

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

MISC. CIVIL APPLICATION NO. 59 OF 2023

*(Arising from Civil Appeal No. 30 of 2019 dated 10th February, 2020, before Hon. Masabo J,
originating from the decision of Ilala District Court vide Misc. Civil. Application No. 13 of 2018)*

DR. INNOCENT NGALINDA APPLICANT

VERSUS

SYKES TRAVEL AGENTS LIMITED..... APPLICANT

RULING

S.M. MAGHIMBI, J.

The application beforehand is lodged under the provisions of Section 11(1) of the Appellate Jurisdiction Act, Cap 141 ("AJA") whereby the applicant is praying following relief(s):

- (a) That this honourable Court be pleased to grant an extension of time to the Applicant to lodge notice of intention to appeal to Court of Appeal of Tanzania out of time against the decision of the honourable Court (Hon. Masebo J) dated 10th February, 2020 which dismissed Applicant's Civil Appeal No. 30 of 2019 between parties.
- (b) That this honourable Court be pleased grant an extension of time to

the Applicant to apply for leave out of time to appeal to the Court of Appeal against the decision of this Court delivered by Hon. Masabo J, dated 10th February, 2020 which dismissed the Applicant's Civil Appeal No. 30 of 2019 between parties.

- (c) Costs of the application be provided for.
- (d) Any other order or relief(s) the Court may deem proper and fair to grant.

The chamber application is supported by an affidavit of Dr. Innocent Ngalinda, the Applicant herein. The supporting affidavit sets out grounds on which the prayers in the chamber summons are sought. On her part, the Respondent resisted the grant of this application by filing a counter affidavit affirmed by Mr. Abraham Sykes, the Director of the respondent company.

The Applicant has come up with for issues that they propose to ask the Court of Appeal to deliberate on in the impending appeal. These are:

- (i) The ruling and drawn order of the trial Court dated 19th November, 2018 in Misc. Civil. Application No. 13 of 2018 between parties which dismissed an application for extension of time to file application to set aside ex-parte judgment dated 22nd December, 2015 is appealable under the law.
- (ii) The ex-parte judgment and decree was tainted with illegalities

as the Applicant was condemned unheard in Civil Case No. 105 of 2015 henceforth the ruling an order of the trial Court in Misc. Civil. Application No. 13 of 2018 refusing to extend time to the Applicant to challenge the said e-parte judgment and decree against him are illegal.

- (iii) The said Civil Case No. 105 of 2011 between parties was time barred and to that effect the trial Court had no jurisdiction to try the said suit leave alone that the Applicant was condemned without being afforded an opportunity to be heard by the trial Court.
- (iv) There is in place a default judgment dated 16th December, 2014 against UNFPA who was privy to contract between itself and the Respondent. The said default judgment dated 16th December, 2014 against UNFPA who was privy to contract between itself and the Respondent. The said default judgment arises out of the third-party Notice and has never been successfully challenged in any Court of law with competent jurisdiction either by UNFPA or Respondent. The Respondent is opposed to the grant of leave, though they did not prefer any deposition in reply to the affidavit sworn in support.

When the parties appeared before me on the 23rd day of March, 2023 it was agreed that the disposal of this application be disposed by way of written submissions. The parties was duly filed their submissions, while Mr. Octavian Mshukuma learned Counsel drawn and filed the submissions on behalf of the applicant, the respondent's submissions were drawn and filed by Mr. F. Mgare, learned Counsel. I appreciate the comprehensive submissions filed by both parties.

In his submissions to support the application, Mr. Mshukuma submitted that the Applicant was the Defendant in Civil Case No. 105 of 2011 at Ilala District Court. That the advocate who represented him passed away and the applicant was not aware of the date of continuation of the hearing as a result the trial Court proceed ex-parte against him. He further submitted that being served summons to show cause in execution proceeding, his client filed an application for extension of time under Section 14 of the LLA, vide Misc. Civil. Application No. 15 of 2018 to set aside the decree dated 22nd December, 2015. Whereby on 19th November, 2018 the application was dismissed for want of merits. Still aggrieved by the said ruling, he lodged Civil Appeal No. 30 of 2019 in the High Court, an appeal which was dismissed for being incompetent. Still aggrieved, he lodged Civil Appeal No. 81 of 2020 at the Court of Appeal, an and the appeal which was struck out for technical grounds, henceforth the

present application.

He went on submitting that under paragraphs 12(a)(b)(c)(d) of the Applicant's affidavit, he raises serious matters of law which he intends to address to the Court of Appeal. He argued that the Respondent's counter affidavit is in agreement that there are serious matters of the law to be addressed by the Applicant in the intended appeal. He further alleged that the ruling of Civil Case No. 105 of 2011 is tainted with illegalities as the Applicant herein was condemned unheard and the trial Court had no jurisdiction to try the suit as it was time barred. He supported his submissions by citing the case of; **Haruna Mpangaos & Others Vs. Tanzania Portland Cement Ltd, Civil Application No. 98 of 2008, CAT** (Unreported) whereby at page 13-14 where it was held:

"It is common ground that once an appeal is struck out, the parties revert to the position they were before the appeal was lodged. In the event parties are interested to pursue the appeal to whole process of filing the appeal has to start afresh, the initial stage being giving a notice of intention to appeal"

Mr. Mgare submitted further that the period to file notice of intention to appeal to the Court of Appeal has been lapsed that is why the Applicant seeking for an extension of time now. He went further to submit that the delay

was technical one and not actual delay because the Applicant had lodged the appeal timely but his appeal was struck out. He supported his arguments by citing the case of; **Fortunatus Masha vs William Shija and Another [1997] TLR, 154**. That the extension of time is entirely in the Court discretion upon good cause being shown by the Applicant. He further supported his argument by referring this Court to the case of; **Lyamuya Construction Co. Ltd Vs. Board of Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010**.

In reply, Mr. Mgare began by castigating the applicant by narrating that, they have no query with the historical background of this case except for a few clarifications that the trial Court never issued an ex-parte judgment. His submission was that upon failure by the Applicant to attend the case, the trial Court issued the judgment pursuant to order XVII Rule 3 of the CPC, Cap 33 R.E 2019 ("CPC"). He further contended that for this court to grant extension of time, the Court shall consider the following grounds namely:

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

He went on submitting that the Applicant had failed to account for days of his delay. He pointed out that the records show the 1st appellate Court's decision was delivered on 20th February, 2020. Thereafter, he submitted, the Applicant appealed to the Court of Appeal vide Civil Appeal No. 81 of 2020 and the same was struck out on 17th February, 2022. Following the striking out of the appeal, the Applicant filed this present application, but since the period from 20th February, 2020 when this Court dismissed Civil Application No. 30 of 2019 to 8th April, 2020 it was about 48 days when the Applicant vide Civil Appeal No. 81 of 2020 appealed to the Court of Appeal and that period has not been accounted for. He further pointed out another 3 days which was unaccounted for arguing that in aggregate, there are 51 days which was unaccounted for by the Applicant. That the Applicant's diligence in pursuing his right in Court is therefore questionable.

The counsel for the Respondent further contends that the Applicant has been negligent in pursuing his suit and this negligence or inordinate does not amount to sufficient cause to warrant the Court to extend time. He supported his submissions by citing the **Tanzania Harbors Authority Vs. Mohamed R. Mohamed [2003] TLR 77** and **Lyamuya Constructions case** (supra)

Responding to what has been deponed by the Applicant at paragraph 12

of his affidavit, the counsel for the Respondent alleged that regarding the issue of ruling and drawn order vide Misc. Civil Application No. 13 of 2018, the Court properly held that as a matter of the law, the same is not appealable. On the issue that the Applicant was condemned unheard vide Civil Case No. 105 of 2011 was not true as the record is clear that the Applicant participated partly in this case and while hearing proceeded, he deliberately stopped to attend the trial for reasons best known to himself. He went on to submit that under circumstance, there was no breach of natural justice on the part of the trial Court. That the alleged illegality by the Applicant must be apparent error on face of records and not one that would be discovered by a long-drawn argument or process. Further that in this application, the Applicant failed to establish sufficient point of law to draw the attention of the Court of Appeal.

In a short rejoinder, Mr. Mshukuma reiterated that this application should be granted so as to address the Court of Appeal on the issue whether he was condemned unheard in Civil Case No. 105 of 2011.

Having gone through the rival submission of both counsels, my duty is to determine whether sufficient reasons for the delay have been advanced. As it is principles in many decisions of this Court and the Court of Appeal, in an application like the one at hand, the applicant must advance sufficient grounds to warrant the discretion of this court to extend time. There are no hard and

fast rules as to what constitutes sufficient reasons and each case has to be decided in its own merits. In the case of **National Housing Corporation Vs. Tahera Somji, Civil Application No.344/17 of 2018**, Court of Appeal of Tanzania at Dar es Salaam, the court confirmed the provided guidelines for grant of extension of time as follows;

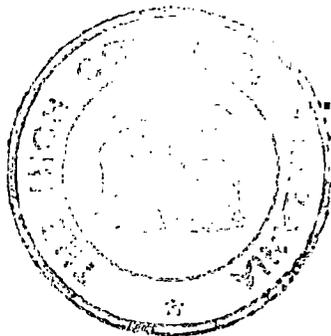
- a) The Applicant must account for all the period of delay*
- b) The delay should not be inordinate.*
- c) The Applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take*
- d) If the Court feels there are other sufficient reasons such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

It is for the court to see whether the applicant has demonstrated some or all of the set guidelines to warrant the grant of this application. Going through the records of this application, especially paragraph 9 and 10 of the Applicant's affidavit supporting the application, I am satisfied that the appellant has been active in pursuing his rights. As submitted the applicant had previously lodged Civil Appeal No. 81 of 2020 at the Court of Appeal, an appeal which was struck out on technical grounds. He promptly lodged the current application hence it cannot be said that the applicant was apathy, he

was rather diligent in pursuing his rights. That being the case, this application was filed only 11 days after the appeal was struck out in the Cat. That being the case I allow this application.

Time is hereby extended for the applicant to file both the notice of appeal and an application for leave to appeal to the Court of Appeal of Tanzania. The same shall be filed within twenty one (21) days from the date of this ruling. Costs shall follow cause in the intended appeal.

Dated at Dar Es Salaam this 29th day of May, 2023.



A handwritten signature in black ink, appearing to read 'S.M. Maghimbi', is written over a horizontal dotted line.

S.M MAGHIMBI

JUDGE