

**IN THE HIGH COURT OF TANZANIA**

**IN THE DISTRICT REGISTRY**

**AT MWANZA**

**MISC. CIVIL APPLICATION No. 08 OF 2020**

*(Arising from the HC Civil Appeal No. 46 of 2018, Originating from Civil No.16 of 2013  
of the Court of Resident Magistrate Court of Mara at Musoma)*

**JUMA ISOMBE.....APPLICANT**

**VERSUS**

**MWITA NYAMHANGA MAHEGERE .....1<sup>ST</sup> RESPONDENT**

**WEREMA MWIKWABE WEREMA.....2<sup>ND</sup> RESPONDENT**

**NICHOLAUS NKOMBE MATARE.....3<sup>RD</sup> RESPONDENT**

**RULING**

08<sup>th</sup> December, 2020 & 18<sup>th</sup> February, 2021

**TIGANGA, J.**

The Applicant Juma Isombe filed an application through chamber summons made under Rule 45(a) of the Tanzania Court of Appeal Rules, 2009 as amended by the Tanzania Court of Appeal (Amendments), Rules 2017, Section 5(1)(c) and 11(1) of the Appellate Jurisdiction Act, [Cap 141 R.E 2002] now [R.E.2019], together with any other enabling provision of the laws seeking the following orders,



- a) That, this Honourable Court be pleased to extend time within which, the applicant may apply for the leave to appeal to the Court Appeal of Tanzania against the judgment and the decree of the Resident Magistrate Court of Mwanza (Extended Jurisdiction)(Hon. Sumaye, SRM) (HC Civil Appeal No. 46 of 2018) dated 30<sup>th</sup> day of December, 2019 Arising from Civil Case No. 16 of 2013 then in the Resident Magistrate Court of Mara at Musoma.
- b) That, this Honourable Court be pleased to grant leave to applicant to appeal to the Court Appeal of Tanzania against the judgment and the decree of the Resident Magistrate Court of Mwanza (Extended Jurisdiction)(Hon. Sumaye, SRM) (HC Civil Appeal No. 46 of 2018) dated 30<sup>th</sup> day of December, 2019 Arising from Civil Case No. 16 of 2013 then in the Resident Magistrate Court of Mara at Musoma,
- c) Costs of this application to be in the due course,
- d) Any other order(s) or/and relief(s) as this Honourable Court may deem fit to grant.

The application was supported by the affidavit of the applicant, Juma Isombe, he deposed that after the Senior Resident Magistrate had delivered his judgment sitting with extended jurisdiction on 30/12/2019 he





applied for copies of judgment, decree and proceedings. He was supplied with the same on 04/02/2020 by the time he was so supplied with the said documents he was already late for five days to file the application for leave to appeal to the Court of Appeal of Tanzania.

Accounting for the delay from 04/02/2020 he said those were used by the advocate for drawing this application. He deposed that given the nature of the case and the way it was conducted and decided, he believes that this is a fit case to go to the Court of Appeal of Tanzania for consideration on the following issues;

- a. Whether the hon. SRM extended jurisdiction was correct to proceed with composing and delivering of a judgment without ascertaining as to whether the appellants had filled written submissions and served the same to the applicant herein as scheduled by the first appellate court.
- b. Whether the honourable learned magistrate with extended jurisdiction was correct to write a judgment basing on the written submissions which does not form part of records of the court.
- c. Whether the honourable senior resident magistrate with extended jurisdiction was correct to decide that the plaintiff failed to prove



his case on the balance of probability without regarding the admission by the respondent on the fact that they did convene and attended a Ritongo meeting which included ten villages and the regional Commissioner RC meeting in which the third respondent announced the applicant to be a thief.

- d. Whether the honourable learned senior resident magistrate with extended jurisdiction was correct to find that the plaintiff applicant and his family were not ex communicated basing on the evidence adduced during trial.

The application was countered by the respondents by filing the counter affidavit sworn on behalf of all of them by Mwita Nyamhanga Mahegere the first respondent. In the counter affidavit, the deponent stated that they complied with the filing schedule and filed their written submission on 08/11/2019, to prove that he annexed the exchequer receipt and the written submission he filed as JLC 1(a) and (b) therefore the applicant was duty bound to obtain the said copy in the court registry which he did and filed a reply a copy of which is annexed hereto as JLC 2 with the counter affidavit.





Further to that, he submitted that the facts deposed in the affidavit do not in any way amount to sufficient cause for the delay, and that the applicant ought to have acted diligently than that.

He also deposed that the Senior Resident Magistrate with extended jurisdiction considered the submissions of both parties as depicted in the judgment. Last that the period from 04/02/2020 to 12/02/2020 is not accounted for as this kind of application cannot take a learned counsel 8 days to prepare.

Hearing of this application was conducted orally, in which Mr. Alfred Daniel, Advocate who represented the applicant in his submission did adopt the affidavit filled in support of the application and submitted that the reasons contained therein are concrete. He relied on the decision of **Indo African Enterprises Ltd vs consolidated holding corporation**, Civil Application No.07 of 2007. At page 6-8 of the judgment, he in the end asked for the application to be granted as prayed.

In his reply Mr. Hezron objected the application by first adopting the counter affidavit filed by 1<sup>st</sup> respondent. The objection was premised on two main grounds, first the duty to account each single day of delay has

not been discharged as he has not stated what he was doing from 04/02/2020 to 12/02/2020.

On application for leave, he prayed the court to consider the record and find that the submissions were all considered as they were part of the record.

In rejoinder, the applicant submitted that they accounted all the delayed days and specifically referred the court under paragraph 12 of the affidavit. He also submitted that, he perused the record and found no such a submission. He prayed that his prayer be granted as prayed in the chamber summons.

The application for extension of time in our jurisdiction is not a virgin ground; there are so many criteria, some set by the laws while others set by the decisions given in interpretations of the said laws by the court of records of this country.

In the case of **Eliakim Swai and Frank Swai vs Thobias Karawa Shoo**, Civil Application No. 02 of 2016 CAT-Arusha, it was held *inter alia* that,





"...extension of time may only be granted upon the applicant showing good cause of delay. It is trite law that such decision is entirely in the discretion of the court to grant or refuse it. It is also trite that such discretion is judicial and so it has to be exercised according to the rules of reason and justice, and not according to private opinion, whimsical inclinations or arbitrarily - see: **Yusufu Same & Anor v. Hadija Yusufu**, Civil Appeal No. 1 of 2002 and **Lyamuya Construction Company Ltd v. Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No.2 of 2010, both unreported'.

In looking for factors to consider as good cause, the court went further and elucidated on the lack of one agreed definition of what amounts to good cause, and held that;

"Admittedly, what amounts to "good cause" has not been defined. This is so because extension of time being a matter within the Court's discretion cannot be laid down by any hard and fast rules but will be determined by reference to all the circumstances of each particular case - see: **Regional**



**Manager, TANROAOS Kagera v. Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007 and **Tanga Cement Company Limited v. Jumanne O. Massanga and Amos A. Mwalwanda**, Civil Application No.6 of 2001, both unreported decisions of this court. In Tanga Cement (*supra*) for instance, this court, referring to its unreported earlier decision of **Dar es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987,"

From the stand of the law, it is clear that the decision whether or not to grant extension of time is purely discretionary; with need for the consideration of one main factor which is whether the applicant has given good cause for delay. In **Lyamuya Construction Company Limited vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No.2 of 2010 (unreported), CAT, the following guidelines were formulated in considering of what amounts to good cause:-

- (a) *The applicant must account for all days of the delay.*
- (b) *The delay should not be inordinate.*





*(c) The applicant must show diligence, and not apathy, negligence or sloppiness in prosecuting the action that he intends to take.*

*(d) If the court feels that there are other reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged."*


In the authority cited above, the principle requires the applicant in cases for extension of time, to account for every day of delay, for him to be entitled for extension of time. That being the condition precedent, the issue which arises is, whether the applicant in this application, has managed to account each days he delayed?

In accounting the delay, the applicant in his affidavit and the submission made by the learned counsel, two main grounds were pointed out as the reasons for delay, **first**, that the applicant was lately supplied with the copies of Judgment, decree and proceedings on time for him to initiate the appeal process, **second**, that after he was supplied with the said copies on 04/02/2020 up to 12/02/2020 he used eight days to prepare this application. Now looking at the two reasons, one can quickly find that the delay by the applicant from when the decision by the SRM with



extended jurisdiction was delivered up to the time when he was supplied with the copies of judgment, decree and proceedings, this delay can be conveniently be termed as a technical delay as termed in the case of **Fortunatus Masha v. William Shija And Another** [1997] TLR 154 at 155. I hold so because it was important for the applicant to have the said copies of the decisions sought to be appealed against before commencing the appeal process. That said the applicant cannot be blamed for such a delay.

The second period is the period of eight days from when he was supplied with the copies that is on 04/02/2020 up to when he filed this application on 12/02/2020. From the affidavit and the submissions made by the counsel is that the time was used for preparation of this application. As rightly submitted by the applicant, the decision in the case of **Indo African Enterprises Ltd vs Consolidated Holding Corporation**, Civil Application No.07 of 2007 which cited with approval the decision in the case of **Tanga Cement Company vs Jumanne D. Masangwa and Amos A.Mwalandwa**, (CA), Civil Application No.06 of 2001 (unreported) requires the applicant to give valid explanation for the delay, prove that he acted promptly and without negligence. The issue remains to be whether





the applicant has accounted all eight days of delay, in that the applicant has given valid explanation for the delay, acted promptly, and without negligence. The law, that is rule 45 of the Court of Appeal Rules, 2009, allocates fourteen days of the decision for the person aggrieved with the decision of the High Court to file an application for leave to appeal to the Court of Appeal. From the philosophy embodied to that enabling law, the law presumed the preparation of the application for leave to take fourteen days, as the applicant filed this application in eight days after he was supplied with the copies of necessary documents which is half of the period provided by law, it can be rightly held that he acted promptly and without negligence. I thus find that he has shown good cause for him to be entitled extension of time to file his application for leave as prayed.

Now having granted the leave to appeal, let us go to the second component of the applicant that is an application for leave to the Court of Appeal.

The provision of section 5(1)(c) of the Appellate Jurisdiction Act, [Cap 141 R.E 2019] cited above does not provide for the criteria to be considered in granting leave to appeal, however a plethora of case laws



have extensively discussed and provided for general principles and guidance.

In **Harban Haji Mosi and Another vrs Omar Hilal Seif and Another**, Civil Reference No. 19 of 1997 CAT, the following principles were laid down;

*"Leave is grantable where the proposed appeal stands reasonable chances of success or where, but not necessarily the proceedings as a whole reveals such disturbing feature as to require the guidance of the Court of Appeal. The purpose of the provision is therefore to spare the court the spectre of unmeriting matters and to enable it to give adequate attention to cases of true public importance"*

In the authority of **British Broadcasting Cooperation Vrs Erick Sikujua Ng'maryo** Civil Application No.138 of 2004 (CAT) - Dar Es Salaam (Unreported) (which was cited and relied on in the decision of **Swiss Port Tanzania Ltd Vs Michael Lugaiya** (supra)) it was held *inter alia* that;





*"Needless to say leave to Appeal is not automatic. It is within the discretion of the court to grant or refuse leave. The discretion should however be judiciously exercised and on the materials before the court. As a matter of general principle, leave to appeal will be granted where the grounds of Appeal raise issues of general importance or a novel point of law or where the grounds show a prima facie or arguable Appeal....However, where the grounds of Appeal are frivolous, vexatious, useless or hypothetical, no leave will be granted."*

Those issues with such disturbing features proving that there would be the arguable Appeal must be shown by the applicant both in his affidavit and the submissions.

Now the issue is whether the applicant in this application has managed to show, through the issues raised, the arguable points or disturbing feature or any novel point of law worthy to be attended by the Court of Appeal?

I am aware that my authority in considering to grant leave to appeal is limited on just assessing the intended grounds of appeal and whether



there are disturbing features from the complaint of the applicant which merits consideration of the Court of Appeal, I am not supposed to step into the shoes of the Court of Appeal and discuss on the merit or demerit of the intended grounds of appeal.

I have carefully considered the application, the supporting affidavit and counter affidavit together with the submissions by the counsel in support and opposition of the application in line with the guiding principle as enunciated in the case authorities cited above. Looking at the intended grounds, I am satisfied that the grounds of complaints intended to be used in appeal are raising disturbing features for worthy of consideration by the court of appeal. The application is thus allowed, leave to appeal is hereby granted as prayed. Cost to be in due course.

It is so ordered.

**DATED at MWANZA, this 18<sup>th</sup> Fenruary, 2021**



**J. C. Tiganga**

**Judge**

**18/02/2021**



Ruling delivered in the open chambers in the presence of the representative of the parties as per coram.



**J. C. Tiganga**

**Judge**

**18/02/2021**

ORIGINAL