

IN THE HIGH COURT OF TANZANIA

MUSOMA SUB – REGISTRY

AT MUSOMA

MISC.CIVIL APPLICATION NO. 83855 AND 25480 OF 2023

REF NO. 20231114000083855

{Arising from Civil Appeal No, 01 of 2023 at Bunda District Court}

BETWEEN

KAMPUNI YA MABASI YA ZACHARIA..... APPLICANT

VERSUS

MARIAM CHARLES..... RESPONDENT

RULING

7th & 21st May, 2024

M. L. KOMBA, J.:

This is an application for extension of time to appeal out of time against the ruling of Bunda District Court (the trial court) in Civil Appeal No. 01 of 2023 which dismissed the appeal. The application is premised under section 25(1) (b) of the Magistrates' Courts Act, Cap 11 R. E 2019 and is supported by an affidavit sworn by the counsel for the applicant, Onyango Otieno. Respondent filed counter affidavit with Preliminary Objection (PO) to contest the same.

Derived from the affidavit filed by the counsel for applicant, a brief background of the matter goes like; the applicant was appealing from the decision of Bunda Urban Primary Court in Civil Case No. 148 of 2022 and

the appeal was registered as Civil Appeal No. 01 of 2023 at Bunda District Court. In the cause of hearing respondent raised PO on the use of language which was sustained and the trial Magistrate dismissed the appeal for want of language. It was in the affidavit of Mr. Onyango that the appeal was supposed to be strike out and not otherwise. Following the dismissal the applicant applied for enlargement of time via Misc. Application No. 08 of 2023 which was truck out and ordered to refile, wherefore, he filed the current application so that he can appeal out of time.

This court after was done with PO, schedule the hearing date where applicant was represented by Mr. Onyango Otieno and respondent had a legal service of Mr. Kajitanus both being advocates.

It was Mr. Onyango who was the first to make the ball roll after praying his affidavit to be adopted and submitted that under section 25 1(b) of Cap 11 the applicant prays this court to extend time so that the applicant can file an appeal out of time in respect of a ruling in Civil Appeal No. 1 of 2023. He referred this court to paragraph 3 of his affidavit which has background of the matter as narrated in foregoing paragraph. It was his submission that the Magistrate presided over the appeal instead of strike out, he dismissed the matter which was not heard to its finality.

As deponed at paragraph 5 he submitted that the order in the ruling Civil Appeal No. 1 of 2023 is tainted with irregularity as the suit was dismissed instead of strike out the fact which bar the applicant from refiling the same. He cited the case of **Kyariko Village Council vs Kiseru Savings and Credit Co-operation**, Land Appeal No. 24 of 2021 (Musoma HC) where this court once ruled that where there is incompetent appeal the remedy is to strike out and not dismissal.

It was his further submission that when the applicant was in the process of appealing including gathering of relevant copies, he finds himself out of time to challenge the dismissing order that's why he prefer this application. In support for his application, he cited the case of **Principal Secretary Minister of Defence and National Service vs Devram P. Valambia** [1991] TLR 387 that when there is illegality on face of record, the court is at liberty to extend time so that the applicant may rise issues on appeal. He explained that the alleging illegality is dismissal of the appeal instead of strike out. He prayed for time so that applicant can challenge the decision of the Bunda District Court and any other reliefs.

On the other hand, Mr. Kajitanus started by clearing doubt that he agrees with applicant on what was deponed at his paragraph 4 that this

application emanates from Civil Application No. 8 of 2023 where the matter was strike out and was given 14 days to refile. It was his submission that by the time applicant was filing **Misc. Application No 8 of 2023** he was late for 40 days. He refers me to rule 3 of Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules 1964 GN 312 of 1964 (GN 312 of 1964) which among other things applicant who fail to appeal within 30 days has to provide reason for delay. He insisted the rule used the word "shall" to mean the function so confirmed must be performed.

It was Mr. Kajitanus submission that the applicant has failed to show good and sufficient cause as why he failed to appeal within time as provided under rules. Citing the case of **Zainab Nzota vs Omary Mahindi**, Misc Civil Application No. 429 of 2021 counsel insisted that applicant has to state reasons for delay. He opposes submission that applicant was gathering some documents on the ground that rule 4 of GN 312 of 1964 has no requirement to attach Judgment nor ruling in application of this nature and support his submission with **Zainab Nzota vs Omary Mahindi** (supra), **Gregory Raphael vs Pastory Rwehabura**, TLR 2005 at 99 and **Abdala Mkuba vs Mohamed Lilame**, TLR 2001 at 326.

Further he was of the submission that in **Bruno Wenceslaus Nyalifa vs PS Home Affairs Civil Appeal**, No. 82 of 2017 Court of Appeal insisted of three things which are accounting delay, promptness and not apathy. He was of the position that the applicant fails to explain why he did not appeal on time, the position is the same in **Wambele Mtumwa Shamahe vs Mohamed Hamis**, Civil Reference No. 8 of the 2016.

During rejoinder Mr. Onyango submitted that counsel for the respondent had a long submission on accounting each day but he did not deny the illegality as registered by him (Mr. Onyango). In cementing his submission, he cited the case of **Lyamuya Construction vs Board of Registered Trustee of Young Women Christ Association of Tanzania**, Civil Application No. 2 of 2010 and of **Principle Secretary of Ministry of Defence** (supra) that all these cases provided four major criteria to be considered in extension of time and he underscore the fourth criteria which is illegality as the matter was dismissed instead of struck out. He prayed for time so that applicant can challenge the decision in Civil Appeal No.01 of 2023.

I have dispassionately considered and weighed the rival arguments from both parties. To begin with, I feel it is instructive to reiterate, as a matter of general principle that whether to grant or refuse an application

like the one at hand is entirely in the discretion of the Court, but that discretion is judicial and so it must be exercised according to the rules of reasoning and justice.

It is trite that whenever any part seeks for extension of time to file an application or appeal out of time, he/she must advance the sufficient reason (s) that the court can consider in exercise its discretion. There is no decisive definition of what a sufficient/good cause is, however, in determining the good cause courts have been invariably taking into account various factors including length of delay involved, reasons for delay as submitted by Mr. Kajitanus. See **Zainab Nzota vs Omary Mahindi** (supra), **Jaliya Felix Rutaihua vs Kalokora Bwasha & Another**, Civil Application No. 392/01 of 2020 and **Ludger Bernard Nyoni vs. National Housing Corporation**, Civil Application No. 372/01/2018, CAT at Dar es Salaam (Unreported).

It has been also held in a bundle of precedent that a ground alleging illegality constitutes good cause for extension of time just as submitted by Mr. Onyango. Among the decisions includes **James Anthony Ifada vs Hamis Alawi**, Civil Appeal No. 482/2014 of 2019 and **Amour Habib Salim vs Hussein Bafagi**, Civil Application No. 52 of 2009, **Lyamuya Construction vs Board of Registered Trustee of Young Women**

**Christ Association of Tanzania (supra) and Principal Secretary
Minister of Defence and National Service vs Devram P. Valambia
(supra).**

In the later case it was held;

'In our view, when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record straight.'

However, it is noteworthy that in **Devram P. Valambia** (supra), the illegality of the impugned decision was clearly visible on the face of the record in that the High Court had issued a garnishee order against the Government without affording it a hearing. Incidentally, the Court in the case of **Lyamuya Construction** (supra) made the following observations: -

'Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in VALAMBIA case, the court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted 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 also be apparent on the

Face of the record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process.'

In the present application, the counsel for applicant registered only one reason for extension of time, illegality, which was not denied by Mr. Kajitanus. I had time to read ruling delivered on 10/03/2023 the Magistrate dismissed the appeal and ordered parties to file in a required language. When the matter is dismissed, a party cannot remain in court. As was held in **Bernard Balele vs the Republic**, Criminal Appeal No. 81 of 2011, CAT that an incompetent appeal should be struck out not dismissed. An order of dismissal implies that, a competent appeal has been heard on merit. Whereas an order of striking out an appeal implies that an incompetent appeal has been disposed of on account of irregularities or defects therein. See also **Kyariko Village Council** (supra).

The remedy of incompetent appeal is to struck out so that a party may file proper one. Applying the foregoing statement of principle to the case at hand, I am persuaded that the alleged illegality is clearly apparent on the face of the impugned decision hence applicant manage to move this court.

All being done, I hold that the applicant has sufficiently registered good reason to be granted what he prayed. I hereby grant 30 days from the date of this ruling for the applicant to lodge his appeal.

No order as to costs.

DATED at **MUSOMA** this 21st day of May, 2024.



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M. L. KOMBA
Judge