

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA**  
**TEMEKE HIGH COURT SUB – REGISTRY**  
**(ONE STOP JUDICIAL CENTRE)**

**AT TEMEKE**

**MISC. CIVIL APPLICATION NO. 708 OF 2024**

*(Originating from Civil Appeal No 47 of 2022 at Temeke District Court One Stop Centre)*

**AVELINA JOHN DIMINIOFF.....1<sup>ST</sup> APPLICANT**  
**RASHID HUSSEIN MKEMBE.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**WINLEY ADMIN SICHONE .....RESPONDENT**

**RULING**

*Last Order date: 5.02.2024*  
*Ruling Date: 11. 03.2024*

**M. MNYUKWA, J.**

Before me is an application for extension of time within which the applicant prays for this court to extend time to file notice of appeal and leave to appeal to enable them to pursue their right to appeal to the Court of Appeal. The application is supported by the affidavit sworn in by the counsel of the applicants, Mr. Mngumi Samadani Suedi.

The said application was vigorously resisted by the counter affidavit sworn in by the respondent, Mr. Winley Admin Sichone. It is on record that the main reason advanced by the applicants for this court to consider their prayer for extension of time is irregularity in the Judgment of this

Court delivered on 25/9/2023. The irregularity posed is failure of the trial Judge to state the right to appeal in the Judgment.

During the hearing of the application both parties were represented. The applicants enjoyed the legal services of Mr. Mngumi Samadani Suedi, learned counsel while the respondent enjoyed the legal services of Mr. Jerry Msamanga, the learned counsel too. The application was argued by way of written submissions. I extend my appreciation to counsel of both parties for filling their respective submissions.

Arguing in support of the application, the applicants' counsel was very brief. In the beginning, he prayed the affidavit sworn in by himself to form part of his submissions. He argued that, the Judgment in Civil Appeal No 47 of 2022 is tainted with irregularity since the same did not state the right of appeal to the parties as it is provided for under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, Cap 2 R.E 2019 which states that a party shall be entitled to a fair hearing and the right to appeal.

He added that, the omission to disclose to the parties their right to appeal in the Judgment occasioned injustice and fatal to the applicants herein. He claimed that the applicants were not aware of their right to appeal hence resulted into a failure to file notice of appeal within time. He



concluded that the omission had the effect of denying the applicants their right to appeal.

The counsel went on to submit that, if the applicants would have been informed their right to appeal, they could have done so within time. He was of the view that, since the irregularity of not stating the right to appeal was committed by this court, the applicants cannot be punished, He supported his argument with the decision of this court in the case of **Demetelius G. Lwena v Zamda Kassimu Ngonyani**, Civil Appeal No 02/2020, HCT at Iringa. He thus prayed the application to be granted.

Opposing the application, the respondent's counsel prays this Court to refuse the applicants' prayers. He observed that, the applicants failed to meet the threshold set by the Court of Appeal in the case of **Lyamuya Construction Company Limited v Board of Trustee of Young Womens Christian Association of Tanzania**, Civil Application No. 2 of 2010. He highlighted the threshold stated in the above mentioned case and argued that, applicants failed to show good cause, account for each day of delay and failed to show that the delay was not inordinate.

In countering the irregularity raised by the counsel for applicants, Mr. Jerry Msamanga contended that, it is not the duty of the court to inform the applicants the remedy available incase they were aggrieved by the decision of this court. He referred to Order XX Rule 4 of the Civil



Procedure Code, Cap 33 R,E 2019 which provides for the contents of Judgment and argued that, the same does not require the Judge to state the remedy available if the party is not satisfied with decision.

He distinguished the case of **Demetelius G. Lwena v Zamda Kassimu Ngonyani** (supra) cited by the counsel of the applicants by stating that the issue that was irregular in that decision was that, the said decision was not dated. He thus prayed the application not to be granted.

In a short rejoinder, the applicants' counsel mainly reiterated what he had submitted in chief and insisted that, it was the duty of the trial Judge to state the right of appeal in his Judgment.

After the submissions of both parties the main issue for consideration and determination before me is whether the application is merited.

When I was composing this Ruling, a legal issue came in my mind on the propriety of the second prayer for leave to appeal to the Court of Appeal. Thus this court invited the parties to address on the effect of amendment of section 5 of the Appellate Jurisdiction Act, Cap 141 (the AJA) brought by section 10 of the Legal Sector Laws (Miscellaneous Amendment Act, No 11 of 2023) which came into effect on 1<sup>st</sup> December



*(i) In civil proceedings, except where any other written law provides otherwise, an appeal shall lie to the Court of Appeal against every order or decree, including an ex-parte or preliminary decree made by the High Court, in the exercise of its original. Appellate or revisional jurisdiction."*

Thus, from the above provision, it is clear that the amendment remove the pre-requisite requirement for leave before ones appeal to the Court of Appeal against the decision of the High Court. For that reason, the applicants' second prayer is overtaken by event and the only remedy is to strike it out as I hereby do. (See the case of **Petro Robert Myavilwa v Zera Myavilwa and Another**, Civil Application No 117/06 of 2022).

Now, coming to the first prayer, it is worthy to note that it is settled that, in the application for an extension of time it is within the court's discretion to grant it. However, the discretion has to be exercised judiciously. It is upon the applicant to show good cause that the delay was with a sufficient cause. What amount to good cause differ from one case to another as there is no hard and fast rule as to what constitute a good cause. (See the case of **Osward Masatu Mwizarubi v Tanzania Fish Processing Ltd**, Civil Application No 13 of 2010)



2023. Parties prayed for short adjournment to research on the legal issue raised by the court *suo moto*.

After a short adjournment, this court resume. Responding to the above question, it was Mr. Mngumi Samadani submissions that the second prayer of the applicants on leave to appeal to the Court of Appeal is overtaken by event. He conceded that, it is true that as per the current position of law it is no longer a requirement. He thus prays the same to be struck out from their prayer sought in the chamber summons. He added that, from 01 /12/2023 an application for leave to this court is no longer a requirement as it was held in the case of **Petro Robert Myavilwa v Zera Myambilwa and Another**, Civil Application No 117/06 of 2022. On his part. Mr Jerry Msamanga joined hands the submissions of the counsel for applicants.

At this juncture it is important to note that, the amendment brought by the Legal Sector Laws (Miscellaneous Amendments) Act No 11 pf 2023, specifically on section 10 which amended section 5 of the Appellate Jurisdiction Act, Cap 141 R.E 2019, effective from 1<sup>st</sup> December 2023 states that:

*"Sect 10. The Principal Act is amended by section 5*

*(a) By deleting subsection (1) and substituting for it the following:*





Furthermore, depending on the circumstances of each case, the applicant also is required to account for each day of delay for the prayer to extend time to be granted or else must have shown that, there was a point of illegality or irregularity that impedes justice as the illegality cannot be left to stand.

As highlighted above, the main grounds advanced by the applicants' counsel is the irregularity of the decision of this Court for not stating the right of appeal to the parties.

From submissions of both parties, it is not disputed that the applicants delayed to file the notice of appeal within time. The impugned decision sought to be challenged was delivered on 25/09/2023 while this application was filed on 15/01/2024. It is settled that the applicants were supposed to file the notice of appeal within 30 days from the date the impugned decision was issued ( See Rule 83 of the Court of Appeal Rules, GN No. 344/2019). For a simple calculation, the applicants delayed for about 74 days after their statutory period to file notice of appeal expired.

Having in mind that the only ground advanced by the applicants for this court to grant their application for extension of time is irregularity or illegality, which when proved, is a sufficient ground for this court to allow them to file the notice of appeal out of time and that the issue of accounting for each day of delay will be ignored because illegality cannot

be left to stand. In **Ngao Godwin Losero v Julius Mwarabu**, Civil Application No 10 of 2015. The Court of Appeal observed that:

*"In our view when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record straight."*

However, for the irregularity or illegality to stand as a ground for extension of time, the applicants must successfully demonstrate that the point of law which is said to be irregular, must be of sufficient importance and apparent on the face of the record such as a point of jurisdiction. In **Lyamuya Construction Company Limited v Board of Trustee of Young Womens Christian Association of Tanzania**, Civil Application No. 2 of 2010, it was held that:

*"Since every party intending to appeal seeks to challenge a decision either on points of law or facts it cannot in my view be said that in valambia's case, the Court meant to draw a general rule that every applicant who demonstrate that his intended appeal raises points of law should, as of right be granted extension of time he applies for one. The Court there emphasized that such point of law must be that of sufficient importance and I would add that it must also be appearent on the face of the record, such as the question of jurisdiction;*



*not one that will be discovered by a long drawn argument or process."*

Going to the records, it is true that the judgment of this court does not state a right to appeal as a remedy to the party who is aggrieved by the decision. But the relevant question for this court to decide is whether the said anomaly is the irregularity for this court to grant the application for extension of time.

The Court of Appeal in **Charles Richard Kombe v Kinondoni Municipal Council** Civil Reference No 13 of 2019 had this to say:

*"The term illegality as defined in the Black's Law Dictionary 11<sup>th</sup> Edition. Page 815 means:*

- 1. An Act that is not authorized by law*
- 2. The state of not being legally authorised;*

*The above definition is consistent with Mulla's Code of Civil Procedure where the learned authors write at page 1381 that:*

*It is settled that where a court has jurisdiction to determine a question and determines that question, it cannot be said that it has acted illegally or with material irregularity, merely because it has come to an erroneous decision on a question of fact or even of law."*

Thus, it is my humble view that failure of the trial Judge to state the remedy available to the party who is not satisfied with the civil decision is not fatal irregularity at all for this court to exercise its discretionary power

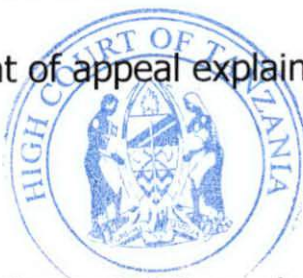
to grant extension of time. As it was rightly stated by the counsel for respondent, it is not the duty of the trial Judge to state the remedy available to a party who is dissatisfied with the decision. The least I can say, it is presumed that everyone knows the law and ignorance of the law is not a defence. Thus, it is expected for the applicants to have known the remedy available to them if they were aggrieved with the decision of this court and take appropriate steps within the statutory period provided by the law.

In the circumstances, I am satisfied that the applicants have failed to show good cause for this court to exercise its discretionary power to grant extension of time. And that, they have failed to account for each day of delay as the law requires.

In the event, the application is dismissed with n order as to costs since parties are related.

It is so ordered.

Right of appeal explained to the parties.



**M.MNYUKWA**  
**JUDGE**  
**11/03/2023**

**Court:** Judgment delivered on 11<sup>th</sup> March 2024 in the presence of second applicant and counsels for both parties.

**M.MNYUKWA**  
**JUDGE**  
**11/03/2024**