

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

MISC. CIVIL APPLICATION NO.11 OF 2023

(Originating from Masasi District Court at Masasi in Civil Case No.1 of 2022)

YUSUPH ATHUMANI NAMKUKULA @ NYERERE.APPLICANT

VERSUS

MOHAMED ALLY MOHAMED @ NANDULE.....RESPONDENT

RULING

19th & 29th September 2023

LALTAIKA, J.:

The applicant herein, **YUSUPH ATHUMANI NAMKUKULA @ NYERERE**, under the Certificate of Agency, prays for this court to grant him an extension of time within which to lodge a Petition of Appeal out of time. The applicant has moved this court under section 14(1) of the **Law of Limitation Act [Cap. 89 R.E. 2019]**. This application is supported by the affidavit affirmed by the applicant. On the other hand, the application is resisted by the counter affidavit of the respondent sworn by **Mr. Robert K. Dadaya**, learned counsel for the respondent.

At the hearing of the application, the applicant was represented by **Mr. Hashim Mziray**, learned counsel, while **Mr. Robert K. Dadaya**, learned counsel, appeared for the respondent.

Mr. Mziray submitted that the application is for an extension of time through which the applicant can appeal against the judgment in **Civil Case No.1 of 2022 decided by Masasi District Court on the 12th of January 2023**. Furthermore, the learned counsel prayed for the applicant's affidavit to be adopted and made a part of his submission. The learned counsel further contended that in the said affidavit, it is clear that the applicant did appear for the trial, and the case proceeded. Mr. Mziray submitted that as per paragraph 3 of the affidavit, on the 21st of December 2022, the trial court set the day of judgment to be the 12th of January 2023. The learned counsel insisted that it was a public holiday. To substantiate his argument, the learned counsel referred this court to the case of **Philip Tilya vs. Vedastina Bwogi**, Civil Application No.546/01 of 2017 (unreported).

Mr. Mziray stressed that the process at the trial court continued to be opaque, and there was no communication to the defendant. Moreover, the learned counsel for the applicant averred that it was upon perusal of the court file **on the 25th of May 2023**, by counsel for the applicant that brought the matter to their attention as per paragraphs 13 and 15 of the affidavit, plus the annexes.

In reply, Mr. Dadaya at the outset submitted that he objected the application for lack of merit and prayed the same be dismissed with costs.

He prayed further that his counter affidavit with an annexure thereto be adopted and to form a part of their submission.

Furthermore, the learned counsel for the respondent contended that the applicant has failed to account for the days between the date the judgment was delivered to the date of signing the affidavit on **the 1st of June 2023**. Mr. Dadaya went further and averred that as far as the law is concerned, every Tanzanian is presumed to know the law. He contended that in our jurisprudence, if a court activity falls under a public holiday, the same is performed on the next working day. The learned advocate insisted that even if the judgment was set to be delivered on **the 12th of January 2023, which was a public holiday**, the applicant had a duty to make a follow-up on the next working day. He went on and maintained that since no effort was made to that effect, it is prima facie evidence that the applicant is reckless.

Furthermore, the learned counsel for the respondent contended that as per paragraph 9 of the counter affidavit, there is an affidavit for clarification by the then trial magistrate to the effect that the judgment was delivered on the 13th of January 2023. Mr. Dadaya stressed that as per the applicant's affidavit, he made a perusal of the file on the 25th of May 2023. Surprisingly, no action was taken until the 1st of June 2023 when he signed the affidavit in support of the current application. The learned counsel contended that from the 13th of January 2023 to the 25th of June 2023, the applicant took no action. He further submitted that from the 25th of May 2023 to the 1st of June 2023, the applicant has not accounted for even a single day of his whereabouts and what he was doing.

It was Mr. Dadaya's submission that it is trite law in our jurisdiction that in an application for an extension of time, the applicant has to account for each and every day of delay. He insisted that this is how to move the court to exercise its discretion. Short of that, the application would be incompetent, deserving a dismissal order. The learned counsel for the respondent further cited the case of **Franconia Investment Ltd vs. DIB Development Bank Ltd** Civil Application No. 270/01 of 2020 CAT (unreported) p.5 second paragraph where the Court of Appeal of Tanzania referred to the case of **Bushiri Hassani vs. Latifa Lukiyo Mashayo** Civil Application 3/2017 that one must account for each day of the delay.

On top of that, Mr. Dadaya averred that as per paragraph 7 of the applicant's affidavit, it contains hearsay that he made a follow-up and would be informed of the judgment day. The learned counsel submitted that unfortunately, the applicant never mentioned which judicial officer he met and briefed him on what is stated. He maintained that in law, the applicant had to go and obtain an affidavit from that judicial officer to back up his story.

In the line of the above submission, Mr. Dadaya submitted that in the **Franconia case** (supra) at page 4, the Court of Appeal refers to its previous case of **Sabena Technics, DR LTD vs. Michael J. Luwunzu** Civil Application No. 451/18 of 2020 (unreported). It also cited in the case of **Benedict Kiwanga vs. Principal Secretary Ministry of Health** Civil Application No.31/2000 (unreported) the Court of Appeal provided on the need to bring an affidavit of a person quoted. To this end, the learned

counsel prayed that the information indicated to be hearsay be expunged and disregarded.

Submitting on the issue of illegality, the learned counsel for the respondent stressed that the learned counsel for the applicant submitted that the same would be determined on appeal. Mr. Dadaya prayed that such a blanket statement be disregarded as he has blanketed the court to start gauging the point on its own. The learned counsel stressed that the applicant was supposed to show that point of illegality. He insisted that the applicant wants to use the second bite as per the case of **Wilson Sirikwa vs. Michael Mollel** Civil Case 544/02 of 2021 CAT, Arusha, referring to the case of Lyamuya Construction Ltd. (unreported) where the Court indicated that for the point of illegality to be valid for the purpose of extension of time, it must be traceable in the judgment sought to be challenged and not require a long-drawn argument but it must be apparent.

In rejoinder, Mr. Mziray submitted that as far as illegality is concerned, the principle stated is valid. However, the learned counsel contended that he had asserted earlier in his submission that he adopted the affidavit. He insisted that when one adopts an affidavit, he/she does not traverse the same all over again. The learned counsel insisted that paragraphs 14 and 15 are illegal. He maintained that there is also that date on judgment which is illegality.

Submitting on the need for the affidavit of the judicial officer, the learned counsel contended that it is not a valid argument. Mr. Mziray

submitted that as far as paragraphs 6, 7, and 8 are on the issue as to whether the 12th of January 2023 was a public holiday. He contended further that the FRANCONIA case is distinguishable on the annexes. He insisted that the matter in that case is financial constraint while the current one is on the opaque nature of the whole case.

Mr. Mziray went back to the assertion of the affidavit of the magistrate. He submitted that paragraph 13 is on perusal. The learned counsel insisted that the court records are clear and there is no dispute. He prayed that this affidavit of the magistrate be disregarded because it contravenes Order XX Rule 1 of the CPC that requires the court to issue due notice to the parties.

Furthermore, the learned counsel submitted that should this court agree with the learned counsel of the respondent, would it be basing its decision on the judgment or on the affidavit? Mr. Mziray contended that the next day after the public holiday is the day the court business has no authority. He stressed further that the public holidays are public holidays.

Mr. Mziray prayed this Court to take judicial notice that the perusal was done on the 25th of May 2023 on Thursday in Masasi. He averred that the counsel was from Dar es Salaam and on the 26th of May 2023 was Friday. He submitted further that the 27th and 28th were days in a weekend. Mr. Mziray submitted that as per the **Interpretation of Laws Act Cap. 1 RE 2019** weekends are excluded from Court business. He maintained that law firms do not work on weekends. However, he

submitted that three days, the 29th, 30th, and 31st, were the days for preparation of the application.

Last but not least, Mr. Mziray contended that since there is no evidence that the judgment was delivered on the 13th of January 2023, and there is no justification for that and that the magistrate did not summon the parties, they prayed that the application be granted. On top of that, the learned counsel submitted that the only way to remedy the wrong is to allow the application for an extension of time with costs.

Having gone through the submissions of both parties, I am inclined to decide on the merits or otherwise of the application. It is trite law that an application for an extension of time is entirely in the discretion of the court to grant. Furthermore, an extension of time may only be granted where it has been sufficiently established that the delay was due to sufficient or good cause. In **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others [2015] eKLR, the Supreme Court of Kenya had this to say:**

"... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favor of the applicant."

In the application at hand, the reasons for the delay are featured under paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16 of the affirmed affidavit of the applicant plus the oral submissions of both learned

counsel. The reasons for the delay are **one**; the last order of the trial court scheduled the pronouncement of the judgment day on the Public Holiday which confused the applicant. **Two**, the trial court failed to issue the due notice of appearance for judgment to the parties or their advocates. Three, the presence of illegalities in the proceedings and judgment of the trial court.

In view of the above reasons, it is apparent that the delay was caused by factors beyond the ability of the applicant to control and cannot be blamed on him. For instance, it is very clear that the trial court ordered the pronouncement of the judgment on the Public Holiday, "Mapinduzi Day" (on the 12th of January 2023). This order was issued on the 21st of December 2022 by the then presiding magistrate. It is a well-known practice in our jurisdiction and other common law countries that court activities are controlled by court calendars and diaries. The diaries used in courts feature all public holidays and the weekends of our very country.

The presiding magistrate, being assisted by a court clerk, was duty-bound to observe those public holidays and weekend days not to schedule the matter for the pronouncement of judgment. In case it has happened that the matter was scheduled for judgment on the day which falls within the public holiday or weekend days, then the court shall have a duty to issue a due notice to the parties or their advocates. In the present matter, the trial court did not issue the due notice to the parties for them to appear for the pronouncement of the judgment. I am saying this because the matter was scheduled on the public holiday of "Mapinduzi Day," whereby no public office, including the trial court, was working. To this end, it is

difficult even to subject the applicant to account for each day he has delayed because as a party to the matter, he was waiting for the due notice of the trial court.

Surprisingly, the records show that the trial Magistrate pronounced the impugned judgment on the 12th of January 2023 in the presence of the respondent and a court clerk, one called Upendo. This is what the records of the court show. Based on that observation, I am very much interested in the decision made by the Court of Appeal of Tanzania in the case of **Halfani Sudi v. Abieza Chichili** [1998] T.L.R. at page 529, which held:-

"We entirely agree with our learned brother, MNZAVAS, J.A and the authorities he relied on which are loud and clear that "A court record is a serious document. It should not be lightly impeached"; Shabir F.A Jessa v. Rajkumar Deogra, (1), and that "There is always the presumption that a court record accurately represents what happened". Paulo Osinya v. R. (2). In this matter, we are of the opinion that the evidence placed before us has not rebutted this presumption."

In the case at hand, the learned counsel for the respondent has attached an affidavit sworn by the learned trial Magistrate in the bid to rebut the presumption that the impugned judgment was not delivered on the MAPINDUZI DAY. Indeed, this practice is unacceptable because what appears on the trial court proceedings and impugned judgment cannot be cured by an affidavit of the trial Magistrate.

What appears on the trial court records features an illegality that should be resolved by the higher court and not the same court. In addition,

the said illegality is on the face of the record, which requires little or no effort to locate. It is the trite law that 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 extension of time shall be granted. See, **Lyamuya Construction Co. Ltd vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania** (Civil Application 2 of 2010) [2011] TZCA 4 (3 October 2011).

On top of that, I find some difficulties in addressing this issue of the respondent's counsel obtaining an affidavit from the trial Magistrate sworn on the 24th of July 2023 before Mr. Jackson Wilbert, Advocate, Notary Public, and Commissioner for Oaths. First of all, **the learned trial Magistrate was functus officio**, thus, was not required to swear an affidavit. Two, it appears that the learned counsel for the respondent is wholly responsible for ill advising the learned Magistrate to swear an affidavit in order to "strengthen" his preliminary point of objection. I am saying so because the records show that the judgment was delivered on the 12th of January 2023 on the MAPINDUZI DAY. If indeed the learned magistrate had the best of intentions to rectify court records, he should have done so earlier and not when this matter was getting ready to be listed in this court. Indeed, he could have sworn an affidavit as he did but as soon as he had delivered the judgment and placed it in the court file.

Following these glaring defects, this court's intervention is necessary and of paramount interest to justice. More importantly, as held in **Halfani Sudi v. Abieza Chichili** (supra) that trial court record is a serious

document that cannot be lightly impeached by annexing the so-called affidavit for clarification of the trial magistrate.

The next issue I am inclined to resolve is whether or not the reasons stated by the applicant amount to good cause. Our law does not define what amounts to good/sufficient cause. However, in **TCCA Investment Company Limited vs. DR. Gideon H. Kaunda**, the Court of Appeal of Tanzania cited with approval the decision of the Erstwhile Court of Appeal for East Africa in the case of **Shanti v. Hindochie and Another** [1973] E.A. 207, the Court stated:

"Sufficient reasons cannot be laid down by any hard and fast rule. This must be determined in reference to all the circumstances of each particular case. This means the applicant must place before the court material that will move the court to exercise its judicial discretion in order to extend the time."

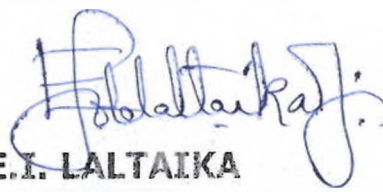
As to the matter at hand, I can safely state that the applicant has advanced good cause for his delay in lodging his Petition of Appeal out of time. The chain of events explained in the applicant's affidavit, as well as his oral submission, shows that even though the circumstances depicted were not caused by him, he has not given up.

I am fortified that the applicant has not displayed apathy, negligence, or sloppiness in the prosecution they intend to take, as emphasized in the case of **Lyamuya Construction Co. Ltd. vs. Board of Registered Trustees of Young Women Christian Association of Tanzania** (supra).

Based on the foregoing reasons, I find and conclude that the applicant has provided good/sufficient reasons for the delay, warranting this court to exercise its discretion in granting the requested extension of time. Therefore, the applicant is hereby granted thirty (30) days from the date of this ruling to lodge his Petition of Appeal. Costs to follow the event.

It is so ordered.

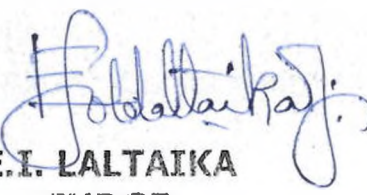



E.I. LALTAIKA
JUDGE
29.09.2023

Court:

This ruling is delivered under my hand and the seal of this court on this 29th day of September 2023 in the presence of Ms. Radhia Abdallah Luhuna, Advocate holding brief for both Mr. Robert Dadaya and Hashim Mziray Counsel for the applicant and respondent respectively.




E.I. LALTAIKA
JUDGE
29.09.2023