

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM.**

**MISC. COMMERCIAL APPLICATION NO. 59 OF 2020**

**(Arising from Commercial Case No. 135 of 2013)**

**FAUZIA JAMAL MOHAMED .....APPLICANT**

**VERSUS**

**LILIAN ONAEL KILEO ..... RESPONDENT**

**RULING**

**B.K.PHILLIP, J**

This is an application for extension of time within which the applicant herein can lodge his notice of appeal against the judgment and decree of this Court made on 18<sup>th</sup> January, 2016. It is made under the provisions of section 11 (1) of the Appellate Jurisdiction Act, supported by an affidavit sworn by the applicant. The learned Advocate Edward Chuwa swore a counter affidavit in opposition to the application. The learned Advocates Rita Chihoma and Edward Chuwa appeared for the applicant and the respondent respectively.

The hearing of this application has been done by way of written submissions. Submitting in support of the application, Ms. Chihoma invited this court to adopt the contents of the affidavit in support of this application and the skeleton arguments she filed in Court pursuant to the provision of Rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 as amended by GN. No. 107 of 2019. Relying on the case of **Kabedco Vs Wetcu Ltd , Civil Appl. No 526/11 of 2017, (2019) TZCA 483**, Ms. Chihoma submitted that the task of this court is to make a determination on whether or not the applicant has shown good cause to

move this to court to grant the application not to look into the merits of the intended appeal. On what amounts to good cause, Ms. Chihoma submitted that there is no single definition of what amounts to good cause as the term "good cause" is a relative one and dependent upon the circumstances of each case. She contended that in principle, the time spent by a party in the court corridors should be excluded when computing the time for delay. To cement her arguments, she cited the case of **Andrew Athuman Ntandu and another Vs Dustan Peter Rima, Civil Application No 551/01 of 2019** in which the Court of Appeal said the following;

*"that there is no single definition of what amounts to good cause, in determining good cause. Circumstances of each case have to be taken into consideration as the term "good cause" is a relative one and is dependent upon the circumstances of each individual case. The term "good cause" may include but not limited to, whether the application has been brought promptly, some considerations that have been consistently taken by the court in determining if good cause has been disclosed include the cause for the delay involved the length of the delay, the degree of prejudice. If any that each party stands to suffer depending on how the court exercises its discretion, the conduct of the parties and so on."*

Ms. Chihoma further submitted that the applicant's appeal of which its notice of appeal was lodged on time, that is Civil Appeal No.203 of 2016 was struck out on 6<sup>th</sup> April 2020 for being accompanied with a defective certificate of delay. Immediately after receiving a copy of the Ruling of the Court of Appeal the applicant wrote a letter to the Deputy Registrar of this Court requesting for amendment of the defective certificate of delay, in terms of Rule 90(1) of the Court of Appeal Rules as amended. She contended that writing the aforesaid letter to Deputy Registrar of this court was the correct action. She cited the case of **Barclays Bank Tanzania Limited Vr Phylisian Hussein Mchemi, Civil Application No, 17 of 2015** (unreported) to buttress her argument.

Moreover, Relying on the case of **Fortunatus Masha Vs William Shija and another 1997) TLR 154**, Ms. Chihoma submitted that the time during which the applicant was pursuing her appeal mentioned herein above, should be excluded in counting the days of delay. Another case referred to this court by Ms Chihoma is the case of **Zaidi Baraka and 2 others Vs Exim Bank ( T) Limited , Misc Commercial Cause No. 300 of 2015**, (unreported) in which this Court said the following;

*"The fact that, the requisite time of issuing a notice of appeal expired while pursuing her appeal, that, alone in my view is reasonable and sufficient caused for extending their time of giving notice of Appeal."*

In addition to the above, Ms. Chihoma invited this court to take judicial notice that in the month of April, 2020 there were many holidays such as Karume day, on 7<sup>th</sup> April 2020 and from 10<sup>th</sup> to 13<sup>th</sup> April 2020 were Easter Holidays. She also submitted that in April 2020, the Covid 19 pandemic was at its peak in Tanzania and normal working places were disrupted. She invited this court to exclude the days from 6<sup>th</sup> to 13<sup>th</sup> April 2020 in the computation of the days of delay on the reason that the ruling of the Court of Appeal was delivered on 6<sup>th</sup> April 2020, before the Registrar and copies of the ruling were supplied to the applicant on 9<sup>th</sup> April 2020, and from 10<sup>th</sup> to 13<sup>th</sup> April 2020 were Easter Holidays. She contended that since this application was filed on 28<sup>th</sup> April 2020 that is, 14 days only after the copy of the ruling of the Court of Appeal was supplied to the applicant, then, same was filed within a reasonable time and there is no inordinate delay.

In addition to above Ms. Chihoma submitted as follows; That the applicant's appeal was not struck out on the negligence of the applicant, but it was due to the defect in the certificate of delay. Had it not been for the defect in the certificate of delay, the applicant's appeal would have been heard and decided on merits. If this application is not granted the applicant would suffer a lot as she is the most affected party in this matter

and that the intended appeal has serious triable issues. In conclusion of her submissions, she invited this court to grant the application.

In rebuttal, Mr. Chuwa submitted as follows; That it is a matter of principle, when an appeal is struck out, it has the effect of striking out the notice of Appeal. The time to file the appeal starts to run from the date the notice of appeal is filed. The certificate of delay has no place in an application for extension of time to file a notice of appeal like the one in hand, as what was struck out by the Court of Appeal was the appeal and the notice of Appeal.

Mr. Chuwa further submitted that it is only the delay in respect of days from the date the applicant's appeal (Civil Appeal No. 203/2016) was lodged to the date it was struck out, that is 6<sup>th</sup> April 2020, that can be covered by arguments raised by Ms. Chihoma that the applicant has been in court corridors seeking for justice. He contended that the fact that the applicant lodged a letter for rectification of the certificate of delay before the Deputy Registrar of this court is not a good reason for the delay. Furthermore, he contended that the letter was written on 9<sup>th</sup> April 2020 but was delivered in court on 14<sup>th</sup> April 2020. He insisted that the applicant is duty bound to account for delay for days between, 6<sup>th</sup> to 14<sup>th</sup> April 2020, when she chose to deliver her letter to court, and from 6<sup>th</sup> April to 30<sup>th</sup> April 2020 when she chose to file this application. He distinguished the cases cited by Ms. Chihoma on the reason that in the case of **Barclays Bank Tanzania Limited**, (supra), the Notice of Appeal was yet to be struck out by the Court of Appeal and the applicant applied for extension of time to lodge an appeal since she spent time seeking for a correct certificate of delay, whereas in the case of **Kabdeco** (supra), the applicant accounted for each day of delay. Mr. Chuwa insisted that the applicant has failed to account for the delay from 6<sup>th</sup> April to 30<sup>th</sup> April 2020, a total of 24 days. He maintained that the position of the law is that the applicant is duty bound to account for each day of delay and even a single day of delay has to be accounted for. To cement his arguments he referred this court to the case of **Finca (T) Limited and another Vs**

**Boniface Mwalukisa, Civil Application No 589/12 of 2018**  
(unreported).

Lastly, Mr. Chuwa submitted that the applicant and her advocate have been negligent. He contended that negligence and failure to account for each day of delay has never been sufficient cause for the court to extend time. To cement his arguments he cited the case of **Ngao Godwin Losero Vs Julius Mwarabu, Civil Application No.10 of 2015**, (unreported) in which the Court of appeal said the following;

*"When all is said in respect to the principles, I will right away reject the explanation of ignorance of the legal procedure given by the applicant to account for the delay. As has been held times out of number, ignorance of law has never been featured as a good cause for extension of time ... to say the least, a diligent and prudent party who is not properly seized of the applicable procedure will always ask to be apprised of it for otherwise he/she will have nothing to offer as an excuse for sloppiness"*

Mr. Chuwa invited this court to dismiss this application with costs.

In rejoinder Ms. Chihoma reiterated her submission in chief. She insisted that the case of **Barclays Bank Tanzania Limited** (supra) and **Kabdeco** (supra) are relevant and good authority in this matter. She also pointed out that in this application the respondent's advocate has not disputed the fact that the degree of prejudice the applicant stands to suffer outweighs the degree of prejudice of the respondent and that the intended appeal has serious triable issues.

Moreover, she submitted that the case of **Finca (T) Limited and another** (supra) and **Ngao Godwin Losero** (supra) cited by Mr. Chuwa are distinguishable from the instant application because the facts behind the instant application are different from the facts of those cases. In justification of her contention, she further submitted that in the case of **Finca (T) Limited and another** (supra), the leave to appeal was a statutory requirement and the certificate of delay was not at issue while in

this application is not the case, and the reason for the court's refusal to grant the application in that case was the applicant's allegation that it was going through restructuring while in the instant application the reason for delay is that the applicant spent time in the court corridors.

Having dispassionately analyzed the competing arguments raised by the learned Advocates, I have noted that it is a common ground that in an application for extension of time, like the one in hand, the applicant has to give sufficient cause for the delay and account for each day of delay. Looking at the case laws cited by both learned advocates, it is also a common ground that what amounts to sufficient cause is not defined. However, in the determination of what are good/sufficient causes for a particular case, courts have been looking into various factors. In the case of **Finca (T) Limited** (supra), the court of appeal said the following;

*"It is settled that where extension of time is sought, the applicant will be granted, upon demonstrating sufficient cause for the delay, conversely, it is also well settled that the sufficient cause sought depends on deliberation of various factors, some of which revolve around the nature of actions taken by the applicant immediately before or after becoming aware that the delay is imminent or might occur."*

In addition to the above, it is undisputed fact that previous to this application, the applicant lodged his notice of appeal and the appeal vide Civil Appeal No. 203/2016 timely. However, when the same was called for hearing at the court of Appeal, it was struck out because it was accompanied with a defective certificate of delay. Under the circumstances, this application falls in what is termed as "technical delay" as described in the case **Fortunatus Masha Vs William Shija and another (1997) TLR 154**. For ease of reference, let me reproduce the relevant part of the court's findings in the case of **Fortunatus Masha** (supra) hereunder;

*"I am satisfied that a distinction should be made between cases involving real or actual delays and those like the present one which*

*only involve what can be called technical delays in the sense that the original appeal was lodged in time but the present situation arose only because the original appeal for one reason or another has been found to be incompetent and a fresh appeal has been instituted. In the circumstances the negligence if any refers to the filing of an incompetent appeal not the delay in filing it. The filing of an incompetent appeal having been duly penalized by striking it out. The same cannot be used yet again to determine the timeousness of applying for filing the fresh appeal."*

From the foregoing, in making the determination as to whether the applicant has adduced sufficient cause for the delay, this court is required to look into the applicant's action after receiving the ruling of the Court of Appeal. I have taken into consideration the arguments raised by Mr. Chuwa, that the applicant has not accounted for the days of delay from 6<sup>th</sup> April to 30<sup>th</sup> April 2020. However, in my considered view, the explanations given by the applicant's advocate are satisfactory. The applicant's advocate has explained the steps she took after receiving the ruling of the court of appeal which includes communicating with the Deputy Registrar of this court as well as preparing and filing this application on 30<sup>th</sup> of April 2020. From what is submitted by Ms. Chihoma, it is obvious that immediately after receiving the ruling of the Court of Appeal the applicant took steps to rectify what went wrong. The letter to the Deputy Registrar for request for amended certificate of delay was filed in court on 14<sup>th</sup> April 2020, that is within five days from the date of receipt of the ruling of the Court of Appeal. On 30<sup>th</sup> April 2020 the applicant filed this application, not 28<sup>th</sup> April 2020 as alleged by Ms. Chihoma, that is twenty one days from the date of receipt of the ruling of the Court of Appeal. In my opinion, the time spent by the applicant in preparing and filing this application is reasonable, bearing in mind that, as correctly submitted by Ms. Chihoma, in the month of April this year there were holidays (Karume Day and Easter holidays). There is no any inordinate delay in filing the application, since the same has been filed within the same month the applicant's appeal was struck out.

It has to be noted that in a case of technical delay like the instant application, the court has to take into consideration the fact that the applicant needs time to prepare the application. What matters is that, the time spent should be reasonable in the circumstances of the case, as the law does not provide for a specific time when an application for extension of time should be filed in case of technical delay, which is different from real or actual delay whereby days of delay are counted against the time limit provided in the relevant law.

From the foregoing, the applicant is granted extension of time to file the notice of appeal against the decision of this court in Commercial Case No. 135 of 2013, the same has to be filed within 14 days from the date of this order.

Dated at Dar es Salaam this 25<sup>th</sup> day of September 2020.



  
**B.K. PHILLIP**

**JUDGE**