

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**GEITA SUB-REGISTRY**

**AT GEITA**

**MISCELLANEOUS CIVIL APPLICATION NO.8579 OF 2024**

*(Arising from District Court of Geita, Civil Appeal No. 27 of 2022 delivered on 17/3/2023. Originating from Katoro Primary Court Civil Case No. 106 of 2022)*

**1. PAUL DAUDI**

**2. DAUDI MASAGA.....APPLICANTS**

**VERSUS**

**DOTTO KAPAYA.....RESPONDENT**

**RULING**

*Date of last Order 25/04/2024*

*Date of Ruling 14/04/2024*

**MWAKAPEJE, J.:**

Under a certificate of urgency and through a chamber summons supported by an affidavit of the 2<sup>nd</sup> Applicant, before this Court, seeks leave to extend the time within which to file a petition of appeal against the decision of the Geita District Court in Civil Appeal No. 27 of 2022, which was delivered on 14 April 2022. The present application is made pursuant to Rule 3 of the Civil Procedure Code (Appeals in Proceedings Originating in Primary Courts) Rules, G.N No. 312 of 1964.

Before proceeding, it is pertinent to illuminate the essential facts of this application. They are as follows: the first Applicant borrowed a total

of **Tshs. 6,000,000/=** from the Respondent in two instalments. Initially, he borrowed **Tshs. 4,000,000/=**, followed by an additional **Tshs. 2,000,000/=**. The second Applicant acted as a guarantor, undertaking responsibility in the event of the borrower's default on repayment. The borrower indeed defaulted on the loan terms for a period of 30 months. Consequently, the matter was brought before the Primary Court of Katoro in Civil Case No.106 of 2022, wherein the Applicants were ordered to reimburse the Respondent the sum of **Tshs. 30,000,000/=**.

Displeased with the decision of the Primary Court of Katoro, the Applicants sought to challenge it by appealing to the District Court of Geita in Civil Appeal No. 27 of 2022. The District Court decided against them on 14 April 2022. Subsequently, they lodged a second appeal in the High Court Mwanza Registry on 13 May 2023. However, before its determination, on 05 March 2024, the Applicants filed the same in the High Court Geita Registry. Regrettably, the appeal was struck out for want of jurisdiction. Consequently, the Applicants find themselves before this Court once again with the appeal. Upon realisation that they were out of time to seek redress from this Court, they filed the present application.

At the hearing, the Applicants and the Respondent used the services of Mr Yisambi Siwale and Beatus Emmanuel, both learned advocates, respectively.

Mr. Siwale adopted the contents of the Applicants' affidavit and averred before this court that the Applicants did not delay filing the appeal. However, for unknown reasons, they found their appeal before the High Court Geita Sub Registry, which was initially filed in the High Court Mwanza Sub Registry, and the same was struck out for lack of jurisdiction.

Mr Siwale further submitted that he is seeking an extension of time for the illegality pertaining to the lack of jurisdiction of the Primary Court in a mortgaged land dispute, i.e. collateral which comprises the house of the guarantor. He added that, when determining the extension of time, the cause of delay and illegality are crucial, and the Applicants have accounted for the delay and have shown overwhelming chances of success in the intended appeal. He cited the case of **The Attorney General vs Emmanuel Marangakisi (as attorney of Anastansious Anagnostou) and 3 Others**, Civil Application No. 138 of 2019, to bolster his argument.

Mr Beatus, on the other hand, and as his counterpart, adopted what was in his counter affidavit and opted to argue about what he termed as five areas as per the Respondent's counter-affidavit. One is that the application is *res subjudice*. He contended that the present application is similar to the one pending before the High Court Mwanza Sub-Registry. He averred that the Civil Appeal No. 4448 of 2024, which this court dealt with, should proceed where it was initially lodged.

Two: that he is of the opinion that the 1<sup>st</sup> Applicant ought to have been joined as the Respondent in this application, as he has not sworn in an affidavit to support this application. Three: he contended that the Applicants failed to account for the period of delay from 14 April 2022 to February 2024 when the appeal was admitted to this Court. Mr Beatus argued that the applicant's advocate was submitting as if the said appeal was lodged in High Court Mwanza Sub-Registry, but in reality, the appeal was lodged in Geita Sub-Registry, and that includes the case number, which was of Geita Sub-Registry and not Mwanza.

Four: he argued that the application for extension of time cannot bar execution, and should the Applicants intend that they ought to have invoked Rule 8 of the Civil Procedure Code (appeals in proceedings originating from the Primary Courts) Rules, GN No. 312 of 1964. He

stressed further that such an application of stay could only be granted if the court was exercising its original jurisdiction and not the appellate stage. Five: He submitted that there is no illegality pertaining to jurisdiction, and even in the intended appeal attached, there is no such ground. The learned advocate further added that on the second ground of the intended appeal, the illegality does not feature and that the said illegality was resolved fairly by the District Court of Geita in the first appeal.

In his rejoinder, Mr Siwale opposed that the application is *res subjudice and* maintained that the sworn affidavit cites the decision of the District Court of Geita, which was challenged by submitting the appeal before the High Court Mwanza Registry and later registered in the Geita Registry. He argued that if the advocate for Respondent is claiming as such, he should then tell the court the status of the case before the Mwanza Registry.

Pertaining to the issue of accounting, the advocate considered it to be baseless, as the Applicants were in Court challenging the decision of the District Court, though it was in improper jurisdiction. Also, the learned advocate maintained that the Court has jurisdiction to stay the execution and cited the case of **UAP Insurance (T) Limited vs Yuda Thomas**

**Shayo & Others**, Civil Application No.611/18 of 2022, stating that the Court Appeal issued a stay though it was not exercising original jurisdiction. He stressed that paragraph 9 of the sworn affidavit touches on the issue of a guarantor and not a borrower. Hence, the issue of illegality is therefore reflected.

Before delving into the application at hand, I wish to address the point of law raised by the Respondent that the present application is *res subjudice*. Hence, it should not be entertained by this court as the same is still pending before the High Court Mwanza Registry. He cemented his argument by referring to the decision of this Court in the PC Civil Appeal No. 4448 of 2024. Accordingly, the issue of *res subjudice* is provided under section 8 of the Civil Procedure Code, Cap 33 R.E 2019, that:

*"No court shall proceed with the trial of any suit in which **the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other court in Tanzania having jurisdiction to grant the relief claimed**". [Emphasis is supplied]*

From the provision above, I am aware that what was before the High Court Mwanza Registry was the appeal and not the application for an extension of time. Had it been an application, one could have

successfully claimed *res subjudice*. On the contrary, in the present case, the matter in issue before this Court is an extension of time, while at High Court Mwanza, what was in issue was an appeal; since the reliefs sought varied from one another, the principle of *res subjudice* cannot apply.

It is true, however, that this Court, in its ruling in Civil appeal No. 4448 of 2024, actually did strike out the said Appeal, among other reasons being, involving the same parties present before a pending appeal in the High Court Mwanza Registry. This Court did so conclude because the same was filed in Mwanza Registry, but for unknown reasons which were not substantiated, the parties found their way to the High Court Geita Registry with all pleadings bearing the name of High Court Mwanza Registry. The relief sought was the same in both Registries; again, the appeal was filed before the existence of the Registry, which came into operation on 1<sup>st</sup> December 2023.

However, the Respondent cannot rely on that ruling at this juncture unless he proves his claim to this Court. I am so saying, having in mind that the law clearly requires the party alleging the existence of any fact to prove. See the case of **Paulina Samson Ndawavya vs Theresia Thomasi Madaha** (Civil Appeal 45 of 2017) [2019] TZCA 453. Since the Respondent failed to supply this Court with the status of the case he

claimed to be pending before the High Court Mwanza Registry, the same cannot be acted upon.

Now, digging further into the application, principally, the grant or denial to extend time is the discretionary power of the court, which discretion, however, has to be exercised judiciously. Consideration in exercising the said discretion is pegged on sufficient cause advanced by the Applicant. Factors to consider on the sufficient cause were stated in the case of **Tanga Cement Co. Ltd vs Jumanne D. Masangwa & Another** (Civil Application No. 6 of 2001) [2004] TZCA 45 (8 April 2004), include:

*"(i) whether or not the application has been brought promptly;*

*(ii) the absence of any or valid explanation for the delay;*

*(iii) lack of diligence on the part of the Applicant."*

Furthermore, what amounts to a good cause was elaborated in the case of **Dar es Salaam City Council vs Jayantilal P. Rajani**, Civil Application No. 27 of 1987 (CAT) (unreported), which, in turn, drew inspiration from the decision rendered in the case of **C.M. Van Stillevoeldt v. El Carriers Inc.** (1983) 1 All ER 699, where it was expounded that:



*".....in my judgment, all the relevant factors must be taken into account in **deciding how to exercise the discretion to extend time.** Those factors include the **length of the delay, the reasons for the delay, whether there is an arguable case on appeal, and the degree of prejudice to the defendant if time is extended.**" [Emphasis supplied]*

These factors have been underscored in a plethora of judicial pronouncements in the land requiring an application to meticulously justify each day of delay. Notable among these decisions are the cases 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 (3 October 2011); **Paradise Holiday Resort Ltd vs Theodore N. Lyimo**, Civil Application No. 435/01 of 2018 [2019] TZCA 670 (17 May 2019); and **Bushiri Hassan v. Latifa Lukiyo Mashayo**, Civil Application No. 3 of 2007 (unreported).

In the instant application, the Applicants, in their affidavit, aver that subsequent to the delivery of the District Court's decision, they lodged an appeal No. 4448 of 2024 in February 2024. It is common ground that the period within which the Appellant can appeal to the High Court upon dissatisfaction with the pronouncement of the District Court is 30 days.

The Respondent contends that the Applicants have not accounted for the days delayed.

Since the Applicants never filed their appeal within the prescribed time, they now seek leave of this court to grant them an extension of time for them to appeal out of time according to the provisions of Rule 3 of the Civil Procedure Code (Appeals in Proceedings Originating in Primary Courts) Rules, G.N No. 312 of 1964. The said Rule provides that:

*"An application for leave to appeal out of time to a district court from a decision or order of a primary court or to the High Court from a decision or order of a district court in the exercise of its appellate or revisional jurisdiction shall be in writing, **shall set out the reasons why a petition of appeal was not or cannot be filed within thirty days after the date of the decision or order against which it is desired to appeal**, and shall be accompanied by the petition of appeal or shall set out the grounds of objection to the decision or order." [Emphasis supplied]*

The decision from which the Applicants are applying for an extension of time within which to lodge their appeal, as stated, was rendered by the District Court of Geita on 14 April 2022 and not on 14 April 2023, as stated in paragraph 3 of the Applicant's Affidavit. They lodged an appeal in the High Court, Mwanza sub-Registry, on 13 May 2023, which later found itself in the High Court, Geita Registry, on 05 March 2024, where it was struck out accordingly for want of jurisdiction.

Now, as stipulated, from the date when the decision of the District Court was pronounced to the date when the appeal landed in the High Court premises (Mwanza Sub Registry), with the exclusion of the period the same was in the High Court Sub Registry of Geita, is almost 395 days, which the Applicants delayed. As stated herein above, for the extension of time to be granted, there must be sufficient explanation for the Applicant's delay. In the case of **Saidi Issa Ambunda vs Tanzania Harbours Authority**, Civil Application No. 164 of 2005, reference was made to the case of **Ratman versus Cumara Samy** (1965) 1 WLR 10 on Page 12 wherein the Privy Council observed that:

*"The rules of court **must be obeyed**, and **in order to justify a court extending the time during which some step in the procedure requires to be taken, there must be some material upon which the court can exercise its discretion**. If the law were otherwise, a party in breach would have an unqualified right to an extension of time, which would defeat the purpose of the rules, which is to provide a timetable for the conduct of litigation." [Emphasis supplied].*

Having thoroughly reviewed the affidavit, encompassing all 10 paragraphs and reading between the lines, I find no evidence of the Applicants complying with the prescribed rules for applying for an extension of time within which to file an appeal out of time. The Applicants have failed to provide any reasons, let alone sufficient ones, to account

for the delay of 395 days, spanning from 14 April 2022 to 13 May 2023. Sufficient cause was clearly stipulated in the case of **Bahati Mussa Hamisi Mtopa vs Salum Rashid** (Civil Application 112 of 2018) [2019] TZCA 69 (8 February 2019) while citing the case of **Felix Mtumbo Kisima vs. TCC Limited and another**, Misc. Civil Appeal No. 1 of 5 1997, that:

*"it should be observed that sufficient cause should not be interpreted narrowly, **but should be given a wider interpretation to encompass all reasons or causes which are outside the applicant's power to control or influence resulting in a delay in taking any necessary steps.**" [Emphasis Supplied]*

In the application at hand, the Applicants did not even wish to speak about the said delayed days; rather, they only spoke of the days when the appeal was struck out by this Court on 16 April 2024, which is not applicable in the circumstances of this application; neither did they establish reasons outside their power for failure to appeal within the prescribed time.

Another point I wish to address is the issue of illegality with respect to the decision of the Primary Court. As indicated in the case of **Lyamuya Construction Co. Ltd vs Board of Registered of Young Women's Christian Association of Tanzania** (*supra*), an application for an

extension of time can be granted where there is a point of law of sufficient importance, such as the illegality of the decision sought to be challenged. A point of law in these premises should, however, be on matters pertaining to jurisdiction, denial of the right to be heard or that the matter was time-barred, see the case of **Charles Richard Kombe vs Kinondoni Municipal Council** (Civil Reference No. 13 of 2019) [2023] TZCA 137 (23 March 2023). Further, one of the requirements for illegality to constitute good cause is that it must be apparent on the face of the record, as seen in the case of **Modestus Daudi Kangalawe vs Dominicus Utenga** (Civil Application 139 of 2020) [2021] TZCA 560 (1 October 2021), while quoting the case of **Lyamuya Construction Co. Ltd** (*supra*), that:

*".....every applicant who demonstrates that his intended appeal raises points of law should as of right be granted an extension of time if he applies for one. The Court there emphasised that such point of law must be that 'of sufficient importance' and, I would add that it must **be apparent on the face of the record**, such as the question of jurisdiction; **not one that would be discovered by long drawn argument or process.**" [ Emphasis supplied]*

In the present application, the Applicants assert in paragraph 9 of their Affidavit that they are dissatisfied with the decisions of both the Primary and District Courts because of lots of "illegalities and irregularities" which they claim are outlined in the "intended petition of

appeal." However, to me, this contention is not specific and apparent in the record. Such assertions must be pleaded in the affidavit rather than merely mentioned. Moreover, the contention that these issues are reflected in the intended appeal, which has not yet been filed, is premature.

The advocate for the Applicants argues further that paragraph 9 of the sworn affidavit addresses the issue of illegality, that the issue of a "*guarantor*" rather "*than a borrower*" was determined by the Primary Court, while it lacked jurisdiction on issues related to mortgage. This aspect, however, was neither raised in either the affidavit nor in the intended petition of appeal. To me, it is an argument, presented from the bar that cannot be entertained as the court's decisions are bound by the pleadings. This Court is constrained to accept only those arguments and evidence that are pleaded by the parties. I, therefore, agree with the Advocate for the Respondent that there is no illegality apparent on the face of the record.

Lastly, the Respondent stated in paragraph 8 of his counter affidavit that the 1<sup>st</sup> Applicant was to be the second Respondent and, in his submission, further stated that there is no affidavit of the 1<sup>st</sup> Applicant supporting this application. It is trite law that where an application which

requires facts to be proved by an affidavit has more than one applicant, all the Applicants are to support the same. In the case of **Aidan George Nyongo vs Magesse Machenga & Others** (Civil Application No. 205/01 of 2022) [2024] TZCA 147 (1 March 2024), it was stated that:

*".....it has to be well understood that where **there are two or more Applicants in the application**, the notice of motion has to be supported by all Applicants"*

Further, in the case of **N.B.C. Holding Corporation and Another vs Agricultural & Industrial Lubricants Supplies L.T.D & 2 Others** (Civil Application 42 of 2000) [2001] TZCA 5 (9 April 2001), as referred in the case of **Aidan George Nyongo vs Magesse Machenga & Others** (*Supra*), it was held that the omission to file the affidavit of the other applicant renders the application incompetent before the Court.

The present application, as stated by Mr. Beatus, had two Applicants but only one deposed in an affidavit. Looking at paragraphs 2, 3, 4, 5 and 10 of the Affidavit, are in plural form and indicate that they both know the facts they depose. Paragraphs 1, 6, 7, 8, and 9 are in the singular form. However, at the end only the second applicant affirms the contents of the entire affidavit. The first applicant is nowhere to be seen to supporting the said affidavit, contrary to the rules of the law. Needless to say more, the application at hand is incompetent.

From what is stated above, the application is not only incompetent but also lacks sufficient cause to grant it. Consequently, I dismiss it with costs.

It is so ordered.

**DELIVERED** at **GEITA** this 14<sup>th</sup> day of May, 2024.



**G.V. MWAKAPEJE**  
**JUDGE**

Ruling is delivered this 14<sup>th</sup> day of May 2024 in the presence of Mr Yisambi Siwale, learned advocate for the Applicant and Mr George Alfred, a learned advocate holding the brief of Mr Beatus Emmanuel, advocate for the Respondent.



**G.V. MWAKAPEJE**  
**JUDGE**