

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISC COMMERCIAL APPLICATION NO. 201 OF 2022**

**(Arising from Misc. Commercial Cause No. 33 of 2021)**

**MOHAMED ABDILLAH NUR.....1<sup>ST</sup> APPLICANT**

**UMMUL KHERI MOHAMED.....2<sup>ND</sup> APPLICANT**

**WINGS FLIGHT SERVICES LTD.....3<sup>RD</sup> APPLICANT**

**VERSUS**

**HAMAD MASAUNI .....1<sup>ST</sup> RESPONDENT**

**ARTHUR MOSHA.....2<sup>ND</sup> RESPONDENT**

**JUMA MABAKILA.....3<sup>RD</sup> RESPONDENT**

**RULING**

*Date of Last Order: 01/12/2022.*

*Date of Judgement: 24/2/2023.*

**AGATHO, J.:**

In this application, the applicants are in pursuit of extension of time within which to file an application for leave to appeal to the Court of Appeal (CAT) against the ruling and order in Miscellaneous Commercial cause No.33 of 2021 dated 8<sup>th</sup> July,2022. The application was brought by way of chamber summons made under, section 11(1) of the appellate Jurisdiction Act, [Cap 141 R.E. 2019], Section 95 of the Civil Procedure Code [CAP 33 R.E. 2019] and Rule 2(2) of the High Court

(commercial Division) Procedural Rule, 2012 as amended in 2019, praying for following orders:

1. That this honourable court may be pleased to extend time for applicants to apply for leave to appeal to court of appeal of Tanzania against the ruling and orders of the High court in Misc. Commercial Cause No. 33 of 2021.
2. costs
3. Any other reliefs as this court shall deem fit and just to grant.

The chamber summons was accompanied by the affidavit sworn by Abdillah Mohamed Nur a director of the 3<sup>rd</sup> and 4<sup>th</sup> Applicant, Mohamed Abdillah Nur 1<sup>st</sup> Applicant and Ummul Kheri Mohamed 2<sup>nd</sup> Applicant, stating the reasons why this application should be granted. Upon being served with chamber summons accompanied with affidavits, the respondents through the 1<sup>st</sup> respondent on behalf and other respondents filed counter affidavit stating the reasons why this application should not be granted.

A brief background of the matter leading to this application is that, in the year 2020 the respondents herein vide Misc. Application No 164 of 2020 preferred an ex-parte application seeking for the leave to institute a derivative action on behalf of the 4<sup>th</sup> respondent. Following the grant of

leave, the respondents then proceeded to file Misc. Commercial Cause No 33 of 2021. Upon the determination of the petition, the court delivered its ruling on 8<sup>th</sup> July, 2022 in favour of the respondents. Being aggrieved by the decision, the applicant lodged an application for the leave to appeal, (Misc. Commercial application No 122 of 2022). However, the said application was struck out on 3<sup>rd</sup> November, 2022 for want of supportive affidavit of the 1<sup>st</sup> and 2<sup>nd</sup> Applicants, still enthusiastic to pursue the appeal, the applicants filed the instant application on 11<sup>th</sup> of November, 2022 for extension of time to lodge his application for leave to appeal to court of appeal, hence this ruling.

It was agreed between the parties that hearing of this application be by way of written submission, subsequently this court on 1.12.2022 scheduled and ordered the applicants to file written submission on 16.01.2023, the respondents to file their reply on 30.01.2023 and rejoinder if any be filed on 6.02.2023. Both parties complied with schedule. During hearing of the application, the applicants were represented by Mr. Lucas Myula learned advocate while Ms. Lujjaina Mohamed represented the respondents.

The grounds for extension of time to file application to apply for the leave to appeal to the Court of Appeal by the counsel for the applicants

can be summarised in two grounds, first, that the delay was not caused by negligence or inaction in pursuing their rights because the ruling in Misc. Commercial cause No 33 of 2021 was delivered on 8<sup>th</sup> July, 2022 the applicant on 14<sup>th</sup> July, 2022 had duly filed application for leave to appeal Misc. Commercial application No 122 of 2022 it was however, struck out on 3<sup>rd</sup> November, 2022 for being defective for want of supporting affidavit of 1<sup>st</sup> and 2<sup>nd</sup> applicants. It was the submission of the learned counsel for applicants that, following the striking out of the application in Misc. Commercial application No 122 of 2022 he promptly refiled the instant application on 11<sup>th</sup> November, 2022. According to the learned counsel for applicants, the applicants have been diligently in prosecuting their case ever since. The learned counsel for applicants denied being negligent or sloppy as error which led to striking out of the application was not caused by negligence but rather the delay to file application for leave was caused by sufficient cause. On that note the learned counsel urged the court to grant the application because a technical delay constitutes a sufficient reason for extension of time. To support his argument, he cited the cases of **Benedict Mumello v Bank of Tanzania, Civil Application No 12 of 2012**, and **Tanga Cement Company Ltd v Jumanne D. Madangwa and Amos A. Mwalwanda, Civil application No 6 of 2001** (both unreported).

Another reason advanced is on illegalities. The learned counsel for applicants under paragraph 4 of the affidavit and in his submission, he mentioned 8 issues that need to be looked by the Court of Appeal. He contended that, the decision on Misc. Commercial Cause No. 33 of 2021 was tainted with illegalities because the court had no jurisdiction to entertain the matter, it did not adhere to Civil Procedure Code [Cap 33 R.E. 2019], the said petition was not a derivative action but the court entertained it like it is a derivative action. It was filed out of time, leave was not required under Section 234 of the Companies Act, there was no proper interpretation of Sections 233 and 234 of the Companies Act [Cap 212 R.E. 2002], and whether the damages granted were according to the law. According to the learned advocate these issues are serious matter of law and mixed law and fact which deserve to be considered by the Court of Appeal. And since there is illegality then it is sufficient reason for extension of time.

Submitting against the grant of application the learned counsel for respondent, prayed to adopt counter affidavit to form part of their submission filed in opposing this application. Admitting that the grant of an extension of time was entirely in the discretion of the court she referred this court to the case of **Benedict Mumello (supra)**.

Submitting further the learned counsel added that and when the court is exercising its discretion to grant the application for extension it should be guided by the principals stipulated in the case of the case of **Lyamuya Construction Company Limited v Association of Tanzania, Civil Appeal No. 2 of 2010 (unreported)** must be observed. Those principles are as follows,

- i. The applicant must account for all days of the delay
- ii. The delay should not be inordinate
- iii. The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take and
- iv. If the court feels that there are other reasons, such as the existence of a point of law of sufficient importance, such as illegality of the decision sought to be challenged.

Expounding his submission, the learned counsel for respondents, submitted that there is no reason for delay rather that the negligence and sloppiness on the part of applicant and their advocate and they are just hiding under the principle of technical delay. But they were negligence to file Misc. Commercial Application No. 122 of 2022 which was struck out for being defective for want of supporting affidavit of the

1<sup>st</sup> and 2<sup>nd</sup> applicants. According to the learned counsel for respondents, the applicants' or their advocate's negligence is not and can never be taken as a good cause for extension of time by the court. To buttress his point cited the case of **Umoja Gerege v National Bank of commerce [1997] TLR 109; Hamis Mohamed v Mtumwa Moshi, Civil Application No 407 of 2009** cited in the case of **Mwesiga Christian Michael v Feza Girls Secondary School, Revision Application No. 449 of 2020 [2021] TZCLD 510 (08 November 2021)** in which it was held that, lack of diligence on the part of counsel is not sufficient ground for extension of time because applicant has to be diligent all along in pursuing his right and not negligent and sloppy. He contended that to the respondents, the applicants were negligent and sloppy for filing an incompetent application therefore they cannot use technical delay as ground for extension of time. In addition, he submitted that, the applicants have failed to account for all the period of delay, the original application was struck out on 3<sup>rd</sup> November, 2022, and they refiled the instant application on 11<sup>th</sup> November, 2022. According to the learned counsel for respondents the applicants ought to have accounted for days delayed after the striking out of the application. To cement his position referred this court to the **Airtel Tanzania Ltd v Mr Mister Light Electronical Installation Co. Ltd & another, Civil**

**Application No 37 /01 of 2020** with the approval of the case of **Bushiri Hassan v Latifa Lukio Mashayo Civil Application No. 3 of 2007 (unreported)**. He urged this court to dismiss this application with costs for want of reasonable cause.

The learned counsel for Respondents referred to paragraph 3 of the counter affidavit where they strongly disputed that there is no serious issue of law that need to be considered and decided by the Court of Appeal. They say so because the petition was brought under Section 234 of the Companies Act as the respondents were protecting the interest of the 4<sup>th</sup> respondent. The respondents averred further that the petition was not filed out of time because it was emanating from the joint venture agreement which was still intact as a such the provision of Sections 233 and 234 were properly interpreted. The respondents stated that, the relief granted were according to prayers in the petition and all that were granted without being prayed for fall under item vii on other reliefs. The respondents stated further that hearing was conducted by way of written submission as per order dated 11<sup>th</sup> May, 2022 all parties were given right to be heard. In concluding his submission, the learned counsel for the respondents attacked the submissions by the applicants' counsel. He contended that, what the applicants did in their submissions



in chief was only to pinpoint what happened in the proceedings without demonstrating sufficient reasons to warrant grant of the application.

In rejoinder the learned counsel for applicants reiterated what he submitted in chief and referred this court to the case of **Principal Secretary, Ministry of Defence and National Service v Devram Valambia [1995] TLR 387** and the case of **National Housing Corporation Vs Etienes Hotel Civil Application No 10 of 2005** where the Court held that, where there is an application which falls within the technical delay and the decision to be challenged is tainted by illegality the two circumstances as such are fit for one to grant the sought extension of time. Submitting further the learned counsel for applicants added that the applicants have accounted for each day of delay and the argument that they have not accounted for each day delay is a mere statement from the bar because it was not raised in counter affidavit. Since submissions are not evidence or law that argument remain as a mere statement and cannot be acted by the court. To cement his position, he referred this court to the case of **James Bernaro Ntambala v Furaha Denis Pashu, Civil Application No 178/11 of 2016** and the case of **FINCA Tanzania**

**Limited v Hassan Lolila, Civil Application No 165/18 of 2021**

**CAT.**

Regarding above authorities, the learned advocate for the applicants implored this court to ignore the submission made by the respondents because three days of delay cannot be considered as unreasonable delay. Concluding his submission, the learned counsel submitted that some of illegalities mentioned need to be considered by the Court of Appeal because most of them go to the root of the matter especially the question of jurisdiction as a such this court be pleased to extend time within which the applicants to apply for leave to appeal.

Having heard and followed the rivalling arguments for and against the grant of this application, in my respective opinion, the issue for determine is whether the applicant has demonstrated sufficient cause warranting this Court to grant the application. It is trite law that, applicant seeking for extension of time having failed to act or do a certain legal act, must disclose sufficient reasons regarding why he was unable to do that act within the prescribed time and always the aim must be to achieve real and substantial justice between the parties and implication of the issue to the parties. It should be further noted that, what constitute a sufficient cause cannot be laid by any hard and fast

rules but depends on the fact in each case. The above stance was stated in the case of **VODACOM Foundation v Commissioner General (TRA) Civil Appeal No. 107 /20 of 2017 CAT (Unreported)**. However, the relevant factors must be taken into account, these includes, length of the delay, the reasons for the delay whether there is an arguable case on appeal and if will cause prejudice to the defendant if time extended. Now back to the instant application, having carefully considered the rival arguments of learned counsel for the parties on grant or not to grant and having gone through the affidavits for and against the application and the circumstance of the case, the question is whether technical delay coupled with illegalities can be a sufficient cause to warrant extension of time to file application for leave to appeal to the Court of Appeal?

The applicants' contention is that the delay to file was attributed by technical delay. While the learned counsel for respondents refuted reliance on technical delay and submitted that, the said technical delay were technical error caused by lack of diligence and seriousness of the part of applicants. I agree with the respondents' counsel that, lack of diligence on the part of the advocate is not a sufficient reason for enlargement of time. However, extension of time may be granted if the

party seeking extension of time has shown that he has acted reasonably diligently and promptly to seek remedy. If that is the position, then, the question that follows, therefore, is whether the applicants acted reasonably diligently and promptly in seeking the remedy. The original application was filed timely but with a serious anomaly that rendered it incompetent. The present application was filed only because the original application was found to be incompetent, and it was struck out on 3<sup>rd</sup> November 2022. This means that the applicants could refile it after rectification of the errors which featured in the said application and if there was not a possibility that the application can be re-filed again the Court could have dismissed it to close all options of refiling. See the case of **Fortunatus Masha v William Shija and Another [1997] TLR 154** in which it was stated and held that:

*"Where it was stated that, a distinction has to be drawn between cases involving real or actual delays and those such as the present one which clearly only involve technical delay 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 has to be instituted."*

*"In the present case the applicants had acted immediately after pronouncement of the ruling of the court striking out the first application. In these circumstances, an extension of time ought to be granted."*

In the circumstance, I subscribe to the view taken by CAT in the above case, that since the applicants have been dully penalised by having Misc. Commercial Application No 122 of 2022 struck out, lack of diligence cannot be used to refuse extension of time to refile the fresh appeal because at first place the applicants acted diligently and promptly in seeking the remedy save only for negligence on filling Misc. Commercial Application No 122 of 2022. And the said negligence was not in the delay to refiling the instant application but rather in the previously application which was penalised by striking it out for being incompetent.

Let me ponder this point a little more. It is intriguing that the Applicants filed the application without a supporting affidavit. That in my view is a gross negligence that ought not to take advantage of a technical delay. But unfortunately, the technical delay excuse lacks clear parameters to restrict its use. Having that in mind I am inclined to hold that the negligence on the applicants in filling incompetent application may hardly be used as a ground for refusing to grant extension of time to

re-lodge the application to apply for leave to appeal to the Court of Appeal. The technical delay defence on the part of applicants is thus a sufficient cause to extend time considering that the said negligence was penalised by striking out the former application. See **The Director General LAPF Pension Fund v Pascal Ngalo, Civil Application No. 76/08 of 2018 CAT.**

The next ground was on illegality. I am alive that once illegality is raised as ground of extension of time has been argued and proved, a party is not burdened to account for each day delay. See **Attorney General v Wafanyabiashara Soko Dogo Kariakoo Cooperative Society Ltd, Misc. Civil Application No. 606 of 2015** at page 10 where the delay was for 12 years but extension of time was granted.

However, a party may not be at liberty to apply for extension of time any time he wishes as long as he banks on illegality. Also, I am aware that illegality that has been raised as ground for extension must be on the face of the record. See **Lyamuya Construction's case** (supra). The question is whether the raised illegality is sufficient of importance and apparent on the face of the record? I have perused the records on the impugned ruling, all alleged illegalities were raised as point of preliminary objection in the petition and the question of jurisdiction and

period of limitation were dropped out by the learned counsel for applicants on ground that the court had jurisdiction and the petition was not filed out of time. For detailed analysis of illegality as a ground for extension of time see **Marcel J. Msoka v Abdi Mshangama, Misc. Civil Application No. 3 of 2022, High Court of Tanzania, Tanga District Registry** (unreported).

Indeed, it is now settled that for illegality to amount to good ground to support application for extension of time, it should emanate from the proceedings or judgement sought to be challenged and not one that would be discovered by long-drawn arguments or process. See **Lyamuya Construction Company Ltd v Board of Registered Trustees of Young Women Christian Association of Tanzania, Civil Application No. 2 of 2010 CAT**. It is my considered opinion that, since the question of jurisdiction and time limitation were left out the rest of issues will take a long-drawn to decipher from the impugned decision the alleged misdirection and non-direction on the points of law. This is what the case law such as **Lyamuya Construction's case** (supra) clearly disallows. If there are any illegalities then they are not apparent on record as they require a long-drawn-out process to reach to the bottom of the claimed illegalities as it was held in **Lyamuya**

**Construction's case** (supra). I thus decline to hold such illegalities are apparent on record.

However, I have considered the circumstance of this application and the interest of justice alongside the conduct of the applicants. It is worth noting that the illegalities claimed in impugned ruling is not apparent on record after all the petition was a derivative action. Further this Court was only asked to consider extending time so that the Applicants could file an application to apply for leave to appeal to the Court of Appeal and for the interest of justice. To do an in-depth examination of the record of proceedings to fetch the illegalities claimed will be going beyond the territory the Court is permitted at this stage. Nevertheless, it is a common ground that the extension of time sought by the Applicants to file the application for leave to appeal to the Court of Appeal is the only way through which the Applicants can pursue their rights. Like such scenario, in the case of **Mobrama Gold Company Ltd v. Minister for Energy [1998] TLR 426** it was held that:

*"It is generally inappropriate to deny a party an extension of time where such denial will stifle his case; as the applicant's delay does not constitute a case of procedural abuse or contemptuous default and because the Respondent will not*

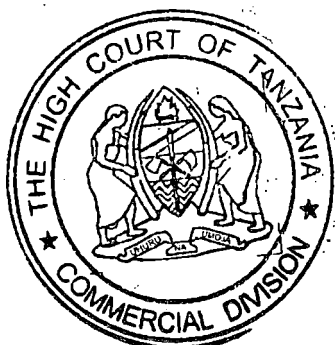


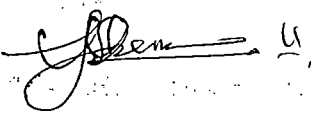
*suffer any prejudice, an extension should be granted.*

That being a position, I am inclined to grant the Applicants the extension of time to apply for leave to appeal to the Court of Appeal. That said and done, this application for extension of time is hereby granted. The Applicants are given 14 days from today to apply for leave to appeal to the Court of Appeal. Since the parties have had, and yet are in a legal tussle each party shall bear its costs.

It is so ordered.

**DATED at DAR ES SALAAM this 24<sup>th</sup> Day of February 2023.**



  
**U. J. AGATHO**  
**JUDGE**  
**24/02/2023**

**Date: 24/02/2023**

**Coram:** Hon. U. J. Agatho, J.

**For Applicants:** Mr. Lucas Myula, Advocate

**For Respondents:** Ms. Lujjaina Mohamed, Advocate.

**C/Clerk:** Beatrice

**Court:** Ruling delivered in chambers, today this 24<sup>th</sup> February 2023 in the presence of Mr. Lucas Myula, counsel for the Applicants, and Ms. Lujjaina Mohamed, learned counsel for the Respondents.



**U. J. AGATHO**  
**JUDGE**  
**24/02/2023**