

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
TABORA DISTRICT REGISTRY
AT TABORA

MISCELLANEOUS CIVIL APPLICATION NO. 21 OF 2023

(Arising from Civil Revision No. 02 of 2021, Originating from Misc. Civil Application No. 05 of 2021 of Tabora District Court, Civil Case No. 07 of 2019, Misc. Civil Application No. 04 of 2022 in the District Court of Tabora and Execution No. 33 of 2019 of Tabora Resident Magistrates' Court)

SIMON WOLFGANG NDAUKA.....APPLICANT

VERSUS

IDD SEIF.....1ST RESPONDENT
MAIKO LUSANGANYA.....2ND RESPONDENT
JONAS MANYANYA.....3RD RESPONDENT
HAMISI LUMODYA.....4TH RESPONDENT
PIUS ILINDILO.....5TH RESPONDENT
NIA RASHID.....6TH RESPONDENT

RULING

Date of last Order: 16/09/2023

Date of Ruling: 29/9/2023

KADILU, J.

This is an application for an extension of time to apply for leave to appeal to the Court of Appeal. The applicant preferred this application under Section 11 (1) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2002] read together with any other enabling provisions of the law. The application is supported by an affidavit of the applicant. The respondents filed a counter affidavit sworn by the third respondent on behalf of others to challenge the merits of this application.

The history as it can be discerned from the record is that the applicant filed Civil Case No. 7 of 2019 at Tabora District Court against the six respondents claiming for a total of Tshs. 76, 790,000/= being compensation for sabotage caused to his investments by the respondents.

The matter was heard *ex parte* because the respondents did not appear in Court to defend the case. Upon delivery of judgment on 23/09/2019, the Magistrate ordered attachment of the judgment debtors' livestock, farms and houses valued at Tsh. 76,790,000/= . During the execution process, the respondents lodged Misc. Civil Application No. 5 of 2021 seeking extension of time to set aside *ex parte* judgment and Misc. Civil Application No. 4 of 2021 for a restraint order against the respondent and their agents from executing the decree. Upon hearing, all the applications failed and the trial court ordered the execution process to proceed.

It is on the record that, this Court acting upon the complaint letter lodged by the 3rd respondent called the record of Civil Case No. 7/2019, Misc Civil Application No. 4/2021, Misc. Civil Application No. 5/2021 and Execution Case No. 33/2019 so that it could investigate the claims. Upon full hearing, the Court quashed and set aside the entire proceedings, rulings, orders and *ex parte* judgment of the District Court of Tabora in Civil Case No. 7/2019. Still dissatisfied, the applicant applied for an extension of time to apply for leave to appeal to the Court of Appeal of Tanzania against the decision of this Court in Civil Revision No. 2 of 2021.

In respect of the application at hand, the applicant was represented by Mr. Akram William Magoti, the learned Advocate whereas the respondent enjoyed legal representation of Mr. Frank Severine Kavishe, also the learned Advocate. Submitting in support of the application, Mr. Akram stated that granting or refusing the application for an extension of time is discretionary power of this court, but the said power has to be exercised judiciously. To support his argument, he cited the case of ***Shabani Maganga v Matheo Miselya & 2 Others***, Misc. Land Application No. 19 of 2023 in which it was stated that, the court is

supposed to consider factors such as the length of delay, reasons for the delay, the degree of prejudice which is likely to be suffered by the respondent if the application is granted, illegality and the applicant should account for each day of delay.

It is Mr. Akram's submission that, immediately after the pronouncement of the ruling in Civil Revision No. 02 of 2021 on 05th August, 2022, on 09th August, 2022 the applicant filed a notice of appeal against the decision of the High Court followed by Misc. Civil Application No. 13 of 2022 filed on 19th August, 2022 in which he applied for the certificate on point of law. However, the court ended up striking out the application for being incompetent. Again, the applicant filed another application on 23rd March, 2023 seeking an extension of time to file a notice of appeal. The said application was registered as Misc. Civil Application No. 16 of 2023 which was withdrawn on 25th April 2023 before filing the present application on 02nd May, 2023.

Mr. Akram contended further that, the applicant had never sat idle rather he was in court corridors seeking justice, a fact which is excusable under the laws of our country. He referred to the case of ***Shabani Maganga v Matheo Miselya & 2 Others*** (*supra*), in which this court cited the decision of the Court of Appeal of Tanzania in the case of ***Fortunatus Masha v William Shija & Another*** [1997] TLR 154 where it was stated that:

"... a distinction has to be drawn between cases involving real or actual delays and those such as the present one which only involved a technical delay in the sense that the original appeal was lodged in time, but was incompetent for one or another reason and a fresh appeal had to be instituted."

Regarding the issue of illegality, Mr. Akram submitted that each of the enumerated points from paragraph 12 (i) up to 12 (ix) of the applicant's affidavit are points of law that constitute illegality and irregularity which is apparent on the face of the record of the High Court decision. He contended that, the points have largely occasioned a miscarriage of justice on the part of the applicant. On this point, he cited the decision of the Court of Appeal in the case of the ***Principal Secretary Ministry of Defence and National Service v Deveram Valambhia***, Civil Application No. 19 of 1993.

Based on the aforementioned, Mr. Akram prayed this court to grant an extension of time because the applicant has managed to account for each day of delay as required by the law. He argued that the delay was for almost eight (8) days only, which is a reasonable time for preparing the application. Mr. Akram invited the court to read the case of ***Vodacom Tanzania Public Limited Company v Commissioner General, Tanzania Revenue Authority***, Civil Application 101 of 2021, where it was held that:

"The underlying question is whether the 9 or 10 days for the sake of argument are reasonable to prepare such an application and file. I am of the view that the said days are reasonable since they were spent preparing and filing the current application. This is in tandem with the decision of the single Justice in Patrick Magologazi Mangella where 12 days were found to be reasonable in preparation and filing of the application for extension of time upon receipt of the necessary documents in pursuit of intended revision."

In reply, Mr. Kavishe faulted this court for entertaining this application for the reason that, the applicant's delay is not actual, but

technical. Mr. Kavishe submitted that the applicant contended that all the time he was in court corridors searching for justice as his reason for the delay, which is not sufficient reason for one to be given time to do an action in courts. He cited the case of ***Shabani Maganga v Matheo Miselya & 2 Others***, Misc. Land Application No. 19 of 2023 (*supra*).

He explained that, technical delay is when the original application was correctly filed, but is found incompetent for some reasons requiring the same application to be filed with some few modifications. It is technical delay in the sense that the original appeal was lodged in time, but was incompetent for one or other reason and a fresh appeal had to be instituted. Thus, there is neither a technical delay nor good reason shown by the applicant in his first ground for an extension of time.

As to the illegality, Mr. Kavishe submitted that irregularities are a decisional error which is never a ground for the applicant to rely on for an extension of time. According to him, a decisional error is that which may be cured on appeal. Mr. Kavishe added that, illegality may be a good cause for extension of time as stated in a plethora of authorities, but not every pleaded illegality may constitute a ground for an extension of time. He cited the case of ***Kabula Azaria Ng'ondi & Others v Maria Francis Zumba & Another***, Civil Appeal No. 174 of 2020 where it was observed that:

"... for a decision to be attacked on the ground of illegality, one has to successfully argue that the court acted illegally for want of jurisdiction, or for denial of the right to be heard, or that the matter was time-barred."

Mr. Kavishe argued that the applicant was in court corridors in his uninterrupted willingness out of ignorance of laws and procedures to be

followed. He further submitted that being in court corridors is never a sufficient ground for extension of time. As to the limitation, Mr. Kavishe submitted that the applicant used eight (8) days in preparing and filing this application, an argument which he rebutted, and went further by citing the case ***Kibo Hotel Kilimanjaro Limited v The Treasury Registrar & Another***, Civil Application No. 502 of 2020, Court of Appeal of Tanzania at Dar es Salaam, where it was stated that:

"... it is my considered view that this line of reasoning is too casual because the applicant has not explained how he used the whole eight days to prepare this application. I therefore find that the applicant has failed to account for the whole period of the delay."

Mr. Kavishe alleged that the service to the respondents was effected on the 2nd June 2023, a month later without any explanation. He added that the applicant has not discharged his duty on the settled principle that, in applications of this nature, an applicant must account for every day of delay as held in ***Bushiri Hassan v Latifa Lukio Mashayo***, Civil Application No. 3 of 2007 and ***Sebastian Ndaula v Grace Rwamafa (Legal personal representative of Joshua Rwamafa)***, Civil Application No. 4 of 2014.

I have thoroughly read the rejoinder to the reply and considered the same. It is almost a reiteration of what has been stated in the submission in chief. I thus find no reason to reproduce it here. After careful consideration of the submissions of Counsel for the parties, the point for determination is whether the applicant has demonstrated a good cause of delay for this court to grant him an extension of time. What amounts to a good cause was stated in the case of ***Tanga Cement Co. Ltd v***

Jumanne D. Masangwa & Another, Civil Application No. 6 of 2001 [2004] TZCA 45, where Nsekela JA said:

"What amounts to sufficient cause has not been defined. From decided cases, several factors have to be taken into account including whether or not the application has been brought promptly, the absence of any valid explanation for the delay, lack of diligence on the part of the applicant."

In ***Veronica Fubile v National Insurance Corporation & 2 Others***, Civil Application No. 168 of 2008, the Court held that, the existence of special circumstances warrants a grant of extension of time to appeal out of time. Among the list of special circumstances include the claim of illegality. At the outset, this application for an extension of time to apply for leave to appeal to the Court of Appeal is hinged on two limbs. One, the complaint of illegality, Two, an account of delay. The applicant argued that, the case before the District Court was a land dispute and that such court had no jurisdiction while the dispute between the parties before the said court was a claim of a total of Tshs. 76,790,000/= for sabotage to his investments like grinding machine, grocery, salon, cafe, carpentry and cattle husbandry.

The respondents contended that, on the claim of illegality, it deals with the manner a certain decision is reached not the decision arrived because the latter is based on evidence. In my considered view, the applicant's claim on the illegality of the challenged decision is one of the special circumstances constituting sufficient cause for an extension of time to be granted. However, such an allegation of illegality must be apparent on the face of the record such as the question of jurisdiction; not one that would be discovered by long drawn argument or process. (See the case

of *Lyamuya Construction Company Limited v Board of Registered Trustees of Young Women's Christian Association of Tanzania*

Civil Application No. 2 of 2010. Therefore, without going into the merits of the alleged illegality, I am satisfied that the alleged illegality suffices for the grant of an extension of time as it touches the question of jurisdiction of the district court to try land disputes.

As to the second limb regarding the reasons for the delay, Counsel for the parties have taken different positions as to whether the applicant has demonstrated a good cause to be granted an extension of time or not. Mr. Akram for the applicant, is of the view that the applicant has presented a good cause as he could not have sought stay of execution without having filed a notice of appeal which was filed immediately after the pronouncement of the ruling in Civil Revision No. 02 of 2021 that is on 05th August, 2022.

According to him, the applicant filed a notice of appeal against the decision of the High Court followed by Misc. Civil Application No. 13 of 2022 which was filed on 19th August, 2022 in which he applied for the certificate on point of law. On 15th March, 2023 his application was struck out for being incompetent, a fact which drove him to refile another application on 23rd March, 2023 which was registered as Misc. Civil Application No. 16 of 2023 seeking for an extension of time to file a notice of appeal which was withdrawn on 25th April, 2023 before filing the present application on 02nd May, 2023.

According to Mr. Kavishe for the respondents, the applicant has not shown a good cause to move the court to exercise its judicial discretion. He further argued that a voluntary stay in court corridors out of ignorance

of law and procedures by whoever, is never a sufficient reason for the extension of time.

In the case at hand, the applicant has shown that he was not lying idle or dormant in pursuing the intended appeal. From the day he became aware of the dismissal to quash and set aside the default judgment, the applicant was vigilant in pursuit of the matter. What the respondents attribute to be a delay, in my view is not inordinate and the applicant exercised diligence as indicated in his relentless efforts to pursue the matter including the application at hand in which he is seeking an enlargement of time.

Besides, even if there was attributed negligence on the part of the Advocate for the applicant to follow the proper procedures, the applicant deserves the grant of the application to extend the time to apply for leave to appeal against the complained illegality of the decision sought to be appealed against.

Given the aforementioned reasons, this court is satisfied with the reasons that resulted in the delay and therefore grants the applicant the time to apply for leave to appeal to the Court of Appeal out of time. The application for leave be filed within (14) fourteen days from the date of this order. Each party to bear its costs.

Order accordingly.




KADILU, M.J.

JUDGE
29/09/2023.

Court:-

Ruling delivered in the presence of the applicant and his Counsel Mr. Akram Magoti who also holds brief for Mr. Frank Kavishe Advocate for the respondent.



G.P. NGAEJE
AG. DEPUTY REGISTRAR

29/09/2023

DEPUTY REGISTRAR
HIGH COURT OF TANZANIA
TABORA

Court:-

Right of appeal fully explained.



G.P. NGAEJE
AG. DEPUTY REGISTRAR

29/09/2023

DEPUTY REGISTRAR
HIGH COURT OF TANZANIA
TABORA