IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 432 OF 2023

(Arising from Civil Case No. 24 of 2017 at Resident Magistrate Court of Dar es Salaam at Kisutu)

CAPITAL RADIO ..... 1ST APPICANT

SOFIA RAJAB ..... 2ND APPICANT

INDUSTRIAL PRODUCTION PROMOTIONS (IPP) MEDIA ..... 3RD APPICANT

WILBERT DEOGRATIAS MASONA ..... 4TH APPICANT

VERSUS

CATHERINE HENRY MALILA ..... RESPONDENT

RULING

S. M. MAGHIMBI, J:

The applicants have moved this court under the provisions of Sections 3A, 93, 95 and Order XLIII Rule 2 of the Civil Procedure Code, [Cap. 33 R. E. 2019] ("CPC") and Section 14 (1) Of Law Of Limitation Act, [Cap. 89 R. E. 2019]. They are seeking for an Order extending time within which they may be allowed to appeal to this court against an ex -parte judgment and decree of the Resident Magistrate Court of Dar es Salaam at Kisutu in Civil Case No. 24 of 2017 delivered on 06.09.2021. The application has been made by way of chamber summons and an affidavit

sworn by one Joyce John Mhavile, the Managing Director of the 1st and 3rd Applicant.

When this matter was scheduled for hearing, Mr. Nyangarika Learned advocate representing the applicants prayed that the application be heard by way of written submission.

Submitting for the applicants, Mr. Nyangarika prayed to adopt the affidavit of one, Joyce John Mhavile filed on 05.08.2023 as well as her Reply to Counter Affidavit filed on 27.09.2023, to form part of their written submission in support of this application. He then submitted that upon being allowed to peruse the court file record as well as going through the judgment and decree of this Court in Civil Appeal No. 342 of 2021 delivered on 31.10.2022, they discovered that this Court struck out their appeal with costs because it was incurably defective. That the reasons therein was **one,** the dates shown in the decree differs substantially with that which appears in the *ex parte* judgment; **two,** that the appeal was not maintainable because there was filed an appeal in this Court and subsequently the applicants had filed an application to set- aside the *ex parte* judgment and decree at the same time.

Mr. Nyangarika submitted further that on 04.03.2022 or 24.03.2022, the Misc. Civil Application No. 142 of 2021 for setting aside the *ex parte* judgment and decree was also struck out with costs by the trial court on

the ground that, it was time barred as well as incorrect for the applicants to file an application to set aside *ex parte* judgment and at the same time file Civil Appeal No. 342 of 2021 before this court. That the decree in Civil Appeal No. 342 of 2021 against the *ex parte* judgment was lately served to the applicants and it was after being allowed to peruse the court's files on 05.08.2023 when they realized the record showed that after Civil Appeal No. 342 of 2021 was filed in this court and the same was struck out with costs on 31.10.2022, the applicants filed a Notice of Appeal on 16.11.2022, intending to appeal to the Court of Appeal against the decision of Hon. Mruma, J and the respondent was served with the said Notice of Appeal on 18.11.2022.

Mr. Nyangarika went on submitting that they wrote a letter to this court seeking to be supplied with requisite documents for appeal purposes, a letter that was served to the respondent on 17/11/2022 and that the applicant's Counsel being instructed to appeal against the decision of this court, claimed not to have been availed with a Copy of the judgment and decree of this court. Thereafter, the applicants made a follow up of the requisite documents in Civil Appeal No. 342 of 2021 for appeal purposes as shown in "Annexture J" dated 16.11.2022. Further that the judgment and decree in Civil Appeal No. 342 of 2021 of this court was obtained on 02.08.2023 from the Deputy Registrar.

It was further submitted that, it is on record that when the application for leave to appeal came on 09.02.2023 for hearing Before Hon. Mkwizu, J the same was struck out with leave to refile as then a copy of Judgment and Decree in Civil Appeal No. 342 of 2021was not yet supplied to the applicants as sought until on 02.08.2023.

It was the applicants' submission that the record shows that Misc. Civil Application No. 545 of 2023, for leave to appeal to the Court of Appeal was struck out with leave to refile it again within fourteen (14) days because, by then the applicants were not yet supplied with a copy of the judgment and decree of this Court in Civil Appeal No. 342 of 2021 to be attached in the application for leave to Appeal to the Court of Appeal as required by the Law. He went on submitting that it is also on record the applicants reminded this court to supply them, with a certified copy of the Judgment and Decree in Civil appeal No. 342 of 2021 but the same was not supplied for the whole period from 31.10.2022 until on 02.08.2023. Later, the applicants, after perusal of the Court records applied for rectification of the dates which differed in the *ex parte* judgment and decree of the trial court on 28.07.2023. That they also wrote another letter asking the trial court to allow the newly engaged counsel for the applicants to peruse and make copies of some of the documents from the record case file regarding Civil Case No. 24 of 2017 as well as High Court

file in Civil Appeal No. 342 of 2021. The applicant's Counsel paid for perusal fees on 01.08.2023 and that on 02.08.2023 is when the applicant's newly engaged counsel was allowed to peruse the court files and take copies of some of the documents and the rectified *ex parte* Judgment and Decree of trial court.

Upon perusal of the court files, he submitted, the Counsel realized that on 20.05.2020, 26.05.2020, 07.09.2021 and 21.10.2021, the respondent herself, wrote several letters to the trial Court without even serving a copy of those letters to the applicants or Applicant's Counsel. The respondent's letters were not even copied to the applicants Counsel while seeking, among others, perusal as well as rectification of the defective *ex parte* judgment and decree of the trial Court. That after seeking for Perusal of the court file and going through the record thoroughly for almost two (2) day consecutively, the applicant's newly engaged counsel decided to withdraw the Notice of appeal filed as shown in [Annexure "K"] as well as High Court Civil Revision No. 13 of 2023 [Annexure "L"] on 5.07.2023. The reasons submitted being that in the judgment and decree in Civil Appeal No. 342 of 2021, it showed that the cases were not subject to appeal to the Court of Appeal and the applicants were required to seek rectification of the dates which differed with the one in the *ex parte* judgment and decree and the same be corrected by

the trial court. Thereafter the applicants can have a second bite or a chance to appeal to this court against the *ex parte* judgment and decree of the trial court after seeking an extension of time.

He further submitted that, the application for enlargement of time within which to appeal to this court was lodged before this court on 05.08.2023 after preparation of the application for only three (3) days upon getting the rectified copies of ex parte judgment and decree of the Trial Court. That for the period from 31.10.2022 up to 05.08.2023 when this application was lodged, the applicants were in Court corridors seeking for justice so that the applicants may be heard against the *ex parte* judgment and decree of the trial court before this court. His argument was that this period spent in courts of law is a technical delay on the part of the applicants as they were pursuing this matter in court in search for justice.

Moreover, it was the applicant's submission that they still want to appeal to this court because of illegality appearing in the *ex parte* judgment and decree of the trial court. Further, that there are arguable legal points in the *ex parte* judgment and decree of the trial Court to be considered by this court if this application sails through. That **one** of the point is that the suit was filed in the trial court on 09.02.2017 but during the First Pre trial conference held before Hon. J.H. Mtega, both sides,

proposed for speed tracks 1 and 4 , respectively, but the trial court did not record in the scheduling order under which speed track the case was assigned. T**wo,** was that on 02.03.2021, the plaintiff herself is recorded seeking an extension of time of the speed track and the trial court made an Order to the effect that the speed track was extended by adding six (6) months while the scheduling order does not show which speed track was assigned to the case, therefore, it is unknown as between the two speed tracks proposed by the parties, which one was assigned to the case. **Three,** the issues of evidence as recorded in court proceedings which had a lot of problems to be addressed by this court in the intended appeal.

The applicants cited the case of **Director General Lapf Pension Fund vs. Pascal Ngalo** [2020] TLR 216 at 217 [CAT] where the Court held that:

> *"if the applicants main explanation for delay is that time was lost when she was pursuing matters in court, this constitutes what is known as technical delay, developed by case Law. In their case at hand, the applicants claim to be delayed while pursuing matters in court and therefore, this is a technical delay".*

He also cited the case **Mpoke Lutengano Mwakabuta & Jane Jonathan [as a legal representative of the late SIMON MPERA SOKA [2020] TLR 485 at 486 [CA]** where it was held, inter-alia, that:

> *"it is settled law that in exercising Jurisdiction under Rule No. 10 of the Rules, the court has to consider the length of delay and whether it has been explained away, diligence or sloppiness and whether it has been explained an illegality in the decision sought to be impugned".*

He concluded by a prayer that the application be allowed with costs.

In reply, the respondent also started by praying that her Counter affidavit be adopted to form part of her submission. The respondent's submission stated that the applicants are trying to appeal against an *ex parte* judgment and decree that was delivered on 06/09/2021 which was delivered before both parties therefore the applicants are barred from claiming not to be aware of the said decision.

It was also averred by the respondent that the applicants filed this application on the 15/08/2023 that is to say they delayed for one year and eleven months that is 695 days and they have failed to account for all these days of delay. On the applicants' allegation that they have been in the corridors of the Court fighting for their right the respondent cited the decision of the Court of Appeal in **Esther Baruti vs Seth Senyael**

Ayo Mrisho Ramadhani, Civil Application No. 514/17 of 2022.

Stated that: -

"Many times without number, it has been pronounced by the Court that time spent in the court corridor by the applicant in further pursuit of her rights resulting into delay, that delay is technical constituting good cause for extension of time. The court went further at page 10 and 11 and it ruled that , 'However, the rule built in those precedents, I think was not meant to be universally applicable even at the situation where the applicant approaches a wrong forum, or proper forum but for a wrong remedy, or apply the principle unreasonably. Even in a situation where the applicant is disinterested to the conclusion on the matter, that deliberately uses wrong forum to buy time. In such a situation, technical delay cannot help. See the case of Commissioner General of Tanzania Revenue authority and Another vs Urban J, Mtui, Civil application, the principle of technical delay does not feature, Therefore, she cannot seek amnesty of the purported technical delay as she acted negligently. In other words, her changes of advocates cannot amount into technical delay. The issue of technical delay therefore is neither here nor there".

The respondent then averred that the applicants in this matter filed a number of cases in different Court only to buy time so that the respondent may give up on her rights. That they were approaching wrong forums intentionally so as to torture the respondent. She elaborated that the applicants had filed Civil Appeal No. 342 of 2021 before Honorable Mruma J, and which was struck out for the reason that they had filed an application for setting aside an *ex parte* judgement which was Civil Application No. 142 of 2021 at Kisutu Resident Magistrate Court. This application at Kisutu was struck out for being time barred. And again, the applicants had before this Court filed Civil Application No. 545 of 2023 seeking for leave to file an appeal before the Court of Appeal and the same was also struck out. That there was also application No. 08 of 2022 for stay, which was rendered an abuse of Court process and also struck out intending to deny the respondent enjoy the decision and decree that was in her favour. She submitted that they intended nothing apart from buying time and misusing the court to delay the respondent to enjoy her decree in filing those applications, appeal and notice of appeal they were aware that they were going to wrong forums but they intended to torture the respondent who had nothing and has no power to fight with them.

It was the respondent's submission that the applicant's application is scrupulous which also intends to torture the respondent. That Hon.

Mruma, J, in Civil Appeal No. 342 of 2021 in his ruling held that the said appeal before him was abuse of the court process. She pointed out that the applicants did not appeal against the said ruling before Hon. Mruma, J, instead they opted to continue hearing the application for setting aside *ex parte* decision. The respondent finds that the applicants cannot come to this court seeking again for time to appeal against the *ex part* decision instead they were supposed to file appeal against the decision which struck out the application to set aside expert decree for being time barred.

The respondent emphasized that, the Court should condemn the habits of using the Court to oppress parties that cannot afford to fight battles in Court. She argued that the applicants acts of filing multiple cases should not be entertained. The applicants after having their application on setting aside the ex parte decision had the room to appeal against the said application and not seeking for an extension of time before this Court to file an appeal. This is a mischief that cannot even be cured by overriding objective principle.

It was the respondents submission that the Court of appeal in several cases has ruled out that it does not matter the end result, if a matter was supposed to be dismissed and mistakenly it was struck out the remedy remained the same that the aggrieved party must appeal and

not start afresh suit on matters of which the law is clear that it is not open for a fresh suit.

Submitting further, the respondent claimed that the law of limitation Act [Cap. 89 of 2019], section 3(1) clearly states that:

> *"subject to the provision of this act let every proceeding described in the first column of the schedule to this* act *and which is instituted after the period of limitation prescribed therefore opposite thereto in the second column shall be dismissed whether or not limitation has been set up as a defence".*

Also, the law of limitation Act, under the Schedule in Part III rule 21 states that: -

> *"Application under the Civil Procedure Code, Magistrate's Court Act or other written law for which no period of limitation is provided in this Act or any other written law the time limit is sixty days".*

The respondent continued by citing the case of **Hashim Madongo and 2 Others vs Minister for Industry and Trade and 2 Others, Civil Appeal No. 27 of 2003** whereby the Court held that: -

> *"nevertheless the end result was the same in that once the application was struck out by Kalegeya J, it was not open to the*

appellants to bring a fresh application, she concluded, with respect, we wish to pause here and observe that, for reasons which will be apparent hereunder, Miss Monica Otaru was correct in the assertion that after the application was determined by Kalegeya, J. the appellants were not at liberty to bring afresh application notwithstanding that the judge struck out the application instead of dismiss".

From the above case law, the respondent states that this Court has no jurisdiction to extend time because there was already an application to set aside which was struck out for being time barred as submitted by the applicant in the submission in chief.

Arguing further, the respondent averred that, Counsel for the appellants is a senior advocate with experience and long time practise he is aware that once a matter is determined that it is time barred there was no path, there is no back door to pass through apart from appeal. Any way or path misleading the Court is nullity. That as an officer of the Court, Counsel is aware that he has the duty to guide the Court in a proper way, and not to convince the Court to allow his client to pass through a back door on legal technicality. That he had a role to play to assist the Court and not to mislead the Court and that all the authorities cited by the respondent suggest that once the matter has been ruled out that it is time

barred, the trial court becomes *functus officio* and *res judicata.* Therefore, the applicant has failed to show good cause for extension of time to be granted.

On the issue of illegality the respondent cited the decision of the Court of appeal in **Civil Application 514/17 of 2022 Ester Baruti vs Seth Senyael Ayo Mrisho Ramadhani** where it was held: -

> *"The illegality as alleged in the affidavit of the applicant, in our jurisdiction is as well developed. However, granting extension of time based on illegality, the illegality must be developed. However, granting extension of time based illegality the illegality must be on the face of the record with sufficient public importance".*

The respondent also cited the Case **Lyamuya Construction Company Limited and Principle Secretary Ministry of Defense and National Service vs Dev rum Valambia [1992] T.L.R 185,** whereby the same position was held. She maintained that illegality should be a point of law and that the same has to be on the face of records, however, reading through the judgment and ruling of the Court the respondent's Counsel has negated the presence of any illegality.

It was the respondent's additional submission that, in the entire applicant's affidavit there is no issue of illegality of speed truck since the

respondent did not file counter affidavit on that issue. In that regard it cannot be decided by this court as the parties are bound by their pleading. That the court to decide on an issue not pleaded in the pleading is to open the sky and make the sky to be the limit while the parties are bound with the pleadings. She cited the case of **Ramadhan Bakari and 78 others vs Agha Khan Hospital,** in Civil Application No. 5/01 of 2022 where the said position was held. She then submitted that the issue of illegality not being pleaded in the affidavit cannot serve they fault the law and want to go through a back door an act the law does not allow.

The respondent added that what the applicants are bound to prove is on accounting for the days of delays which they had delayed for one year and eleven months without good cause but rather causing intentional inconveniences to the respondent causing her not to enjoy her rights for 4 years. The applicants have submitted that they were making followup of rectifying the decision and they have not attached the letter suggesting that they discovered an error and are requesting for correction. The defence that they found in the file the respondents letter requesting for rectification of the decision can not be good Cause for delay because when the decision was delivered on the 06/09/2021 the applicants were present. The respondent argued that the applicants did not request for

rectification of the dates of the decree so as to file an application for setting aside within time.

Moreover, it was submitted by the respondent that the applicants cannot blame the respondent not to have informed them of the abnormally while they were present the day the decision was delivered. The applicants also argued that they had a new Counsel who is assisting them in the matters and hence the Court consider that, the respondent replied that the change of advocates has never been a ground for extension of time. She concluded that the applicants are using tactics to delay the respondent from enjoying her rights as they have failed to account for the days they delayed. She prayed for the dismissal of the application.

Having gone through the submissions of both parties, I will start with principles set down in the case of **Lyamuya Construction Company Limited vs Board of Registered Trustee of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010** where the Court stated that: -

> *"As a matter of general principle, it is in the discretion of the Court to grant extension of time. But that discretion is judicial, and so it must be exercised according to the rules of reason and justice, and not according to private opinion or*

arbitrarily. 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.

It is the position in our jurisdiction that when it comes to applications such as this one before me, the above guiding principles/test when applied, lead to the determination of the application. To begin with the first Principle, it requires an applicant to account for the days of delay. The applicants herein are seeking for an extension of time to appeal against an ex parte judgment and decree of Civil Case No. 24 of 2017 delivered on 06/09/2021. The applicants have declared that there was a technical delay that caused the delay of appealing in time. The respondent has argued against that contention and states that the delay claimed to be a technical delay does not hold water in the circumstance of this case

since the applicants wasted time in opening multiple application in different forums which ended up being struck out for being incompetent. That those applications were intentionally filed at different forums and different times just to delay the respondent to access her right.

Records before the Court reveal that there was an *ex parte* judgement delivered against the applicants at Kisutu Resident Magistrates Court on the 06/09/2021. The applicants being aggrieved by the decision of Kisutu Resident Magistrates Court filed an application for setting aside the *ex parte* judgment this was Civil Application No. 142 of 2021. While the application for setting aside was pending in Court the applicants filed an appeal against the *ex parte* decision Civil Appeal No. 342 OF 2021 before this High Court and the same was heard and determined by Hon. Mruma, J. This appeal was struck out on the reasons that the same was an abuse of Court process and unprocedural since the appellants had filed this appeal and subsequently there was also an application of setting aside the *ex parte* judgement at Kisutu Resident Magistrate Court. The application for setting aside the *ex parte* judgement was struck on 24/03/2023 while the appeal at the High Court was struck out on 31/10/2022 October.

The applicants claim that among other reasons for the appeal being unfit was the decree of the ex parte judgment lacking a proper date and

an order was given for rectification of the decree. The records reveal that the Counsel for the applicant after perusal of the Court file realised that the respondent had written letter way back seeking for rectification of the decree but those letters were not served to the applicant. The applicant at this stage cannot also hide behind the decree that was defective since the same was revealed when Hon. Mruma made his decision in Civil appeal No. 342 of 2021. If they were serious, they would have immediately made follow ups but that was not the case.

The decision sought to be appealed against herein is the *ex parte* judgment that was delivered on 06/09/2021. It is in the records that on the date the decision was delivered all parties were present. Since it is Civil Case No. 24 of 2017 to be challenged and considering the out comes of other applications that were found to be unfit in the eyes of law the applicant here in ought to have accounted for the days of delay from when the *ex parte* judgement was delivered to the day of filing this application. The applicants have delayed for 695 days. In consideration of the principle put to test here the applicant has narrated on applications that were filed in Court to be considered that the applicant was in the Court Corridors in search of their rights hence a technical delay. Looking at the out comes of the applications is the same as the said applications did not exist, since they were defective. The applicant cannot hide behind the said

applications by stating to have been in courts corridors seeking for their rights. Therefore, the first principle fails, the applicant did not account for the days of delay.

Secondly putting to test the second principle that, the delay should not be inordinate, the applicant states that there delay is only for three days from the day they were given the records of the decision in Civil Appeal No. 342 of 2021. The respondent on the other side reminds the Court that it is Civil Case No. 24 of 2017 that is to be appealed against hence the applicants ought to account from the day the ex parte judgment. From the above it is clear that the applicant has delayed for 695 days. These days are so inordinate to be tolerated. The applicants herein have taken up an inordinate amount of time to file for an extension of time so as to challenge the ex parte judgment. It is in the eyes of law that the second test fails.

Third, in considering the third test that, the applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take. In the circumstance of the application at hand the Counsel for the applicant or the applicants themselves have explained to have been aggrieved by the *ex parte* judgement. In challenging the *ex parte* judgement two cases were instituted in two different Courts to challenge one decision. The respondent on the side

finds that the applicant did not exercise diligence and were negligent to the Court procedures for opening multiple cases in wrong forums. Looking at the appeal at the high Court and the application at Kisutu Resident Magistrate's Court for setting aside the *ex parte* judgment these two matters both were intended to challenge the *ex parte* decision. It is apparent before the eyes of law that the two applications were an abuse of the Court process hence direct proving that the Counsel did not show diligence and was negligent. From the above the third test also fails.

Last is the test on illegality or other sufficient reasons. The applicant has pleaded illegality to be another reason for seeking an extension of time and has also claimed that there are grounds from which if the appeal is filed there are chances to succeed. The respondent has argued that there is no illegality from the decision to be appealed against and that the applicant has raised illegality while the same has not been pleaded in the affidavit. There are other grounds such as, matters of speed track which have not been pleaded in the affidavit also. It should be remembered that parties are bound by there pleadings. Illegality has been stated by case law to be a sufficient reason to grant extension of time. But having gone through the affidavit I do agree with the respondent that illegality has not been pleaded and hence to me appears to be an afterthought. It has been raised in the submission all in the determination to be granted an

extension of time. It is the position of the law and I need not cite case law that parties are bound by their pleadings had the applicants truly intended to argue illegality the same would have been pleaded. Therefore this last test too fails.

Having made the above findings, I finds the applicants to have failed to convince the court to exercise its discretionary powers to extend time. In the result, the application is without merits and it is hereby dismissed with costs.

Dated at Dar es Salaam this 20th Day of May, 2024.

S. M. MAGIMBI

JUDGE