

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

MISC. CIVIL APPLICATION NO. 44 OF 2023

(Arising from Civil Case No. 19 of 2019 Resident Magistrate's Court of Bukoba)

AMIN MUSTAPHA..... 1st APPLICANT

MAGATA PRIMARY COOPERATIVE SOCIETY..... 2nd APPLICANT

VERSUS

JOSEPHAT RWEYEMAMU.....1ST RESPONDENT

JR SERVICES STATION LTD.....2ND RESPONDENT

RULING

9th and 24th November, 2023

BANZI, J.:

Before the Resident Magistrate's Court of Bukoba (the trial court), the respondents sued the applicants for recovery of Tshs.180,750,400/= advanced to them for coffee business. After a successful trial, the trial court decided in favour of the respondents and the first applicant was ordered to pay the respondents the outstanding amount of Tshs.180,750,400/= and Tshs.2,000,000/= as general damages. Aggrieved with that decision, the applicants appealed to this Court vide Civil Appeal No. 21 of 2022. However, the respondents raised a preliminary objection challenging the competence of the appeal for being accompanied by the defective decree. After hearing

both parties, on 30th June, 2023, this Court (Hon. Mwenda, J.) struck out the appeal for being incompetent.

After the appeal was struck out, the applicants through their counsel Mr. Dunstan Mutagahywa initiated the process to secure a rectified decree and the same was issued to them on 17th July, 2023. A month later, the applicants filed this application for extension of time to appeal against the judgment and decree of the trial court. The application was made under Order XLIII, Rule 2 of the Civil Procedure Code [Cap. 33 R.E. 2019] (the CPC) and section 14 (1) of the Law of Limitation Act [Cap. 89 R.E. 2019] (the LLA) and it is supported by the affidavit deposed by Mr. Dunstan Mutagahywa, learned counsel. The respondents through counter affidavit sworn by Mr. Frank Kalory John opposed the application.

At the hearing, the applicants were represented by Mr. Dunstan Mutagahywa, learned counsel, whereas the respondents had the services of Mr. Frank Kalory John, the learned counsel.

Mr. Mutagahywa adopted his affidavit as part of his submission and argued that, according to Paragraph 1, Part II of the Schedule to the LLA, every appeal is supposed to be filed within 90 days after issuance of copy of judgment. He further argued that, the judgment subject to this appeal was delivered on 10/10/2022 and the applicants filed their appeal timely but the

same was struck out on 30/06/2023 for being accompanied by defective decree. On 04/07/2023, they requested for the rectified decree which was supplied to them on 17/07/2023 and on 18/08/2023, they filed this application. He contended that, the period when the applicants were prosecuting the incompetent appeal be excluded pursuant to section 21 (2) of LLA and thus, the 90 days should begin to run from 30/06/2023 and was supposed to end on 29/09/2023. He further contended that, as section 21 (2) of the LLA does not give automatic exclusion, they have come to this Court seeking for extension of time. He urged this Court to grant their application in order to exercise their right of appeal because they spent time prosecuting the appeal which was incompetent.

In his reply, Mr. John submitted that, the applicants and their advocate were negligent for not taking appropriate steps to challenge the decision of the trial court. He further responded that, section 21 (2) of LLA cannot be applicable in the matter at hand because such section is read together with section 19 where a party is waiting for relevant documents. He added that, in the matter at hand, after the appeal was struck out on 30/06/2023, they were supplied with the rectified decree on 17/07/2023, but in their affidavit they did not explain about the delay for one month from when they were supplied with rectified decree until 18/08/2023 when they filed this

application. He supported his submission with the case of **Ramadhani J. Kihwani v. TAZARA** [2019] TZCA 171 TanzLII which insisted about the requirement to account for each day of the delay. He concluded that, since the applicants have failed to account for each day of delay, this Court should find that, they have failed to establish sufficient cause of the delay. He therefore prayed for this application to be dismissed for want of merit.

In rejoinder, Mr. Mutagahywa insisted that, sections 19 and 21 are different and so as their applicability because, section 19 (2) could be used if the copy of decree and judgment were not supplied within time. He further insisted that, under section 21 (2) of the LLA, 90 days ought to be counted from 30/06/2023. He concluded that, they applied for extension of time because section 21 (2) of the LLA does not state about automatic exclusion.

Having thoroughly considered the affidavits and the submission of both parties, the issue for determination is *whether the applicants have established sufficient cause to warrant this Court to grant extension of time.*

Section 14 (1) of the LLA provides that:

*"Notwithstanding the provisions of this Act, **the court may, for any reasonable or sufficient cause, extend the period of limitation for the institution of an appeal or an application, other than an application for the execution of a decree, and an application for such***

extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application.”(Emphasis supplied).

From the above cited provision of the law, it is obvious that, in application for extension of time, the applicant is required to establish reasonable or sufficient cause in order to be granted extension of time. Nevertheless, what amount to sufficient cause has not been defined but there are plenty of legal authorities which underline factors to be taken into account including the length of delay, the reasons for the delay, the degree of prejudice that the respondent may suffer if the application is granted, whether or not the application has been brought promptly, lack of diligence on the part of the applicant just to mention a few. See the cases of **Tanga Cement Company Limited v. Jumanne D. Masangwa and Another**, Civil Application No. 6 of 2001 CAT (unreported) and **Omary Shabani Nyambu v. Dodoma Water and Sewerage Authority** [2016] TZCA 2024 TanzLII. Also, it is the requirement of the law that, the applicant must account for each day of the delay. See the cases of **Lyamuya Construction Co. Ltd v. Board of Registered of Young Women's Christian Association of Tanzania** [2011] TZCA 4 TanzLII, **Wambele Mtumwa Shahame v. Mohamed Hamis** [2016] TZCA 898 TanzLII and **Sebastian Ndaula v. Grace Rwamafa (Legal Personal Representative of**

Joshwa Rwamafa), Civil Application No. 4 of 2014 CAT at Bukoba (unreported).

In the case at hand, Mr. Mutagahywa relied on section 21 (2) of the LLA and argued that, the 90 days for filing the appeal ought to be counted from 30/06/2023 when the applicants' appeal was struck out for being incompetent and not on 10/10/2022 when the judgment was delivered. According to him, the period between 10/10/2022 and 30/06/2023 has to be termed as if there had never been any appeal filed before this Court. With due respect, his argument is misconceived because; **first and foremost**, it should be noted that, section 21 (2) of the LLA is applicable where there was another case before the court which was diligently prosecuted but was found to be incompetent. Therefore, that time spent by the applicant in prosecuting the incompetent case, is what is termed as "technical delay" which is excluded in accounting for each day of the delay. **Second**, had the time began to run from 30/06/2023 as suggested by Mr. Mutagahywa, there would be no need to apply for extension of time, as they would have filed the appeal directly under the umbrella of automatic exclusion. It is my considered view that, they were very much aware about being out of prescribed 90 days after their appeal been struck out that is why they filed this application.

The issue of technical delay was also illustrated by this Court in the case of **The Registered Trustees of the Redeemed Assemblies of God in Tanzania v. Obed Heziron Sichembe and Another** [2021] TZHC 2846 TanzLII which set out the conditions to be proved where there was a technical delay including:

- i. That, prior to the application for extension of time under consideration of the court, the applicant must have timely filed in court a matter or matters for some reliefs.*
- ii. That, the matter/s previously filed by the applicant (mentioned under the first paragraph above), must have been struck out for incompetence before the application for extension of time was instituted.*
- iii. That, subsequent to the striking out of the previous matter, the applicant must have filed in the court the application for enlargement of time (envisaged under the first paragraph above) for instituting a competent matter out of time which will seek the same relief/s as those which were sought in the previous matter that had been struck out.*
- iv. That, the applicant must have promptly and diligently filed in court the application for enlargement of time (envisaged under first and third paragraphs above), upon the previous matter being struck out.”*

According to the record, it is evident that from 01/11/2022 when the appeal was filed to this Court to 30/06/2023 when it was struck out, this period is termed as a technical delay which has to be excluded by the court because the applicants were in court prosecuting their appeal diligently although it was later struck out for being accompanied with defective decree. Therefore, the applicants have no duty and are legally exempted to account for each day of the delay within that period. However, after their appeal being struck out of incompetence on 30/06/2023, and taking into consideration the conditions laid down in the case of **The Registered Trustees of the Redeemed Assemblies of God in Tanzania** (*supra*), the applicants were supposed to act promptly in filing this application. Equally, they were supposed to account for each day after their incompetent appeal been struck out.

In his affidavit, at paragraphs 6 and 7, Mr. Mutagahywa stated that, after the appeal was struck out on 30/06/2023, he applied for the rectified decree on 04/07/2023 and the same was supplied to him on 17/07/2023. Nonetheless, after obtaining the rectified decree, he stayed for one month until 18/08/2023, when he filed this application. This period of one month is termed as real or actual delay which according to the law ought to be accounted for. However, the applicants through their counsel have just

accounted for those days before they were issued with the rectified decree. Unfortunately, they have failed to account for the delay of one month after they have received the rectified decree.

In the case of **Tanzania Fish Processors Limited v. Eusto K. Ntagalinda**, [2019] TZCA 67 TanzLII, where the applicant delayed for 14 days from the period the application was struck out to the period she filed the application without accounting for such delay, it was stated that:

"Despite the foregoing, there is a period from 6/12/2017 when the application for review was struck out and the time when this application was filed on 21/12/2017, which is termed as 'real or actual delay'. This is a period of about fourteen days which has not been accounted for by the applicant. In his submission, Mr. Mutalemwa did not explain away this delay. The law is clear that in an application for extension of time, the applicant should account for each day of the delay."

In another case of **Wambele Mtumwa Shahame v. Mohamed Hamis** (supra), it was underscored that:

"Delay, of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken."

Similarly, in the matter at hand, the applicants have delayed for one month after being supplied with the rectified decree and they have failed to account for each day of the delay within those 30 days which amounts to failure to adduce reasons for the delay. Thus, it is the finding of this Court that, the applicants have failed to establish sufficient cause to warrant this Court to grant extension of time. Since the applicants have failed to show sufficient cause for the delay, I find this application without speck of merit and is hereby dismissed. Each party shall bear its own costs.



I. K. BANZI
JUDGE
24/11/2023

Delivered this 24th day of November, 2023 in the presence of the first applicant and in the absence of the second applicant and the respondents. Right of appeal duly explained.



I. K. BANZI
JUDGE
24/11/2023