

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(SHINYANGA SUB-REGISTRY)
AT SHINYANGA**

MISC. CIVIL APPLICATION NO. 27696 OF 2023

*(Arising from the decision of the High Court of Tanzania, Shinyanga Sub-Registry at
Shinyanga in Civil Appeal No. 15 of 2022)*

ZACHARIA FAUSTINE MASALU.....APPELLANT

VERSUS

NGOSSO TRADERS CO. LTD..... RESPONDENT

RULING

Date of Last Order: 24.03.2024

Date of Ruling: 28.03.2024

MWAKAHESYA, J.:

The applicant herein is applying for leave to file notice of appeal to the Court of Appeal out of time. The intended appeal being against the judgment of the High Court of Tanzania, Shinyanga District Registry, at Shinyanga in Civil Appeal No. 15 of 2022.

A brief background of the matter is that, at the Kahama District Court the applicant had filed Civil Case No. 38 of 2021 against the respondent. When the same was heard and became due for judgment the applicant withdrew it with leave to refile citing that he desired to join a necessary party. The trial court granted the withdrawal thus prompting the

respondent to appeal against the order through Civil Appeal No. 15 of 2022.

On the 16th August, 2023 the High Court, Hon. Mahimbali, J. allowed the appeal, quashed the proceedings and the resulting orders in Civil Case No. 38 of 2021, directed the trial magistrate to compose/pronounce the prepared judgment, condemned the applicant to pay costs incurred by the respondent in litigating Civil Case No. 38 of 2021 and costs of the appeal.

Subsequently, at the conclusion of Civil Case No. 38 of 2021 the trial court found in favour of the applicant and amongst other reliefs granted him costs of the suit.

The present application is brought by way of chamber summons and is supported by an affidavit sworn by the applicant himself. The gist of the applicant's application can be garnered from paragraphs 6-10 of his affidavit in support of the application. The same are reproduced hereunder:

6. That, the Applicant aggrieved with the order of the Appellant (*sic*) Court in Civil Appeal No. 15 of 2022 in respect of paying costs of litigating Civil Case No. 38 of 2021 but failed to lodge a notice of appeal within the prescribed time as the Appeal would be premature

as there was an order to the lower court to pronounce judgment of the Civil Case No. 38 of 2021.

7. That, immediately after the delivery of the judgment of Civil Case No. 38 of 2021, the Applicant could have lodged a notice of appeal but he was unable to proceed with his appeal because of economic hardship he went through that made him unable to pay for a lawyer who may go through the appeal process.

8. That, in line with the fact in paragraph 7 above, the applicant failed to lodge a notice of appeal within time as there are two pending cases the respondent filed against the applicant regarding Civil Case No. 38/2021 of which the applicant is spending money to defend the same. One, is Taxation Cause No. 04 of 2023 filed on 10/10/2023 in the District Court of Kahama, before Hon. E.P. Kente-SRM, and two, Civil Appeal No. 17 of 2023 filed on 23/10/2023 in this court before Hon. Kulita, J.

9. That, the applicant's delay to file a notice of within time is not deliberately but is due to the premature order of cost given by the appellate court in Civil Appeal No. 15/2022, and thereafter the respondent instituted cases that has to dealt (sic) by the applicant and economic hardship the applicant has been going through.

10. That, both the Appellant (sic) Court and the trial court awarded litigating cost in respect to Civil Case No. 38 of 2021 which makes two conflicting orders that needs guidance of the higher court.

The respondent, contesting the application, filed a counter affidavit sworn by its advocate one Eric Katemi and, briefly, he counters the applicant's assertions by indicating that the applicant could have lodged a notice of appeal after the decision in Civil Appeal No. 15 of 2022 regardless of the order of the appellate court directing the trial court to compose and deliver judgment. He also contests the assertion that it was economic hardship that made the applicant unable to appeal against the order for costs made by the High Court in Civil Appeal No. 15 of 2022.

At the hearing of the application the applicant was represented by Ms. Zena Kazimoto, learned advocate, while the respondent enjoyed the services of Mr. Eric Katemi, learned advocate.

Having adopted the applicant's affidavit in support of the application Ms. Kazimoto was brief and precise in her submission. She was of the view that the order of the High Court in Civil Appeal No. 15 of 2022 that the applicant was to pay costs in Civil Case No. 38 of 2021 was premature and that was manifested when the trial court awarded the applicant costs at the conclusion of Civil Case No. 38 of 2021. She went further to state that,

as a result there are two conflicting orders: one awarding costs to the applicant, this was granted in Civil Case No. 38 of 2021; and the second one awarding costs to the respondent, which was granted in Civil Appeal No. 15 of 2022.

She elaborated that, it is difficult to enforce the orders for costs thus resulting in miscarriage of justice and due to that apparent error, the applicant is seeking extension of time to lodge notice of appeal against Civil Appeal No. 15 of 2022. She prayed that the application be allowed with costs.

In reply the learned counsel for the respondent submitted that, the applicant has not shown sufficient reasons warranting this court to grant leave to lodge Notice of Appeal to the court of Appeal out of time. He relied on the Court of Appeal decision of **Lyamuya Construction Ltd. Vs Board of Registered Trustee of Young Women's Association Christian Association of Tanzania, Civil Application No. 2 of 2010** (unreported) where at page 6 the Court listed six (6) principles to be followed in order for a court to extend time. The same are:

1. The applicant must account for all the period of delay.
2. The delay must not be inordinate.

3. The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.
4. If the court feels that there are sufficient reasons such as the existence of a point of law of sufficient importance; such as the illegality of the decision to be challenged.

Mr. Katemi went on to submit that, in the affidavit in support of the application, it is not clear as to what caused the delay for the applicant to file the intended appeal as from 16 August, 2023 when judgement in Civil Appeal No. 15 of 2022 was delivered to 15 December, 2023 when this application was filed which is about four months. Such lapse of time he termed as inordinate delay.

He submitted that, the reasons given by the applicant such as economic hardship and prematurity lack merit. The applicant has not proved that there was economic hardship which made him unable to engage a lawyer to file a notice of appeal.

On the issue of prematurity, the learned counsel submitted that, the same lacks merit as when Civil Appeal No. 15 of 2022 was delivered on 16th August, 2023 it had no bearing with Civil Case No. 38 of 2021. Therefore, if the applicant was aggrieved with the decision, he should have lodged a notice of appeal without having to wait for the decision in Civil Case No. 38 of 2021. He went on to state that, the learned counsel for the respondent

has not availed any provision of the law or case law which barred the applicant to lodge the said notice.

He concluded that, the applicant has breached the 3rd principle in **Lyamuya's Case** (supra) because he was negligent and did not take action.

Regarding the issue of illegality, the learned counsel was of the view that the same also lacks merit. He submitted that, if in Civil Appeal No. 15 of 2022 there was double costs, then that was in the discretion of the High Court hence it was not illegal. He prayed for dismissal of the application.

In rejoinder, Ms. Kazimoto concurred that **Lyamuya's Case** (supra) issued principles to be followed when a court is seized with an application like the present one. However, she focused on the 4th principle which provides that the court can extend time if it feels that there are sufficient reasons, such as the existence of a point of law of sufficient importance, or to put it in other words "the illegality of the decision to be challenged". And since the guidelines are not cumulative, she submitted that the fourth guideline warrants consideration of this court.

She went on to elaborate that, at page 9 of the said decision the Court also stated that such point of law must be of sufficient importance

and must also be apparent on the face of the record and she was of the view that, the awarding of double costs was an error.

She concluded that, the judgment in Civil Appeal No. 15 of 2022 and Civil Case No. 38 of 2021 were intertwined because the High Court's Order was that the judgement in Civil Case No. 38 of 2021 was to be pronounced. She reiterated her prayer for this court to grant the application.

Having considered the rival submission by both parties, this court is now in the position to make a finding if the application is meritorious or else.

Rule 83(2) of the Court of Appeal Rules puts the timeframe for lodging a notice of appeal to the court of appeal in civil matters to within thirty days of the decision against which it is desired to appeal against. In the matter at hand whether the applicant is out of time or else is not in contention between the parties.

The application itself is brought under section 11(1) of the Appellate Jurisdiction Act, which reads:

11.-(1) Subject to subsection (2), the High Court or, where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned, may extend the time for giving notice of intention to appeal from a judgment of

the High Court or of the subordinate court concerned, for making an application for leave to appeal or for a certificate that the case is a fit case for appeal, notwithstanding that the time for giving the notice or making the application has already expired.

The test applied in applications like the present one is that of “good cause” shown by the party applying for extension of time as provided under rule 10 of the Court of Appeal Rules.

As to what amounts to *good cause*, the Court of Appeal in **Laurent Simon Assenga vs Joseph Magoso and 2 others**, Civil Application No. 50 of 2016 (unreported), at page 3, held that:

“In determining an application under Rule 10, the issue that has to be resolved is always, whether, the applicant has shown good cause for extension of time. What is a good cause is a question of fact, depending on the facts of each case. For that reason, many and varied circumstances could constitute good cause in any particular case.”

Again, the applicant’s counsel submitted that, in Civil Appeal No. 15 of 2022 this court made two orders regarding costs: the first being that costs in the appeal itself were awarded to the respondent (erstwhile appellant); and also costs in Civil Case No. 38 of 2021 was awarded to the respondent (erstwhile defendant). However, when Civil Case No. 38 of 2021 was decided on merit subsequent to Civil Appeal No. 15 of 2022 the applicant emerged victorious and was awarded costs. To quote the order of this court, in Civil Appeal No. 15 of 2022, read:

"...Further the respondent is condemned to pay costs incurred by the appellant in litigating Civil Case No. 38 of 2021 before the trial court and costs of this appeal".

However, in Civil Case No. 38 of 2021 the order of the trial court went as:

"I now move to consider the last issue on relief (s) which the parties are entitled to, as far as I have already established that the Plaintiffs prove his claim hence entitled for the relief (s). I proceed to grant the plaintiff the following reliefs: -

1. N/A
2. N/A
3. Costs of the suit."

It is clear that, there is a confusion as to whom, between the applicant and the respondent, is to be reimbursed costs in Civil Case No. 38 of 2021. And, in my view this fact falls squarely within the ambit of *good cause* as stated in the case of **Laurent Simon Asenga** (*supra*) and is enough to grant the application.

For the sake of argument, the applicant has not been able to prove that he suffered economic hardship culminating in his failure to lodge the notice of appeal within time. It is my view that, such an averment has to be specifically proved and proof of the same has been found wanting in the applicant's submission. I therefore, subscribe to the submission by the respondent's counsel that, the applicant has not proved that there **was**

economic hardship which made him unable to engage a lawyer to file a notice of appeal.

In the upshot, I grant the application and the applicant is to file the notice of appeal within thirty (30) days from the date of this ruling. Considering the circumstances which brought about this application I make no order as to costs.

It is so ordered.

DATED at **SHINYANGA** this 28th day of March, 2024



[Signature]
N.L. MWAKAHESYA

JUDGE

28/03/2024

The ruling delivered this 28th day of March, 2024, in the presence of Elizabeth Luhigo, Advocate holding brief Ms. Zena Antony Kazimoto, learned advocate for the Applicant and Mr. Erick Katemi, learned advocate for the Respondent is hereby certified as a true copy as original.

[Signature]
A.H. MWETINDWA
DEPUTY REGISTRAR

28/03/2024