vs. Blandina Macha**, Civil Application No. 344/17 of 2022 (CAT-unreported) which cited the case of **William Kasian Nchimbi and three others Vs Abas Mfaume Sekapal and Two Others**, Civil Reference No. 2 of 2015 (CAT-unreported) providing that, illegality cannot be used as a shield to hide against inaction on the part of the applicants. Basing on the above submission she implored this Court to dismiss this application with cost.

In rejoinder, submission Mr. Rwekaza was insistent that, there was illegality in the sought to be appealed ruling. He tasked the Court to ask itself as to whether the trial judge was correct to apply the provisions of order IX Rule 9 (1) of the CPC when held that the application was filed out of time which

is 21 days, and whether or not it was proper for the trial judge in the impugned ruling to dismiss the application for want of merit after he had already made a finding that the application before him had been filed out of time. He argued that, the trial judge misconstrued the applicability of Order IX Rule 9 (1) of the Civil Procedure Code, (Cap 33 R.E 2002) as the same refers another Rule which is Rule 6 (1) (ii) of the same order. To him the rule applies only where the defendant is Attorney General and not otherwise. He submitted further that; the prescribed 21 days are applicable only to Attorney General. He took the view that the proper provision to be applied was part III Item 5 of the Law of Limitation Act, [Cap. 89 R.E 2019] where the time limitation is 30 days. According to him by applying section 60 of Interpretation of Laws Act, Saturday, Sunday and holidays are excluded, thus since the ex-parte Judgement was delivered on 22/11/2019, 30 days was supposed to be reckoned from 25/11/2019 to 24/12/2019 because 23rd and 24th November 2019 were weekends thus excluded.

Concerning the second ground he reiterated his submission in chief and maintained that, the illegality demonstrated is sufficient to warrant this court to grant extension of time to the applicant so as to file the notice of intention to appeal to the court of appeal and cure the said anomaly. He also attacked

Lyamuya's case cited by respondent counsel claiming that the same is distinguishable to the fact of this case as in this matter there is a point of law ought to be determined by the Court of Appeal.

Concerning the submission that applicant acted under ignorance as instead of appealing against the dismissal order in Misc. Civil Application No. 688 of 2019 he filed Misc. Civil Application No. 219/01 of 2021 to set aside judgement and decree, he contended that, the same is misconceived and has no merit as it is clearly elaborated under paragraph 9 and 10 of the applicant's affidavit that after the said Misc. Civil Application No. 668 of 2019 was dismissed while out of time the applicant filed for extension of time to file a notice of appeal out of time but the same was rejected for want of jurisdiction and withdrawn on technical ground hence the issue of ignorance of law is not applicable as the applicant acted with due diligence in exercising his right to be heard. Concerning the authority of **Hamimu Hamisi Totoro** cited by Ms. Athumani, he said it is irrelevant to the present application since no ignorance of law was shown in the part of the applicant.

On the respondent's response in respect of the reasons for the delayed in filing this application in exclusion of the days consumed by technical delay, he said the applicant has accounted for the delayed days as demonstrated

in under paragraph 14 of the affidavit that from 16th February, 2023 when Misc. Civil Application No. 219/01/2021 was withdrawn to 28th March 2023, the 30 days were spent in the process of engaging an advocate and 8 days used in preparations of the application. Thus to him, the applicant successfully accounted for each and every day of delay. That aside he was insistent that, where there is illegality of the decision claimed, the Court has to grant extension of time even if the applicant has failed to account for each day of delay. He then reiterated his prayer in the submission in chief.

I have dispassionately examined and considered the affidavit, counter affidavit and submissions in support and against the application. in my humble view the issue which this Court is called to determine is whether the application has all what it takes to make it a success.

Notably, the powers of this Court to extend time within which application of this nature can be filed as provided for under Section 11 of the Appellate Jurisdiction Act [Cap 141 R.E 2019] is discretionary exercised upon applicant demonstrating to the satisfaction of the Court that, the delay was occasioned by good cause. It is also well settled that sufficient/good cause depends on deliberation of various factors some of which revolve around the nature of actions taken by the applicant immediately before or after becoming aware

that the delay is imminent or might occur. It is also significant to state that what constitutes sufficient cause has been widely covered in a multitude of court decisions. For instance, in the case of **Lyamuya Construction Company Limited Vs. Board of Trustees of YWCA**, Civil Application No.2 of 2010 (CAT-unreported), the Court of Appeal of Tanzania set out key conditions which constitute the applicant's basis for quest for extension of time. The conditions though not exhaustively demonstrated are:

"(a) The applicant must account for all the period of delay.

(b) The delay should not be inordinate.

The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action 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 illegality of the decision sought to be challenged."

See also the cases of **Regional Manager, Tanroads Kagera Vs. Ruaha concrete Company Ltd**, Civil Application No 96 of 2007 and **Tanzania Coffee Board Vs. Rombo Millers Ltd**, Civil Application No 13 of 2015 (both CAT-unreported).

Further, in assigning reasons, the applicant has to account for each and every day of delay as it was stated in the case of **Bushiri Hassan Vs. Latina Lukio, Mashayo**, Civil Application No. 3 of 2007 and **Sebastian Ndaula Vs. Grace Rwamafa**, Civil Application No. 4 of 2014 (both CAT-unreported).

In this application as alluded to above the reason cited by the applicant in his affidavit are two, **one**, technical delay and **second**, illegality of the decision sought to be impugned. To start with the ground of technical delay, it is uncontroverted fact that, technical delay is a good cause or sufficient ground warranting court to grant the extension of time, if the same is successfully established as advocate's negligence in adopting correct procedure of the law does not constitute sufficient reason for the exercise of the Court's discretion. See the case of **Fortunatus Masha Vs. William and Another** [1997] TLR 213 (CAT).

In this application as rightly submitted by Ms. Athumani, after being dissatisfied with the decision of this court when dismissing his application, the applicant had to appeal to the court of appeal against dismissal order. In this matter no doubt applicant's advocate acted negligently or in ignorance of the law and without due diligence when wrongly took another path and

filed an application for extension of time to file notice of appeal out of time to the Court of Appeal instead of this Court before the same was rejected for want of jurisdiction, hence an inordinate delay of two years and 47 days or more than 777 days. It is the law that advocate's negligence or ignorance of the law and lack of diligence on his part has never been good cause for extension of time. See the cases of **Tanga Hardware & Auto Parts Limited and 6 Others Vs. CRDB Bank Ltd**, Civil Application No. 114 of 2005 and **Omari R. Ibrahim vs. Ndege Commercial Services LTD**, Civil Application No 83/01 of 2020 and (CAT-unreported). In **Tanga Hardware & Auto Parts Limited and 6 Others** (supra) the Court had the following to say:

*"...this Court should not allow an advocate to plead oversight wherever there is a transgression of the rules or of directives of this Court on its decisions. After all, it has been said up-teen times, needing no citation of authority, **that an error of an advocate is not sufficient cause for extending time. I dare say that an oversight of an advocate is not sufficient cause for this Court to waive a requirement that has been observed religiously like this one.**"*

(Emphasis supplied)

Similarly in **Omari R. Ibrahim** (supra) the Court of Appeal of Tanzania observed that:

*"It should be stated once that, **neither ignorance of the law nor counsel's mistake constitutes good cause** in terms of Rule 10 of the Rules. (See *Bariki Israel v. The Republic*, Criminal Application No. 4 of 2011 and *Charles Salungi v. The Republic*, Criminal Application No. 3 of 2011 (both unreported)). In the case of *Umoja Garage v. National Bank of Commerce*, [1997] TLR 109, the Court stated that **lack of diligence on the part of the counsel is not sufficient ground for extension of time**. In the current application, the record speaks loudly that **the Applicant was negligent on the path he chose which culminated into inordinate delay which he failed to account for**. For the foregoing and taking into consideration the circumstances pertaining in the current application, it is my view that no good cause has been shown by the Applicant to warrant extension of time sought. In the final result, this application is devoid of any merit and the same is dismissed with costs. (Emphasis added)*

On basis of the above authorities and reasoning it is apparent to me that the point of technical delay cannot stand, hence a finding that the applicant has failed to account for the delay of 777 days. Further to that, assuming for the sake of argument the period of 38 days ending 28th March, 2023 in which

the applicant alleges to have spent searching for fund to engage the legal services and file this application from 16th February 2023 when Misc. Civil Application No.219/01 of 2021 was withdrawn, constituted good caused though all fouls it did not, still I would hold he failed to account for another 30 days from 28th March, 2023 to 28th April, 2023 when this application was filed as per the filing fees receipt since the same was not filed on 28th March, 2023 as the applicant would want this Court to believed.

It is also uncontroverted fact as gathered from the affidavit and Mr. Rwekaza's submission that, when illegality is successful pleaded the court has to grant extension of time regardless of whether the delayed days have been accounted or not. This settled position of the law was articulated in the case of **VIP Engineering and Marketing Limited and Three Others Vs. Citibank Tanzania Limited**, Consolidated Civil Reference No. 6, 7 and 8 of 2006 (CAT-unreported) where the Court of Appeal patently stated that:

"It is, therefore, settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under rule 8 regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay."

Nevertheless, it is also worth of note that, reliance on the ground of illegality is not automatic and without any condition precedent, as the settled position is that, the alleged illegality must be apparent on the face of record. If illegality is so unclear and would not be discovered without a long-drawn argument or process, the same fails the test or the threshold requisite for having it as a ground or good cause for extension of time. This principle was pronounced in the case of **Lyamuya Construction Company Ltd Vs. Board of Trustee of Young Women's Christian Association of Tanzania**, (supra) when the Court of Appeal of Tanzania had the following to say:

*"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, 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 and, I would add that it must also be apparent on the face of record, such as the question of jurisdiction; not one that would be discovered by a long-drawn argument or process.**" [Emphasis supplied]*

In the matter at hand Mr. Rwekaza alleges illegality in two folds, firstly misdirected of the Court on applicability of the provisions of Order IX Rule 9 (2) of the CPC in determination of the time limitation for setting aside the ex-parte judgment in Misc. Application No. 688 of 2019 as also conceded by the respondent and the secondly, the trial judge's act of dismissing the matter for want of merit after discovering that the same was out of time.

In my view the issue as to *whether the trial judge was correct to apply the provisions of order IX Rule 9 (1) of the CPC and hold the application was filed out of time which is 21 days* and *whether or not it was proper for the trial judge in the impugned ruling to dismiss the application for want of merit after he had already made a finding that the application before him had been filed out of time*, need to be canvassed by evidence and arguments from both parties. That, however, is not the task of this Court, at this stage. It is my humble view that, when the matter gets into that level shifts into the realm of the Appellate Court. The duty of this Court is to satisfy itself, as to whether such illegality is apparent on face of record as observed in **Lyamuya Construction Company Ltd's case** (supra).

In my unflustered view, the illegality alleged to exist is of sufficient importance and apparent on record and not the one that would require a

long-drawn argument to discover. It is my conviction that the ground of illegality has passed the requisite threshold to be relied on by the applicant as good cause for extension of time. As alluded to in the above cited cases, though the applicant failed to account for delayed days, he has successfully pleaded the ground of illegality as good cause warranting this Court exercise its discretion to grant him the sought prayers..

All said and done, I grant the application by extending time on the ground of illegality of the decision alone and proceed to order that the applicant should file the notice of appeal to the Court of Appeal in respect of the ruling in Misc. Civil Application No. 688 of 2019, within fourteen (14) days from the date of this ruling.

Each party to bear its own costs.

It is so ordered.

Dated at Dar es Salaam this 25th August, 2023.



E. E. KAKOLAKI

JUDGE

25/08/2023.

The Ruling has been delivered at Dar es Salaam today 25th day of August, 2023 in the presence of Mr. Meshack Dede, advocate for the applicant, Ms. Jamila Kassim, advocate for the respondent and Mr. Oscar Msaki, Court clerk.



E. E. KAKOLAKI
JUDGE
25/08/2023.

