

IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA
MISC. CIVIL APPLICATION NO.04 OF 2021
(Arising from Civil Case No.66 of 2019)

ACCESS BANK TANZANIA LIMITED APPLICANT

VERSUS

JOSEPH MAGESA CHILAYE RESPONDENT

RULING

Date of the Last Order: 15.02.2021

Date of the Ruling: 16.02.2021

A.Z.MGEYEKWA, J

I am called upon in this matter to decide whether this court should exercise its discretion under section 14 (1) and section 19 (2) of the Law of Limitation Act, Cap. 89 [R.E 2019] and section 60 (1) (b) of the Interpretation of Laws Act, Cap.1 [R.E 2019] to extend time for the applicant to file an appeal against Judgment and Decree entered against the applicant on 3rd

September, 2020. The application is supported by an affidavit deponed by Amos Gondo, learned counsel. The respondent resisted the application and have demonstrated their resistance by a counter-affidavit deponed by Joseph Magesa Chilaye, learned counsel.

In prosecuting this application, the applicant enjoyed the legal service of Mr. Julius Mulokozi, learned counsel while Mr. Chegula, learned counsel the appeared for the respondent.

Commencing his submission, Mr. Mulokozi urged this court to adopt the applicant's affidavit and form part of his submission. He stated that the applicant prays for extension of time to file an appeal against the judgment which was delivered on 3rd September, 2020. He avers that on 17th June, 2020 the Civil Case No. 66 of 2019 was finally heard by both parties and the defence case was close whereas the court scheduled for judgment on 29th August, 2020. Mr. Mulokozi went on to state on 29th August, 2020 neither of the parties appeared and the court ordered the parties be notified on the next judgment date and the said judgment was again scheduled on 3rd September, 2020. Mr. Mulokozi insisted that the applicant was never notified on the date of the judgment.

It was Mr. Mulokozi further submission that on 01st December, 2020 the applicant made a follow-up and was informed that the judgment was delivered on 3rd September, 2020. He added that the applicant wrote a letter praying for certified copies of the judgment whereby after receiving the said copies the applicant's Advocate noted that the judgment was tainted with irregularities. Mr. Mulokozi went on to state that the applicant decided to file an appeal but found himself out of time.

The learned counsel for the applicant went on to state that based on the said irregularities they pray for this court to find that it is a good reason for extension of time to file the appeal out of time. Mr. Mulokozi fortified his submission by referring this court to the cases of **The Principal Secretary, Ministry of Defence and National Defence v Valambhia** 1992 TLR 387, **Karunga and Company Advocate v National Bank of Commerce Ltd** (2006) TLR 235, and the case of **Mary Rwabizi T/A Amuga Enterprises v National Microfinance PLC**, Civil Application No. 378/01 of 2019.

In conclusion, Mr. Mulokozi beckoned this court to grant the applicant's application to file an appeal out of time.

Opposing the application, Mr. Chagula, learned counsel for the respondent urged this court to adopt the counter affidavit and form part of their

submission. Mr. Chegula valiantly objected the applicant's application by stating that during the hearing of the case, the applicant was represented by Mr. Mulokozi, learned counsel. He lamented that the applicant in his affidavit did not state as to who informed them that the judgment was delivered and the copies of judgment were available for collection on 10th December, 2020.

It was Mr. Chegula further submission that the applicant has not stated sufficient reasons for his delay since he wrote a letter to request for copies after 70 days from the date when the copies were ready for collection. He went on to argue that the applicant was required to account for each day of delay. To bolster his position he cited the case of **Bruno Nyalifa v The Permanent Secretary Ministry of Home Affairs and Attorney General**, Civil Appeal No. 82 of 2017, and added that the court held that a delay of even a single day must be accounted for.

Responding on the issue of illegality, Mr. Chegula forcefully argued that the applicant has not specified which illegality was involved. He added that irregularity is not a good ground for extension of time. He went on to state that the applicant's in his affidavit specifically on paragraph 8 raised grounds of appeal whereas this court cannot determine them. He insisted that the applicant has not stated sufficient reasons to warrant this court to extend time to file the appeal out of time.

Rejoining briefly, Mr. Mulokozi insisted that although parties were heard inter parties but it was important to notify them on the judgment date. He argued that irregularity means illegal. He stated that they have raised the issue of illegality thus the same suffice to warrant this court to extend time therefore they were not bound to account for each day of delay. He refuted that the irregularities as stated under paragraph 8 of the applicant's affidavit are not grounds of appeal.

Having adopted the affidavits and the oral submissions for and against the application, the applicant's Advocate urged this court to grant the application on the ground that there was good condonation of the delay and the judgment intended to be challenged was fraught with illegality.

In the light of the arguments raised by the learned counsels for and against the application, the shove on this Court is whether or not, the application by the applicant has merits. It is trite law that the court of law can only grant an application for extension of time if good cause is shown which include the length of the delay, the reason for the delay, the degree of prejudice the respondents stands to suffer if time is extended, whether the applicant was diligent, whether there is a point of law of sufficient important such as the illegality of the decision sought to be challenged.

There are overabundance of authorities as to what is meant by good or sufficient cause. As it was held in the cases of **Godwin Ndewesi and Karoli Ishengoma v Tanzania Audit Corporation** [1995] TLR 200, **Joseph Paul Kyauka Njau and Another v Emanuel Paul Kyauka and Another**, Civil Application No. 7/5 of 2017, and the famous case of **Lyamuya Construction Company Limited v Board of Trustees of Young Women's Christian Association of Tanzania**, Civil Application No.2 of 2010 (all unreported). In **Lyamuya Construction Company Limited's** (supra), the Court laid down some factors which can be used to assist the Court, in assessing as to what amounts to good or sufficient cause which were as follows:-

1. The applicant must account for all the period of delay;
2. The delay should not be inordinate;
3. The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action he intends to take;
4. If the Court feels that there are other reasons, such as the existence of a point of law of sufficient importance, such as illegality of the decision sought to be challenged.

Basing on what has been highlighted above, this court is enjoined in this application, to consider whether it qualifies in terms of the captioned factors.

To that fact, I read between the lines the submissions made by both learned counsels, whereby the applicant's Advocate in his rejoinder insisted that there were some irregularities in the impugned decision of the lower court therefore their submission did not base on account for each day of delay. I am in accord with the applicant's Advocate submission that it is not necessary for the applicant to account for each day of delay if there is a complaint of illegality. The same was observed in the case of **TanESCO v Mufungo Leonard Majura and 15 Others**, Civil Application No. 2016, (unreported), The Court of Appeal of Tanzania held that:-

“ Notwithstanding the fact that the applicant in the instant application has failed to sufficiently account for the delay in lodging the application, the fact that, there is a complaint of illegality in the decision intended to be impugned suffices to move the Court to grant extension of time so that., the alleged illegality can be addressed by the court.”

Guided by the above authority, I will not waste the time of the court to determine whether the applicant has accounted for each day of delay instead I will determine whether the applicant has stated good reasons to move this court to grant his application. The applicant in his affidavit specifically

paragraphs 7 and 8 has stated grounds of irregularities believing that the same form part of illegality. To bolster his position the learned counsel for the applicant cited the case of **The Principal Secretary, Ministry of Defence and National Defence v Valambhia** 1992 TLR 387. In this case, the illegality of the decision was challenged and the Court of Appeal of Tanzania determined the issue whether illegality was a sufficient reason to allow the application.

Likewise, the applicant's Advocate in his submission cited the cases of **Karunga and Company** (supra) and **Mary Rwabizi T/A Amuga Enterprises v National Microfinance PLC**, (supra). In all these decisions the illegality of the decisions was challenged and not the issue of irregularity. However, it is worth noting that there are some irregularities that amount to illegality but the said any illegality must be of sufficient importance and on the face of the record. In the case of **Moto Matiko Mabanga v Ophir Energy PLC and 2 Others**, Civil Application No.463/01 of 2017, the Court of Appeal of Tanzania stressed that:-

“... for the ground of illegality to stand, the challenged illegality of the decision must clearly be visible on the face of the record, and the illegality in focus must be that of sufficient importance.”

Equally, in the case of **Lyamuya Construction Company Limited v Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No.2 of 2010 (unreported), the Court of Appeal of Tanzania held that:-

*“ Since every party intending to appeal seeks to challenge a decision either on points of law or facts, **it cannot in my view be said that in Valambhia’s case the Court meant to draw a general rule** that every applicant who demonstrates that his intended appeal raises points of law **should, as of right, be granted extension of time if he applies for one.** The Court there emphasized that such point of law must be that of sufficient importance and, I would add that it must also be apparent on the face of the record, such as the question of jurisdiction, (but), not one that would be discovered by a long drawn argument or process.”*

Applying the above-settled position to the instant application, I have noted that in the applicant’s affidavit particular paragraph 7 the applicant’s Advocate has raised an issue of illegality that the trial court had no jurisdiction to determine the suit. In my view, the illegality of the decisions is

challenged, it is apparent on the face of the record and is of sufficient importance to merit the attention of this court.

Consequently, the applicant's application for extension of time to file an appeal before this court is granted. The applicant is required to file the appeal within 21 days from today.

It is so ordered.

Dated at Mwanza on this 16th February, 2021.




A.Z.MGEYEKWA

JUDGE

16.02.2021

Ruling delivered on 16th February, 2021 via audio teleconference, and both parties were remotely present.


A.Z.MGEYEKWA

JUDGE

16.02.2021