

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

MISC. CIVIL APPLICATION NO. 22 OF 2022

*(Arising from the Decision of the High Court of Tanzania at Tabora in Land Civil Case
No. 03 of 2015)*

- 1. RAJABU HAMIS MAGULATI..... 1ST APPLICANT**
- 2. RAJABU KOMBO RAJABU..... 2ND APPLICANT**
- 3. AMINA ABAS RASHID (the administratrix of the
estate of the late HAMIS JUMA SHABANI) 3RD APPLICANT**

VERSUS

- 1. MOLE AGRICULTURAL MARKETING 1ST RESPONDENT
COOPERATIVE SOCIETY**
- 2. CHRISTIAN KIWELU 2ND RESPONDENT**
- 3. PETER MBEZI 3RD RESPONDENT**
- 4. NATIONAL MICROFINANCE BANK PLC LTD 4TH RESPONDENT**

RULING

Date of Last Order: 10/10/2023

Date of Delivery: 27/10/2023

KADILU, J.

The applicants have tried to move this court under Section 11 (1) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] to enlarge the time for them to file a notice of appeal out of time. The application is supported by an affidavit of their Advocate, Ms. Stella Nyakyi. The background giving rise to the application may be narrated as follows. In 2015, the applicants instituted a Civil Case No. 03 in this court against the respondents claiming for payment of USD 106,848.54 being the value of tobacco they had sold to the respondents. The decision of the High Court was delivered on

08/05/2017. Aggrieved, on 11/05/2017, the applicants filed a notice of intention to appeal.

They did not however file the intended appeal rather, they applied for a certificate of delay from the Registrar of the High Court, which they obtained on 27/10/2017. They then filed Civil Appeal No. 309 of 2017 in the Court of Appeal at Tabora on 02/11/2017. On 29/10/2021 when the appeal was called on for hearing before the Court of Appeal, the certificate of delay was found to be defective. They were granted 30 days to refile their appeal accompanied by a rectified certificate of delay. A correct record of appeal was filed, but on 26/10/2022 when it was called for a hearing before the Court of Appeal, the certificate was found to be defective again. The appeal was also objected for being time-barred.

On 03/11/2022, the appeal was struck out for being incompetent before the Court. Still determined to pursue their right, on 24/11/2022 the applicants filed this application seeking for extension of time to file the notice of intention to appeal. During the hearing of this application, the applicants were represented by Advocate Stella Thomas Nyakyi. The 1st respondent was represented by Mr. Akram William Magoti, Advocate. The 2nd and 3rd respondents did not appear to the Court despite being duly served. The 4th respondent was represented by Mr. Galati Mwantembe, also the learned Counsel. Ms. Stella prayed the hearing to proceed exparte against the 2nd and 3rd respondents, a prayer which was granted as it was supported by the Advocates for the 1st and 4th respondents.

Submitting for the application, Ms. Stella requested the court to adopt her affidavit supporting the application to be part of her oral submission. She then repeated the contents of her affidavit which reveals the factual background of the matter as shown herein above. Finally, Ms. Stella pleaded for the application to be granted since the delay was a technical one. The application faced vigorous opposition from the Advocates for the 1st and 4th respondents through their counter affidavits and oral submissions. For the avoidance of being repetitive, Mr. Akram prayed this court to adopt his counter affidavit in lieu of oral submission. He implored the court to dismiss the application with costs.

On his part, Mr. Galati referred this court to the case of ***Lyamuya Construction Company Ltd v Board of Registered Trustees of Young Women's Christian Association of Tanzania***, Civil Application No. 2 of 2010, in which the factors to be considered before granting any extension of time were laid down. He submitted that the factors constituting the delay in this case include several applications made by the applicants, but which turned out to be incompetent. He opined that in the instant case, the cause of delay was negligence on the part of the Advocate for the applicants. Mr. Galati expounded that the Counsel for the applicants was duty-bound to ensure the appeal documents were in order including by attaching proper annexures.

To support his argument, Mr. Galati cited the case of ***Fortunatus Masha v William Shija & Another*** [1997] TLR 213. He said it was an

application for reference by the Court of Appeal whereby it was held that negligence of the Advocate in filing wrong applications which caused the delays cannot constitute a sufficient reason for the extension of time. He added that the applicant should account for the whole period of delay, even the delay for a single day is sufficient to deny the extension of time if not accounted for. The learned Counsel relied on page 41 of the book titled, **LexisNexis's Commentary on the Limitation Act**, by T R Desai, 12th Edn. of 2019, where it is stated that in dealing with the question of condoned delay under the Law of Limitation Act, the party should satisfy the court that he had a sufficient cause for not preferring the appeal or application within the prescribed time. He argued that in the instant case, the applicants have not shown what they were doing from 03/11/2022 when the appeal was struck out to 24/11/2022 when they filed this application. He finally prayed for the court to dismiss the application with costs because it has not met the standard for granting an extension of time.

I have keenly gone through the affidavit, counter affidavits and submissions by Advocates for the parties. Now the issue for me to determine is whether the applicants have established sufficient reasons for the delay which persuaded the court to grant leave to file the notice of appeal out of time. Section 14 (1) of the Law of Limitation Act [Cap. 89 R.E. 2019], requires the applicant for an extension of time to account for each day of delay by giving reasonable and sufficient reasons for the delay. As to what amounts to good or sufficient cause, the Court of Appeal in the case of *Jumanne*

Hassan Bilingi v R., Criminal Application No, 23 of 2013 it was stated as follows:

*"...what amounts to good cause is upon the discretion of the court and it differs from case to case. But basically, various judicial pronouncements define a good cause to mean, a **reasonable cause** which prevented the applicant from pursuing his action within the prescribed time."*

In the matter before me, the impugned judgment was delivered on 08/05/2017. Under Rule 83 (2) of the Court of Appeal Rules, the applicants were required to file the notice of intention to appeal within 30 days from 08/05/2017, and the appeal was supposed to be instituted within 60 days from the date when the notice of appeal was lodged. (See Rule 90 (1) of the Tanzania Court of Appeal Rules, 2009 as amended). The said 60 days for filing the intended appeal expired on 08/07/2017. For no apparent reason, the applicants did not file their appeal from 11/05/2017 when the notice of appeal was filed to 02/11/2017 after having obtained a defective certificate of delay on 27/10/2017.

The learned Advocate for the applicants relied on the case of **Fortunatus Masha v William Shija & Another** [1997] TLR 154 in arguing that a distinction has to be drawn between cases involving real or actual delays and those which involve technical delays for example, where the original appeal was lodged in time, but was incompetent and a fresh appeal had to be instituted. According to her, a technical delay is excusable. The law is very clear that for an extension of time to be granted, the applicant

should account for each day of delay, the delay should not be inordinate, and he should have shown diligence, not negligence, apathy, or sloppiness. Lastly, where the applicant raises illegality that is apparent on the face of the record, an extension of time must be granted so that the illegality may be determined and rectified by the Court of Appeal.

As already shown, the delay by the applicants is inordinate as the application was filed 6 years after the date of the decision being challenged. Moreover, the applicants have failed to account for each day of delay. The applicants alleged that the delay was caused by the prosecution of their earlier appeal which was later struck out by the Court of Appeal. Nonetheless, as correctly argued by Mr. Galati, the applicants have not accounted for the days from when the said appeal was struck out to the date of filing this application.

Further, the reason for the struck out of the appeal as correctly stated by Advocates for the respondents, was negligence or inaction by the applicants and their Advocate for they knew the appeal was time-barred, yet they volunteered the risk of filing it without seeking for extension of time. It should be noted that the certificate of delay is not a requirement for lodging an appeal from the High Court to the Court of Appeal. As such, the applicants didn't have to apply for a certificate of delay before filing an appeal. Wasting time to process a certificate of delay indicates a lack of diligence and the time spent for that purpose cannot be said to have been properly accounted for.

I am mindful that the court has discretion to grant extension of time in applications like the present one, but I am also aware that such discretion is supposed to be exercised judiciously. This is to say, the discretion should be exercised in accordance with the rules of reason and justice and not arbitrarily. Ms. Stella contended that the applicants had never sat idle rather, they were in court corridors seeking justice, a fact which is excusable under the laws of our country. With due respect, 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 to be granted.

The applicants failed to show diligence because instead of filing their appeal within statutory time which they had, they wasted numerous months requesting for a certificate of delay from the Deputy Registrar of the High Court, which in my view, was unnecessary. This is a form of negligence or carelessness as they were represented by an Advocate who is trusted to be knowing the law very well. It should be emphasized that the negligence of an Advocate or his ignorance of the law and procedure, is not an excuse and does not constitute a sufficient cause for extension of time. See the decision of the Court of Appeal in ***Jubilee Insurance Co. Ltd v Mohamed Sameer Khan***, Civil Application No. 439/01 of 2020. Further, in the case of ***Exim Bank (Tz) Ltd v Jacqueline A. Kweka***, Civil Application No. 348 of 2020, it was stated that:

"Firms are manned by lawyers who ought to know court procedures. ... failure of the Advocate to act within the detect of law cannot constitute a good cause for enlargement of time."

Besides, in the case of *Omar Ibrahim v Ndege Commercial Services Ltd*, Civil Application No. 83 of 2020, the Court stressed that neither ignorance of the law nor the Counsel's mistake constitutes good cause. In the instant application, the applicants have not raised any point of law of sufficient importance or alleged any irregularities in the impugned decision of the High Court. As such, the fourth factor for consideration as laid down in the case of *Lyamuya (supra)*, is not applicable in this application. The law requires that for irregularity to stand as a ground for granting an extension of time, the nature of the said irregularity should be apparent on the face of the record. It has been shown that the applicant herein has not pointed out any irregularity, let alone the one that is apparent on the face of the record.

For the reasons stated herein above, the application fails and is hereby dismissed. Given the circumstances of the parties herein, I make no order as to the costs.

It is so ordered.


KADILU, M. J.
JUDGE
27.10.2023.

The ruling delivered in chamber on the 27th day of October, 2023 in the presence of Mr. Akram Magoti (Advocate) holding brief for Ms. Stella

Nyakyi, learned Advocate for the applicants, and Mr. Saikon Justin holding brief for Ms. Flavia Francis, Advocate for the 4th respondent.




KADILU, M. J.

JUDGE

27.10.2023.