

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB – REGISTRY

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 189 OF 2023

(Arising from Civil Appeal No. 37 of 2023 High Court at Dar es Salaam, Originating from Civil Appeal No. 24 of 2022 Temeke District Court, Original Civil Case No. 43 of 2022 Temeke Primary Court)

JAYSON INDUSTRY LIMITED.....APPLICANT

VERSUS

SAI ENERGY & LOGISTICS SERVICE LIMITED.....RESPONDENT

RULING

POMO, J

In this Application the Applicant, JAYSONS INDUSTRY LIMITED, under section 25(1)(b) of the Magistrates' Courts Act, Cap.11 R.E. 2022] is moving this court praying for: -

- 1. That, this Honourable Court be pleased to extend time within which to file an appeal against PC Civil Appeal No. 24 of 2022 Temeke District Court*
- 2. Any other order(s) and directive as the Honourable Court may deem proper and expedient to grant in the circumstance*
- 3. That, for the sake of advancement of justice, this Honourable Court be pleased to make an order and finding*

that there exist good causes for granting orders being sought herein

4. Costs of this Application

It is accompanied with an affidavit supporting it. The affidavit was deposed by Joseph M. Paulo who is the Applicant's learned counsel.

The facts of the matter as can be gathered from the record as follows. Against the Respondent, the Applicant filed Civil Appeal No. 34 of 2022 at Temeke Primary Court claiming for payment of TZS 28,556,531/- an outstanding debt for supply of plastic bags the Applicant made to the Respondent. On 5th September, 2022 the suit was decided in the Applicant's favour by Hon. C.J. Kavishe, RM. Aggrieved, the Respondent filed Civil Appeal No. 24 of 2022 at Temeke District Court. The District Court allowed the appeal by reversing the trial court decision. The judgment of which was delivered on 22th February, 2023 Hon. C.M. Madili, RM.

Not happy with the District Court judgment and decree in the said Civil Appeal No. 24 of 2022, the Applicant timeously lodged before this court Civil Appeal No. 37 of 2023. This appeal on 24th April, 2023 was struck out because it was found to be incompetent before the court. The appeal was caught by procedural irregularities in that, contrary to the legal requirement set under section 25(3) of the Magistrates' Courts Act, [Cap.

11 R.E.2019] the Applicant didn't lodge her appeal to this court through Temeke District Court, the court which decided the impugned decision. Following the above, the Applicant on 3rd May, 2023 lodged the instant Application.

The Application is resisted by the Respondent who lodged her counter affidavit on 19th June, 2023. The same is deponed by Musa Mhagama, learned advocate for the Respondent.

I ordered hearing of the application be carried out by way of written submissions. Whereas the Applicant had legal service of Joseph Paulo, learned advocate of Teal attorneys, the Respondent enjoyed legal representation of Musa Mhagama, learned advocate from Delta Law Chambers. I am grateful to the learned minds for their industrious submissions which were timely filed

Arguing the Application, Mr. Paulo firstly adopted the affidavit which supports it. Submitting, he argued that the Applicant timely filed in this court a Civil Appeal No.37 of 2023 against the decision of the District Court, the appeal was lodged in this court instead of filing it through the District Court which decided it. The Respondent filed an objection against that appeal in that it contravened section 25(3) of the Magistrates' Courts Act, [Cap.11 R.E. 2022] the appeal having been filed to the High Court

instead of being lodged at Temeke District Court where the impugned decision was decided. The Applicant conceded to the objection hence this application for extension of time to appeal out of time her previous appeal having been struck out.

It is Mr. Paulo's argument that delay in appeal by the Applicant is a technical delay her earlier appeal though timely filed, ended being struck out. According to him, technical delay is a good cause for extension of time. In support of his stance, He cited to this court the case of **Senga Omary Kawambwa versus Tumaini Kimwaga**, Misc. Land Application No. 88 of 2019 HC (Land Division) at Dar es Salaam (unreported) and **Fortunatus Masha versus William Shija and Another** [1997] TLR 154. He then prayed the Application be granted.

Replying, Mr. Mhagama also adopted the counter affidavit earlier on filed resisting the application and submitted that the applicant was negligent in wrongly filing her appeal before this court, Civil Appeal No. 37 of 2023 instead of filing it through the District Court. That, this Application was filed 9 days from the date the Applicant's Appeal was struck out by this court and no account for such delay is given by the Applicant. That, technical delay relied upon as ground for extension of time is not a sufficient cause. This is due to the fact that the Applicant

was negligent in not following the legal procedures set by the law in appealing and negligence had never been a good ground for extension of time, Mr. Mhagama stressed. On this, he cited two cases, **Lyamuya Construction Company Ltd versus Board of Registered Trustees Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 CAT at Arusha and **Vehicle and Equipment Leasing (Tanzania) Ltd versus Jeremiah Charles Nyagawa**, Misc. Civil Application No. 452 of 2022 HC at Dar es Salaam (Unreported). In the end Mr. Mhagama prayed the application be refused by this court for want of good cause.

In his rejoinder, basically the Applicant reiterated the submission in chief and maintained the prayer that the application be granted

On my part, having heard both sides submissions and gone through the affidavit and the counter affidavit, the issue I am required to resolve is whether the Applicant has adduced sufficient cause warranting this court to grant the extension of time sought. It has been said time without number that extension of time is the discretionally exercise of the court which have to be applied judiciously. For instance, in In **Omary Shabani Nyambu versus Dodoma Water and Sewerage Authority**, Civil

Application No.146 of 2016 CAT at Dar es Salaam (Unreported) the Court of Appeal, at page 6, had this to state:

*"It is significant to emphasize that **the Court's discretion in deciding whether or not to extend time must be exercised judiciously and not arbitrarily or capriciously, nor should it be exercised on the basis of sentiments or sympathy.** Fundamentally, the said discretion must aim at avoiding injustice or hardships resulting from accidental inadvertence or excusable mistake or error, but should not be designed at assisting a person who may have deliberately sought it in order to evade or otherwise to obstruct the cause of justice".*

[See also: **Nyabazere Gora versus Charles Buya**, Civil Appeal No.164 of 2016 CAT at Mwanza; **Osward Masatu Mwizarubi versus Tanzania Fish Processing Ltd**, Civil Application No.225 of 2014 CAT (Unreported), (both unreported)]

Technical delay is the ground on which this application is based. The former appeal, Civil Appeal No. 37 of 2023 having been lodged timely but struck out for being incompetent, makes the delay by the applicant to appeal to be technical delay and reliance is sought from the case of **Fortunatus Masha versus William Shija and Another** [1997] TLR 154 where the Court of Appeal at page 155 had this to state: -

"I am satisfied that a distinction should be made between cases involving real or actual delays and those like the present one 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".

The Court of Appeal went on stating that, at the same page thus: -

*"In the circumstances, **the negligence if any**, really refers to the filing of an incompetent appeal not the delay in filing it. **The filing of an incompetent appeal having been duly penalized by striking it out, the same cannot be used yet again to determine the timeousness of applying for filing the fresh appeal**".*

The Respondent has advanced an argument that the Applicant was negligent in filing an incompetent appeal, but guided by what the court of appeal held in **Fortunatus Masha** case (supra), the Applicant was penalized by her negligence in filing the appeal incompetently and the same cannot be used again as ground to deny her application for extension of time.

Delay of nine (9) days by the Applicant in filing the instant application counted from 20th April, 2023 when her incompetent appeal

timely filed but struck, up to 29th April, 2023 when this application was filed, in my considered view, is not inordinate one. I am fortified by the court of appeal decision which considered two weeks delay in filing application for extension of time to be not in ordinary delay when it was confronted by the case of **Jonathan Harald Christer Abrahsson Vs Exim Bank (T) Limited and 3 Other, Civil Application No.224/16 of 2018 CAT at Dar es Salaam (Unreported)**, where it held, at page 8, that: -

*"...and that upon being struck out on that technical delay the applicant **acted promptly "within two weeks" in bringing this present application. Since the Applicant was not idle but all along have been in this court pursuing an incompetent application, that by itself constitutes good cause. See Robert Schelten V, Balden Norataram and 2 Others, Civil Application No.112 of 2016 (Unreported)**".*

Yet in **Samwel Kobelo Vs National Housing Corporation, Civil Application No.302/17 of 2017 CAT at Dar es Salaam (unreported)** held at page 8 that: -

*"In addition, I have taken into account that **it has not been suggested that the respondent would suffer any prejudice if time is extended**".*

There is nothing suggested in the respondent's counter affidavit so is in the submission that if the Application is to be granted will be prejudiced anyhow.

That said and done, I hereby grant the application. The Applicant is granted leave to file an appeal within twenty days from the date of this decision. I make no order as to costs. It is so ordered

Dated at Dar es Salaam this 23rd day of February, 2024



MUSA K. POMO
JUDGE
23/02/2024



Ruling delivered this 23/02/2024 in presence of Mr. Joseph Paul, learned advocate for the Applicant and Mr. Musa Mhagama, learned advocate for the Respondent

Sgd: S. B. Fimbo
Deputy Registrar
23/02/2024