

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 374 OF 2023

(Arising from the judgment of the Court in Civil Appeal No. 70 of 2022)

VERNA JUSTUS MUTUNGI.....APPLICANT

VERSUS

OMARY AYOUB KIMBAURESPONDENT

RULING

Date of Last Order: 2/11/2023
Date of Ruling: 23/11/2023

DING'OHI, J;

The applicant is seeking an extension of time to lodge a fresh notice of appeal against the decision of this Court by Hon. Ismail, J in Civil Appeal No. 70 of 2022. The application has been brought under Section 11(1) of the Appellate Jurisdiction Act Cap. 141 R. E 2019 and supported by the affidavit of Charles G. Lugaila, who is the applicant's Advocate. The application was countered by the counter affidavit of Willian Yohana Fungo, the respondent's Advocate.

The matter was heard by way of written submission whereby only the applicant filed his submission as scheduled.

In his submission Charles Lugaila, Advocate for the applicant submitted that the Respondent's side has not contested the averments of paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 adduced in the Applicant's adopted affidavit in support of Application, and therefore the present application may just be treated as a "Wo contest" as it proves the contention of paragraph 11 (i) of the said adopted affidavit that the delay has been caused by a Technical delay and not an actual delay as it was held in the case of **BENEDICT SHAYO VERSUS CONSOLIDATED HOLDINGS CORPORATION AS OFFICIAL RECEIVERS OF TANZANIA FILM COMPANY LIMITED**, Civil Application No. 366/01 of 2017, NDIKA, J.A (Unreported)

He submitted that as for the ground of illegality as stated in paragraph 11 (ii) of the adopted affidavit, it is his humble submission that, the decision of this honorable Court in Civil Appeal No. 70 of 2022 which is intended to be appealed, is characterized by illegality which is sufficient reason to extend time.

He submitted that in the last paragraph of page 7 of the said decision the court invoked the overriding principle on the ground that, so long as the court is empowered to grant the orders sought, failure to cite a correct provision of the law is not fatal, however, the issue is that the applicant

does not subscribe into the courts view because of the following;

- i. The issue was not just non-citation of the correct provision of the law but also the contention that, there is not an actual provision of the law that empowered the Trial Court with powers to grant the orders sought by the Applicant (now Respondent) at the trial Court's proceedings.
- ii. The Hon. Judge invoked the Overriding principle without stating what provision of the law empowered the Trial Court to grant the Orders sought in an application for maintenance. If such a provision of the law had existed, then the invocation of the Overriding principle would be correct, but in the absence of an actual provision of the law, the Overriding Principle cannot be invoked.

He further submitted that as for ground stated in paragraph 11(iii), it is quite clear that, after the first Notice of Appeal was withdrawn on the 13th of July, 2023, the Applicant had a grace period of 14 days as per Tanzania Court of Appeal Rules, 2019 as amended to conduct a service on the Respondent's side, and the same was served on 19th July, 2023 as per Annexure HESL-6 after various attempts to serve the same on the Respondent's side, and after that period, it took the Applicant 4 days only to prepare the application, Lodging it online for admission and filing the same on 21st July, 2023, therefore, by the time the present Application

was filed, the Applicant was still in the grace period of 14-day limit to serve the Notice of Withdrawal of the first Notice of Appeal which would end on 27th July, 2023, therefore the Applicant has been able to account for each day of delay.

He added further that not only that but also, the contention by the counsel for the Respondent in his Counter-Affidavit in paragraph (9), that the error in the first notice of appeal has made the Respondent incur costs, is absurd because, the Hon. Mkwizu, J., granted the Order to withdraw Misc. Civil Application No. 226 of 2023 on the 12th of July, 2023 with costs, therefore, it is up to the Respondent to claim it. He insisted that the order is not attached but the file is in the Court's registry, therefore, his Lordship can call for the said file and satisfy himself if the said Application was withdrawn with or without costs.

He therefore prayed that this honorable court sees the merit of the Application and grants an extension to the Applicant as prayed without costs.

Now the issue is ***whether the applicant has adduced sufficient to convince this court to grant the prayer sought.***

In the case of **Benedict Mumello v Bank of Tanzania, Civil Appeal**

No 12 of 2012, the Court of Appeal said as hereunder:

"It is trite law that an application for extension of time is entirely in the discretion of the court to grant or refuse it, and that extension of time may only be granted where it has been sufficiently established that the delay was with sufficient cause."

I examined and considered the chamber summons and affidavit, and found out that, the respondent in his counterclaim did not contest the contents of paragraphs 1 to 10 of the affidavit where in paragraph 10 the applicant stated that he prayed to withdraw his notice of appeal with the leave to refile, and his prayer was granted by the court.

Considering that there was a leave to refile notice of appeal and the fact that this application was brought 14 days after the order of refiling, I find that the delay is not inordinate.

I have found credence in the celebrated case of **Lyamuya Construction Co. Ltd Vs Board of Registered of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 [2011] TZCA 4 (03rd of October, 2011) TZCA, where the Court provide guidelines that may be followed in the course of determination of an application for extension of time, these are: -

- (a) The applicant must account for all the periods 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 intends to take.
- (d) 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.

Having said that I am therefore convinced that the applicant has adduced sufficient reasons to convince this court to grant the prayer sought. I grant the extension of time to the applicant to file a notice of appeal as prayed with no order to costs. The notice shall be filed within 14 days from the date of this ruling.

It is so ordered.



A handwritten signature in blue ink, consisting of stylized, overlapping loops and lines.

S. R. DING'OHI,

JUDGE.

23/11/2023.