

**IN THE COURT OF APPEAL OF TANZANIA
AT TABORA**

(CORAM: MWARIJA, J.A., MWANDAMBO, J.A, And MASHAKA, J.A.)

CIVIL APPLICATION NO. 427/11 OF 2019

**1. EVELINA LEONARD
2. REBEKA KALOMBO
3. KAFIKA MATHEO
4. BAHATI IDD
5. STAFFORD NTAMISIGO
6. EUGEN SIMON
7. ROZA SAMSON
8. SHUKURU KISIMBA
9. ANDREA KASHURURU
10. KADUDUS JOHN
11. SALUM MPAMBANSI
12. NDOMTAHE KALIVO
13. SEIF HAMIS
14. LAURIAN GERALD
15. ADVELINA MESHAK
16. HAMIDA ATHUMAN
17. MELASANIA HENERY
18. FELIX FENDAMBO
19. MAJENGO KAJORO**

..... **APPLICANTS**

VERSUS

PHANUEL CHARLES NZENDA RESPONDENT

(Application from the decision of the High Court of Tanzania, at Tabora)

(Rumanyika, J.)

dated the 30th day of July, 2018

in

DC. Civil Appeal No. 5 of 2018

.....

RULING OF THE COURT

30th March & 25th May, 2022

MWANDAMBO, J.A.:

The matter, subject of this ruling, is a second bite application for extension of time preferred under rule 45A (1) (b) of the Tanzania Court

of Appeal Rules, 2009 (the Rules) for extension of time within which to apply for leave to appeal. The decision from which leave to appeal is sought arises from the *ex parte* judgment dated 30/07/2018 in which the High Court at Tabora dismissed the applicants' Civil Appeal No. 5 of 2018. The application, as required by the Rules, by way of notice of motion is supported by an affidavit of Innocent Michael, learned advocate who represented the applicants before the High Court and before this Court during the hearing.

The founding affidavit discloses facts showing that, following the dismissal of the applicants' appeal by the High Court, they lodged a notice of appeal against that decision on 24/08/2018. Since the impugned decision required leave to appeal, the applicants lodged before the High Court Misc. Civil Application No. 58 of 2018. Nonetheless, the High Court (Bongole, J) dismissed that application on 26/03/2019 for being time barred. As the time for lodging a fresh application had already run out, on 20/05/2019, the applicants filed Misc. Civil Application No. 21 of 2019 for extension of time within which to file such application. However, the applicants were not lucky enough before Matuma, J. who was not satisfied that the affidavit disclosed good cause for a favourable exercise of discretion. The learned Judge dismissed that application in a ruling delivered on 24/06/2019.

Apart from outlining the chronology of the events and steps taken from the moment the application for leave to appeal was dismissed by the High Court for being time barred, to the filing of the application for extension of time before the High Court, para 8 of the affidavit avers that the intended appeal has overwhelming chances of success warranting an order sought.

The respondent did not file an affidavit in reply but appeared for hearing to oppose the application through Mr. Kamaliza Kamoga Kayaga, learned advocate.

During the hearing of the application, Mr. Michael appeared representing the applicants. He adopted the averments in the founding affidavit and made brief oral arguments with the view to persuading the Court in his quest to demonstrate that good cause exists warranting the Court's exercise of discretion in favour of his clients. After a brief background based on the averments in the affidavit on what transpired before the High Court, the learned advocate faulted the learned High Court Judge for misinterpreting rule 45 (a) of the Rules with regard to time limit within which an application for leave to appeal should have been lodged before the High Court. We understood the learned advocate suggesting that the refusal to extend time was influenced by the alleged misinterpretation of rule 45 (a) of the Rules. However, we do

not think the learned advocate's criticism was called for because, this is not an appeal from the ruling of the High Court dismissing the application rather a second bite application to be considered on its own merit. This is more so because we are not concerned with any determination of the exercise of discretion by the High Court Judge rather, looking at the application afresh and weighing whether there exists good cause for exercising our discretion in the applicant's favour independent of what the High Court decided.

Submitting further, Mr. Michael invited the Court to find that from the affidavit, the applicants have exhibited good cause by explaining, not only the reason for the delay, but also accounting for each day of such delay in line with the Court's decisions in **Lyamuya Construction Co. Ltd v. Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. 10 of 2015 and **Regional Manager Tanroads Kagera v. Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007 (all unreported) which he placed before us. By those decisions, the learned advocate impressed upon us, albeit with some difficulty, that the applicants have demonstrated exercise of diligence in pursuing their application warranting an exercise of discretion in their favour.

Addressing the Court in reply, Mr. Kayaga reminded us that despite the applicants moving the Court under rule 45A of the Rules, the enabling provision through which the Court can exercise its discretion for extension of time is none other than rule 10 of the Rules. From that perspective, the learned advocate contended that the applicants have not met the threshold for the Court's exercise of its discretion under rule 10 of the Rules citing **Ramadhani J. Kihwani v. TAZARA**, Civil Application No. 401/18 of 2018 (unreported) and thus the application lacked merit warranting its dismissal with costs.

Mr. Michael's submission in rejoinder was that the applicants have accounted for each day of the delay judged from the copies of documents annexed to the founding affidavit and thus the Court should exercise its discretion by granting the application.

We propose to say a word or two with regard to the preliminary remark by Mr. Kayaga. There is no doubt that the exercise of discretion by this Court to extend time is derived from rule 10 of the Rules in applications brought to the Court for the first time. The instant application was preferred as a second bite after the High Court had refused to exercise its discretion in the applicant's favour under section 11 (1) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] (the AJA). The applicants moved the Court under rule 45A which, as rightly

submitted by Mr. Kayaga, is a gate way to access the Court rather than an end in itself. That rule is a purely jurisdictional provision for the Court to entertain applications for extension of time to lodge a notice of intention to appeal or leave to appeal upon refusal by the High Court under section 11 (1) of the AJA which is exclusively applicable to that court. In the premises, we are inclined to go along with Mr. Kayaga that it was incumbent for the notice of motion to cite rule 45A along with rule 10 of the Rules. Be that as it may, mindful of rule 48 (1) of the Rules and in view of the fact that Mr. Kayaga was not insistent on the omission, we ignored it and proceeded with the hearing of the application on merit upon being satisfied with our jurisdiction. Next on the merits.

It is plain that the cases cited by both Mr. Michael and Kayaga set out the parameters guiding the Court in applications for extension of time under rule 10 of the Rules. Such parameters include; explanation on the reason for the delay in taking a particular step within the prescribed period, length of the delay coupled with accounting for each day of delay and, in appropriate cases, the existence of an illegality in the impugned decision with sufficient public importance. We note from the deponent's averment in para 8 of the affidavit that the applicants contend that the intended appeal has overwhelming chances of success

but as we have held in the past, such consideration is not relevant for the purpose of determining an application for extension of time. In **Hindocha & Others** [1973] E.A 207, our predecessor; the defunct Court of Appeal for East Africa stated:

"The position of an applicant for extension of time is entirely different from that of an applicant for leave to appeal. He is concerned with showing sufficient reasons why he should be given more time and the most persuasive reason that he can show... is that the delay has not been caused or contributed by dilatory conduct on his part. But there may be other reasons and these are all matters of degree."

The remaining averments in paragraphs 1 through 7 inclusive of the affidavit are merely explanatory of what transpired before the applicants filed the instant application. Of material significance, whereas the application for leave to appeal was dismissed by the High Court on 26/03/2019, it took the applicants nearly two months to file the application for extension of time before the High Court. The averments in the founding affidavit have not explained away that delay neither is there any document from which one can say that there is such an explanation. Consistent with **Regional Manager Tanroads Kagera** (supra), the Court cannot exercise its discretion in the applicant's favour

because the applicants have not placed any material in that regard. Similarly, in line with **Lyamuya Construction Co. Ltd** (supra) and **Ngao Godwin Losero** (supra) the Court cannot exercise its discretion in favour of a party who fails to show diligence in pursuing his rights as it were. See also, **Sebastian Ndaula v. Grace Rwamafa**, Civil Application No. 4 of 2014, **Saidi Ambunda v. Tanzania Harbours Authority**, Civil Application No. 177 of 2004 and **Abood Soap Industries Ltd v. Soda Arabian Alkali Limited**, Civil Application No. 154 of 2008 (all unreported).

The above said, we find no merit in the application and dismiss it with costs.

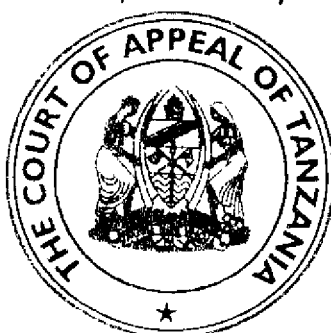
DATED at DAR ES SALAAM this 24th day of May, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The ruling delivered this 25th day of May, 2022 in the presence of Mr. Innocent Michael, learned counsel for the Applicants and Mr. Mtaki holding brief of Mr. Kamaliza Kayaga, learned counsel for the Respondent, is hereby certified as a true copy of the original.



F. A. MTARANIA
F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL