

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF SHINYANGA  
AT SHINYANGA**

**MISC. CIVIL APPLICATION NO. 50 OF 2022**

*(Originating from Civil Case No. 12 of 2017)*

**TIGO TANZANIA LIMITED ..... APPLICANT**

**VERSUS**

**SHINYANGA DISTRICT COUNCIL ..... RESPONDENT**

**RULLING**

2<sup>nd</sup> & 25<sup>th</sup> August 2023

**F. H. Mahimbali, J.**

The applicant in this case is seeking for extension of time to file appeal against the decision of Shinyanga Resident Magistrate Court in civil case No. 12 of 2017 which was decided on 29<sup>th</sup> November 2018. The respondent is resisting the application stating that it has not accounted for each day of delay and that there is no sufficient cause for the grant of the said application.

As to why the applicant is seeking for extension of time, it has been averred on her behalf that after the judgment of the trial court was delivered on 29<sup>th</sup> November 2018, the applicant lodged her appeal before this Court which the same was struck out for carrying a defective decree.

Thus, efforts to rectify the said defective decree had commenced before the trial court which eventually was issued on 16<sup>th</sup> December 2022 and thereafter this current application filed before this Court on 27<sup>th</sup> December 2022 seeking for extension of time.

Mr. Obedi Mwandambo, learned advocate for the applicant while appreciating that the grant or refusal of the said application is the court's discretion, however the same must be acted but judiciously.

As per the affidavit accompanying the application, Mr Mwandambo contended that there are reasonable explanations for the said grant. He relied support from the cases of **Kalunga & Company Advocates vs. National Bank of Commerce Limited**, civil Application No. 124 of 2005 (2006) TLR 235, **Tanzania Fish Processors Limited vs. Euso k. Ntagalinda**, Civil Application No. 41/8 of 2018 CAT at Mwanza at page 9, on reasonable explanations and accounting of each day of delay and the case of the **Principal secretary Ministry of Defence and National Services vs. Valambia** (1991) TLR 387, where illegality is established, it is sufficient ground to warrant extension of time.

Finally, Mr. Mwandambo prayed that for the interests of justice, let the extension of time be granted for errors committed by the trial court as per grounds of appeal annexed with the affidavit as there is good

reason for that delay and prudence dictates that such an application for extension of time is grantable.

On his part, Mr George Kalenda learned state attorney for the respondent in resisting the application, he argued that as per s. 14(1) of the Law of Limitation Act, there are three pre-requisite conditions to be established before such an application is considered.

The first pre-requisite is court's discretion. This is well narrated 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 /2010, CAT at Arusha, at page 6 formulated four guide lines for the consideration, namely: (1) account for each day of delay , (2) the delay should not be inordinate (3) the applicant must show diligence, and not apathy, negligence or sloppiness (4) illegality.

He submitted that in the current case as per para 2 of the applicant's affidavit, clearly states that the judgment thereof was delivered on 29/11/2018. At para six of the affidavit, the applicant says that on 13/5/2020, he brought a letter to court praying for rectification of decree. Now counting the days from 29/11/2018 – 13/5/2020 it is more than 106



days passed before the applicant woke up from the deep sleep and wrongly moved the court by the letter.

Elaborating his argument, Mr. Kalenda submitted that under part 2 of the schedule of LLA, column 2 provides for 45 days for appeals from the lower court to High Court. Thus in his opinion, all these days were not accounted for.

Under para 7 of the applicant's affidavit, he criticised the follow ups made by the applicant on 23/3/2021, 16/7/2022, 16/8/2022 and 3<sup>rd</sup> October 2022 as sufficient explanations to account all the delayed days.

He mathematically made simple calculations that from the 13<sup>th</sup> May 2020 up to 23<sup>rd</sup> March 2021, there is a total of 310 days. Worse enough these days are not accounted by the applicant. He drew support from the case of **Jubilee Insurance Company (T) Limited vs. Mchaned Samear Khan**, Civil Application No. 43/1/2020, CAT at Dar es salaam at page 12, that each day of delay must be accounted for, even a single day. Also in the case of **Elias Kahisa Tibenderana vs. Inspector of General Police and AG**, Civil Appeal No. 388/01 of 2020, CAT at Dar es salaam, page 7. In the current case, that has not been accounted for.

Secondly, the issue for consideration is delay should not be inordinate. Inordinate delay means unusual or un proportionally large.



Thus from 29/11/2019 to 13/5/2020, the days passed are more than 160 days and from 13/5/2020 to 23/3/2021, the days passed is equivalent to 310 days. Then from 23/3/2021 to 16/3/2022 is more than 408 days passed. In total, the total days are more than 900 days. He thus considered these 900 days were not accounted for and thus very inordinate delay.

Thirdly, as per Lyamunya's case, the applicant must show diligence and not negligence, apathy or sloppiness. With the application at hand, the applicant didn't show diligence. Counting from 29<sup>th</sup> Nov. 2019 to 16/5/2020 when the applicant wrote a letter to the trial court for proper decree. As it is more than 160 days, the delay is thus inordinate and the applicant has exhibited negligence on his part for failure to take appropriate action as per law. The same decision of **Jubilee case** at page 14 (para 2) talks of negligence visa vis diligence. In addition, the case of **Elias Kahimba** (supra) page 8, clarifies well.

*"It does not seem just that an applicant who has no valid excuse for failure to utilize the prescribed time, but tardiness, negligence or ineptitude of counsel should be extended extra time merely out of sympathy for his cause."*

On the fourth guideline, if there are other sufficient reasons such as illegality, being of sufficient importance.

In the current case, there is no issue of illegality contrary to what has been averred by the counsel for the applicant that illegality is found in the memorandum of appeal. The annexed memorandum of appeal (para 4 of the affidavit), there is no illegality mentioned. Furthermore, the said memorandum was already struck out by this court. Thus, no illegality explained at all. He made reference to the cases of **Jubilee Insurance Company case**, at page 15 (para 2), Elias Kahamba (supra) at page 9 is clear on that insistence, the **Registered Trustees of the Arch Diocese of Dar es Salaam Vs. the Chairman of Bunju Village Government and 11 others**, Civil Appeal No. 147 of 2006 CAT at page 8-9, that there has not been pleaded and demonstrated sufficient cause.

On para 11 of the applicant's affidavit, says that the memorandum of appeal annexed which in essence was struck out by this court raises grounds for determination and that has overwhelming chances for success. In law, overwhelming chance of success has never been a good ground for extension of time (**See also Jubilee Insurance**) case at page 16.

Rebutting to what has been submitted by the counsel for the applicant, he distinguished the case of **Kalunga & Company Advocate case** (supra) submitting that the court in that case raised the matter suo moto. Further, in that case the parties demonstrated sufficient reasons for extension of time. In the matter at hand, there is no such demonstration by the applicant as stated in the case of Lyamuya. With the case of Tanzania Fish Process (supra), the same is distinguishable as there is nothing explained and accounted for.

On that basis, he considered the application as out of place for this Court to honor it by grant in the application as prayed for want of accounting each day of delay and sufficient cause.

In his rejoinder submission, Mr. Obedi Mwedambo learned advocate reiterated his submission in chief submitting that upon a thorough digest to the submission by the respondent's attorney, it is undisputed that the grant or refuse of this application is court's discretion.

However, whether there are sufficient grounds for such extension, rebutting the respondent's submission that he has not established grounds for the said extension, he stated that the mentioned uncounted days are misconceived as per the respondent's submission. That



submission in his considered view is very misleading in view of para 2, 4, 5 of the applicant's affidavit. There was already a pending appeal before this court which was struck out on 20<sup>th</sup> April 2020. Following that ruling, the applicant started taking action of rectification of the said defective decree. This paras 2- 6 account for the 160 days, which days are alleged uncounted by the respondent's counsel.

As from 23<sup>rd</sup> March 2021 to 16<sup>th</sup> July, 2022, 3<sup>rd</sup> Oct, 2022 to 16<sup>th</sup> Dec. 2022 that there are 900 days unaccounted, is a misleading submission. There are various steps taken by the applicant as stated under para 5 of the affidavit in support of the application.

Thus, going by affidavit, it is clear that there are no unaccounted days as alleged. The respondent's submission and his fabricated calculations are baseless. Thus be disregarded.

As per my submissions in chief there is nothing left unaccounted as contended by the respondent's attorney. Since the current application was filed in this court on 27<sup>th</sup> Dec. 2022 while order for rectification was done on 16/12/2022, then there is no any inordinate delay.

With diligence, as per his submission in chief and affidavit, he maintained that there is no such negligence, sloppiness, apathy has been exhibited but rather diligence.

As to the supplied cases/authorities he is of the firm view that they are very relevant and in support of their application to the grant of extension of time. Thus s. 3(1) of the LLA Cap. 89 is misplaced as per context of this case.

I have seriously digested the merit of the application and the accompanying submissions for and against. The relevant question is whether there is a sufficient cause to warrant the grant or refuse the application.

As well argued by both sides, to grant or refuse the application is the court's utmost discretion which however, must be judiciously exercised (See **Lyamuya Construction Company Ltd vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania, Kalunga & Company Advocates vs. National Bank of Commerce Limited, Tanzania Fish Processors Limited vs. Euso k. Ntagalinda**, - supra)

In the current case, it is undisputed that the judgment of the trial court was dated as delivered on 29<sup>th</sup> November, 2019. It is also undisputed that the decree extracted from it, was also dated 29<sup>th</sup> November, 2018 (See annexure QE1 of the accompanying affidavit to the application). Therefore, there was a confusion as which was the proper

date for the delivery of the said judgment. Nevertheless, as per accompanying affidavit of the application, para 2, it is deposed that the said judgment was delivered on 29<sup>th</sup> November 2018 and not 29<sup>th</sup> November 2019 as reflecting in the said judgment. However, it is also undisputed that the said struck out appeal No. 15 of 2019 was filed before this Court on 19<sup>th</sup> June 2019. That means, since the judgment of the trial court was issued on 29<sup>th</sup> November 2018, and the appeal was first filed before this Court on 19<sup>th</sup> June 2019, suggests that it was filed after a lapse of 202 clear days.

That the said appeal was struck out on 28<sup>th</sup> April 2020 before Mkeha, J on reason of variation between the dates on the judgment and decree. Thereafter, the process to rectify the said variations of dates had commenced before the trial court and thereafter rectified on 16<sup>th</sup> December 2022 and eventually the filing of this application on 27<sup>th</sup> December 2022.

The issue for consideration by this Court is whether there is accounting of each day of delay as per law or not and whether there are sufficient causes by the applicant to warrant the grant the said application. Mr.

Mwandambo learned advocate says on what transpired before the High Court in the appeal first lodged before and the strike out order



thereof and restarting of the process, there are sufficient reasons to the grant of the application as there is no inordinate delay and that the said delay has been occasioned by the trial court in its confusion as to the date of judgment and date of decree. Thus, none to blame but the Court itself.

I agree with Mr. Mwandambo that where the delay has been occasioned by the court's inaction or by other factors such as this, it is no party's fault but the court itself. In the current case, though the High Court's order striking out the said appeal has not been annexed for court's satisfaction, but by the ruling of the trial court dated 16<sup>th</sup> December, 2022 correcting the anomaly spotted in the said judgment of the trial court from being 29<sup>th</sup> November 2019 to that of 29<sup>th</sup> November 2018, suffices to justify that the appeal lodged before the High Court was improperly filed. However, that was not the High Court's task to scrutinize the lower court's copies if it provided the right copies as per order. The applicant was therefore not prevented from taking appropriate actions even before filing his earlier appeal. A party to the case is equally duty bound to ascertain whether the court's records availed are true and correct, otherwise they have an equal duty of applying for correct copies either by official administrative channel or by a court process.

That said, the issue now for this court's consideration is whether there has been such an accounting of each day of delay as per law. As what was being done between 16<sup>th</sup> December 2022 to 27<sup>th</sup> December, 2022, Mr. Mwandambo learned advocate under paras 15 and 16 of his affidavit accompanying the application, deposes:

*Para 15: That following the ruling of the aforesaid, on 16<sup>th</sup> December, 2022 we duly informed our client via email about the outcome of the ruling and instructed my firm to proceed to start the process of the appeal afresh.*

*Para 16: Following the said instructions aforesaid, my firm proceeded to draft this application and shared a draft of the application, with the applicant for review and approval. It was until 22<sup>nd</sup> December 2022 when my firm received the instructions from the applicant to proceed with the filing of this application.*

In my considered view, since there must be accounting of each day of delay, delay in receiving instructions from the client has never been a good reason to justify the extension of time. Since it is the applicant's case and not the advocate's case, timeliness of action does not wait instructions of the client. It is thus the party himself to blame. Since it is trite law that there must be accounting for each day of delay, even a

single day delay is as good as any other delay if not accounted for sufficiently (See **Jubilee Insurance Company (T) Limited vs. Mchamed Samear Khan**, Civil Application No. 43/1/2020, CAT at Dar es salaam at page 12), **TanESCO Vs. Mfungo Leonard Mkajura** (civil Appeal No. 94/2016, **Ngao Godwin Losero** (Civil Application No. 10 of 2015 at page 4). In these case, amongst other things the Court of Appeal set basic guidelines/conditions prior to granting extension of time as constituting sufficient reasons or good causes.

All in all, guided by the minimal guidelines set by the court of Appeal in the case of **Ngao Godwin Losero** (supra) making reference to the case of **Lyamuya Construction Company Ltd Vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania** (Civil Application No. 2/2010 – unreported) the Court of Appeal reiterated the following guidelines for the grant of extension of time.

- 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 is intending to take.*



*d) If the court feels that there are other sufficient reasons such as existence of a point of law of sufficient importance; such as the illegality of the decisions ought to be challenged.*

For sure I am mindful that to refuse or grant this application is the court's discretion. However, to do so there must accounted reasons for that. In Mbogo Vs. Shah (1968) EA the defunct Court of Appeal for Eastern Africa held:

*"All relevant factors must be taken into account in deciding how to exercise the discretion to extend time....."*

In my considered view, as to the context of this case, first of all, assuming the first appeal had no such errors of date confusion, there is nothing said if the same was within time if by being filed on 19<sup>th</sup> June 2019, as the judgment was delivered on 29<sup>th</sup> November 2018. Nothing is accounted for in between. In the case of **THE DIRECTOR GENERAL LAPF PENSION FUND VERSUS PASCAL NGALO, CIVIL APPLICATION NO.76/08 OF 2018** (unreported), the Court of Appeal at page 6 of the typed Ruling, pointed out that;

*"the applicant's main explanations for delay is that time was lost when she was pursuing matters in Court. This I think, constitutes what is known as technical delay, developed by case law from **Fortunatus Masha versus William Shija and Another** (supra) by a Single Justice, to **Salvant K.A.Rwegasira V China Henan International Group Co. Ltd, Civil Reference No.18 of 2006** (unreported) by the Court. In the latter case, the Court adopted the principle that had been developed by the single justice in the former, to wit;*

*"A distinction had to be drawn between cases involving real or actual delays and those such as the present one which clearly only involved technical delays in the sense that the original appeal was lodged in time but had been found to be incompetent for one or other reasons and a fresh appeal had to be instituted. In the present case, the applicant had acted immediately after the pronouncement of the ruling of the Court striking out the first appeal. In these circumstances extension of time ought to be granted."*

In the current case, there is not much said about the first appeal lodged before this Court, though admitted whether it was filed within time. The applicant is mute on this.

Moreover, just basing on the current application, the dates between 17<sup>th</sup> December to 26<sup>th</sup> December, seem to be insufficiently accounted for. As stated above, what is alleged to be delay in receiving instructions has never been a good ground for accounting a day of delay.

As regards the issue of illegality, in the case of **Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young Women's Christian Association of Tanzania**, *Misc. Civil Application No. 2 of 2010*, the Court observed; -

*"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 the record**, such as the question of*



*jurisdiction; not one that would be discovered by **a long-drawn argument or process**” [Emphasis added]*

Guided by the principle laid down in **Lyamuya’s case**, I find the applicant’s advocate failed to identify and point out the illegality committed by the trial Court which needs rectification and of which can be ascertained on apparent face, as its discovery may be by **a long drawn argument or process**. Therefore, this ground is also dismissed.

In a total consideration of this application, I agree with Mr. George Kalenda, learned state attorney for the respondent that this application is brought with insufficient cause to warrant its grant. The same is hereby dismissed with costs as the Court’s discretion cannot be judiciously exercised in the context of this case where there are no sufficient causes for the grant of extension of time and lack of accounting of each day of delay.

Right of appeal explained.

DATED at SHINYANGA this 25<sup>th</sup> day of August, 2023.



  
**F. H. MAHIMBALI**  
**JUDGE**