

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 492 OF 2023**

*(From Civil Case No. 39 of 2021 before the District Court of Ilala at  
Kinyerezi)*

**MOHAMED KAZAMALI..... APPLICANT**

**VERSUS**

**YUSUPH RASHID KANIKI.....RESPONDENT**

**RULING**

*Date of Last Order: 25/10/2023*

*Date of Ruling: 27/10/2023*

**MWAKAPEJE, J.:**

The applicant Mohamed Kazamali has knocked on the doors of this Court for an order to extend the time to file an appeal out of time against the judgment and decree in Civil Case No. 39 of 2021 in the District Court of Ilala at Kinyerezi. This application was brought under section 14(1) & (2) of the Law of Limitation Act, Cap. 89 [R.E.2019], and is supported by Chamber Summons and Affidavit of the Applicant.

The facts of the application in summary are thus: On 19 May 2021 the Respondent filed a Civil Case No. 39/2021 in the said court claiming

against the applicant **Tanzania Shillings Forty-two Million Two Hundred Seventy-Nine Thousand only (TZS 42,279,000/=)** for breach of contract of nonpayment of hardware goods he received from the Respondent. The applicant defended his case and refused to pay the respondent the said amount.

After the pleadings were concluded, the applicant fell sick, which caused him to fail to follow up on his case. His evidence was made through a witness statement. Before and during the entire period of his ailment, he enjoyed the services of one Clara Madaraka, a learned Advocate in the conduct of his defence on his behalf. The Applicant further contends that his counsel lost her fiancé, mourned for him, and later resumed work on 01 September 2023, only to find out that his case was already decided on 04 July 2023. The decree of the said court was issued on 20 July 2023. According to him, the time to lodge an appeal ended on 19 August 2023. The applicant's main reason for the extension of time is illegality as the trial court proceeded to entertain the matter without having pecuniary jurisdiction.

On his part, the Respondent in his Counter Affidavit disputed all the facts save for those in paragraphs 1, 3, 6, and 11 of the applicant's application.

When this application was scheduled for hearing, the Applicant was represented by Mr. Yohana Ayall, learned Advocate, while the Respondent appeared in person.

Mr. Yohana Ayall was the first to address the Court and he adopted the affidavit filed in this Court. In his submission, he stated that the main reason for this application is illegality. Records indicate that claims in the District Court valued at **TZS 42,279,000/=** is not within the jurisdiction of the District Court but rather the Primary Court according to section 18(a) (iii) of the Magistrates Court Act, Cap.11 [R.E 2019]. He supported his contention with the case of **Principle Secretary Ministry of Defence V. Davian Vhalambhia (1992) TLR 182** where it was stated that;

*"...When a point at issue is one alleging illegality of the decision being challenged, the Court has a duty even if it means extending the time to ascertain the point. And if the alleged illegality is established to take appropriate measures to put the matter and record straight".*

Mr. Yohana, Counsel for the Applicant in the application at hand went on to refer to Annexure **MK1** of his Affidavit (a copy of the plaint) which was filed by the Respondent in this application in the District Court which indicated on page 13 that the District Court had jurisdiction to

entertain the claim of **TZS 42,279,000/=** something which is not the case. He further referred to the case of **Transport Equipment Ltd V. D.P Valambhia [1993] TLR 51** and **Kalunga & Co. Advocates Vs. National Bank of Commerce [2006] TLR 235** which maintains the position in the case of **the Principal Secretary, Ministry of Defence (Supra)**.

The Counsel went further to state that the counterclaim never stated if that which was countered was true. This is so because oaths, unlike Complaints, Written Statements of Defence, and Rejoinder, are used as evidence in court. He referred to the case of **East African Cables (T) Ltd V. Spencorn Services Limited, Misc. Civil Application No. 61 of 2016** page 7 in paragraph 1 where this Court stated when a person is put to strict proof of the fact without giving his side of the story which one wants to be believed, amounts to admission of the fact. He therefore prayed that due to these reasons, the applicant be extended time within which to file his appeal.

On the other hand, the Respondent retained what was contained in his counter affidavit. He further stated that he opposed the application because it was out of time what he was directed was to stay execution proceedings pending appeal. Otherwise, he left everything in the hands

of the Court to determine as the same is there to dispose justice to both parties.

In his rejoinder, Mr. Yohana, after hearing the submission of the Respondent in reply, stated that they also as indicated in Paragraph 5 of the Affidavit of the Applicant and that of his Advocate, delayed filing the appeal on time because the Applicant and his advocate had a communication breakdown resulting from the sickness of the Applicant and the death of his Advocate's fiancé. When the advocate resumed work in September 2023, it was found that the decision of the District Court had already been delivered on 20/07/2023 and the time of appeal ended on 19 August 2023.

As stipulated in Paragraph 6 of the Affidavit and noted in Paragraph 6 of the Counter Affidavit, the application for execution was filed on 09 August 2023, nine days before the time of appeal elapsed. From this submission and because of the reasons for the delay in advance, he prayed that the Applicant be granted an extension of time within which to file an appeal for both parties to be heard accordingly.

Having gone through this application together with the attached Chamber Summons and Affidavit by the applicant on the one hand, and Counter Affidavit by the Respondent on the other hand, the issue is

whether there is sufficient cause to grant an application for an extension of time within which to file an appeal to this Court.

It is a long-established principle of law that in applications for an extension of time to appeal out of time, one has to establish sufficient /or good cause to enable the Court to exercise its discretionary jurisdiction. Since the law does not define what good cause is, practice through case law, has established the same given the circumstances of individual cases as was observed in the case of **Hyasintha Malisa Versus John Malisa, Civil Application No. 167/01 of 2021 TZCA [5<sup>th</sup> May 2023 TanzLII]**. Since there are no hard and fast rules as to the good cause, however, in the case of **Joel Silomba vs Republic, (Criminal Application 5 of 2012) [2013] TZCA 332**, factors to consider as good cause are:

*"(i) the length of the delay;*

*(ii) the reason for the delay, was the delay caused or contributed by the dilatory conduct of the applicant?;*

*(iii) whether there is an arguable case, such as, whether there is a point of law or the illegality or otherwise of the decision sought to be challenged; and*

*(iv) The degree of prejudice to the opposite party if the application is granted."*

In the application at hand, the applicant never slept on his rights. The time to appeal elapsed on 19 August 2023. He filed this application on 07 September 2023, i.e. Seventeen days later after he came to know that the matter was disposed of in July 2023. This was Secondly, there was no negligence on his part that caused him to delay in filing his appeal on time. Thirdly, an arguable point of law (illegality- as discussed hereunder) has been raised; and accordingly, the respondent has not been prejudiced as he in his oral submission prayed for justice to be done. The Applicant, has shown that he took necessary steps and action to pursue his right to appeal, hence this application.

In addition, the applicant in the application at hand stated that he was sick for quite some time and his advocate's fiancé expired while the case was still pending in Court, which made both of them lose track of the same, just to find out that the case was already decided. This fact was conceded by the Respondent as far as this Court's decision in the case of **East African Cables (T) Ltd** (*Supra*) is concerned. In his Counter Affidavit, the Responded did put the Applicant on strict proof of his contention, while he had nothing to offer on his side about the sworn fact, something which amounted to an admission of the fact that indeed the applicant had challenges which made him to lodge his application in this

Court. According to section 95 of the Civil Procedure Code, Cap 33, this Court has inherent powers to make:

*"S. 95.....such orders as may be necessary **to make the ends of justice** or to prevent abuse of court process." (Emphasis supplied).*

Since it is in the interest of justice, and according to the submission by the Respondent, that this Court's function is to dispense justice, I am of the opinion that the Applicant has advanced sufficient reasons to grant an extension of time within which he can appeal out of time.

As with the issue of illegality as raised by the Appellant, I agree with Mr. Yohana, Counsel for the Appellant that it be looked into by this Court on appeal, to ascertain on the point of whether the District Court acted without jurisdiction when it dealt with Civil Case No. Civil Case no. 39 of 2021. As was pointed out in the case of **Principle Secretary Ministry of Defence V. Davian Vhalambhia (1992) TLR 182**, if the alleged illegality is established, appropriate measures should be taken to put the matter and record straight".

In the upshot, and according to the circumstances of this application, bearing in mind the good cause advanced by the applicant, and to ascertain the point of illegality, it is ordered that this application be



granted. The Applicant is to file his appeal within fourteen (14) days from the date of this ruling.

Order accordingly



  
**G.V. MWAKAPEJE**  
**JUDGE**  
**27/10/2023**