

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

MISC. CIVIL APPLICATION NO.159 OF 2023

*(Arising from Civil Case No. 29 of 2019 High Court at Dar es Salaam delivered
on 14th February, 2020 Hon. R.A. Ebrahim, J)*

BITAN INTERNATIONAL ENTERPRISES.....APPLICANT

VERSUS

MISHED KOTAK.....RESPONDENT

RULING

25/07/2023 & 31/8/2023

POMO, J

The Applicant, BITAN INTERNATIONAL ENTERPRISES, is applying for extension of time to lodge notice of appeal to the Court of Appeal citing section 11(1) of the Appellate Jurisdiction Act, [Cap. 141 R.E.2019] as an enabling provision of the law. The application which is preferred by way of chamber summons, is supported by the affidavit deposed on 6th April, 2023 by Mr. Samuel Shadrack Ntabaliba, learned advocate for the Applicant. On the other hand, the application is strenuously contested by the respondent through his counter affidavit deposed on 12th May, 2023.

VS.

Briefly stated, the Applicant instituted Civil Case No.29 of 2019 before this court against the Respondent. The suit didn't go to its full trial because it was dismissed with costs on 13th February, 2020 Hon. R.A. Ebrahim, J on the strength of preliminary objections raised against it by the respondent and upheld by this court.

Following the above decision, the Applicant, on 18th February, 2020, initiated appeal process by lodging notice of appeal to the Court of Appeal and letter applying for copy of ruling, drawn Order and proceedings. Again, on 29th April, 2020 the Applicant lodged to this court a reminder letter on proceedings which were yet to be supplied to her.

Upon being supplied the documents requested, the Applicant prepared record of appeal and lodged an Appeal, Civil Appeal No.239 of 2020, to the Court of Appeal of Tanzania. Again, the appeal didn't sail through hearing on merits stage because on 28th March, 2023 it was struck out by the Court of Appeal on the ground that the Applicant's letter requesting for copy of ruling, drawn order and proceedings for record of appeal preparation was not served to the Respondent within prescribed time. Since the Applicant didn't fulfil her quest of pursuing her right of appeal to the Court of Appeal against Civil Case No.29 of 2019, thus has re-initiated appeal process by

filing the herein Application for extension of time to lodge notice of appeal out of time.

When the Application was called on for hearing on 6/6/2023, Mr. Samuel Ntabaliba and Francis Mgare, learned advocates appeared for the Applicant and the Respondent respectively. I ordered the application be disposed by way of written submissions and both sides have complied the scheduled orders of filing respective submissions. I am grateful to the learned minds for their submissions for and against the Application.

Submitting for the Application, Mr. Ntabaliba adopted the affidavit supporting the Application and argued that from the date Civil Appeal No.239 of 2020 was struck out by the court of Appeal to 6th April, 2023 when this Application was filed is a delay of 15 days of which he contends are days which are justifiable on the basis that are the days used in looking for an advocate to represent the Applicant and preparation of the application herein hence not inordinate delay and invited this court to exercise its discretion. Mr. Ntabaliba is of a further contention that the Applicant was caught in technical delay the time her appeal got struck out by the Court of Appeal and to bolster his argument he cited the case of **Costantine Victor John**

versus Muhimbili National Hospital, Civil Application No.214/18 of 2020
CAT at Dar es Salaam (Unreported).

In his further submission, Mr. Ntabaliba, is of the argument that the decision reached by the court of appeal in striking out the Applicant's Appeal is tainted with illegality thus asserted illegality as good cause for extension of time.

Responding, Mr. Mgare, learned counsel for the Respondent adopted the counter affidavit and argued that the Applicant's former appeal to the Court of Appeal, Civil Appeal No. 239 of 2020 was dismissed for being time barred therefore even if the application is to be allowed, the order will serve no purpose because it will be tantamount to reviving the already time barred case. On this, he cited the case of **Hashim Madongo and 2 Others versus Ministry of Industries and Trade and 2 Others** [2009] TLR 357.

Again, it is Mr. Mgare's submission that the Applicant has failed to account on each day of delay, the days being from 24th March, 2023 when Civil Appeal No.239 of 2020 was struck out to 13th April, 2023 when this application was filed, a total of 19 days. In support, he referred this court to the case of **Constantine Victor John** case (**supra**), **Shah Hemraj**

Bhamal & Brothers versus Kumari w/o J.N. Bhila [1961] EACA 679.

In the end, he asked 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.

To begin with, 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)]

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 page 6 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”.***

Now, from both affidavits for and against the application, parties are not in dispute in regards to days from 14th February, 2020 when the Applicant's Civil Case No. 29 of 2019 was dismissed by this court to March, 2023 when the Applicant's Civil Appeal No. 239 of 2023 was struck out by the court of appeal. These are days which are regarded to be within technical delay because are days during which the applicant was pursuing her Civil Appeal No.239 of 2023 before the court of appeal [see: **Fortunatus Masha**

versus William Shija and Another [1997] TLR 154]. Parties has locked horns on days from the date Civil Appeal No.239 of 2020 got struck out to 13th April, 2023 when this Application was filed.

Admittedly, both parties have not supplied this court the order of the court of appeal striking out the said Civil Appeal No.239 of 2020 to make it certain to this court as to when exactly the same was struck out by the court of appeal. Also, whether the court of appeal order was supplied to them or is yet to be supplied, is undisclosed hidden secret to both parties. That being the case, the question come, is this court placed in a position to accept with certainty that on 24th March, 2023, which is stated by the Respondent, and not 28th March, 2023, which is stated by the Applicant, to be the date on which the said appeal before the court of appeal was struck out? These assertions, in my view, need proof and I see no reason for not believing the one stated by the Applicant that the same was on 28th March, 2023 hence days in dispute on whether are accounted for or not are 14 days.

Taking into account that an application before the court is something which has to be drafted legally and attested before being filed, and all these needs time and research, in my view, 14 days from the date of striking out the Applicant's Civil Appeal No. 239 of 2020 to the date of filing this

Application is not inordinate delay and the same falls within what was decided by the Court of Appeal in **Lyamuya Construction Company Ltd** case (Supra) that delay should not be inordinate. I am also fortified by the decision of the court of appeal in **Kalunga and Company Advocates versus National Bank of Commerce**, Civil Application No.124 of 2005 CAT at Dar es Salaam (Unreported) where, at page 10, observed that a delay of 17 days was not inordinate delay.

The Respondent has raised an important and novel issue that since the applicant's appeal before the court of appeal was time barred, then any order herein will serve no purpose because will amount to reviving a time barred appeal. with due respect to Mr. Mgare, learned counsel, since the appeal was struck out then parties were automatically brought back into the position before initiating an appeal against the impugned ruling in Civil Case No. 29 of 2019.

Another issue which, although does not feature in any of the parties' affidavits, was addressed in the cause of their submissions is that of allegations by the Applicant on the illegalities of the court of appeal decision striking out the Applicant's civil Appeal No.239 of 2020. On this, I fully subscribe the submission by Mr. Mgare, learned counsel that, this court is

not vested with the power to question the court of appeal decision in whatever way as the High Court is subordinate to it. Thus, the issue of illegality (if any) ought to be premised on the High Court impugned decision and not on the decision of the court of Appeal.

All said and done, I find the application to be merited and thus allow it. Time is hereby extended to the Applicant to lodge 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 31st day of August, 2023


MUSA K. POMO

JUDGE

31.08.2023

Ruling delivered in presence of Mr. Francis Mgare, learned advocate
for the Respondent only




MUSA K. POMO

JUDGE

31.08.2023