

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI SUB REGISTRY

AT MOSHI

MISC. CIVIL APPLICATION NO. 31 OF 2023

(Originating from Consolidated Civil Appeals Nos. 10 and 11 of 2017 of the High Court of Tanzania at Moshi)

DR. JOHN HAULE 1ST APPLICANT
MAGRETH MBANZA 2ND APPLICANT

VERSUS

WAZALENDO SACCOS LIMITED RESPONDENT

RULING

14/05/2024 & 30/05/2024

SIMFUKWE, J.

The instant application was filed under **section 11(1) of the Appellate Jurisdiction Act**, Cap 141 (R.E 2022). The applicants prayed for the following orders:

1. That, this court be pleased to grant an extension of time to file Notice of Appeal out of statutory time to appeal against the whole

judgment and decree of the High Court in Consolidated Civil Appeals Nos. 10 and 11 of 2017 delivered on 14th November 2019.

2. Costs of this application.
3. Any other relief(s) this Court may deem fit and just to grant.

The application was supported by an affidavit dully sworn by Mr. Alfred Sindato learned counsel for the applicants. It was resisted by the counter-affidavit of one Boniphace Sanjura, the Principal Officer of the respondent.

In his affidavit, Mr. Sindato deponed inter alia that their delay was technical as they were diligently prosecuting this Court's Civil Application No. 4 of 2020 and Civil Appeal No. 10 of 2021 at the Court of Appeal. At paragraph 6 of his affidavit, the learned counsel stated that the Court of Appeal struck out their appeal for lack of a letter of the High Court Deputy Registrar notifying the appellants that the records were ready for collection. Moreover, at paragraph 9 the learned counsel for the applicants raised the following issues which are subject of the intended appeal before the Court of Appeal:

- a) That, the trial High Court Judge erred both in law and fact to decide that the Resident Magistrate court had no jurisdiction to vacate its own orders.

b) That, the Honourable High Court Judge erred both in law and fact to hold that the trial Resident Magistrate court went into detail and validity of amount(s) payable under decree(s) and surcharge at issue.

In his counter affidavit Mr. Boniphace Sanjura Principal Officer for the respondent, noted the contents of paragraphs 1, 2, 3, 4, 5 and 9 of the affidavit of the learned counsel for the applicants. At the same time, he strongly disputed the contents of paragraph 6, 7 and 10 of the affidavit. He stated that, the applicants were not serious in taking essential steps in time or at all for prosecuting the appeal as a result of failure to obtain all prescribed documents within the prescribed time.

The applicants were represented by Mr. Alfred Sindato, learned counsel while, the respondent had the service of Mr. Hassan Herith, learned counsel.

In his written submission, Mr. Sindato adopted his supporting affidavit to form part of his submission. He submitted that, on 18/11/2019 the applicants requested for copies of impugned proceedings, judgment and decree. Also, the applicants lodged their Notice of Appeal on 21/11/2019. They were supplied with the requested documents out of time on 23/10/2020. Thus, the Deputy Registrar granted them a certificate of

delay which enabled them to file their appeal before the Court of Appeal out of time. Their record of appeal lacked a letter from the Deputy Registrar notifying the applicants that their documents were ready for collection. That anomaly vitiated the Certificate of Delay. Hence, on 29th September 2023 the appeal before the Court of Appeal was struck out for being incompetent. Then, on 02/10/2023 the instant application was filed.

Mr. Sindato was of the opinion that the applicants are entitled to extension of time to file Notice of Appeal on the reason that they have been prosecuting their case diligently. The learned counsel also thought that at paragraph 4 of the counter affidavit, the respondent supported this application. In support of the application, Mr. Sindato cited the case of **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. 10 of 2015, CAT, which held that:

"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 the discretion is judicial and so it must be exercised according to the rules of reason and justice."

Another reference was made to the case of **Fortunatus Masha v. William Shija and Another [1997] TLR 156** where it was held 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. In the circumstances the negligence if any really refers to the filing of an incompetent appeal not the delay in filing. The filing of an incompetent appeal having been dully penalized by striking it out, the same cannot be used yet again to determine the timeliness of applying for filing the fresh appeal. In fact, the present case, the applicant acted immediately after the pronouncement of the ruling of this Court striking out the first appeal."

In addition, Mr. Sindato cited the case of **Attorney General v. Consolidated Holdings Corporation and Another**, Civil Application No. 26 of 2014, in which the Court of Appeal stated inter alia that:

"...in each case the court must be satisfied by the reason(s) of the delay, the length of the delay, the degree of the prejudice to the respondent if the application is granted and the point of contention in the intended action."

In the circumstances of this case, the learned counsel was settled that the respondent will not be prejudiced if this application is granted. That, it is in the interest of justice to ensure that the dispute between the parties is determined on merit to its finality.

It was concluded that the applicant has satisfied the factors for granting an extension of time as invariably made in **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 02 of 2010.

Contesting the application, Mr. Hassan Herith started his submission by adopting the counter affidavit to form part of his submission. Then, he submitted that they were dissatisfied with the submission made by the applicants concerning the reasons for their failure to file Notice of Appeal timely. That, the applicants want to establish their failure to file the Notice of Appeal timely as a technical delay against actual delay which is a result of negligence. The learned counsel said that the applicants have drawn two issues: That, the Deputy Registrar forgot to issue the letter notifying the Applicants that the documents were ready for collection when he issued the Certificate of Delay. Second, that, by noting their affidavit's fourth paragraph the respondents had conceded/supported their application for extension of time.

Mr. Herith strengthened his argument by subscribing to the cases of **Daudi Robert Mapuga and 417 Others v. Tanzania Hotels Investment Ltd and 4 Others**, Civil Application No. 462/18 of 2018, CAT, and **Monica Makungu v. Director of Education Department Archdiocese of Mwanza**, Civil Application No. 31/08 of 2021, CAT (unreported) which emphasized the importance of due diligence and duty of follow-up to the Deputy Registrar. That, the applicants were supposed to make follow up to the Deputy Registrar for the notification letter regarding the availability of the requested documents.

The learned counsel quoted the case of **Daudi Robert Mapuga** which held that:

"We are unprepared to let the respondents claim that they were home and dry. It would be most illogical and injudicious, we think, to accept the respondents' wait infinitely for a copy of the proceedings while they take no action on their part to follow on their request to the Registrar. To say the least, this infinite inaction, in our respectful view offends the ends of justice."

Also, the learned counsel referred the holding in the case of **Monica Makungu** (supra) in which it was observed that:

"We agree that the Deputy Registrar's inaction contributed to the mess. The respondent, in the same way, cannot escape blame. Indefinite wait does not fit well with the timely dispensation of justice mantra."

Moreover, Mr. Herith subscribed to the four principles to be considered before granting or denying the application for extension of time which were expounded in the case of **Lyamuya Construction Company Ltd** (supra). That:

"On the authorities, however, the following guidelines may be formulated:

- (a) The applicant must account for all the period of delay.*
- (b) The delay should not be inordinate.*
- (c) The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.*
- (d) If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged."*

Mr. Herith was of the opinion that, the applicants have failed to adhere to the above noted principles, specifically the third principle. He added that, blaming the Deputy Registrar in any way has never been a good cause in

any application for extension of time for filing Notice of Appeal. That, the applicant's submission does not indicate or account for any day of delay and reasons thereof contrary to the principles enunciated in the case of **Mapuga** (supra).

Replying the issue of conceding to the application; Mr. Herith contended that noting paragraph 1 to 5 and 9 of the applicant's affidavit did not amount to conceding to the application for extension of time. He said that their aim was firm that they had taken note of their argument and that they were not in the position of disputing the same.

In his final analysis, the learned counsel for the respondent prayed that this application be dismissed with costs and any other reliefs which this court may deem just and fit to grant.

Having keenly examined the rival submissions of both parties and records of this case, the issue for determination is **whether this application has merit.**

It is settled law that, extension of time can only be granted upon good cause being shown and where the delay has not been caused or contributed by negligence or sloppiness on part of the applicant. There is a number of decisions to that effect including the case of **Brazafriic Enterprises Ltd vs Kaderes Peasants Development (PLC) (Civil**

Application 421 of 2021) [2022] TZCA 624 (13 October 2022)

[Tanzlii] at page 8 & 9 where the Court of Appeal stated that:

*"It is noteworthy that there is no universal definition of the term 'good cause'. Therefore, **good cause may mean among other things, satisfactory reasons of delay or other important factors which needs attention of the Court,** once advanced may be considered to extend time within which a certain act may be done..."*Emphasis added

Therefore, any party who seeks before any court an order for extension of time should establish good cause for his/her delay taking into consideration the length of delay, the reason for the delay and the duty to account for each day of delay.

Moreover, granting extension of time is within the discretion of the court which must be exercised judiciously.

In the case of **Godwin Ndewasi and Karoli Ishengoma vs Tanzania Audit Corporation [1995] T.L.R 200** it was held that:

"..... And in order to justify extending time during which some steps in proceedings to be taken, there

must be some material on which the court can exercise its discretion.”

In the instant case, the learned counsel for the respondent was of the opinion that the applicants were negligent in making follow up of the requested documents to the Deputy Registrar. Mr. Sindato for the applicants was firm that they acted diligently in pursuing their matter and asserted that their delay was technical one as their former Notice of Appeal was struck out together with Civil Appeal No. 10 of 2021. Respectfully to the learned counsel for the respondent, I join hands with the learned counsel for the applicant that their former Notice of Appeal was valid. Except that it suffered the same fate with the incompetent appeal which was struck out by the Court of Appeal for lack of a letter from the Deputy Registrar. I also underline the holding in the case of **Fortunatus Masha** (supra) in which the Court of Appeal held that:

*“..... The filing of an incompetent appeal having been dully penalized by striking it out, **the same cannot be used yet again to determine the timeliness of applying for filing the fresh appeal.** In fact, in the present case, the applicant acted immediately after the pronouncement of the ruling of this Court striking out the first appeal.”*

I am of the same opinion in the case at hand, that negligence of the applicants if any was rewarded by striking out Civil Appeal No. 10 of 2021 which was struck out on 29/09/2023. Immediately on 02/10/2023 the instant application was filed. Therefore, the applicants cannot be punished twice for the same mistake. Having regard to the raised issues sought to be considered by the Court of Appeal, as correctly said by Mr. Sindato I am convinced that it is in the interest of justice to grant this application so that the matter can be finalized on merit.

Therefore, I grant extension of time to the applicants to file their Notice of Appeal within 14 days. No order as to costs.

It is so ordered.

Dated and delivered at Moshi this 30th day of May 2024.



X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

30/05/2024