

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM REGISTRY)
AT DAR ES SALAAM**

MISC. CIVIL APPLICATION NO. 451 OF 2023

(Arising from the Judgment and Decree of the Resident Magistrate's Court of
Dar es Salaam at Kisutu (Hon. Nongwa, SRM in Civil Case no 50 of 2014)

REGLICE A. LYIMO.....APPLICANT

VERSUS

AMOS GITYAMWI.....1ST RESPONDENT

NATIONAL BANK OF COMMERCE LTD

(3RD PARTY).....2ND RESPONDENT

RULING

5th Dec. 2023 & 8th March, 2024

DYANSOBERA, J.

This is an application for extension of time within which to lodge an appeal to this court against the decree of the Court of the Resident Magistrate at Kisutu dated 29th May, 2018 in Civil Case No. 50 of 2014.

The application is supported by the applicant's affidavit and supplementary affidavit dated 16th August, 2023 and 7th day of November, 2023, in that order. The application has, however, been resisted through the affidavit in reply filed by the respondents.

For a better appreciation of the issues of contention, it is necessary to explore the factual setting giving rise to the application which may be, briefly, recapitulated as follows: -

The applicant Reglice A. Lyimo did, on 17th April, 2009, secure from the 2nd respondent an overdraft facility to the tune of TZS 60,000,000/= upon mortgaging a house situated on Plot No. 739 Block

"A" located at Sinza, Kinondoni District in Dar es Salaam Region. The house belongs to the 1st respondent who was the guarantor of the overdraft facility.

It would seem, the applicant defaulted servicing the loan as agreed. The 2nd respondent issued a default notice which was served to the 1st respondent requiring him to honour the contractual obligation and settle the debt which, by 11th January, 2011, stood at TZS 59, 601,192.91.

Later, the 2nd respondent filed a suit (Commercial Case No. 102 of 2011) against the 1st respondent at the High Court, Commercial Division for the recovery of the loaned money intending to obtain a foreclosure.

In his endeavour to rescue his house from being sold, the 1st respondent made an out of court settlement with the 2nd respondent whereby the former paid the latter a sum of TZS 68,894,250/=. The 1st respondent then sued the applicant to recover the money paid in liquidation of the loan. In that civil action, the 1st respondent was claiming from the applicant payment of TZS 68, 894, 250/= being the principal sum, interests thereon, TZS 50, 000, 000/= as general damages and costs of the suit. At the hearing before the trial court, parties were duly represented by learned Counsel.

On 29th day of May, 2018 the trial court handed down the judgment on the following terms: -

- a) The applicant to immediately pay the 1st respondent the principal amount of TZS 68,894,250/=,
- b) The applicant to pay the interest at the rate of 10% p.a. from the date the 1st respondent paid to the 2nd respondent to the date of full payment,
- c) The applicant to pay to the 1st respondent a sum of TZS 10, 000, 000/= being general damages,
- d) The 2nd respondent to pay back to the applicant the amount paid to satisfy the overdraft facility while the 1st respondent had discharged his obligation
- e) The applicant was condemned to pay costs of the suit.

Following that judgment in Civil Case No. 50 of 2014, the 1st respondent filed Execution No. 101 before the trial court against the 2nd respondent and the mode the applicant employed in having the decree executed in his favour was to have Theobald Sabi, the 2nd respondent's Managing Director, arrested and detained as a civil prisoner. The applicant who was claiming TZS 58, 403, 797.11 from the 2nd respondent lost the application for execution after the trial court was satisfied that the decree sought to be executed did not specify the

amount payable which was in violation of O. XX rule 6 (1) of the Civil Procedure Code [CAP 33 R.E.2019] hence defective. The application was thus struck out on 1st June, 2022.

On 17th August, 2022, the trial court, through Miscellaneous Civil Application No. 90 of 2022, granted the applicant extension of time in which to file an application for review of the judgment in Civil Case No. 50 of 2014. Consequently, the applicant filed Miscellaneous Civil Application No. 123 of 2022 seeking a review of the said judgment. Fortune was, however, not on his side as the same application for review was struck out on 28th March, 2023 on account that the court was not properly moved.

On 21st July, 2023, the trial court granted the 1st respondent's application for execution of the decree by arrest and detention of the applicant, the judgment debtor, as a civil prisoner.

The applicant, believing that justice has flown into his face, has filed this application seeking to have time extended for her to file an appeal to this court out of time. The grounds for the present application are sufficiently canvassed under paragraphs 14, 15, 16 of the applicant's affidavit and paragraphs 11, 12, 13 and 21 of the applicant's supplementary affidavit.

Arguing in support of the application, Ms Regina Herman, learned Counsel for the applicant agree on the factors to be taken into account in an application for extension of time to be the following: -

- (a) The applicant must account for all 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 illegality of the decision sought to be challenged.

With regard to the first and third criteria of accounting for all period of delay and showing diligence, the applicant's Counsel, admitting that from the date of judgment which is 29th day of May, 2018 which is almost five years and four months, argues that the applicant has not failed to take steps from the said date as she has been instituting different cases/application including Execution No. 90 of 2022, Miscellaneous Nos. 123/2022, 101 of 2020, 69 of 2023 and 524 of 2020 and that all those applications were struck out for different reasons. It is her argument that the applicant took due diligence in pursuing her light (sic) but that due to technicality, all applications were

struck out. Buttressing her argument that the delay was technical, Counsel called in aid to the cases of **Metro Petroleum Tanzania Ltd and 3 others v. United Bank for Africa**, Civil Appeal No. 530/16 of 2018.

As to the fourth criterion on the illegality, it is contended for the applicant that Civil Case No. 50 of 2014 was wrongly instituted as an ordinary suit before the subordinate court instead of the case being instituted as a commercial one in a proper court. Augmenting this argument Counsel for the applicant refers this court to section 2 of the Magistrate's Courts Act [CAP 11 R.E.2019] as amended by the Written Laws (Misc. Amendments) (No. 2) of 2004, Act No. 48 of 2004 on the definition of a commercial case. According to learned Counsel, the dispute in question arose in 2014 from a contractual arrangement after the 2nd respondent had provided a loan to the applicant who later serviced it and the 2nd respondent exercised his right under the mortgage. Further that, the amount to be determined by in the Magistrate's Courts Act before the amendment was TZS 30m/- as per section 40 (3) (b) of the Magistrate's Courts Act. The applicant's learned Counsel was confident that in the instant matter the 1st respondent filed a suit before the trial court on 2014 claiming among others, payment of TZS 68,894,454/= and 2, 270, 000/=, which amount the trial court

lacked pecuniary jurisdiction to entertain, the position emphasised by the Court of Appeal in the cases of **National Bank of Commerce Ltd v. Maisha Mussa Ulid (Life Business Centre)**, Civil Appeal No. 501 of 2022 and **Finca Tanzania Ltd v. Mazenge Investment Company Ltd**, Civil Appeal No. 278 of 2020.

The applicant's Counsel is emphatic that in the 2014 the pecuniary jurisdiction on a commercial case was 30m/- and at the time the judgment was pronounced in 2018 still the amount was the same. She, therefore, urges this to grant an extension of time so that the identified illegality is cured.

In response, the first respondent told this court that he had filed his counter affidavit dated on 24th day of May, 2021 and had nothing to add to the contents of his counter affidavit. The second respondent prayed his counter affidavit dated on 24th day of September, 2021 to be adopted as part of his submission and had nothing to add.

I have dispassionately considered and weighed the rival arguments from both parties. To start with, I think it is imperative to reiterate as a matter of general principle that whether to grant or refuse an application of extension of time is entirely in the discretion of this court. But, I am aware that discretion is judicial and must be exercised

judiciously and according to the rules of fair trial and administration of justice.

For this court to be able to exercise its discretionary powers in granting an extension time to an applicant who wishes to pursue an appeal out of the prescribed time, the Court has set criteria which have to be considered when dealing with the matter of such nature. For instance, the defunct Court of Appeal for Eastern Africa in the case of **Mbogo v. Shah** [1968] EA held that: -

"All relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reason for the delay, whether there is an arguable case on the appeal and the degree of prejudice to the defendant if time is extended."

Besides, the applicant may have delayed in filing the application in time but where illegalities are alleged, the court has to consider given opportunity to the applicant to have them redressed.

In the case of the **National Bank of Commerce Limited** (Supra) at page 14 whereby Court cited the case of **Prosper Baltazar Kileo and Another**(Supra) , it was observed that;

"...it is undisputed fact that the application was delayed. However, the alleged illegalities seem to cause injustice if not addressed to by the Court."

The point was brought better home in **National Bank of Commerce Limited vs. Mahmood Salum Cibango Mhina, Chibango Investments Company Limited and Aisha Said Mkomwa**, Civil Application No.472/17 of 2016(unreported) at Dar es Salaam, where the Court, at pages 10-11, held that;

In this context the court will accept either a reason that prevented an applicant from taking the essential steps in time, or other reason why the intended appeal should be allowed to proceed through out of time. For example, an application that it brought promptly will be considered more sympathetically the one that is brought after unexplained delay. But even where the application is unduly delayed the court may grant extension if shutting out the appeal may appear to cause injustice.

It has been further demonstrated that the applicant has been over the court corridors prosecuting some matters in pursuit of her rights which means that her delay in taking essential steps cannot be

attributed to her negligence or sloppiness. I take that she was diligent all along.

Having weighed the applicant's sworn affidavit and supplementary affidavit vis a vis the above guidelines as established by the Court, I am satisfied that the applicant has adduced sufficient cause for her delay to file her appeal to this court.

In the result, this application succeeds and is granted. The applicant shall file her appeal within fourteen days from the date of this ruling.

Costs to be in the intended appeal.

It is so ordered.




W.P. Dyansobera
JUDGE
8.3.2024

This ruling is delivered under my hand and the seal of this Court on this 8th day of March, 2024 in presence of learned advocate Ms Regina Herman and Ms Ollomi, learned Counsel for the applicant and Mr. Yohana Ayall, learned Counsel for the respondents.




W.P. Dyansobera
JUDGE