

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**DAR ES SALAAM.**

**MISC. COMERCIAL APPLICATION NO. 156 OF 2019**

***(ARISING FROM COMMERCIAL CASE NO. 115 OF 2011)***

**EDWARD EPIMARK LASWAY, T/A**

**LASWAY TRUCK.....1<sup>ST</sup> APPLICANT**

**HUSSEIN RAJAB MWIMBA**

**(AS THE ADMINISTRATOR).....2<sup>ND</sup> APPLICANT**

**EVELINE ISRAEL KIRENGA.....3<sup>RD</sup> APPLICANT**

**VERSUS**

**NATIONAL BANK COMMERCE.....1<sup>ST</sup> RESPONDENT**

*Date of Last Order: 18/11/2020*

*Date of Ruling: 18/12/2020*

**RULING**

**MAGOIGA, J.**

The applicants, **EDWARD EPIMARK LASWAY, T/A LASWAY TRUCK, HUSSEIN RAJAB MWIMBA** (administrator of the estate of **late Rose Gerald Saria**) and **EVELINE ISRAEL KIRENGA** jointly instituted the instant application by chambers summons under Section

11(1) of the appellate Jurisdiction Act, Cap .141 R; E 2002 (the AJA) against the above-named respondent praying for the following orders, to wit: -

1. That this Honorable Court be pleased to grant an extension of time to file appeal.
2. And for an order that the costs and incidental to this application abide the result of the said appeal.

The chamber summons as usual was accompanied by supportive joint affidavit of applicants, stating the reasons why this application should be granted as prayed.

Upon being served with the chamber summons and respective supportive joint affidavit of the applicants, the respondents through DICKSON IKUNGURA deposed joint counter affidavits in reply to affidavits of applicants strongly stating reasons for opposing the grant of the orders sought in the chamber summons.

The facts pertaining to this application as gathered from the affidavit is as follows. Parties to this application were originally parties in Commercial Case No. 115 of 2011 filed under Summary Procedure by respondent in this application. Facts go that, on 10<sup>th</sup> August, 2012 Judgment was entered against the 1<sup>st</sup> applicant by Nyangalika J, (as he then was). Aggrieved by

the ruling of the trial court, the applicants lodged notice of appeal to the Court of Appeal of Tanzania. On 24<sup>th</sup> day of July, 2018 their appeal was struck out for being incompetent. Further facts go that, on 4<sup>th</sup> December, 2019 the applicants filed an application No 8 of 2019, seeking an injunction order to restrain the respondents from conducting auction or doing anything in mortgage property but their application was dismissed with cost.

Now they have come to this court armed with the instant application seeking for an extension of time to file appeal to Court of Appeal of Tanzania, hence this ruling.

When this application came on for hearing, the applicants were enjoying the legal services of Mr. Johnson Msangi, learned advocate. The respondent was enjoying the legal services of Ms. Mariam Ismail, learned advocate.

This court directed and ordered learned advocates to argue this application by way of written submissions. Both counsel for complied with the scheduled order of filing written submissions for and against this application paving way for this ruling. Let me record my thanks for their industrious input on this matter. I honestly commend them.

Mr. Msangi prayed that the joint affidavit of the applicants be adopted as part of submission he is making in support of this application. The learned advocate gave the historical background of this matter to the stage of the instant application. According to the learned advocate for the applicants, the 2<sup>nd</sup> respondent who is the administrator of the estate of the late Rose Gerald Saria became aware of this legal dispute on 20<sup>th</sup> November, 2019. Since, then the applicants started the process and by 4<sup>th</sup> December, 2019 were able to file this application for extension of time to file afresh appeal. From that date to the date the instant application was file is 14 days which according to the applicants, the confusion was caused by their late advocate Msefya.

Mr. Msangi cited article 13 of the Constitution of this country which recognizes the right to appeal against any decisions one is aggrieved by. In that note, the learned advocate for the applicant urged this court to exercise its discretion and grant this application because it has overwhelming chances of success and to their view the applicants believe impugned ruling have triable matters worthy for consideration of the Court of Appeal of Tanzania. On that note, the learned advocate for the applicant cried for grant of the application as prayed.



Ms. Ismail, responding on the submission made by counsel for the applicants started her submission by giving out the historical background of the application and he was at one with the applicants that, application for extension of time are only granted once the applicant has proved and shown sufficient reasons for the extension of time.

Expounding her submission, Ms. Ismail submitted that, the allegation that the delay was caused by the negligence, ill-advice and irresponsible in comprehensive record of appeal exhibited by their learned advocate late Msefya, according to her, that by itself does not suffice as a sufficient reason for granting the applicants extension of time. The learned advocate pointed out that, the advocate negligence claimed by the applicants was in relation to records of appeal which was struck out and not in refilling a fresh appeal after the appeal was struck out. Ms. Ismail went on to submit that the applicants were required to establish to the court with reasons as to why the fresh appeal was delayed after the appeal was struck out. More so she argued that negligence of the advocate is not a ground of extension of time.

Submitting on the point that, applicant were not aware that the appeal was struck out until late November, 2019. It was respondent argument that the applicants herein have failed to account for each and every day delay from

24<sup>th</sup> July, 2018 to 20<sup>th</sup> November, 2019. To cement his position he cited the case of **Ramadhan J Kihwani Vs TAZARA Civil appeal No 410 of 2018 CAT**, where the court held that a party seeking an extension of time has to account for each and every day of delay.

Ms. Ismaili further submitted that, one year and six months after the struck out of the appeal it's a massive number of delays which shows relaxation and that the applicants did not exhibit due diligence in requesting for updates on their case at the of appeal registry. In support he cited the case of **Lyamuya Construction Company Limited Vs Board of Registered Trustees of Young women's Christian Association of Tanzania, Civil Application No 2 of 210**, where the court held that among the factors to look out in extension of time is if the applicant has shown diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.

Further reply was that, the applicants have no chances of succeeding in their appeal. Expounding on the point she submitted that applicants' intended appeal against Commercial Case No 115 of 2011 which was filed under summary procedure and the fact that the applicant failed to adduce enough reasons to be granted leave to defend the summary suit, then, the grant of extension will be a futile exercise. More so, she referred this court

to, the Mortgage (Special Provision) Act No 17 of 2007 in which under section 25 gives out conditions for the court to allow a party to defend. According to her, since the applicants did not prove any of the conditions, then, chances of succeeding at the court of appeal are extremely slim, if any.

On that note, learned counsel for the respondent urged this court not granted this application and prayed that the same be dismissed with cost.

In rejoinder the applicants reiterated their former submission in chief and added that there was illegality following struck out of Civil appeal No 82 of 2019. Strangely the applicants' advocate in rejoinder raised the issue of overriding objective and illegality. And to buttress position, he cited the case of **Principle Secretary Ministry of Defence and National Service v. Devram Valambia (1992) TLR182** in which it was held that in case of illegality extension has to be granted to allow the court to take appropriate measures.

The learned advocate for the applicants reiterated his prayers as contained in the chamber summons.

This marked the end of hearing this application and the task of this application now is to determine the merits or otherwise of this application.



It is trite law that whether to grant or refuse an application like this one at hand remains entirely at the discretion of the court which must be exercised according to the rules of reasons and justice. This was clearly stated in the case of **Daphine Parry vs. Murry Alexandra Carson (1963) E.A No 546**, in which the court held that;

"The court in exercising its power under this provision should receive a liberal contraction, so as to adduce substantial justice, when no negligence no in action no want of bona fide is imputed to the applicant".

Also, the case of **Kalunga and Company Advocates vs National Bank of Commerce (2006) TLR 235** which stated that extension being a matter within the court discretion cannot be laid by any hard and fast rules but will be determined by reference to all circumstances of each particular case. This means that the applicants are required to show sufficient reason why they should be given more time and the most persuasive reason that they can show is that the delay has not been caused or contributed by dilatory conduct on their party.

From the foregoing, therefore, the question which pops up at this stage is whether the applicant has demonstrated good cause to warrant the court to exercise its discretionary power under Section 11 (1) of the Appellate Jurisdiction Act, [Cap.141 R.E 2019]. The applicants have assigned two

reasons in persuading this court, one, that the applicants' the delay was caused by negligence, ill advice and irresponsible in preparation of comprehensive record of appeal by their counsel and death of the advocate and 2<sup>nd</sup> respondent. On the other hand, counsel for respondent has challenged the argument that, the advocate's negligence claimed by the applicants was in relation to records of appeal which was struck out and not in refilling a fresh appeal after the appeal was struck out.

Having carefully listened to the rival arguments of the parties, I respectively find this is application raising very peculiar concern/facts this court is to take on board for the interest of justice. Apart from the negligence of the advocate in respect of the appeal but there is another aspect which was raised and not replied, that advocate Msefya who had the conduct of the appeal is no more. The question is, after the appeal was dismissed did he communicate the results to the applicants?. Definitely no! And another equally important point is that second applicant (Rose Gerald Saria) is no more as well. The appeal against the decision of the High Court given was in 2012 and the appeal was called on and decided on July, 2018. I am certain a lot of water went under the bridge that these lay persons losing track of the case or appeal is possible. Also demise of their learned advocate worsens the situation. I have followed the conduct of the

applicants in this application and certainly have at all material time exhibited a due diligence and seriousness in following the matter. All the above taken on board, the argument that period started counting in July, 2018 is not what transpired. The reality is more than that.

On that note, I find 14 days delayed by these lay persons not that much inordinate delay when someone is struggling for the interest of justice. Guided by the overriding objective principle, I am inclined therefore, to exercise my discretion, and hence, grant this application as prayed in the chamber summons. The applicants, therefore, are given 60 days from the date of this ruling to take all necessary steps to have their appeal dully filed for consideration by the Court of Appeal.

It is so ordered.

Dated at Dar es Salaam this 18<sup>th</sup> day of December, 2020.



  
**S. M. MAGOIGA**

**JUDGE**

**18/12/2020**