

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(ARUSHA DISTRICT REGISTRY)
AT ARUSHA**

MISC. CIVIL APPLICATION NO. 126 OF 2019

(Originating from the decision of the High Court of Tanzania, Civil Case No. 35 of 1998)

ELISA OLE MARKOS 1ST APPLICANT

DAVID ELISA MARKOS

***(Suing through OLAIRIVANI LOTA SARUAKI MOLLEL,
holding Power of Attorney) 2ND APPLICANT***

Versus

ERICK RAYMOND ROWBERG 1ST RESPONDENT

HARTLEY DAVID KING 2ND RESPONDENT

EMOLOLOSEK SPRING FARM LIMITED 3RD RESPONDENT

RULING

17th February & 17th May, 2021

MZUNA, J.:

This is an application for extension of time to lodge Notice of Appeal to the Court of Appeal after the first notice was struck by the Court of Appeal due to the applicants' failure to take essential steps after expiry of five years of lodging same. The application is supported by an affidavit deposed by Mr. Duncan Joel Oola, the learned counsel who represented the applicants together with Mr. Eliufoo Loomu Ojare, the learned advocate. The respondent contested the application through a counter affidavit deposed by Mr. Sheck Mfinanga, the learned counsel for the respondents. Hearing of the application proceeded by way of written submissions.

The background story shows, the respondents filed Civil Case No. 35 of 1998 in this court against the applicants. On 30/3/2010, this Court (Sambo, J. as he then was) entered a Consent judgment and Preliminary Decree against the applicants. Aggrieved the applicants intended to appeal to the Court of Appeal but unfortunately they found themselves out of time. As a result, they filed Misc. Civil Application No. 87 of 2014 in this court seeking for extension of time to lodge Notice of Appeal in order to appeal to the Court of Appeal. This Court (Massengi, J. as she then was) on 27/3/2015 granted them 14 days within which to file Notice of Appeal initiating their intended appeal. On 9/4/2015, the applicants lodged their Notice of Appeal in this Court intending to appeal against the decision in Civil Case No. 35 of 1998. However, after lodging the Notice of Appeal, they remained idle. This triggered the respondents to file Civil Application No. 571/2 of 2017 in the Court of Appeal seeking the Court to strike out the Notice of Appeal. In its ruling delivered on 4/12/2019, the Court of Appeal struck out the Notice of Appeal due to the Applicants' failure to take essential steps within time. Still eager to pursue their appeal in the Court of Appeal, the applicants filed the instant application on 20/12/2019, moving this Court to grant them extension of time within which to file the Notice of Appeal in the Court of Appeal.

The application is preferred under section 11(1) of the Appellate Jurisdiction Act, Cap 141 [R.E 2002] and any other enabling provision of the law. The main issue is whether there is sufficient cause for the delay. In other words, did the applicant adduce sufficient cause for the delay from 4/2/2010 and 20/12/2019?

Submitting on the substance of the application, Mr. Oola adopted and sought to rely on his affidavit. Mr. Oola contended that since their Notice of Appeal was struck out on 4/12/2019 for failure of the Applicants to take essential steps in the appeal process, this qualifies to what is referred in law as technical delay. He premised his argument by citing the case of **Fortunatus Masha Vs. William Shija and Another** [1997] TLR 154.

Mr. Oola also referred paragraph 10 of his affidavit stating that there are glaring illegalities in the decision sought to be appealed against. He contended that the illegalities are serious and not frivolous, since it involves fraud and collusion. That where an issue of illegality is involved, it amounts to sufficient cause for extension of time. To bolster his argument, Mr. Oola cited the case of **Juto Ally Vs. Lucas Komba & Another**, Civil Application No. 484/17 of 2019 (unreported). The learned advocate for the Applicants faulted paragraph 9 of Mr. Mfinanga's counter affidavit stating that where there exist illegalities, the Court is restrained from considering the substantive issues that are to be dealt with in the intended Appeal. Whether the alleged illegalities are substantiated or not, that remains exclusive in the domain of the Appellate Court. Mr. Oola cited the following decisions of the Court of Appeal to augment his assertion: **Kabdeco Vs. Wetcu Limited**, Civil Application No. 526/11 of 2017 and **Mary Rwabizi t/a Amuga Enterprises Vs. National Microfinance PLC**, Civil Application No. 378/01 of 2019 (both unreported).

Regarding the 16 days that the applicants delayed in filing this Application from the date the decision of the Court of Appeal was issued to the date of filing this application, Mr. Oola fortified that that time is not inordinate or excessive it is excusable

on the basis of the illegalities pointed out. Mr. Oola implored the Court to grant the application for extension of time to lodge the Notice of Appeal with costs.

Responding on the application, Mr. Mfinanga touched first on the raised issue of technical delay. He contended that the technical delay expressed by the applicants' counsel does not exist since the applicants seek to procure undeserved advantage and sympathy of this Court. He stated that the case of **Fortunatus Masha** (supra) cited by Mr. Oola is distinguishable because in that case the applicant lodged his appeal and all necessary documents and acted diligently but at the end his appeal was struck out for being incompetent. In the case at hand, the applicants were granted extension of time to file the Notice of Appeal, lodged the same but thereafter did not take necessary steps for a period of five years until 4/12/2019 when the said Notice of Appeal was struck out by the Court of Appeal. Mr. Mfinanga added that extension of time in view of **Fortunatus Masha** (supra) is grantable where there is actual or real delay but not one occasioned negligently.

To him, the applicants have failed to show existence of any sufficient cause for the delay and did not account for each day of the delay. On that account, he cited the case of **Lyamuya Construction Company Limited Vs. Board of Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

Mr. Mfinanga firmly contended that first, the applicants must explain the reason for failure to take action until the Notice of Appeal was struck out. Second, they must explain the delay between 30/3/2010 when the decision in Civil Case No. 35 of 1998 was

delivered to 20/12/2019 when the present application was filed because the order of this Court in Misc. Civil Application No. 87 of 2014 has been surpassed and set aside by the Court of Appeal in Civil Application No. 571/02 of 2017. He concluded that the applicants delayed for 11 years. To underscore his point, he cited the case of **Bushiri Hassan Vs. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 and **Addija Ramadhan (Binti Pazi) Vs. Sylvester W. Mkama**, Civil Application No. 13/17/2018 (both unreported) which emphasizes on accounting for each day of the delay. In his view, the delay is inordinate.

Mr. Mfinanga further substantiated that the applicants were not diligent in pursuing their intended appeal despite being represented by two senior advocates. They failed to controvert his averments for failure to file reply to counter affidavit to contradict paragraphs 8 and 9 of the counter affidavit, which has the implication that the applicants admit that there was an inadvertent in attending their appeal. To bring his point home, the learned counsel cited two decisions of the Court of Appeal: **Tanzania Ports Authority Vs. Ms. Pembe Flour Mills Ltd**, Civil Application No. 49 of 2009 and **Zubery Mussa Vs. Shinyanga Town Council**, Civil Application No. 3 of 2017 (both unreported). Both above cited cases presuppose that advocates must act diligently in representing their clients. In the instant application, the advocates for the applicants did not do so for failure to take necessary steps which led to striking out of the Notice of Appeal.

Submitting on the ground of illegality pointed out by Mr. Oola, Mr. Mfinanga submitted that the counsel for the Applicants have failed to establish what illegalities are

being complained of, since they are not apparent on the face of record. He recited the case of **Lyamuya Construction** (supra) which insists that when a party seeks to rely on illegality as a ground for extension of time, such illegality must be a point of law of sufficient importance and that it must be apparent on the face of record and not one that would be discovered by a long-drawn argument or process.

The learned advocate for the respondents concluded that it is in the paramount interest of the public that litigation must come to an end, citing the decision in **Stephen Masato Wasira Vs. Joseph Sinde Warioba and Another** [1999] TLR 334. According to Mr. Mfinanga, the applicants have failed to meet the parameters (a) (b) and (c) set out in **Lyamuya Construction** (supra). He reiterated that the applicants do not deserve to be granted extension of time sought stating that they have shown unnecessary delay, lack of diligence, relaxation and apathy. He implored the Court to dismiss the application with costs.

In a brief rejoinder, Mr. Oola reiterated that in paragraph 10 of his affidavit he pointed out clearly that the consent judgment and the preliminary decree pertaining the impugned decision raises issues of patent illegalities to wit: collusion and fraud which ought to be decided by the Court of Appeal. The same were also referred in annexure "A6", which is the draft Memorandum of Appeal. He maintained that the illegalities pointed out are pure points of law and not factual issues as contended by Mr. Mfinanga. He reiterated his earlier prayers.

From the above submissions, the question is, did the delay in filing this application necessitated by sufficient cause?

It is now established principle of the law that whether to grant extension of time or not, is the discretion of the Court, however such discretion has to be exercised judiciously. The governing factor is to show sufficient cause for the delay. In the above cited case of **Lyamuya Construction Company Limited** (supra), the Court held that:

"As a matter of general principle, it is in the discretion of the Court to grant extension of time. But that discretion is judicial, and so it must be exercised according to the rules of reason and justice, and not according to private opinion or arbitrarily. On the authorities, however, the following guidelines may be formulated:

- a. The Applicant must account for all the period of delay;*
- b. The delay should not be inordinate;*
- c. The Applicant must show diligence, not apathy, negligence or sloppiness in the prosecution of the action that he intends to take; and*
- 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."*

Likewise, in the case of **Ngao Godwin Losero Vs. Julius Mwarabu**, Civil Application No. 10 of 2015 (unreported) the Court of Appeal quoted with approval the decision of the defunct Court of Appeal for Eastern Africa in the case of **Mbogo Vs Shah** [1968] EA which held thus:

"All relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the 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."

I have read the Court of Appeal decision in Civil Application No. 571/02 of 2017, which is said to have struck out the applicants' Notice of Appeal. That application was

filed by the respondents after the applicants lodged the notice of Appeal and stayed idle. On the last page of the ruling, the Court of Appeal ruling it was stated:

"...Whatever the learned counsel may have had in mind however, five years of inaction cannot be wished away by taking refuge to the overriding objective principle."

Much as I am aware that technical delays are excusable as it was so held in the case of **Kabdeco Vs. Wetcu Limited** (supra), yet, the reasons leading to the striking out of the application must be based on its defects (i.e defective application) but not purely on the inaction of the parties and or their advocates as in the present case.

Inaction on the part of the applicants' advocates cannot be condoned on the ground of technical delay, as it was held in **Fortunatus Masha** (supra), which I find distinguishable for the reason that in that case there was no inaction or indiligence on the part of the applicant. To my understanding, technical delay is excusable where the case leading to extension of time is struck out for being found incompetent for one reason or another, See Joseph **Lugata Vs. Republic**, Criminal Appeal No. 86/11 of 2019. That being the case, the ground of technical delay as pleaded by Mr. Oola is inapplicable in the circumstances of this case.

Another reason advanced by Mr. Oola for extension of time is that there are illegalities in the impugned decision of Civil Case No. 35 of 1998. Existence of illegality, I am aware, amounts to sufficient reason for extending as it was so held in the case of **The Principal Secretary, Ministry of Defence & National Service Vs. Devram P. Valambhia** [1992] TLR 185. The application for extension of time was granted because

the alleged illegality was regarded as a point of law of sufficient importance. Such illegality must be apparent on the face of record in view of what was held in the case of **Lyamuya Construction Company Ltd** (supra). The court held that illegality can be pleaded as sufficient cause only where "the alleged illegality is apparent on the face of the record". It is also evident that such illegality should be "a point of law of sufficient importance".

In the instant application, as deponed in paragraph 10 of the Applicants' affidavit, the alleged illegalities are fraud and collusion. These points are not made apparent, they are ones to be discovered by a long-drawn argument or process. First, they are only mentioned, and second, they are not substantiated. The cited case of **Juto Ally Vs. Lucas Komba & Another** (supra), is distinguishable because in that case the illegality complained of was one regarding jurisdiction of the Court. Therefore, ground of illegality pleaded by the applicants cannot come to their rescue.

Mr. Oola also submitted that the ruling of the Court of Appeal in respect of Civil Application No. 571/2 of 2017 was delivered on 4/12/2019 and the instant application was filed on 20/12/2019, which makes it 16 days of the delay. He however referred this not as inordinate delay and that on grounds of technical delay, it is excusable. I do not agree with his argument. The 16 days ought to have been accounted for, specially so because this case has its root from Land case No. 35 of 1998. The sixteen days were never accounted for, and I consider the delay to be inordinate. When faced with a similar case, the Court of Appeal observed in the case of **Sebastian Ndaula Vs. Grace Rwamafa (Legal Representative of Joshwa Rwamafa)** Civil Application No. 4 of 2014 (unreported), citing with approval its previous decision in **Royal Insurance**

Tanzania Limited Vs. Kiwengwa Strand Hotel Limited, Civil Application No. 116 of 2008 (unreported) and held that;

*"It is trite law that an applicant before the Court must satisfy the Court that **since becoming aware of the fact that he is out of time, act very expeditiously and that the application has been brought in good faith.**" (emphasis added).*

The present application has not been brought in good faith, above all, considering the degree of prejudice, the respondents are likely to suffer more. In the case of **Tumsifu Kimaro (The Administrator of the Estate of the Late Eliamini Kimaro) Vs. Mohamed Mshindo**, Civil Application No. 28/17 of 2017 (unreported) it was held that:-

*"...Whereas it may not be possible to lay down an invariable definition of good cause so as to guide the exercise of the Court's discretion under rule 10, the Court must consider factors such as the **length of the delay, the reasons for the delay, the degree of prejudice the respondent stands to suffer if time is extended, whether the applicant was diligent, whether there is point of law of sufficient importance such as the illegality of the decision sought to be challenged.**" (emphasis supplied)*

Allowing this application to file notice out of time will be entertaining the applicants' inaction at the expense of time and unnecessary delays whose impact is that litigation will not come to an end as a matter of State interest. "The degree of prejudice the respondent stands to suffer if time is extended" has also moved this court to decide against the applicants' favour as it was also held in the case of **Addija Ramadhani (Binti Pazi) Vs. Sylvester W. Mkama**, Civil Application No. 13/17/2018 (unreported) cited by Mr. Sheck Mfinanga. The Court of Appeal, at page 5 held that:-

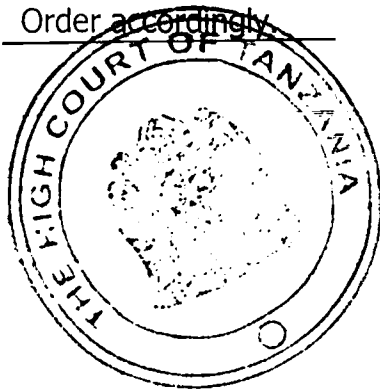
"Finally given the delay of over five years, the respondent will certainly be prejudiced by the order sought." (underscoring mine).


That holding fits squarely to the facts of this case.

In the circumstances, I agree entirely with Mr. Mfinanga, the learned counsel that there was laxity and negligence on the part of the applicants and their advocates. They cannot seek refuge in this court to bless it while they have not even accounted for each day of the delay knowing that it is a long standing matter. The purported technical delay and or illegality is only an afterthought. I do not find merits in this application.

The application stands dismissed with usual consequences as to costs.

~~Order accordingly.~~




M. G. MZUNA,
JUDGE.
May, 17th, 2021