

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
MOSHI REGISTRY  
AT MOSHI**

**MISC CIVIL APPLICATION NO.42 OF 2018**

(C/F Civil Case No.2 of 2015 of High Court Moshi)

**BABITO LIMITED.....APPLICANT**

**VERSUS**

**FREIGHT AFRICA NV – BELIGIUM..... 1<sup>ST</sup> RESPONDENT**

**TAHIR S/O MURTAZA VALJI..... 2<sup>ND</sup> RESPONDENT**

**TOTAL FREIGHT SERVICES (T) LIMITED.....3<sup>RD</sup> RESPONDENT**

*Date of last order: 03/12/2019*

*Date of Ruling: 28/02/2020*

**RULING**

**Mkapa, J:**

The applicant has approached this court in an application seeking to extend time to file notice to appeal out of time to the Court of Appeal of Tanzania against the ruling and order of this court (**A.N. Sumari, J.**) in **Civil case No. 02 of 2015** dated 13<sup>th</sup> November, 2015. The application is brought under section 11 (1) of the Appellate Jurisdiction Act (AJA) (R.E.2002) 1979, Cap 141 R.E. 2002. The application is supported by a sworn affidavit of Rajesh Kumar Shivji Ram Aggrawal, applicant's Managing director. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents disputed the application and filed a joint counter affidavit duly sworn by Ndurumah Keya Majembe, learned advocate.

The brief history of the application is to the effect that, the applicant filed Civil Case No. 2 of 2015 in this Court claiming a total sum of USD 71,400 or equivalent of local currency at the prevailing exchange rate which the respondents are indebted for transportation of cargo services. **Sumari, J.** dismissed the application by upholding the preliminary objection that the suit was time barred. The applicant appealed to the Court of Appeal of Tanzania through **Civil Appeal No. 55 of 2015**, however the same was struck out for lack of authentic copies of documents necessary to form part of the record of appeal in terms of Rule 96 (1) of the Court of Appeal Rules, 2009 (CAT Rules).

The applicant then filed **Misc. Civil Application No. 141 of 2018** seeking for extension of time to file authentic document for appeal purposes to the Court of Appeal, but the same was struck out for wrongful citation of the enabling provision hence this application.

At the hearing, the applicant was represented by Bharat B. Chadha, learned advocate while the respondents were jointly represented by Ndurumah Keya Majembe, also learned advocate.

Submitting for the applicant, Mr. Chadha argued that, the applicant acted promptly in applying for the extension of time after Civil Application No. 14 of 2018 was struck out. He further contended that, was tireless fighting by way of applications to reinstitute

appeal against the ruling and order of the High Court dated 13/11/2015 in Civil Case No. 2 of 2015 that caused the delay in pursuing their cause.

It was Mr. Chadha's further argument that, under section 11 of AJA, when it is established that there is sufficient cause, the High Court while acting judiciously has discretionary powers to extend time, and further sufficient cause should receive a liberal construction in order to advance substantial justice, while no negligence or inaction or want of bon fide is imputable to the applicant. To support his point argument he cited the case of **Felix Tumbo Kisima V TTC Limited and Another**, Civil Application No. 1 of 1997 CAT, where the Court held that:

*"It should be observed that the term "sufficient cause" should not be interpreted narrowly but should be given a wide interpretation to encompass all reasons or causes which are outside the applicant's power to control or influence resulting in delay in taking any necessary step"*

In the light of the above, Mr. Chadha contended that, the grounds of appeal as per the memorandum of appeal of the intended appeal constitute sufficient cause of time as explained under paragraphs 25-34. One of the grounds involves the determination of the issue of limitation of time which is a mixed question of law and fact thus constitute sufficient cause for extension of time as was held in the

case of **National Housing Corporation V Etienes Hotel**, Civil Application No. 10 of 2005, TZCA 82.

On the same vein, the learned counsel submitted that the decision of the High Court intended to be appealed against was illegal and unfair thus it is also sufficient cause for granting extension of time. He cited the case of **Tropical Air TZ (Limited) V Godson Eliona Moshi**, Civil Application No. 9 of 2017 CAT at Arusha. He finally submitted that, the allegations by the respondent that the conduct and pursuit of Civil Application No.55 of 2016 was blemish with serious lapses, inaction, recklessness and gross negligence was rejected in the case of **Fortunas Masha V William Shija and Another** [1997] TLR 154 where the court held that;

*"In the circumstances, the negligence if any really refers to the filing an incompetent appeal and not the delay in filing it. The filing of an incompetent appeal having been duly penalised by striking out, the same cannot be used yet again to determine timeliness of applying a fresh application."*

The same position was also observed in the case of **Salvand K.A. Rwegasira V China Henan International Co. Ltd**, Civil Reference No. 18 of 2006, CAT at Dar es Salaam. For these reasons he prayed this Court to grant the prayers sought in the chamber summons.

Submitting for the respondents, Mr. Ndurumah contested that, the applicant was negligent, careless and sloppy in pursuit of his cause and had not advanced sufficient reasons for an order of extension of time to be granted. He submitted further that, in his first appeal to the Court of Appeal, the applicant willingly decided to exclude authentic copies of the proceedings, ruling and to decided drawn order as well as the authentic copies of the pleadings of the trial court. Also the applicant decided to retype proceedings, ruling and decree of the trial court as well as pleadings filed by parties thereto, thus turning himself a weapon of destruction at his own risk and peril.

He argued further that, there is no practice that allows parties or anyone to retype orders of the court as the same is contrary to rules 3 and 7 of Order XX of the Civil Procedure Code, Cap 33, R.E. 2002 (the CPC). That, advocate Chadha's excuse that he was not aware of the above cited law as well as Rule 96 (1) (f) and (g) of CAT Rule is not a defence for his sloppiness. Mr. Ndurumah maintained that ignorance of law cannot be a defence as sufficient cause in accounting for the delay, Mr. Ndurumah relied on the case of **Ngao Godwin Lasero V Julius Mwarabu, Civil Application No. 10 of 2015** where it has held that;

*"...When all is said with respect to the guiding principles, I will right away reject the explanation of ignorance of the legal procedure given by the appellant to account for the delay..."*

Thus, it was the duty of the counsel for the application to acquaint himself on the legal position requiring him to attach certified relevant copies to be submitted to the Court of Appeal. Furthering his argument, the learned counsel argued that, the applicant was also negligent and reckless when pursuing his case considering the history behind, thus the application at hand is just a gross abuse of the due process of the law. To support his argument he cited the case of **William Shija** (supra) where Court of Appeal held that;

*"...we are with respect, satisfied that, the negligence on the part of the Counsel for the first Respondent in filing wrong Application which caused the delay cannot constitute sufficient reason."*

He maintained further that, for the Court to grant extension of time to file an application for extension of time, sufficient cause for the delay has to be established and the court must guard itself against the danger of being led away by sympathy as it was held in the case of **Daphne Parry V Murray Alexander carson (1963) EA 546.**

Learned counsel also refuted the allegation of illegality in the decision intended to be appealed against as the same were unjust, misleading, unfair, unfounded and misleading since the High Court has powers to deal with limitation. Hence, High Court had

jurisdiction to uphold the preliminary objection and dismiss the suit for being time barred due to the fact that, any court before proceeding to entertain any matter must satisfy itself as to whether it has jurisdiction to entertain the same.

Mr. Ndurumah went on submitting that, Annex P5 attached to the applicant's affidavit is statutory demand made by the applicant to the 3<sup>rd</sup> respondent giving the latter 7 days to pay the debt lest face court action. The said statutory demand is dated 15<sup>th</sup> January 2009 when the debt accrued and from which, time of limitation is to be reckoned. To support his argument he cited the case of **Ms. Safia Ahmed Okash V. Sikudhani Amiri & 82 others**, Civil Appeal No. 138 of 2016 established which established the fact that, section 26 of the Law of Limitation Act which provides for exemption of time limitation of suits founded on fraud begins to run the day the plaintiff discovers the fraud. Therefore it was Mr. Nduruma's argument that the court acted judiciously in exercising its discretionary powers by dismissing the application and no elements of illegality was evidenced.

Mr. Ndurumah finally submitted that, this court should not grant extension of time on the ground that the applicant was industrious in pursuing his cause but, form a strong opinion as to whether there are real issues worth to be considered by the Court of Appeal, and further that should this application continue indefinitely the

respondents are likely to suffer and for the interest of justice litigation must come to an end. He thus prayed this application be dismissed with cost.

In his brief rejoinder, Mr. Chadha maintained his stance in submission in chief.

Having considered either parties submission, I think the issue for determination is whether the applicant has shown sufficient cause to be granted extension of time to file leave to appeal to the Court of appeal out of time.

The law is settled to the effect that, granting of extension of time is entirely the discretion of the court. This discretionary power however, is judicial in nature and must be confined to the rules of reason, justice and supported with sufficient cause as to why there was a delay in timely filing of an application in issue. In the case of **Ngao Godwin Losero (supra)**, the Court of Appeal cited the case of **Mbogo V. Shah [1968] EA** which held that;

*"All relevant factors must be taken into account in deciding how to exercise discretion to extend time. These factors include the length of delay, the reason for the delay, whether there is an arguable case on the appeal and the degree of prejudice to the defendant if time is extended."*



It is noteworthy that, the applicant had once successfully lodged his appeal to the Court of Appeal of Tanzania, which shows promptness on their part. It is unfortunate the appeal was struck out for lacking authentic copies of documents necessary to form part of the record of appeal in terms of Rule 96 (1) of the CAT Rule, 2009. The applicant then filed Misc. Civil Application No. 141 of 2018 seeking for extension of time to file a proper appeal to the Court of Appeal, but the same was also struck out for wrongful citation of the proper enabling provision hence this application.

In the case of **CROPPER V SMITH** 918840 26 CH D 700 (CA0 it was held that:

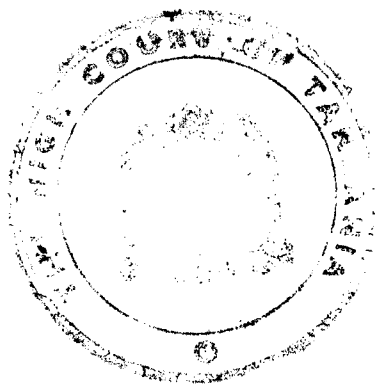
*"It is well established principle that the object of the court is to decide the rights of the parties and not to punish them for mistakes they made in the conduct of their rights. I know of one kind of error or mistake which if not fraudulent or intended to overreach, the court ought to correct if it can be done without injustice to the other part. Court does not exist for the sake of disciplines but for the sake of deciding matter in controversy."*

The same position was also affirmed in the case of **GENERAL MARKET CO. LTD V A.A. SHARIFF** [1980] TLR 61, whether it was emphasized that rule of procedures should not be used to defeat justice.

The effort which was spent by the applicant after series of applications were struck out, speaks for itself and the authorities above, I am of the settled view that the applicant has presented before this Court sufficient reasons as to what caused the delay in filing leave to appeal to the Court of Appeal. More so, in the affidavit, the applicant clearly stated that previous applications were struck out on technicalities without being heard on merit. It seems to me justice demands that the application be granted in order for the matter to be heard on merit as this Court cannot punish the applicant for the mistakes which the respondents referred to as negligence since they were all geared towards pursuing their rights. More so, the above mentioned case **Masha V William Shija** (supra), in support of the application, is informative on the fact.

For the reasons dismissed, I am of the considered view that the application has merit. Therefore extension of time for leave to appeal to the Court of Appeal is hereby granted I make no order as to costs.

Dated and delivered at Moshi this 28<sup>th</sup> day of February, 2020.



  
**S.B. MKAPA**  
**JUDGE**  
**28/02/2020**