

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MOSHI
AT MOSHI**

MISC. CIVIL APPLICATION NO. 37 OF 2023

*(Arising from the Judgment and decree of Hon. Mchome J. dated 28th July 2004 in
Civil Case No. 12 of 1998)*

ROWLAND FAINI SAWAYA T/A SAWAYA BUS:.....APPLICANT

VERSUS

**CHARLES EVANS TARIMO (as administrator
of the estate of the late Cornel K. Tarimo)1ST RESPONDENT**

RAZIEL S. NGOWI.....2ND RESPONDENT

**NATIONAL INSURANCE CORPORATION
OF TANZANIA LIMITED.....3RD RESPONDENT**

RULING

29th April & 19th June, 2024.

A.P. KILIMI, J.:

The application at hand is brought under section 11(1) of the Appellate Jurisdiction Act, [Cap 141 R.E 2019] and supported by the affidavit of Rowland Faini Sawaya the applicant hereinabove, wherein the applicant is seeking an extension of time for giving notice of intention to appeal to the Court of Appeal from the judgment and decree of the High Court in Civil case No. 12 of 1998 dated 28th July 2004. This application is brought under a certificate of urgency sworn by Dickson Johnson Ngowi the applicant's advocate for the reasons that the 1st respondent is seeking to execute decree

tainted with serious illegality as the respondent also he is seeking to commit the applicant in prison as a civil prisoner.

For purpose of this ruling, I find it apposite to state the genesis of the application briefly gathered from the applicant's affidavit supporting the application and the first respondent counter affidavit.

The applicant lost the case in this court Civil case No.12 of 1998 on 15th October 2004, dissatisfied with the decision he timely appealed to the Court of Appeal in Civil Appeal No 53 of 2007. Wherein his appeal was struck out by the Court on 21st August 2012 for being incompetent for the ground that the records of his appeal filed lacked proof of service of Notice of Appeal to the 3rd respondent. After such a ruling, the applicant sought for extension of time to file notice of intention to appeal out of time in High Court vide Misc. Application No. 30 of 2012 where the same was granted on 7th November 2014.

After obtaining leave, he then filed his appeal for the second time to Court of Appeal in Civil Case No 1 of 2015. Later on 28th September 2017 the Court of Appeal found the record of appeal to be incompetent as it lacked

a copy of the application for extension of time to file notice of appeal, consequently the Appeal was struck out.

Undeterred, the applicant preferred another application No 518 of 2020 for extension of time to file application for revision out of time from the judgment and decree of the High Court in Civil Case No. 12 of 1998, however, his Advocate Melkior Sanga prayed to withdraw the said application and the Court of appeal granted that prayer and marked it withdrawn on the 6th day of July 2023. Therefore, he has started afresh application for extension of time and at paragraph 10 is averring that 1st Respondent has already applied for execution pending in this Court, and prayed the applicant be committed as civil prisoner.

Whereas, the first respondent averred that late Cornel Kisinane Tarimo died on 14th day of November 2014 and he was appointed as administrator of his estate on 26th day of May, 2023. Further averred that the applicant has failed to account on each day of delay for the period of 19 years and the alleged illegalities cannot be grasped on the face of record.

When this matter was placed before me for hearing, Mr. Ngowi learned advocate for the applicant prayed to proceed *ex parte* against the 2nd and 3rd respondents after necessary service to attend failed even after this court

issued service by publication which was done in Mwananchi gazette dated 14/11/2023 at page 25. Thereon the 1st Respondent enjoyed the service of Mr. Caessar Shayo assisted with Ms. Lilian Mushi and Ms. Beatrice Chami both learned advocate.

Mr Dickson Ngowi in support of the application stated that the applicant application is cantered mainly into two points which are that the impugned decision civil case No. 12 of 1998 were tainted with illegalities and that there was a breach of right to be heard as the applicant was not given the right to be heard.

He expounded further that when defence closed their case on 17/01/2003 there was violation of right to be heard. He submitted further that on 28/1/2003 the applicant was not afforded right to be heard, because the applicant reported to be sick and prayed for adjournment and the court granted and ordered for Mention on 30/1/2003. When this date for mention accrued, parties were ordered to file their written submissions. He then commented that such move contravened order XVIII rule 2 of the Civil Procedure Act Cap. 33. R.E. 2019 'CPC' hence allowing the matter to proceed by way of written submission was a denial of that right since he was not cross examined, therefore he was not heard.

Further Mr. Ngowi submitted that since submissions were not evidence as per the decision of **Mway Arego Tombo vs. NMB Bank PLC** Civil Application No.627/8/2021 at page 10 and 11 and the decision of **Morandi Rutakyamirwa vs. Petro Joseph** (1990) TLR 49 CA at page 52, it was not proper for the Court in civil case No 12 of 1998 to rely on those submissions in determining the framed issues as it was evidenced in the impugned decision at page 2, 3, and 5 of the decision which was also in violation with article 13(6)(a) of the United Republic of Tanzania Constitution and contrary to order XVIII rule 2 of the CPC.

Further the counsel stated that the trial Court lacked territorial jurisdiction as the matter was ought to be heard and determined in Korogwe - Tanga Registry as the place where cause of action arose and that by doing so it contravened order XVIII and XIX of the CPC. Insisting that this is an illegality, the counsel bolstering his point referred the decision of **AG. Vs. Micco's International Limited and one another**, Civil Application No. 495/16 of 2022 at page 11, and the decision of **Principal Secretary Ministry of Defence, National Service vs. Dervam Valambhia** (1992) TLR 185. The counsel then prayed for the rule of accounting for each day of delay not to be considered as the decision itself was tainted with illegalities.

To support his point he invited this court to consider the decision of **VIP Engineering and Marketing Ltd and 2 others vs. Citibank Tanzania Limited**, Consolidated Civil reference No 6, 7 and 8 of 2006 page 18 and 19. He further stated that the applicant laboured much of his time in pursuing his case in court hence prayed for the court to waive such requirement of accounting each delay days. He referred the decision of **William Shija vs. Fortunate Masha** (1997) TLR 213.

In reply, Mr. Ceaser Shayo learned advocate for the first respondent prayed to adopt the 1st respondent counter affidavit and submitted that there were no breach on right to be heard as the applicant in the civil case No. 12/1998 was represented by the learned advocate one Sandi to dispose the submissions by way of written submission. That the applicant himself reported to be sick where the court adjourned the matter and was heard on another day where upon that date the applicant counsel notified the court that submissions were complete.

In reply regarding to illegality in the civil case No 12/1998 Mr. Ceaser submitted that the same was overruled back when the civil case was being heard . He stated that a preliminary Objection was raised by the applicant therein, the Hon. Mchome J. at page 15,16 and 17 of the proceedings

overruled it and ordered the main case to proceed. In regard to how the trial court lacked territorial jurisdiction the counsel submitted that since the 1st respondent conducted bus services to different regions such as Moshi, Tanga and Dar es salaam it was ok for him to institute a case where he conducted his business at Moshi as in according to section 18(b) of the Civil Procedure Code Cap. 33 R.E. 2019 'CPC'.

Submitting in reply to the issue regarding the extension of time to file notice of intention to appeal to Court of Appeal 'CAT', the counsel submitted that the applicant did not account each day of delay as he filed his appeal to CAT for extension of time which was struck out for being incompetent and that he did not file any appeal up to 2020 where he filed an application No 518/2020 for extension of time in which he then withdrew it on 2023 without praying for leave to re file. To bolster his assertion referred the decision of CAT in **Charles Richard Kombe vs. Kinondoni Municipal Council**, Civil Reference No. 13 of 2019.

In the light of the foregoing submission, the vexing issue which stands for my determination is whether the applicant has established good cause for this court to exercise its discretionary power to grant extension of time sought. (See **Manager, TAN ROADS Kagera vs Ruaha Concrete**

Company Limited, Civil Application No. 96 of 2007 (Unreported). However, in assessing whether there is good cause each case has to be considered on its own peculiar facts and circumstances and the court must always be guided by the rules of reason and justice, and not according to private opinion. This was stated in the cases of **Ygsufu Same & Another v. Hadija Yusufu**, Civil Appeal No. 1 of 2002 (unreported).

According to the record stated above, this is not the first-time applicant is appearing in this court for this kind of application, as per the evidence on records, it appears the applicant herein has been facing a tough wall towards appealing to the CAT against the decision of this Court a Civil Case No 12 of 1998. This have been evidenced through multiple attempts done by the applicant trying to appeal against the said impugned decision to CAT as it was firstly struck out his appeal for being incompetent for failure to attach proof of service of Notice of intention to appeal to the 3rd respondent, second his appeal was struck out for failure to attach the copy of notice of intention to appeal. In between the applicant changed gears and filed application for extension of time for revision against the said decision but before such an application was heard on merit, the applicant withdrew the said application.

Despite of the above intervals on seeking to step into the Court of Appeal, the applicant did not bother to account the delay between them, but prayed the same be waved but relied only on illegality as his sole good cause. In his affidavit the applicant has stated the following as illegalities; First; that the High Court of Tanzania at Moshi registry lacked territorial jurisdiction because the cause of action arose at Korogwe in Tanga. Second; that the trial Court proceeded with the hearing of the case in breach of the basic principle to be heard thus was condemned unheard, and third; that he was denied right to be heard as the trial judge declined to grant prayer of adjournment without having regard that he had good reason for praying for adjournment which was his sickness, instead the High Court proceeded to order that defence hearing be by way of written submissions instead of calling defence witnesses while the plaintiff testified on oath, called witnesses to adduce evidence and tendered exhibits.

I am aware that, a claim of illegality of an impugned decision constitutes a good cause for extension of time. (See **Principal Secretary Ministry of Defence and National Service v. Devram Valambhia** (1992) T.L.R. 185. However, in my view the above principle is a general rule with exception. In **Ngao Godwin Losero vs Julius Mwarabu**. [2016]

TZCA 2099 (TANZLII) the court in determining as to whether the illegalities deserve to be a point of law in granting extension of time, quoting its earlier case of **Lyamuya Construction Company Ltd vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), observed that:

"Applying the foregoing statement of principle to the case at hand, I am not persuaded that the alleged illegality is clearly apparent on the face of the impugned decision. Certainty, it will take a long-drawn process to decipher from the impugned decision the alleged misdirections or non-directions on points of law. To that end, I must conclude that the applicant has not demonstrated any good cause that would entitle him extension of time"

According to the law developed above and the record of this matter, I am of considered view the above illegalities advanced fall under the realm of this exception. I am saying this because, **first**, the issue that this court lacked jurisdiction, I am inclined with Mr. Caesar when he said the same was raised at the trial court and resolved as evidenced at page 17 of the proceeding of the Civil case no. No 12 of 1998 when this court ordered the

case to proceed. Be that as it may, in my view of the crux of the said objection, it need evidence to be ascertained taking regard the nature of the business of the applicant by then. **Second;** in respect to right to be heard which raised in two illegalities above, the same in my view is not in the face of the record, this is because when you look on the face of the impugned judgement and its record which was attached on applicant's affidavit (Annexure MLC-5) all the time the applicant was represented by Learned advocate known as Sandi, thus in such circumstances the right to be heard cannot be drawn as an illegality on the face of record.

In view of the above, I am settled that the above illegalities need a long process in order to grasp that it was illegal or not. For instance, the argument of the counsel for the applicant that by then at the hearing the applicant was sick and court ordered for written submissions, in my view is not apparent in the face of record because it need evidence to prove sickness, but also the case was represented by advocates on both parties and they conceded to the said order of filing written submission and no one objected.

Therefore, in my considered view, if there is any mistake caused by inactiveness of applicant's advocate, the same is rejected as it has been the

stance of this Court that; negligence and inaction of an advocate is not an excuse and does not constitute sufficient cause for extension of time. **See; Jubilee Insurance Company (T) Limited v. Mohamed Sameer Khan**, Civil Application 439 / 01 of 2020 and **Omar Ibrahim v. Ndege Commercial Services Ltd**, Civil Application No. 83 of 2020 and **Wambura N. J. Waryuba v. The Principal Secretary Ministry of Finance & Another**, Civil Application No. 320 of 2020 (all unreported).

In view of what I have endeavoured to discuss above, I find three grounds of illegalities raised by applicants are not apparent on the face of record. In the premises I subscribe with the position of the court in **Jones Elikaney Shoo vs Aika Amy Anita Omari** [2024] TZCA 467 (TANZLII) when observed that not every illegality deserves to be termed as a ground of which the extension of time can be granted and I am settled the objections raised suit the circumstances. Therefore in view thereof according to the circumstances of this matter all cases cited by the applicant's counsel are distinguished.

As alluded hereinabove, according to the record it has been long time over 19 years since the decree of impugned decision issued on 15th October, 2004. The applicant's counsel contended that all the time the applicant was

labouring pursuing various case as shown above. Nonetheless, despite of rejected illegalities above, in view of the circumstances of this matter, the applicant was also required to account for each day of delay, and the applicant cannot seek a refuge as stated by Mr. Ngowi that he was all the time pursuing his case in court.

I am saying this because as highlighted above, there were some gaps between one application to another which he ought to account to, moreover, I have considered applicant's previous applications, in my view the applicant cannot also be covered by technical delay rather those applications were struck out due to failure to follow procedure on part of the counsels employed by the applicant. Therefore, since, negligence on the part of the Counsels for the applicant in filing wrong applications which later caused the delay cannot constitute sufficient reason for this court to allow extension of time.

In view thereof, I have considered the last application at the court of appeal which the applicant's counsel himself withdrew, it was on July, 2023. As rightly submitted by the first respondent that the same was withdrawn without leave to refile, but later the next is this application which was filed on 18th October, 2023. The days between was not accounted for by the

applicant, which to me I think it was important to do so, therefore the fact he did not account for, that time passed in between cannot be shielded by time of pursuing case in courts as stated.

Nonetheless, the applicant at paragraph ten (10) has averred that the first respondent wants to commit him as a civil prisoner, and this was one of the reasons advanced in his certificate of urgent for this application. In my view, although granting of extension of time is discretion of the court, I think the same must aim at avoiding injustice and should not be designed at assisting a person who may have deliberately sought it as delaying technics of the other part's rights of justice, in order to evade or otherwise. See; **Shah v. Mbogo and another** [1967] E.A. 116.

According to the above authority, the applicant was supposed to account the days he delayed as from the day his case was withdrawn and not as to when he became aware of the existence of the process of sending him as a civil prisoner. It is for this explanation; the applicant has miserably failed to account the days as required by law.

For the above reasons, I find that no good cause has been shown for this Court to exercise its discretion to extend time as prayed. The application is therefore dismissed accordingly for being meritless with costs.

It is so ordered.

DATED at **MOSHI** this 19th day of June, 2024.



A. P. KILIMI

**A. P. KILIMI
JUDGE**

Court: - Ruling delivered today on 19th day of June, 2024 in the presence Mr. Elikunda Kipoko, Beatrice Chami and Lilian Mushi learned advocates for respondent. Mr. Dickson Ngowi for applicant absent.

**Sgd: A. P. KILIMI
JUDGE
19/06/2024**

Court: - Right of Appeal explained.

**Sgd: A. P. KILIMI
JUDGE
19/06/2024**