

IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB-REGISTRY

AT MBEYA

MISC. CIVIL APPLICATION NO. 19 OF 2023

*(Originating from the Court of Resident Magistrate of Mbeya at Mbeya, in Civil Case
No. 12 of 2021)*

NJOMBE FILLING STATIONAPPLICANT

VERSUS

ALBERTO JOHN MWINAMI t/a MAWENI LINE.....1ST RESPONDENT

GETRUDA MALEKELA.....2ND RESPONDENT

RULING

Date of Last Order: 13/12/2023

Date of Ruling: 15/03/2024

NDUNGURU, J.

The instant application is made under section 14 (1) of the Law of Limitation Act, Cap. 89 R.E 2019. The applicant, Njombe Filling Station is seeking for this court to grant an extension of time within which to file an appeal against the decision of the Court of Resident Magistrate of Mbeya made in Civil Case No. 12 of 2021. It was supported by an affidavit sworn by Boniface A.K Mwabukusi, counsel for the applicant.

Brief background of the matter is that; it appears on 14th day of November, 2022 the applicant lost a case which she instituted against Alberto John Mwinami t/a Maweni Line and Getruda Malekela (1st and 2nd respondent respectively or respondents accumulatively) for breach of contract. The applicant appealed to this Court to challenge the decision. However, on 16th day of June 2023 the appeal was struck out for being incompetent after upholding a preliminary objection raised by the 1st respondent. Following the struck out of the said appeal the applicant was already out of time to file another appeal hence on 19th day of June, 2023 instituted the present application.

The application was protested through joint counter affidavit sworn by the respondents.

The application was disposed of by way of written submissions. Advocate Kelvin Kuboja Gamba from BAK Mwabukusi and Chambers Advocates represented the applicant whereas the respondents were represented by advocates Innocent Paulos Mwelelwa and Lwijiso Ndelwa.

Supporting the application, Mr. Gamba adopted the affidavit of Boniface A.K Mwabukusi to form part of their submissions then argued generally that they have managed to furnish sufficient reasons for this

Court to grant the applicant. Also, that as per the guidance of the case of of **Lyamuya Construction Company Limited v. Board of Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), they have managed to account for each day of the delay.

Further, Mr. Gamba relying on the case of **Bank M (Tanzania) Limited vs Enock Mwakyusa**, Civil Appeal No. 520/18 of 2018 CAT at Dar es Salaam was of the view that in the instant matter the delay was not actual rather technical one thus that the applicant was prompt in filing this application soon after his appeal being struck out. In the strength of his submissions, he prayed for this Court to grant the application.

In response, counsel for the respondents started by adopting counter affidavit of the respondents and submitted essentially that the applicant has failed to demonstrate any sufficient reason to warrant this Court to grant the application. According to them the applicant has only narrated a chronological background of the matter which does not establish reasons for extension of time.

They went further that though what amounts to sufficient cause has not been defined, but many factors have to be considered including

whether or not the application has been promptly brought, the absence of any explanation for the delay and lack of diligence on part of the applicant. To fortify their argument, they cited the cases of **Kitindi and Dominic B Francis vs Juma Swalehe and 9 others**, Misc. Application No. 4/05 of 2017 CAT at Arusha (unreported) and **Lyamuya Construction Company Limited v. Board of Trustees of Young Women Christian Association of Tanzania**, (supra). In view of the respondents' counsel the applicant was supposed to meet all the requirements enumerated in the **Lyamuya** case (supra) and failure to do so amounts to failure to establish sufficient reasons for extension of time. They thus, urged this Court to dismiss the application with costs.

Mr. Gamba for the applicant rejoined briefly that the applicant has managed to meet all the conditions set in the **Lyamuya case** (supra) as the delay was not inordinate from 16th June 2023 to 19th June 2023, the applicant was diligent to prosecute and pursue the application and he has accounted for each day of delay. He therefore insisted that the applicant's application be granted.

I have considered the applicant's affidavits, the counter affidavit and the submissions by counsel for the parties. The major issue for consideration is whether the application is meritorious. Needless to

recount, granting or refusing to grant extension of time is absolutely the court's discretion. Nevertheless, the same has to be judiciously exercised upon sufficient cause being shown. See the case of **Benedict Mumello vs Bank of Tanzania**, Civil Application No. 12 of 2012 CAT (unreported).

Now, it is upon this Court to look if the applicant has established sufficient cause to warrant this application.

As correctly argued by the respondents' counsel, what amounts to "sufficient/good cause" is not defined. It is based on the discretion of the Court which in most cases depends on the circumstances of the case which are to be determined judiciously. Thus, in a number of decided cases such as **Kitindi and Another vs Juma Swalehe and 9 others** (supra), **Lyamuya Construction Company Limited** (supra) and **Tanga Cement Company Limited v. Jumanne D. Massanga and Another**, Civil Application No. 6 of 2001 (unreported), in the latter case the Court of Appeal of Tanzania had this to say:

"What amounts to sufficient cause has not been defined. From decided cases a number of factors have been taken into account including whether or not the application has been brought promptly, the absence of any valid

explanation for delay| lack of diligence on the part of the applicant."

In the application at hand, the applicant's reason for delay is premised on the principle of technical delay in prosecuting Civil Appeal No. 35 of 2022.

Conversely, the principle "technical delay" was described in the case of **Furtanatus Masha vs, William Shija and Another** [1997] TLR 154, in the following words:

*"... A distinction should be made between cases involving real or actual delays and those like the present on which only involve what can be called **technical delays** in the sense that the original appeal was lodged in time but the present situation arose only because the original appeal for one reason or another has been found to be incompetent and a fresh appeal has to be instituted."*

Thus, in law a technical delay is excusable in opportune circumstances and constitutes a sufficient reason for granting the prayed extension of time. The principle of technical delay applies where the previously struck out matter had been filed timely nonetheless, is subject to the fact that, the affected party/applicant promptly moves the court upon the striking out order being made. See **Elly Peter Sanya v.**

Ester Nelson, Civil Appeal No. 151 of 2018 CAT at Mbeya (unreported) and **Vedasto Protace v. John Joseph Mugango** Misc. Land Application No. 115 of 2021 CAT at Dar es Salaam (unreported).

Regards the application at hand, it is undisputed that the applicant had previously filed the appeal (Appeal No. 35 of 2022) in the prescribed time. It is also undisputed that the same was struck out on 16th June 2023 for being incompetent. Having been struck out, on the same date, that is on 16th June 2023 the applicant through advocate Gamba requested for certified copy of the ruling which has been stated in the affidavit that it was availed on 19th June, 2023. It has been further stated in the affidavit and exhibited by the stamp on the application that the instant application was filed on the same day, 19th June 2023.

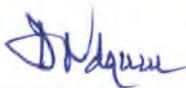
Counsel for the respondents were of the view that the applicant has not made any reason than narrating the background of the matter. However, in my considered view, the background was deliberately made by the counsel for the applicant to point out how each day was accounted for and for demonstrating how the applicant was diligent. Indeed, she was. She had never let any single day to run against her after the ruling striking out the previous appeal being delivered.

In my settled estimation, the trend by the applicant as shown herein above justifies the application of the principle of technical delay. It is also my considered view that the applicant has accounted for each day of delay as the law requires.

In that regard, I hereby grant the application. The applicant shall file an appeal within 30 days from today. Costs to be in the main cause.

Ordered accordingly.




D.B. NDUNGURU,
JUDGE
15/03/2024