IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

CIVIL APPLICATION NO. 87/02 OF 2023

ANNEY ANNEY.....APPLICANT

VERSUS

TEONAS MCHAMA.....1st RESPONDENT

SAILESH GORDAN LAXMAN t/a SAIBABA EXPRESS.....2nd RESPONDENT

(Application from the judgment and decree of the High Court of Tanzania at Arusha)

(Moshi, J.)

dated the 9th day of March, 2016

in

Civil Appeal No. 19 of 2015

.....

RULING OF THE COURT

20th & 23rd February, 2024.

FIKIRINI, J.A.:

The application before me preferred by way of notice of motion in terms of rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules), is to move the Court to grant extension of time within which the applicant, Anney Anney, can lodge his intended appeal. In his affidavit in support of the application the applicant has ably given an account of what transpired from when the High Court delivered its judgment on 9th March, 2016 to 14th September, 2022 when he discovered that the leave granted to him on 16th August, 2022 vide Miscellaneous Civil Application No. 83 of 2022, and

copies of ruling and drawn order supplied to him on 7th September, 2022, time for him to lodge his appeal had elapsed, and hence the present application.

The 1st respondent, Teonas Mchama, could not be served in person. However, by way of substituted service by publication in the newspapers as ordered by the Court on 31st October, 2023, the applicant published the notice in the Nipashe and Mwananchi newspapers. In light of what has been done in compliance with the Court order, the applicant prayed for the hearing of the application to proceed in the absence of the 1st respondent who should be considered dully served.

The 2nd respondent, Sailesh Gordan Laxman t/a Saibaba Express through Mr. Karoli Tarimo learned Advocate contested the application, by filing an affidavit in reply noting paragraphs 1, 3, 4, and 5 of the affidavit and disputing others particularly paragraphs 8, 9 and 10 and paragraph 6 was partly noted that leave was illegally granted as the application was preferred out of time.

Filing of the copies of the two newspapers in Court was evidence that service has been effected against the 1st respondent. Against that proof the

Court pursuant to rule 63 (2) of the Rules ordered the hearing of the application to proceed in the absence of the 1st respondent.

Commencing his address, the applicant opted to adopt his affidavit in support of the application and written submissions filed on 16th January, 2023 in terms of rule 106 (1) of the Rules and urged for the grant of his application for extension of time.

On the 2nd respondent's part, Mr. Tarimo besides adopting the affidavit in reply and written submissions filed on 20th February, 2023, the latter being pursuant to rule 106 (8) of the Rules, he prefaced his submission with two Preliminary Points of Objection namely:

1. That both the notice of motion and affidavit in support did not state the reason for the delay. Instead, the applicant has indicated the chances of the intended appeal to succeed.

2. That the application was improperly before the Court as the applicant after filing a notice of appeal, should have write the Deputy Registrar of the High Court requesting to be furnished with copies of the necessary documents and through the said letter a

certificate of delay would have been issued to allow him to lodge his appeal rather than preferring the present application.

As for the application, he submitted that the applicant has failed to account for each day of his delay as required in law, the application should thus be declined and dismissed.

In a short rejoinder, the applicant dismissed the concern raised by Mr. Tarimo as pure tactics of making sure this application is not heard and determined. And by so doing infringed his right to appeal. He thus pressed for the raised issues to be ignored and the application be determined on merits.

After hearing the applicant and Mr. Tarimo for the 2nd respondent, and gone through the affidavits and rival submissions, though shall not reproduced them but certainly shall considered, in course of determining whether the application deserves granting or not.

The powers to grant or not to grant the application of this nature in terms of rule 10 of the Rules, is bestowed upon the Court. The provision provides thus:-

"10-The Court may, upon good cause shown, extend the time limited by these Rules or by any decision of the High Court or tribunal, for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference in these rules to any such time shall be construed as a reference to that time as so extended."

The powers vested in the Court which are discretionary in nature, can be exercised once "sufficient or good cause" has been shown. And that, even though the powers are discretionary, have to be exercised judiciously considering each case's particular circumstances.

What amounts to "sufficient or good cause" is not defined. However, through case laws guidelines have been enumerated on the term. The parameters though not exhaustive, can nonetheless, be traced from the cases such as **Fortunatus Masha v. William Shija & Another** (Civil Appeal No. 43 of 1996) [1997] TZCA 51 (10th January, 1997, TANZLII) **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christina Association of Tanzania** (Civil Application No. 2 of 2010) [2011] TZCA 4 (3rd October, 2011,

TANZLII), **Regional Manager Tanroads Kagera v. Ruaha Concrete Co. Ltd,** Civil Application No. 96 of 2007 and **Amani Centre for Street Children v. Viso Construction Company Ltd,** Civil Application No. 105 of 2013 (both unreported) to mention a few. The words "sufficient cause" were underscored in the case of **Regional Manager Tanroads Kagera** (supra) where the Court observed that:-

> *"What constitutes sufficient reasons cannot be laid down by any hard or fast rules.* ***This must be determined by reference to all the circumstances of each particular case. This means the applicant must place before the court material which will move the court to exercise judicial discretion*** *in order to extend time limited by rules."* (Emphasis added)

It is clear from the decision that that the words "sufficient cause" varies depending on the circumstances of the case including reasons and explanations advanced by the applicant.

After laying a foundation upon which this decision shall be grounded, I find it apposite, now to trace the history of the present application established from what has been averred in the applicant's affidavit in support of the application.

That after the High Court decision in Civil Appeal No. 19 of 2015, the applicant timely lodged a notice of appeal. The intended appeal was registered as Civil Appeal No. 178 of 2018. The certificate of delay issued pursuant to rule 90 (1) of the Rules included the dates from 22nd March, 2016 up to 17th August, 2017, a total of 513 days that deserved exclusion. Instead of filing his appeal within sixty (60) days from the 17th August, 2017, the applicant filed his appeal on 23rd March, 2018, which was outside the time prescribed by the law. The intended appeal was considered incompetent and accordingly, struck out on 10th August, 2019.

Following the striking out, the applicant started a journey which culminated into the present application. He started with Miscellaneous Civil Application No. 90 of 2020, an application for extension of time to file notice of appeal and leave to appeal to the Court of Appeal out of time. The application was granted on 17th September, 2021. The notice of appeal was lodged on 1st October, 2021, and served on the 2nd respondent on 5th October, 2021. Thereafter, another application styled as Miscellaneous Civil Application No. 83 of 2021 for leave to appeal to the Court of Appeal under section 5 (1) (c) of the Rules, was lodged, heard and determined on 16th August, 2022, by granting the applicant the leave sought.

Supplied with copies of the ruling and drawn order on 8th September, 2022 the applicant embarked on preparing for the record and memorandum of appeal. Midway, that is on 14th September, 2022, the applicant learnt that he was out of time. Right away he started looking for legal assistance and the way forward. It took him almost fifteen (15) days from 15th to 30th September, 2022 to secure one who could assist him in preparing the present application. This application was lodged 11th October, 2022.

From the background, let me now focus on determining the merits of the application or otherwise, starting with examining the second point raised by Mr. Tarimo and dismissed by the applicant. It was Mr. Tarimo's complaint that the present application for extension of time was improperly before the Court. According to him the applicant after filing a notice of appeal, should have write the Deputy Registrar of the High Court requesting to be furnished with copies of the necessary documents. Through the said letter a certificate of delay would have been issued to allow him to lodge his appeal rather than preferring the present application.

It is true that a certificate of delay, warrants filing of an appeal after time to do so has elapsed. The certificate of delay obliged to be issued pursuant to rule 90 (1) of the Rules, excludes the days of delay counting from when a letter was written to the Deputy Registrar High Court (Registrar) to when the applicant has been informed through a letter from the Registrar, that the documents requested were ready for collection. The scenario involved in this application is different. Here I am dealing with an application after the appeal has been struck out. The truth of the matter is once the appeal has been struck out, the Registrar's power provided under rule 90 (1) of the Rules is automatically relinquished. This was well explained in the case of **Badru Issa Badru v. Omary Kilendu and Hashim Rungwe t/a H. Rungwe Ltd,** Civil Application No. 97/17 of 2020, in which the situation akin to the one prevailing in the present application occurred. The Court in illustrating how the certificate of delay operates, stated that the remedy after the appeal has been struck out is for a party to apply for an extension of time instead of requesting a certificate of delay since the Registrar no longer had the power to issue one.

The rationale behind the stance is obvious that: **one,** once the lodged appeal is struck out for being incompetent, the applicant is presumed to have all the requisite documents. Therefore, there was no need to request the same documents again. The only missing and required documents would have been from the application for extension of time to lodge a notice of appeal and/or leave to appeal to the Court of Appeal. **Two,** the Registrar of the High Court is only mandated to issue a certificate of delay, excluding the time when the appellant was following up on the proceedings before the High Court and not otherwise. The provision of Rule 90 (1) of the Rules is strictly restricted to the activities before the High Court. The provision does not empower the Registrar to deal with the exclusion of time not within the High Court jurisdiction. With the above discussion, I am inclined to conclude that Mr. Tarimo's raised issue was misconceived.

Coming to his first point, that the notice of motion lodged did not disclose the grounds or reason for the delay, neither did the affidavit in support, which besides stating what occurred in paragraphs 8 and 9 and the measures taken, no reason was advanced why was there a delay in the first place. In this instance counting from 8th September, 2022 to 14th

September, 2022 when he noted that he was out of time as there is a delay of almost six (6) days.

While Mr. Tarimo relied in the case of **Gibb Eastern Africa Ltd v. Syscon Builders Ltd & 2 Others,** (Civil Application No. 5 of 2005) [2005] TZCA 284 (1st January, 2005, TANZLII), that the Court dismissed the application after both the notice of motion and affidavit in support failed to reflect the grounds of complaints or reasons for the delay warranting grant of the application for extension of time.

On the contrary, the applicant relied on the case of **Royal Insurance Tanzania Limited v. Kiwengwa Strand Hotel Limited,** Civil Application No. 111 of 2009. In that case the Court after extensive deliberation on the application before it, proceeded to grant the application upon considering that the applicant had diligently and persistently been in courts in search of justice.

I am aware in our numerous decision we have ruled that the delay of even a day has to be accounted. In the case of **Elius Mwakalinga v. Domina Kagaruki & Five Others**, (Civil Application No. 120/17 of 2018)

[2019] TZCA 650 (22nd May, 2019, TANZLII), in which the Court stated thus:-

> *"Delay, of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken."*

However, although I am in agreement that the applicant did not apparently elaborate the grounds or reasons for the delay, he had ably shown that he did not sit back, but was vigilant, diligent and persistent in pursuit for his justice. Considering the circumstances of the present application, I do not think the applicant's action should be completely disregarded. And following in the steps and the position taken by the Court in **Royal Insurance Tanzania Limited** (supra), I find the applicant's action should be considered. This is because after noting that he was out of time, he immediately started searching for legal assistance and subsequently this application was filed. This account has not been disputed by Mr. Tarimo.

Whereas, I completely agree that the length of delay is one among the factors to be taken into account in deciding how to exercise the discretion to extend time, the delay in each case should be weighed

differently albeit judiciously, mindful that should not lead to injustice. Moreover, other factors should also be considered in line with the above one, including, the reason for the delay, whether there is an arguable case on appeal and the degree of prejudice to the defendant if time is extended. **See: Mbogo v. Shah** (1968) E.A.

Expounding on the conditions to warrant grant of extension of time, Court stance in the **Finca T. Limited & Another v. Boniface Mwalukisa** (Civil Application No. 589 of 2018) [2019] TZCA 561 (15th May, 2019, TANZLII), is worth examining when the Court stated the following:-

> *"It is settled that where extension of time is sought, the applicant will be granted, upon demonstrating sufficient cause for the delay, conversely, it is also well settled that the sufficient cause sought depends on deliberation of various factors,* ***some of which revolve around the nature of actions taken by the applicant immediately before or after becoming aware that the delay is imminent or might occur.*** [Emphasis added]

Certainly, the Court has time without number considered promptness in taking an action favourably and gave it weight rather than slowness and unexplained delay in bringing an application. This has been so, even where

the application is unduly delayed, if shutting out lodging of the intended appeal may appear to cause injustice, the Court may consider granting the application for extension of time. See also: **Tanesco v. Mufungo Leornard Majura & Others** (Civil Application No. 94 of 2016) [2017] TZCA 239 (5th June, 2017, TANZLII) while referring the decision in **Prosper Baltazar Kileo & Another v. R,** Criminal Application No. 1 of 2010 (unreported).

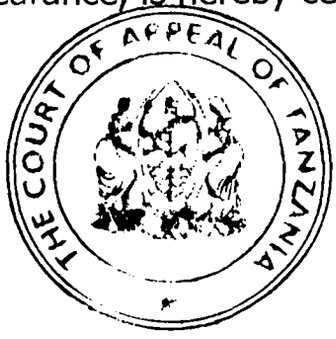
In addition, the applicant in paragraph 10 of his affidavit alluded to overwhelming chances of success of his appeal, if the appeal is heard and determined on merit. As pointed out in the case of **Gibb Eastern Africa Ltd** (supra), that is something which should not be ignored completely. However, in the present application while I have not deliberated on that point specifically, but going by settled legal stance that each case should be determined based on its own circumstance and examining the present application in the light of that position, I do not think six (6) days from when he was availed with the documents to when realizing that he was out of time and later fifteen (15) days of which he was searching for legal assistance are not inordinate, considering the fact that all along the applicant has been in court corridors pursuing to lodge his intended appeal.

In light of the above explanation, I find the application deserves granting. Consequently, I proceed to grant it and order the applicant to lodge his record and memorandum of appeal within thirty (30) days from the date of this ruling. It is so ordered.

DATED at **ARUSHA** this 22nd day of February, 2024.

P. S. FIKIRINI
JUSTICE OF APPEAL

The Ruling delivered this 23rd day of February, 2024 in the absence of both parties who were duly served with a notice/summonce of appearance, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL