

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

**AT TEMEKE**

**MISC. CIVIL APPLICATION No. 64 OF 2023**

*(Arising from PC Civil Appeal No 35 of 2023 at Temeke High Court Sub Registry)*

<b>ALICE JOHN EDWARD .....</b>	<b>1<sup>ST</sup> APPLICANT</b>
<b>BEATRICE HON EDWARD.....</b>	<b>2<sup>ND</sup> APPLICANT</b>
<b>DOREEN JOHN EDWARD.....</b>	<b>3<sup>RD</sup> APPLICANT</b>
<b>JASMINE JOHN EDWARD.....</b>	<b>4<sup>TH</sup> APPLICANT</b>
<b>EDWIN THADAYO.....</b>	<b>5<sup>TH</sup> APPLICANT</b>
<b>WILLIAM JOHN EDWARD.....</b>	<b>6<sup>TH</sup> APPLICANT</b>
<b>ESTER JOHN EDWARD.....</b>	<b>7<sup>TH</sup> APPLICANT</b>
<b>ERENE JOHN EDWARD.....</b>	<b>8<sup>TH</sup> APPLICANT</b>
<b>VERSUS</b>	
<b>DANIEL ELISHA OKELO.....</b>	<b>RESPONDENT</b>

**RULING**

*Last Order date: 14.02.2024*  
*Ruling Date: 18.03.2024*

**M. MNYUKWA, J.**

By way of chamber summons, the applicants' counsel, Mr. Samuel Shadrack Ntabaliba brought the present application which is supported by the affidavit sworn by him. The applicants sought an order for extension of time to file the application for certification of points of law from the decision of this Court in Civil Appeal No 35 of 2022.


In brief, the present application is a result of the Miscellaneous Application No 66 of 2022 which was struck after the preliminary objection raised by the counsel of the respondent being sustained. Going through

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the records, it is without doubt that the Miscellaneous Application No 66 of 2022 was filed within time. Since the said application was struck out for being incompetent and owing to the fact that the applicants wished to exercise their constitutional right to appeal to the Court of Appeal, they filed the present application for this court to exercise its discretionary power to grant their prayer.

In his affidavit to support the application, the counsel for applicants averred that, the applicants were dissatisfied with the decision of this court in Civil Appeal No. 35 of 2022. And that, they filed an application for certification of point of law which was struckout on 5/9/2023 for being incompetent. The counsel went on that they were supplied with a copy of the Ruling on 11/5/2023 where they noticed that the same has typographical error. And that, they asked for a corrected copy of a Ruling which was supplied to them on 22/9/2023. The counsel contended that, failure to bring the present application on time is due to the fact that they were lately supplied with a corrected copy of the Ruling.

As it was expected, the respondent filed a counter affidavit to oppose the application. In his counter affidavit he deponed that the applicants failed to file an application for certification of points of law within time and they are employing delaying tactics to defeat the end of justice.



When the matter came for hearing, three applicants entered appearance who are the 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> applicants. On his part, the respondent and his counsel entered appearance. Upon the prayer of the parties and with the leave of this court, the application was argued by way of written submissions. I thank parties for filling their submissions on time.

Submitting in support the application, the learned counsel for applicants started by referring the case of **Tanzania Revenue Authority v Tango Transport Company Limited and Tango Transport Limited v Tanzania Revenue Authority**, Consolidated Civil Application No 4 of 2008 and No 9 of 2008, CAT at Dar es Salaam. He contended that in the above cited case, the Court gives guides on what should be considered in the application for extension of time where the applicants in our case at hand will be guided by those guides.

The counsel enumerated the guides stated in the above cited case to be the length of the delay, the reason for the delay, whether there is an arguable case like the point of illegality and whether there is any degree of prejudice to respondent.

The counsel went on to submit by referring to the above guides and how they fit in our case at hand. He submitted that, there was a reason for delay since the applicants filed the application for certification of points



of law on time and the same was struck out for being incompetent. He stated that, soon after the decision of this court in Civil Appeal, they filed Miscelleneous Application No 66 of 2022 for certification of points of law.

On a second guide as to whether there is lengthy of delay or whether the delay was inordinate he contended that, the applicants acted promptly to bring the present application as they delayed for only 21 days where the applicants were awaiting to be supplied with a copy of the corrected Ruling of this court after the one which was issued on 5/9/2021 to have some typographical error.

Arguing on the issue of whether there is degree of prejudice to the respondent if the application will be granted he submitted that, there will be no degree of prejudice on the part of the respondent if the application will be granted because the right that will be determine in the intended appeal will also benefit the respondent. So, the counsel prayed for the prayer sought in the chamber summons to be granted.

Contesting, the respondent counsel started his submissions by referring to the case of **Alliance Insurance Corporation Limited v Arusha Art Limited**, Civil Application No 33 of 2015 and stated that granting the application for extension of time is within court's discretion which should be exercised judiciously.

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In countering the applicants' reason for extension of time he argued that, the reason advanced by the applicants that they have filed the application for certification of points of law within time is baseless as the same was struck out due to the error committed by the applicants' themselves. He referred to the case of **Ramadhani Rashidi Kitime v Anna Ally Senyangwa**, Miscelleneous Application No 3 of 2023, HCT at Morogoro which states that failure of an advocate to act within the detect of law cannot constitute good cause for enlargement of time.

Referring to the Miscelleneous Application No 66 of 2023 he argued that, the 5<sup>th</sup> applicant did not swear for and on behalf of the other applicants and therefore the application was struck out due to the negligence of the applicants. He further submitted that, the applicants' reason that they were looking for an advocate that's why they deayed to bring the present application is a lie.

On the reason that they were delayed to be supplied with a corrected copy of a Ruling he argued that, the applicants failed to substantiate this assertion with any proof. The respondent counsel argued that, the applicants failed to demonstrate good cause as it is stated in the case of **Lyamuya Construction Company Limited v Board of Trustees of Young Woman Christian Association of Tanzania**, Civil Application No 2 of 2010. He thus prayed the application to be dismissed.



The applicants did not file any rejoinder after the respondent submissions. The only issue which I am called to determine is whether the application is merited.

It is an established principle that the decision to grant or not to grant an order for extension of time is within court's discretion. The application of this kind among other factors, can be granted if there is good cause advanced by the applicant to satisfy the court so as to exercise its discretionary power. It is trite law that court's discretion should be exercised judiciously since there is no hard and fast rule as to what constitute good cause. (See the case of **Tanga Cement Company Limited v Jumanne D Masagwa and Amos A. Mwalwambe**, Civil Application No 6 of 2001).

In **Osward Masatu Mwizarubi v Tanzania Fish Processing Ltd**, Civil Application No 13 of 2010 it was pointed out that:

*"What constitutes good cause cannot be established by any hard and fast rule rules. The term "good cause" is a relative one and is dependent upon the party seeking extension of time to provide the relevant material in order to move the court to exercise its discretion."*

I have keenly revisited the affidavit of the counsel for applicants and going through the submissions filed by him, I find this application was





filed on 27<sup>th</sup> September 2023 after the earlier on application which was Miscellaneous Application No 66 of 2022 to be struck out on 5<sup>th</sup> September 2023. It is on record that the applicants filed the application for certification on points of law within time to challenge the decision of this Court in Civil Appeal No 35 of 2022.

As it is gathered from the court record, the applicants application among others, was struck out for a reason that it was only the 5<sup>th</sup> applicant among the 8 applicants who swore the affidavit and the same affidavit was not sworn on behalf of others. Again, it is on record that the 5<sup>th</sup> applicant seems to have sworn the affidavit as the applicants' counsel, while in fact he is not an advocate. The applicants sought to rely on the oxygen principle to rectify the anomaly but the prayer was not granted as it was held that the error cannot be cured by the oxygen principle. Thus, in otherwords it can be said that the application was struck out without the same being determined on merit.

Now, the applicants still wished the impugned decision in Civil Appeal No 35 of 2022 to be determined by the Court of Appeal that's why they filed the present application for extension of time for this court to grant leave for them to file an application for certification of points of law.

To begin with, it has to be noted that the present application which I am called for to determine is the application to extend time and not to

determine whether there are points of law worth to be certified by this court. I say so because in paragraph 9 of the respondent's counter affidavit he deposed that, there is no point of law manifested by the applicants which are worth to be determined by the Court of Appeal. At this juncture, determining whether there are points of law or not is to prejudice the intended application if this application will be granted.

Coming now to the application at hand, as indicated above, the applicants' main reason to bring the present application is the delay which to my view can be termed as a technical delay since the earlier on application for certification of points of law was filed within time.

I am alive with the decision of the Court of Appeal in **Fortunatus Masha v William Shija and Another** (1997) TLR 154 where it was pointed out that:

*"A distinction had to be drawn between cases involving real or actual delays and those such as the present one which clearly only involved technical delays in the sense that the original appeal was lodged in time but had been found to be incompetent for one or another reason and a fresh appeal had to be instituted. In the present case the applicant had acted immediately after the pronouncement of the ruling of the Court striking out the first appeal. In these circumstances extension of time ought to be granted."*

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Applying the principle enumerated above in our case at hand, it is beyond doubt that the delay that is envisaged in this application is the technical delay and not the real or actual delay. I say so because it is on record that applicants filed Miscellenous Application No 66 of 2022 on cerification of points of law against the decision of this court in Civil Appeal No 35 of 2022. However, the said application was struck out for being incompetent. It is a common ground that if the struck out application was filed within time, and the applicants was prosecuting in good faith an incompetent appeal, the delay encountered in prosecution of the said appeal is not an actual delay, rather, a technical delay.

I am fortifying my position above with the decision of the Court of Appeal in **Emmanuel Rurihafi & Another v Janas Mrema**, Civil Appeal No 214 of 2019 which quoted with approval the case of **Bank M (Tanzania) Limited v Enock Mwakyusa**, Civil Application No 520/180 of 2017 that:

*".... A prosecution of an incompetent appeal when made in good faith without negligence, ipso facto constitutes sufficient cause for extension of time."*

In the circumstances, I have no hesitation to allow the present application since the incompetent application was filed within time and the applicants in good faith intended to challenge the decision of this

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court. For that reason, they cannot be penalized for their application being struck out.

In showing good faith to prosecute the appeal, the applicants did not delay after their appeal was struck out for being incompetent, As I have alluded above, the applicants appeal was struck out on 5<sup>th</sup> September 2023 and the present application was lodged on 26<sup>th</sup> September 2023 which is almost 21 days after their application was struck out. In the affidavit deposed by their counsel it was stated that they delayed to file because they asked to be supplied with the corrected copy of a Ruling since the Ruling supplied to them had typographical error.

The counsel for respondent's strongly opposed the above assertion as it lacks proof. It is true that the applicants did not substantiate with any proof that they delayed since they were awaiting for the corrected copy of the Ruling. But again, the respondent did not raise this argument in his affidavit as he raised this argument in his submissions while submissions is not evidence. But all in all, to me, 21 days of delay is reasonable and I can say that the applicants acted promptly and diligently.

In **Hamis Mohamed (as administrator of the estate of the late Risais Ngwale) v Mtumwa Moshi (as the administrator of the late Moshi Abdullah)**, Civil Application No 4-7/17 of 2019 the Court of Appeal had this to say:



*"After the latter application was struck out, the applicant took hardly a month to file the present application seeking for extension of time to file an appeal. In otherwords, the appellant was diligent all along to file an appeal."*

In the final result, I find the Misc. Civil Application No. 64 of 2023 is with merit. I therefore exercise my discretionary power to grant extension of time to file application for certification of points of law as prayed. Thus, the applicants are given 21 days to file their intended application to this court.

No order as to costs since parties are relatives.

It is so ordered.



  
**M. MNYUKWA**  
**JUDGE**  
**18/03/2024**

**Court:** Ruling delivered on 18/03/2024 in the presence of the 5<sup>th</sup> applicant and respondent in person.

  
**M. MNYUKWA**  
**JUDGE**  
**18/03/2024**