

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

MISCELLANEOUS CIVIL APPLICATION NO. 43 OF 2020

(From the District Court of Mbeya at Mbeya in Civil Appeal No. 45 of 2019.
Originating from Uyole Primary Court in Civil Case No. 66 of 2019.)

TABIA KILEMBE.....APPLICANT

VERSUS

NELLY ANDULILE MUNDEKESYE.....RESPONDENT

RULING

Date of Last Order : 13/08/2021
Date of Ruling : 15/09/2021

MONGELLA, J.

This application is brought under section 25 (b) of the Magistrates' Courts Act, Cap 11 R.E. 2019 and supported by the applicant's affidavit. In the application, the applicant is seeking for extension of time within which to file appeal against the decision of the District court of Mbeya rendered in Civil Appeal No. 45 of 2019. Both parties appeared in person and the application was argued by written submissions.

In her affidavit as well as in her written submission, the applicant advanced two reasons for the court to consider and grant the extension sought. The first concerns financial constraints, and the second is on illegality in the impugned decision.


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With regard to financial constraints, she submitted that she had no money for filing fees thus failed to file the appeal within time. She claimed to be a peasant and seller of "vitumbua" and "maandazi" which does not generate enough income.

Explaining on the illegality in the impugned decision, she argued on a number of them claiming that the said illegalities render the whole decision and orders thereto a nullity.

The first illegality she explained, regards the respondent's locus standi in the suit. She contended that the respondent sued on behalf of a group named "*Kikundi cha Black*" which had granted a loan to the applicant. In the premises she had a stance that it was illegal for the respondent to file a suit against the applicant on a claim of loan on behalf of the group. Suing on behalf of the group renders the suit incompetent.

The second illegality she pointed out relates to non-joinder of necessary party. On this point, she contended that the group "*Kikundi cha Black*" was a necessary party to the claim thus ought to have been joined in the suit. This is because the money claimed by the respondent belonged to the group. She had a stance that failure to join "*Kikundi cha Black*" was a fatal irregularity, which goes to the root of the matter because without such a party it shall be impossible to execute the court decree.

Lastly, she claimed that the first appellate court failed to address and determine on grounds 2, 3, and 4 of the petition of appeal. She was of the view that this omission is fatal as it occasioned miscarriage of justice.

In consideration of the illegalities she explained as above, she prayed for the court to be guided by the principle settled in the case of **Kalunga and Company Advocates v. NBC Ltd.** [2006] TLR 235, whereby it was ruled that once an illegality on the decision to be challenged has been alleged, the court has a duty to ascertain it even if it means extending time to the party to enable the illegality be determined.

The respondent, on the other hand, opposed the application. She first directed the court to the case of **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, which settled the guidelines to be adhered to when granting extension of time. She as well referred the court to the case of **Mbogo v. Shah** [1968] EA which settled the factors to be considered in determining whether or not to grant extension of time. The factors include the length of the delay, the reasons for the delay, whether there is an arguable case on the appeal, and the degree of prejudice to the defendant if time is extended.

After explaining the legal position, the respondent argued that no sufficient reason has been advanced by the applicant. She first challenged the reason on financial constraints whereby she argued that the applicant faced no financial constraints because she is a business woman trading in sale of clothes at Mwanjelwa market. The fee was thus not a problem on her part. She argued that the applicant has delayed for almost two years as the decision in Civil Appeal No. 2019 was pronounced on 23rd March 2019.

With regard to illegalities, the respondent argued that the same is useless as the applicant admitted to have taken a loan from "Kikundi cha Black." She said that she was a guarantor of the applicant in that loan whereby she had to shoulder the burden to repay the loan after the applicant defaulted. She contended that she filed the suit in court so as to recover her money that she lost in repaying the loan she guaranteed after the appellant defaulted. Challenging the illegality she referred the court to the case of **Lyamuya Construction** (supra) and that **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. 10 of 2015 (CAT at Arusha, unreported), which settled the criteria under which a point of illegality can suffice to be considered for extension of time. She prayed for the application to be dismissed with costs for lack of merit.

In rejoinder, the applicant reiterated the submission she made on the point of illegality. It appears she refrained from rejoining on the issue of financial constraints.

I have given the submissions of both parties due consideration. The law is clear to the effect that extension of time can only be granted upon good cause being shown and where the delay has not been caused or contributed by the dilatory conduct on the part of the applicant. See: **Benedict Mumello v. Bank of Tanzania**, Civil Appeal No. 12 of 2002 (CAT, unreported); and **Jaluma General Supplies Limited v. Stanbic Bank Limited**, Civil Application No. 48 of 2014 (CAT, unreported).

The first reason advanced by the applicant is on financial constraints. The law is settled to the effect that financial constraint is not a sufficient

ground for extension of time. This position was well settled in the case of **Yusuph Same and Hawa Dada v. Hadija Yusuph**, Civil Appeal No. 01 of 2002 (CAT, unreported). See also: **Abdallah Salanga & 63 Others v. Tanzania Harbours Authority**, Civil Reference No. 8 of 2003 (CAT at DSM, unreported); and **Wambele Mtumwa Shahame v. Mohamed Hamis**, Civil Reference No. 8 of 2016 (CAT at DSM, unreported).

In **Wambele Mtumwa Shahame** (supra) the Court while revisiting a number of its previous decisions, insisted that the applicant has to account for the delayed days. Specifically referring to the case of **Bushfire Hassan v. Latina Lucia Masanya**, Civil Application No. 3 of 2007; **Sebastian Ndaula v. Grace Rwamafa** (Legal Representative of Joshwa Rwamafa), Civil Application No. 04 of 2014; and that of **Bushiri Hassan v. Latifa Mashayo**, Civil Application No. 03 of 2007 (all unreported) it ruled that every day of the delay has to be accounted for. So even where the applicant claims that she was financially constrained, she should have accounted for each and every day of the delay. The decision she intends to challenge was pronounced on 24th March 2020. This application was filed on 5th May 2020, which was about two months. This time has not been accounted for.

Concerning the ground of illegality, the applicant advanced three issues being: lack of locus standi, non-joinder of necessary parties, and failure to address all the grounds of appeal. The law is trite to the effect that a claim of illegality can only be entertained if it meets certain criteria. That is, if the illegality is apparent on face of record, is of sufficient importance and the determination of it shall not involve a long drawn process of argument. These criteria were settled by the Court of Appeal in the case

of *Lyamuya Construction Company Ltd. v. Board of Registered Trustees of Young Women's Christian Association of Tanzania* (supra). See also: *Kalunga and Company Advocates v. National Bank of Commerce Ltd*, Civil Application No. 124 of 2005; *Aruwaben Chagan Mistry v. Naushad Mohamed Hussein & 3 Others*, Civil Application No. 6 of 2016 *Jehangir Aziz Abubakar v. Balozi Ibrahim Abubakar & Another*, Civil Application No. 79 of 2016.

I have considered the arguments of both parties with regard to the issue of locus standi of the respondent and non-joinder of necessary parties. Considering the fact that the applicant has admitted even in this application that she obtained the loan from the said "Kikundi cha Black" and the fact that the respondent argued that she guaranteed the applicant in the said loan thus she sued to recover her own money, I find that these two points are not errors on face of record and shall involve a long drawn process of argument. These illegalities can therefore not move the court to grant extension of time.

The other point advanced by the applicant is that the first appellate court never addressed all grounds of appeal leading to miscarriage of justice. It is unfortunate that the respondent never addressed this allegation in her reply submission. Thus, to ascertain the claim I had to go through the impugned judgment. There, I found that it is on face of record that the first appellate court dealt only with the first ground of appeal, while there were four grounds of appeal. Whether the Hon. Magistrate was correct or not, is not something to be dealt in this application, but in an appeal.

In the circumstances, I find merit on this issue. The alleged error is apparent on face of record, it is of sufficient importance as it touches the parties' right to be heard and have their cause determined by the court accordingly. The same shall as well not involve a long drawn process of argument. The applicant is therefore granted the extension of time sought basing on this illegality. She should file her appeal within 30 days from the date of this Ruling. Each party shall bear her own costs of the suit.

Dated at Mbeya this 15th day of September 2021.



L. M. Mongella
L. M. MONGELLA
JUDGE

Date: 15/09/2021

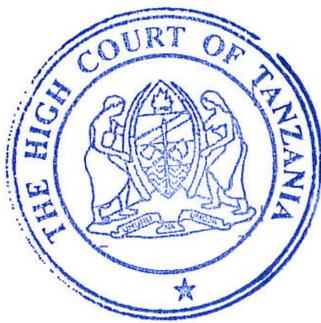
Coram: P.D. Ntumo, PRM - Ag. DR


Applicant: Present

Respondent: Present

B/C: Mapunda

Court: Ruling delivered in the presence of the parties this 15th day of September 2021.




P.D. Ntumo

Ag. Deputy Registrar

15/09/2021