

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

MISC. COMMERCIAL APPLICATION NO. 179 OF 2022

(Arising from Commercial Case No.17 of 2018)

DIANA ALEX KAJUMULO

t/a M/S D. K. AGENCIES COMPANYAPPLICANT

VERSUS

EXIM BANK (TANZANIA) LIMITEDRESPONDENT

RULING

A.A. MBAGWA, J.

The applicant herein, by way of chamber summons, brought this application praying for the following orders;

- i) That this Honourable Court be pleased to grant an order for the extension of time for the applicant to give a notice of intention to appeal from the judgment of the High Court of Tanzania (Commercial Division) in Commercial Case No. 17 of 2018 given by B.K. Phillip J, on the 3rd day of June, 2019 and subsequent to that give the applicant an extension of time to serve the respondent Notice of Appeal and an applicant letter for certified copies of the

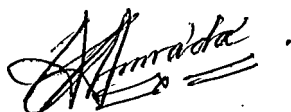


proceedings, judgment, decree and exhibit in Commercial Case No. 17 of 2018.

- ii) That this Honorable Court be pleased to make such any other orders as it may deem fit and just to grant

The application was supported by an affidavit sworn by Mutakyamirwa Philemon, the applicant's learned advocate. The deponent contends that the main ground for delay is a mistake of fact which resulted in striking out of Civil Appeal No. 250 of 2019.

Expounding, in his affidavit, Mr. Philemon contended that the applicant was dissatisfied with the decision of this court (B.K. Phillip J) which was delivered on 3rd June, 2019. As such, the applicant lodged a notice of appeal along with an application letter for certified copies of judgment, decree and proceedings and the same were served to the respondent. However, according to the applicant, the respondent endorsed only the notice of appeal while leaving the application letter unendorsed. Believing that everything was in order, the applicant proceeded to request for certificate of delay after which he filed Civil Appeal No. 250 of 2019 in the Court Appeal. The applicant further contended that the said Civil Appeal No. 250 of 2019 when called on for hearing, the respondent's counsel raised a preliminary



objection on point of law to the effect that, the appeal was time barred on the ground that, the applicant did not serve respondent with application letter for certified copies of judgment, decree and proceedings hence a violation of rule 90(3) of the Court of Appeal Rules, 2009. The learned advocate averred that, the applicant conceded to the objection as such, Civil Appeal No. 250 of 2019 was struck out on 4th October, 2022, by the Court of Appeal. It is against the narrated background, the applicant has brought this application seeking for the above-mentioned reliefs. The applicant therefore implored the court to grant the sought reliefs on the ground that she has demonstrated sufficient cause for delay.

In rebuttal, the application was hotly contested by the respondent through a counter affidavit duly affirmed by Gigi Maajar, the respondent's learned counsel. Miss Gigi Maajar parts company with the applicant on the sufficiency of the reason for delay. She adamantly stated that the letter was not served on the respondent as contended by the applicant and this was the reason for the applicant's counsel's concession to the preliminary objection in Civil Appeal No. 250 of 2019. According to Gigi Maajar, failure to serve the respondent with an application letter for certified copies of judgment, decree and proceedings is not excusable in law because it is contrary to the



requirement of rule 90(3) of the Tanzania Court of Appeal Rules, 2009 herein after referred to as the Rules. In the end, the respondent prayed for dismissal of the application with costs for being devoid of merits.

When the matter was called on for hearing on 5th December, 2022, the applicant was represented by Mutakyamirwa Philemon, learned advocate whilst the respondent had services of Gigi Maajar assisted by Idd Juma, learned advocates. Both counsel prayed for and were allowed to argue the application by way of written submissions. I am thankful to both counsel for their insightful submissions which were timely filed in court.

It was the applicant's submission that, there is no dispute that after delivery of judgment in Commercial Case No. 17 of 2018, the applicant timely filed a notice of appeal and application letter for certified copies of judgment, decree and proceedings. The counsel further submitted that the only fault that the applicant committed was failure to ensure that the respondent endorsed on the application letter. According to the applicant's counsel, the delay deserves to be classified as technical delay because the said Civil Appeal No. 250 of 2019 had been filed in time but it was struck out due to technical error namely, failure to serve the respondent with application letter. The applicant's counsel relied on the case of **Fortunatus Masha vs**



William Shija and Another 1997 T.L.R. 155 to tell the court that technical delay is considered a sufficient cause for extension of time. Mr. Philemon continued that, failure to serve the application letter was just a mistake of fact and therefore excusable.

On the adversary, the respondent's counsel had different views. The counsel submitted that the applicant failed to establish good cause for this court to grant extension. She submitted that there are three factors to be considered in the determination of application for extension of time namely, one, whether the length of time has been explained away, two, whether the applicant was diligent as opposed to negligent and three, whether there is illegality in the decision sought to be impugned. The respondent's counsel strongly submitted that the applicant was negligent by failing to serve the respondent with an application letter for certified copies of judgment, decree and proceedings. Further, the learned counsel argued that the anomaly is inexcusable because it was a failure to adhere to the requirement of rule 90(3) of the Rules. To bolster her argument, the counsel cited the case of **Damas Assey and Flora D. Assey vs Raymond Mgonda Paula and others**, Civil Application No. 32/17 of 2018, CAT at Dar es Salaam. The counsel continued to submit further that, there is no illegality in the decision

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sought to be challenged nor has the applicant accounted for each day of delay. The respondent's counsel cited the case of **Johnson Izengo vs Chacha Magoti Nshoya and 4 others**, Misc. Land Application No. 428 of 2021, HC (Land Division) Dar es Salaam to stress on the applicant's duty to account for each day of delay. Finally, the counsel submitted that the applicant has failed to establish the factors enunciated in the above cited case as such, the applicant has failed to show sufficient cause as required by law.

In the end, the counsel beseeched the court to dismiss the application with costs.

I have keenly gone through the rival submissions as well as the depositions along with their accompanying documents filed by the parties. It is common cause that the main reason for the applicant's delay is the striking out of Civil Appeal No. 250 of 2019 due to the applicant's failure to serve the respondent with an application letter for certified copies of judgment, decree and proceedings contrary to rule 90(3) of the Rules.

The applicant contended that the failure was a mistake of fact and therefore it is excusable while the respondent was opined that the omission is not excusable because it resulted from the applicant's negligence.



Thus, the pivotal issue for determination of this application is whether the applicant has demonstrated sufficient cause, in the circumstances of the case, to warrant extension of time.

It is now a well-established position of law that there is no hard and fast rule as to what constitutes sufficient reasons for grant of extension of time. Rather, sufficient causes are determined by reference to all the circumstances of each particular case. See **Regional Manager, Tanroads Kagera vs. Ruaha Concrete Co. Ltd**, Civil Application No. 96 of 2007, CAT at Dar Es Salaam.

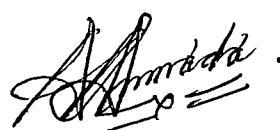
As such, in determining the good cause, courts have been invariably taking into account various factors including but not limited to length of delay involved, reasons for delay, the degree of prejudice, if any, that each party is likely to suffer, the conduct of the parties and the need to balance the interests of a party who has a decision in his favour against the interests of a party who has a constitutionally underpinned right of appeal. See **Jaliya Felix Rutaihwa vs Kalokora Bwasha & Another**, Civil Application No. 392/01 of 2020, CAT at Dar es Salaam, **Paradise Holiday Resort Limited vs. Theodore N. Lyimo**, Civil Application No. 435/01 of 2018, CAT at Dar



Es Salaam and **Ludger Bernard Nyoni vs. National Housing Corporation**, Civil Application No. 372/01 of 2018, CAT at Dar Es Salaam.

I have painstakingly scanned the parties' depositions against the above-mentioned factors in particular, the applicant's promptness in filing this application after striking out of Civil Appeal No. 250 of 2019, the applicant's constitutional right of appeal and degree of prejudice that the applicant is likely to suffer if this application is not granted. It is my findings that the applicant promptly brought this application on 10th October, 2022 immediately after Civil Appeal No. 250 of 2019 was struck out by the Court of Appeal on 4th October, 2022. In addition, I have observed that the applicant had actually filed Civil Appeal No. 250 of 2019 within time save that she omitted to serve the application letter to the respondent. Besides, my holistic assessment of the matter tells me that the applicant stands to suffer more than the respondent would if the application is not granted.

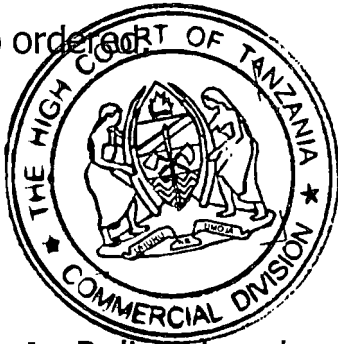
In the event, considering the factors enumerated above, I am satisfied that the applicant has demonstrated a good cause for delay hence this application has merits. Consequently, I allow the application with costs. I am a live to the general principle in civil jurisprudence that, costs follow the event but for the circumstances of this case, applicant has to pay costs because the




respondent has incurred costs of prosecuting this application due to applicant's counsel's fault.

The applicant is therefore given thirty (30) days from the date of this ruling to file a notice of appeal and serve both notice of appeal and the application letter for certified copies of judgment, decree and proceedings to the respondent.

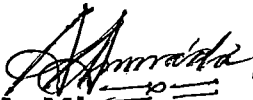
It is so ordered.




A.A. Mbagwa
JUDGE
09/03/2023

Court: Ruling has been delivered in the presence of Mutakyamirwa Philemon, learned advocate for the applicant and Idd Jumaa Kassi, learned advocate for the respondent this 9th day of March, 2023.




A.A. Mbagwa
JUDGE
09/03/2023