

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
MISC.COMMERCIAL APPLICATION NO. 08 OF 2023**

JOE OCEAN CLEARING &
FORWARDING CO. LIMITED APPLICANT
VERSUS

R&K TRUCKING LIMITED.....1ST RESPONDENT

SABIHI RASHIDI NOKOLAGE.....2ND RESPONDENT

RULING

Date of last order: 05/06/2023
Date of Ruling: 05/07/2023

NANGELA, J.

The Applicant herein has filed this application seeking for the following orders as they appear in her chamber summons:

1. The Honourable Court be pleased to extend the time within which the Applicant may file Notice of Appeal against the decision of the High Court of Tanzania (Commercial Division) at Dar-es-Salaam, (Hon. Nangela, J.) dated 23rd

February 2022 in Commercial Case No.68
of 2020.

2. Costs of the application be in the cause.
3. Any other reliefs as this Honourable Court
may deem fit and just to grant.

The Applicant filed the chamber summons under section 11(1) of the Appellate Jurisdiction Act, Cap.141 RE. 2019. The Chamber summons is supported by an affidavit of one JIE QI. The parties (except the Second Respondent who never appeared in Court) filed their respective pleadings, and this Court directed them to dispose of the matter by way of written submissions. The parties present have duly filed their respective submissions, including rejoinder submission and, I will proceed to examine such submissions before I render my verdict on this application.

In his submissions, Mr. Gaspar Nyika, learned counsel for the Applicant submitted that, the application is premised under section 11(1) of the Appellate Jurisdiction Act, Cap. 141 R.E 2019, a provision which does not provide for the grounds upon which the Court is to exercise its discretion pursuant to that provision.

Mr. Nyika submitted, however, that, as a matter of settled law, in an application for extension of time, including extension of time to lodge a Notice of Appeal, the Applicant is duty bound to not only show good cause, account for all the days of delay, and show that the delay is not inordinate but should also show that he/she was diligent, not negligent or sloppy in the prosecution of action that he/she intends to take. That is indeed a correct view and the cited case of **Dr. Nkini & Associates Ltd vs. National Housing Corporation**, Civil Appeal No.72 of 2015 (CAT) (unreported) and many other decisions have addressed those issues.

Mr. Nyika submitted that, the Court may as well consider granting an application for extension of time where the applicant shows that there are other sufficient reasons such as the existence of point of law of sufficient importance, such as illegality of the decision sought to be challenged. That is indeed settled and the cases of **The Principal Secretary, Ministry of Defence and National Service vs. Devram Valambhia** [1992] TLR 192 and that of **Lyamuya Construction Company Ltd vs. Board of Registered**

Trustees of Young Women's Christian Association of Tanzania, [2011] TZCA 4, are to the point.

Mr. Nyika has submitted that, and I quite agree with him, what amounts to sufficient good cause is not defined and does depend on each case. Citing the case of **VIP Engineering & Marketing Ltd and 20Others vs. Citibank Tanzania Ltd**; Consolidated Civil References No.6, No.7 and 8 of 2006 (CAT) (unreported), he contended that, evidence showing that the Applicant was not negligent or that the delay was not caused by contributory or dilatory conduct amounted to sufficient good cause.

Regarding what transpired in this respective application, it was Mr. Nyika's submission, relying on the affidavit of Mr. Jie Qie that, the reasons for the delay to file a Notice of Appeal in time are based on the fact that the Applicant had instructed his advocate to appeal and had innocently believed that based on his knowledge of law he would take all necessary steps to pursue the appeal, including the initial step of filing a notice of appeal.

He submitted that, it later turned out that the Applicant's former advocate did not file such Notice of Appeal but only wrote several letters to the Court applying for copies of judgement, decree, and proceedings for purposes of processing an appeal. He relied on Annexure JO-2, JO-3 and JO-4 to the supporting affidavit and contended that, the respective unnamed advocate was not even aware that there was a requirement to file a notice of appeal thirty days from the date when the decision was made.

Mr. Nyika submitted that, based on the facts disclosed in the supporting affidavit, the Applicant was in an honest belief that the engaged advocate was acting in accordance with the law only to find it otherwise later, because, no '*Notice of Appeal*' was timely filed in Court, which was the first essential step in pursuing an appeal and, that, the time to do so has since lapsed. He told this Court that, the Applicant came to the realization that that the 30days within which an appeal should have been lodge had long expired when he instructed Messrs IMMMA Advocates to take over the process of pursuing the appeal.

Mr. Nyika submitted that, upon being instructed, the newly engaged advocates took immediate steps to ensure that this application is brought to the attention of this Court as soon as practicable. Mr. Nyika admitted that the delay to file the requisite notice of appeal was caused by inaction, negligence, or lack of proper advice from the former Applicant's counsel. He contended that, the Applicant had left the matter, including the advice and handling of the Appeal process to the Advocate believing that all advice he was getting, and steps being taken were correct only to find that one step was missed.

To shielding his client, Mr. Nyika relied on the case of **Dr. Nkini & Associates (supra) and Yusufu Same & Another vs. Hadija Yusufu**, Civil Appeal No.1 of 2002 as well as that of **Felix Tumbo Kisima vs. TTCL Ltd and Another**, Civil Appl. No.1 of 1997, (CAT) (unreported) and contended that, negligence of an advocate may at times constitute a good cause to allow an application for extension of time.

He contended that, such a principle as contained in the above cited cases, is premised on the spirit that, a litigant, in

this case the Applicant's rights, should not be prejudiced by the negligence or mistakes made by an advocate. He surmised, hence, that, it is in the interest of justice that extension of time be granted to the Applicant because the applicant did all that could be done but the rights of the Applicant were prejudiced by the acts of the previous advocate.

As such, he urged this Court to make a finding that this is the fit case to apply the principle as the delay was not a result of contributory or dilatory conduct on the part of the Applicant, hence, warranting extension of time. In my view, however, the premise upon which Mr. Nyika seems to bank his argument on should be taken to be the exception to the rule since, in the case of **Umoja Garage vs. National Bank of Commerce**, [1997] TLR 109, the Court of Appeal did hold that the advocate's inadvertent actions and/or negligence cannot constitute good cause.

As regards the requirement to account for each day of delay Mr. Nyika admitted rightly that, as a settled position of the law, an applicant who is knocks the doors of the Court as late hours with a view to be given audience must account for

each day of his delay to do so. The cases of **Iddi Nyange vs. Maua Saidi**, Civil Appl. No.132/01 of 2017 (CAT) (unreported) and **Bushiri Hassan vs. Latifa Lukio Mashayo**, Civil Appl. No.3 of 2007, (unreported), are all relevant to that point.

Mr. Nyika has submitted that, as per the facts in the Applicant's affidavit, immediately after the delivery of the judgement, the Applicant did meet with the previous advocate on the 25th of February 2022. He contended that, being dissatisfied with the decision of the Court instructed him to commence the appeal process and, that, on the 28th of February 2022 the Applicant's previous counsel wrote to the Court requesting to be availed with certified copies of the Judgement, Decree, Proceedings and Exhibits for purposes of lodging an appeal at the Court of Appeal of Tanzania.

He noted that, a formal notice of appeal was not filed in time and, that, the Applicant was only made aware of that fact by IMMMA Advocates who the Applicant had engaged to take over from the previous advocate, hence the lodging of this application upon the Applicant's instruction on the 10th of January 2023. According to him, from the 10th of January

2023 to the 23rd of January 2023 time was spent to review the case file, discussing with the Applicant's advocates on the way forward and the preparation and filing of this Application.

Mr. Nyika contended further that, the earlier period between 25th of March 2022 (the date when the time to file the requisite notice expired) to 9th of January 2023, was spent by the Applicant *bonafide* believing that his then Counsel had taken all proper steps in pursuing the appeal including filing the 'Notice of Appeal' in the appropriate registry.

He submitted further that, as narrated in paragraphs 6, 10, 13, 15, 16 and 17 of the affidavit of Mr. Jie Qui, the Applicant was diligent in pursuing the matter. In support of his submission, he has relied on the case of **Standard Chartered Bank vs. Bata Shoes (T) Ltd**, Civil Application No. 101 of 2006 (CAT) (unreported) and **Michael Lessani Kweka vs. John Eliafye** [1997] TLR 152. In the Standard Chartered Bank case (*supra*), the Court of Appeal was of the view that:

"Although generally the Plea of inadvertence is not sufficient, nevertheless, I think that extension of

time may be granted upon such plea in certain case, for example, where the party putting forward such a plea is shown to have acted reasonably diligently to discover the omission of and upon such discovery, he acted promptly to seek remedy for it.”

What may be asked based on the above quoted passage in relation to the matter at hand is whether the Applicant has shown that he acted reasonably diligently in discovering the omission and acted promptly to remedy the situation. Mr. Nyika seems to support a view that, the Applicant has acted that way. I will demonstrate otherwise later herein.

Concerning illegalities, it was Mr. Nyika’s submission that, itself can be a sufficient cause for allowing an application for extension of time. He relied on the case of **Rovitha Kemilembe vs. MIC Tanzania Ltd**, Civil Appl.No.192/17 of 2021 (CAT), (unreported) and that of **Principal Secretary, Ministry of Defence, National Service** (supra). He urged this Court, thus, to grant the application. Looking at his submission on that point, it is indeed correct that “illegality”

can be relied upon as a reason for granting a prayer for extension of time, but, as I shall state later, here below, that is not all that needs to be looked at.

Responding to Mr. Nyika's submission, it was the submission of Mr. Jovinson Kagirwa, learned counsel for the Respondent that, the application at hand has not met the requisite tests and requirement for the granting of a prayer for extension of time within which to file the Notice of Appeal. In the first place, he joined hands with Mr. Nyika regarding the applicable principles to a situation as the one at hand.

However, he parted ways with Mr. Nyika and contended that, the points which are taken on board as constituting good cause must be looked at consecutively to arrive at a conclusion that, indeed there is good cause. Mr. Kagirwa contended, that, the Applicant's counsel has included the issue of illegality in his submissions but nowhere was this issue raised, not in the Chamber Summons or in the Affidavit filed in support of the application.

In his submission, he maintained that good cause is the only principle under which this Court is required to exercise its discretion. For that matter, Mr. Kagirwa noted

that, what this Court is required to ask is whether the Applicant has demonstrated good cause. Indeed, that is the key issue which this Court will seek to address before granting or refusing an application as the one at hand.

In the case of **Vedastus Raphael vs. Mwanza City Council and 2 Others**, Civil Application No.594/08 of 2021, the Court of Appeal made it clear that what constitutes good faith depends on the circumstances of each case. In view of that, Mr. Kagirwa submitted that, several factors are to be considered. Such factors were earlier pointed out by the Counsel for the Applicant as well.

Mr. Kagirwa submitted, however, that, according to paragraphs 6, 7, 8, and 9 of the affidavit supporting the application the reasons disclosed therein as the causative agent of failure to file the requisite 'Notice of Appeal' in time thereby warranting this application, is the failure by the applicant's previous lawyer to lodge the requisite 'Notice of Appeal' within prescribed time despite being instructed to do so due to ignorance of the procedure or law on the part of that previous lawyer.

In his submission, Mr. Kagirwa submitted that, in the first instance, it doubtful that the Applicant did instruct the said previous lawyer as contended in paragraphs 6, 7, 8, and 9 of the Affidavit supporting the application. He referred to this Court paragraphs 4 and 7 of the Counter Affidavit where the Respondent disputed the stated facts on those paragraphs referred to by the Applicant's counsel and stated that, the email dated 23rd December 2022 was a communication made way beyond 10 months after the delivery of the Judgment of this Court.

He also contended that, the e-mail dated 20th of December 2022 does clearly show that the instructions to appeal were issued after a lapse of 10 months. Looking at all that, Mr. Kagirwa submitted that, other than the bare averments in the Affidavit, there is no proof availed to the Court to support the fact that the alleged instructions to institute an appeal were indeed issued to the previous advocate.

In principle, his submission was anchored on the lack of an affidavit from the advocate mentioned in the Affidavit of Mr. Jie which he insisted was necessary. To bolster his

submissions, Mr. Kagirwa has relied on the cases of **Mariam Khali Fan Mtoro vs. Shirika la Umeme Tanzania (TANESCO)**, Civil Appl.No.301/18 of 2020 and **Power and Network Backup Ltd vs. Olafsson Sequeira**, Civil Appl. No.307/18 of 2021 (CAT) (unreported).

In his submission, Mr. Kagirwa has as well contended that, looking at both the affidavit supporting the application and its annexures, in particular the email dated 20th of December 2022, the two do not co-relate. He argued that, as per the 20th of December 2020's email, the Applicant instructed the previous counsel on that date and requested for costs associated with prosecution of the intended appeal. He also contended that, as per paragraph 8 of the supporting affidavit, the Applicant instructed IMMMA Advocates on the 10th of January 2023. His conclusions, however, are that the decision to pursue an appeal was made on the 10th of January 2022.

Be that, as it may, in my considered view, I think that, in the totality of things, Mr. Kagirwa's submission has portrayed a correct legal position. I hold it to be so because, as correctly asserted by Mr. Kagirwa, on several times, the

Affidavit in support of the application has referred to one Mr. Kulwa Nshishi, the advocate who was previously engaged by the Applicant to conduct the previous suit from which this application emanates, but no affidavit was filed by the said Kulwa Nshishi to support the assertions.

Essentially, in the case of **Mariam Khali (supra)**, the Court of Appeal instructively stated that:

"If an affidavit mentions another person, then, that person has to swear an affidavit. However, I would add that, that is where the information of that other person is material evidence because without that other affidavit, it would be hearsay."

It is my considered view, that, in this application, whether the previous learned advocate in the name of Mr. Kulwa Nshishi was ever instructed, is material fact to the success of this application since, such a material fact properly established in evidence, forms the bedrock of all other assertions that Mr. Nshishi was instructed to commence the processes of appeal timely, only that, he missed the initial

step of filing the “Notice of Appeal” which was vital to the success of the envisaged appeal.

In my view, knowing when the previous advocate Mr. Nshishi was duly instructed is very important, firstly, because, had that been filed, one would be able to realise if at all such instructions were issued at all, and more so, were if they were issued on time or came as afterthoughts while the time to file the requisite notice had long expired.

Secondly, that disclosure, would help one to determine whether the Applicant acted reasonably diligently in discovering the omission and upon such discovery, he acted promptly to seek for its remedial action. (See **Standard Chartered Bank case** (supra). It is for those two reasons I find Mr. Kagirwa’s arguments to be sound and quite relevant regarding the point that, the affidavit of Mr. Nshishi was necessary having been mentioned in the supporting affidavit.

Concerning the issue of illegality, it was a further submission of Mr. Kagirwa that, much as that point is recognised as one of the points upon which reliance may be laid to warrant granting of a prayer for extension of time, the said condition was qualified by the Court of Appeal in the

Lyamuya's case (supra). In the **Lyamuya's case** (supra) the Court of Appeal of Tanzania had the following to say:

"Since every party to appeal seeks to challenge a decision either on points of law or fact, it cannot in my view, be said that in VALAMBHIA'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 if 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 apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by a long-drawn argument or process.**' (Emphasis added).

In his submission, Mr. Kagirwa has contended, firstly, that, the purported "illegality" was not an issue pleaded in the affidavit filed in support of the application. Secondly, he has

argued that the point raised does not fit in or meet the requirements set out in **Lyamuya's case** (supra). In essence, I tend to agree with what Mr. Kagirwa's contentions. Admittedly, nowhere has the Applicant raised an issue of "illegality" in the affidavit supporting the application but such a point has been canvassed in the submissions. As a settled legal principle, submissions from the bar are not a basis of evidence.

In my considered view, Mr. Nyika's contention regarding what he refers to as "illegality", which is in reference to the "interest rate awarded by the Court", can neither be regarded as an "illegality" **apparent on the face of the record** nor can such an issue constitute a point of law, must be that **"of sufficient importance."**

As I stated earlier, Mr. Nyika did file rejoinder submission, but I do not find anything substantial in that submission which can tilt the scales. Instead, from my assessment of the rival submissions filed by the parties, I find that, the Applicant has no sufficient cause to warrant this Court exercise her discretion and grant the prayers sought after.

In fact, as it may be noticed in Mr. Nyika's submission in chief, there is an outright admission that the delay was a result of negligence and/or ignorance of the procedures, on the part of the earlier Counsel engaged by the Applicant. However, it is a settled legal position as expressed in the case of **Vedastus Raphael** (supra) by the Court of Appeal, that:

"ignorance of the law or rather procedure involved in doing something does not constitute good cause to warrant extension of time. This position was emphasized in the case of **Farida F. Mbarak** (supra) where the Court discussed an akin issue ..."

Considering the above position and the discussions made herein, this Court settles for the following verdict and orders:

1. The Applicant has not been able to demonstrate sufficient cause regarding why there was a delay to file the Notice of Appeal in time.
2. That, the application being devoid of merit is hereby dismissed.

3. That, the dismissal is with costs to the
1st Respondent.

It is so ordered.

**DATED AT DAR-ES-SALAAM ON THIS 05TH DAY OF
JULY 2023**



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DEO JOHN NANGELA
JUDGE