

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(ARUSHA DISTRICT REGISTRY)
AT ARUSHA**

MISC. CIVIL APPLICATION NO. 10 OF 2022

(Based on the High Court of the United Republic of Tanzania, Arusha District Registry
Land Appeal No. 42 of 2019, which in turn originated from District Land and Housing
Tribunal for Arusha Application No. 147 of 2012)

MICHAEL KIVUYO.....1ST APPLICANT
MWL. JOSEPH SIATOI MOLLEL2ND APPLICANT
MKINDI LYIMO3RD APPLICANT
WILLIAM KALAYO4TH APPLICANT
MZUNGU KALAYO5TH APPLICANT
REHEMA SUMLAI.....6TH APPLICANT
JEROME CHAMI7TH APPLICANT
SARUNI OLODI8TH APPLICANT

VERSUS

HURUMA VISION TANZANIA (HVT)

(The Registered Non-Governmental Organization)**RESPONDENT**

RULING

31/10/2022 & 27/01/2023

GWAE, J

Dissatisfied with the judgment and decree of this court dated 17th September 2021 via Land Appeal No. 42 of 2019, the applicants named herein above are desirous to appeal to the Court of Appeal of Tanzania. The applicants' desire to appeal is evidenced by their Notice of Appeal

duly filed on 21st day of September 2021 Henceforth, this application for extension of time to enable the applicants to file their application for leave out of time.

The applicants' application is supported by an affidavit of their advocate one Ronilick Eli Kasamabala Mchami. In essence the main reason for the applicants' delay to file an application for leave is a late supply of copies of judgment and decree of the court (from 21st September 2021 when the requested for the same till on 31st January 2022 when the Deputy Registrar supplied the applicant of the same) and misplacement of the file.

The applicants' application is also supported by a sworn affidavit of one Joyce Mkulungu, the senior court clerk. Her affidavit is to the effect that, the applicants were supplied with copies of judgment and decree late due to misplacement and unavailability of the file from September 2021 to January 2022 when the file in respect of the applicants' Land Appeal No. 42 of 2019 was luckily found.

On the other hand, the respondent through a sworn affidavit of his counsel, Mr. Median Mwale seriously opposed this application and subjected the applicants into vigorous and strict proof of their averments in their affidavit.

On 31st October 2022, this application was called on for hearing and the applicants and respondent were under representation of Dr. Mchami and Mr. Mwale respectively.

Arguing for the application, Dr. Mchami reiterated what is contained in his affidavit. However, he added that even after the supply of the copies of judgment and decree yet there was defect in the date of judgment. Thus, they were thus compelled applied for rectification of the judgment and its decree. According to Dr. Mchami the applicants' delay was associated with the late supply of the copies of judgment and decree, which is out of the applicants' control. The applicants' advocate also argued that, the impugned judgment contains illegality to wit, the court's holding that, advocate Emmanuel Kinabo, the then applicants' advocate was not duly registered as his name did not appear in the Tanzania Advocates Management system (TAMS). He embraced his submission as far as the issue of illegality is concern by a judicial precedent in Criminal Appeal No. 159 of 2018 between **Hussein vs. Said Republic** (unreported) at page 9 of the judgment, it was stated that;

"It is trite law that where there is apparent illegalities, the court hearing an application of time should hesitate to grant such an application....When the issue is one of

alleged illegality, then the court has to ascertain the alleged illegal....”

Mr. Mwale, on the other hand contested that, this application by arguing that this application is baseless for want of good cause as a delay of 143 days has not accounted for. The respondent’s counsel further argued that, the applicants are negligent since an application for leave might have even been made orally. He urged this court to refer to **Jubille (Tanzania) Ltd vs. Mohamed**, Civil Application No. 449 of 2020 (unreported) where it was stated that, a delay of even a single day must be accounted for in an application for extension of time otherwise there would have no need of having Rules on Limitation of time.

More so, Mr. Mwale submitted that, there is no good cause since there is no requirement of obtaining copies of judgment and decree by virtue of Rule 46 (1) of the Rules, 2009 and that the alleged illegality was stated in the applicants’ affidavit.

Rejoining the respondent’s submission, Dr. Mchami stated that, the applicants’ application is well grounded since the law permits applications of this nature are brought under section 11 of the Appellate Jurisdiction Act, Cap 141, Revised Edition, 2019 which provide for such requirement of having obtained certified copies of judgment and decree to be appealed. He also stated that the applicants or their advocate would not

have known the errors, as they were not supplied with the copies of the judgment. The respondent's contention that, the applicants would even apply for leave orally, Dr. Mchami stated that, the applicants could not make an oral application for leave since Deputy Registrar rendered the judgment.

Having outlined what transpired in the parties' affidavits and their oral submissions for and against the application, therefore, issues for the court's determination are; whether the applicants have shown good cause to justify this court grant leave and whether there is point of illegality in the judgment sought to be challenged before the Court of Appeal of Tanzania.

In the first issue, whether the applicants have advanced sufficient cause for their delay. Closely examining the sworn affidavit of Dr. Mchami and that of Miss Joyce, the parties' oral submission as well as annexures thereto and I have come up with the following observations. **Firstly**, that, the applicants promptly filed their Notice of Appeal on 21st September 2021 as the judgment was delivered on 17th September 2021 and on the same date they did apply for the supply of certified copies of judgment and decree. **Secondly**, that, there is ample evidence that, the file was nowhere to be found as the same was misplaced between September

2021 to January 2022 and that on 31st January 2022 when the applicants were duly availed with the certified copies of judgment and decree and **thirdly**, that, this application was duly filed on 9th February 2022. The delay from when the applicants were availed with the documents and time when this application was filed, in my view, is not inordinate one. The sub-issue that follows is, whether obtaining certified copies of judgment and decree in application for leave to appeal to the Court of Appeal is not the legal requirement.. Rule 45 (a) of the Court of Appeal Rules, 2009 as amended through GN. 362 of 2017 reads;

- (a) *Notwithstanding the provisions of rule 46(1), where an appeal lies with the leave of the High Court, application for leave may be **made informally**, when the decision against which it is desired to appeal is given, or by chamber summons according to the practice of the High Court, **within thirty days of the decision** (emphasis supplied)."*

According to section 11 (1) of the Appellate Jurisdiction Act (Supra) and Rule 45 of the Court of Appeal, Rules, 2009, it is vibrantly clear that, there is no requirement of obtaining certified copies of judgment and decree in filing an application for leave to appeal to the Court of Appeal as rightly argued by Mr. Mwale. The requirement to obtain copies of judgment and decree desired to be appealed are mandatory requirement

in the Court of Appeal of Tanzania when an application for leave is filed in the Court of Appeal after a refusal by the High Court. This is by virtue of Rule of 49 (3) of the Court of Appeal Rules, 2009 which provides that;

"Every application for leave to appeal shall be accompanied by a copy of the decision against which it is desired to appeal and where the application has been made to the high Court for leave to appeal by a copy of the order of the High Court."

The rationale for the procedural law for not requiring an application for leave in the High Court to be accompanied by certified copies unlike in the Court of Appeal is that, the judgment to be challenged and its relevant case file is in the same court (High Court). However, with use of modern technologies where most of the judges compose their judgments and rulings through their lap tops unlike to previous era that means judgments and rulings are no longer in hand written form. It follows therefore, it is not easier, for a party or his advocate aggrieved by certain a decision pronounced by the court to file an application for leave without having gone through the decision against which it is desired to appeal to the Court of Appeal unless the presiding judge has issued and duly signed the same.

In our present application, the applicants' former advocate, Mr. Emmanuel Kinabo is not the one who is now representing them in this application. Hence, change of advocates and the fact that, the Appeal file was untraceable immediately after the delivery of the judgment till on 31st January 2022 when it was found without undue regard of the applicants' request for the copies of judgment and decree are in my considered view to be considered in favour of the applicants. In the case of **Rutagatina, C. L. v. The Advocates Committee and Glavery Mtindo Ngalapa, Civil Application No. 2 of 2011 (Unreported)** where application for extension of time was allowed because the applicant was as in this application not guilty of lashes negligence, mistakes, inaction and lack of due diligence in pursuing the matter. The Court of Appeal at pages 5, 6 and 7 held;

3

"Looking at the whole circumstances of the case, particularly considering that, the applicant has been vigorously pursuing the matter...one cannot fairly say that the applicant is guilty of lashes, negligence, mistakes, inaction and lack of due diligence in pursuing the matter as argued by the learned Senior State Attorney. I think, given the whole circumstances of this case, denying the applicant the extension of time may appear to cause injustice. I am satisfied, in the circumstances, that good cause has been shown in terms

of rule 10 of the rules and I accordingly allow the application”

In the circumstances of the present application denying the applicants leave to file their application for leave to appeal to the Court of Appeal, in my opinion will definitely cause injustice to them. I am of that view simply because they acted promptly and their delay was certainly out of their control or control of their advocate who could not access the Land Appeal File No. 42 of 2019 or certified copies of the judgment and decree timely since the file was misplaced.

Similarly, though by virtue of Rule 45 (a) of the Rules, the applicants would make their application for leave informally as correctly argued by the respondent’s learned counsel to the court yet the one who delivered the judgment was not competent to entertain such prayer as submitted by the counsel for the applicants.

In the 2nd issue on the alleged illegality, from outset, it is common ground that, submissions are not evidence worth of consideration. The parties’ submissions are generally meant to reflect the general features of the parties’ case. Hence, submissions are elaborations or explanations on evidence already tendered in court (See the case of **The Registered Trustees of the Archdiocese of Dar es Salaam vs. The Chairman**

Bunju Village Government & four Others, Civil Appeal No. 147 of 2006 (Unreported -CAT).

In our instant application as rightly admitted by the applicants' advocates that, the issue of illegality is not contained in the applicants' supporting affidavit. Hence, it is new issue which cannot be raised during oral hearing or written submission of the application. Basing on the above findings, the alleged issue of illegality cannot therefore curtail me in determining on whether to grant or refuse this application since it was not pleaded in the applicants' affidavit. The Court of Appeal rightly stressed this position in the case of **Finca (T) Limited & another vs. Boniface Mwalukisa**, Civil Application No. 589/12/2018 (unreported) by stating that;

"It is, however, significant to note that the issue of consideration of illegality when determining whether or not to extend time is well settled and it should be borne in mind that, in those cases where extension of time was granted upon being satisfied that there was illegality, the illegality was explained."


In the light of the above decision, the illegality in the decision must be explained or pleaded as opposed to our application. The assertion that, the applicants would not raise issue of illegality since they were not

availed with the copies of judgment and decree is unfounded since the same are appended to this application

Consequently, I find the merit of this application. The applicants are given fourteen (14) days within which to file their application for leave to appeal to the Court of Appeal of Tanzania. Costs of this application shall abide the result of the intended appeal. It is so ordered.

DATED at ARUSHA this 27th January, 2023




M. R. GWAE
JUDGE