

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

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 506 OF 2022

*(Arising from the ruling by Hon. A. Nyenyema in Civil Case No. 96 of 2021 dated 29th
August, 2022 in the District Court of Ilala at Kinyerezi)*

MOONGA JACOB ETOKA APPLICANT

VERSUS

ABEL BISOMWA MAPENZIRESPONDENT

RULING

10th February, 2023

MWANGA, J.

The applicant filed this application seeking order for extension of time to file appeal out of time. The application was filed under Section 14 of the Law of limitation Act, Cap. 89 R.E 2019 and Section 95 of the Civil Procedure Code, Cap. 33 R.E 2022. It is supported by sworn affidavit of Advocate Edward L. Mkungano.

The respondent filed preliminary objection on the point of law that, the application is legally unmaintainable as it contravenes Column one part II item 1 of the law of limitation Act, Cap. 89 R.E 2019. Under that part, the prescribed statutory time for appeal is ninety (90) days from the date of the decision. It was the respondent contention that, the applicant had filed this application at the time when his appeal is still within prescribed time of 90 days.

Parties preferred to argue both the preliminary objection and main application together and by way of written submission. In that respect, I will provide reasons for the decision in two phases; **first**, on the preliminary objection and **two**, on the substance of the application for extension of time to the applicant to appeal out of time.

To start with the first phase, the respondent submitted that decision in the ruling sought to be challenged was issued on 29 August, 2022 while the application was lodge on 9th November, 2022, which was 20 days within the prescribed time for the applicant to lodge an appeal originating from the district court with original jurisdiction.

In response, the applicant conceded that there was still time for him to lodge an appeal when this application was filed. However, it was his contention that S. 14(1) of the Law of limitation Act, Cap. 89 R.E 2019 allows the application for extension of time to be brought either before or after the expiry of the period of limitation prescribed for such appeal or application. He cited the High Court decision in **Equity of Tanzania Limited vs Ngwessa**, Civil Application No. 33 of 2021 quoting Section 14(1) of the Law of Limitation that, application for extending the period of limitation for institution of an application, other than an application for the execution of the decree may be made either before or after expiry of the period of limitation prescribed for such application.

In the light of the provision of section 14(1), I am inclined to hold that, this application is properly before the court as it was brought in accordance to law. Hence, the preliminary objection by the respondent is overruled.

Now, conclusion of the first phase of submission takes me to the second phase. Whether the applicant has tabled sufficient reasons for extension of time to file appeal out of time.

One and the only reason advanced under paragraph 4 of the affidavit in support of the application was that; the applicant's advocates lost communication with the applicant before ruling was pronounced and that, it was until 30th October, 2022 the communication with his advocates resumed. It was deposed under paragraph 3 of the applicant affidavit that; the applicant was and still is in Australia. Annexure 1 is a *whatsapp* messages purporting to show communication between the applicant and his Advocate indicating the following, I quote.

Applicant: ***'Hello Wakili, Kesi Yangu Hinaendeleaje? Kwasababu tulipoteza mawasiliano mimi na wewe. Ahsante ni Jacob.***

Advocate: ***Civil Case Number 96 ya 2021. Wewe ukiwa Plaintiff dhidi ya Abel Bisomwa Mapenzi imesomwa ruling tarehe 29/08/2022. tumeshindwa, naomba ruksa yako tuweze kukata rufaa mhkm kuu.***

Applicant: ***Hello wakili, Nawaruhusu mawakili wangu kukata rufaa mahakama -kuu.***

Wenu Jacob'.

The learned counsel for the respondent strongly opposed the application stating in paragraph 3 of the counter affidavit that; **one**, applicant and his advocate acted undue diligence to take essential steps to file appeal and that, there is no prove of documentary evidence showing such kind of miscommunication between the applicant and his advocate. It was also contended that, there is no affidavit of the applicant showing that he is in Australia and that there was such miscommunication. The learned counsel added further that; such allegations were hearsay and for interest of justice, the same shall not be relied on by this court. **Two**, failure by the applicant to communicate with his advocate to be updated with his case was a clear implication that he has lost interest to prosecute his case.

As to the print out of *WhatsApp* messages, it was argued that the same do not justify presence of miscommunication for the reason that; sender, receiver and date when the alleged SMS were sent are not known, hence it is a concocted story legally misconceived. Under paragraph 5 of the counter affidavit, it was submitted by the learned counsel that applicant has failed to show sufficient grounds for extension of time.

I have gone through depositions and submission of both parties and wish to state that, lack of communication alone between the applicant and his advocate(s) is not a sufficient ground for the court to exercise its discretion and grant application for extension of time. I think the applicant ought to state further reasons that caused such breakdown of communication which was beyond his control. Failure to exercise his rights of appeal within 90 days as prescribed by law without good reasons could justify the argument by the respondent that applicant had acted negligently and failed to account for each day of delay. Again, the applicant has not been able to advance sufficient reasons that led him to file application for extension time within the prescribed period of an appeal.

The contention of the applicant that, he did file the appeal on time in order to avoid all the possible delays like waiting for the appeal to be admitted after filing online which sometimes take a lot of time is not a good reason for the delay. Be that as it may, the applicant did not account each day of delay and in essence. Such argument raises the question as to whether there was real communication gap between advocate in Tanzania and a client in Australia. It is so because the issues of difficulties in accessing the online system was not even pleaded in the affidavit. It is a

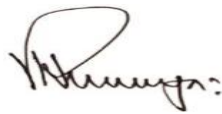
submission from the bar which has no value in the eyes of law, case in registered Trustee of the Archidio case of Dar es Salaam Vs Bunju Village Government and 4 others, Civil Appeal No. 147 of 2006 CAT (Unreported) the court held that evidence must be given in the affidavit not in submission.

In addition to that, the purported correspondence on *Whatsup* messages between the applicant and his advocate(s) do not show the sender, date and place or address. In an attempt to save this application, the applicant cited Section 18(1) of the Electronic Transactions Act, No. 13 of 2105 to justify reception of the said data message. However, the reading of that section do not clear the way on admissibility of data message without observing some rules. Section 18(2) of the said Act, requires that in determining admissibility and evidential value of a data message it must be reliable. That is, the manner in which the data message was generated, stored, or communicated, the manner in which the integrity of the data message was maintained, the manner in which its originator was identified. In other words, the data message has to be authentic in order to be admitted as evidence.

That being said, I entirely agree with the respondent that, the *Whatsup* message sent to the advocate by the applicant marked as annexure 'A' do not fit the standard set by law on admissibility of a data message. The said message is so naked to the extent that, it does not bear any information such as date and time, address, name of sender, receiver necessary to authenticate the message. Under the circumstances, such data message is unreliable. Even though extension of time is discretionary powers of the court, the same has to be exercised cautiously and by following the rules of reason and justice. See, **Heritage Insurance Company Ltd Vs Sabians Mchau & 2 Others**, Civil Application No. 284/09 of 2019; CAT(Unreported).

For the above reasons, the application is not merited, and it is hereby dismissed with costs.

It is so ordered.



H. R. MWANGA

JUDGE

10/02/2023

COURT: Ruling delivered in the presence of the learned counsel for the applicant and absence of the respondent.



H. R. MWANGA

JUDGE

10/02/2023