

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 320 OF 2021

SHABBIR GULAMABBAMBAS NATHANI..... APPLICANT

VERSUS

SAJJAD IBRAHIM DHARAMSI.....1ST RESPONDENT

ALLY JAWAD GULAMABAMBBAS JIVRAJ.....2ND RESPONDENT

RULING

Date of last Order: 07/12/2021.

Date of Ruling: 10/12/2021.

E.E. KAKOLAKI, J

Before this court, by way of chamber summons supported by affidavit of one **Nakzael Lukio Tenga**, applicant's advocate, the court is moved by the applicant to grant him extension of time within which to apply for leave to Appeal to the Court of Appeal of Tanzania against the Judgment and Decree of this court, Mlacha. J, in Civil Appeal No. 42 of 2020, delivered on 30/10/2020. The application which was preferred under section 11(1) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2019], is strenuously resisted by the respondents who instructed their counsel one **Hussein Mohamed** to affirm and file the counter affidavit to that effect. With leave of the court

parties argued the application by way of written submissions as both were represented. The applicant hired legal services of Ms. Nakazael Lukio Tenga, learned advocate whereas the respondents were fended by Mr. Hussein Mohamed and Steven Urassa , both learned counsels.

Briefly the applicant, a biological father of the child aged 11 years being dissatisfied with the decision of this court in Civil Appeal No. 42 of 2020, Mlacha, J, which overturned the decision of the Juvenile Court of Dar es salaam in Misc. Application No. 149 of 2019 granting him custody of the said child and restored the decision of the same Juvenile Court in Misc. Application No. 129 of 2019, granting custody of the said child to the respondents, filed a Notice of Appeal and the appeal to the Court of Appeal on 21/04/2021. While awaiting for hearing of the appeal the applicant noted the same was inadvertently filed without leave of this court as required by the law, the fact which prompted his advocate to withdraw the appeal through the Registrar of Court of Appeal on 25/06/2021.(The order annexed NA-6 to the affidavit). As time for filing the application for leave to appeal to the Court of Appeal was out, the applicant preferred the present application which was filed on 06/07/2021.

It is the law that, this court has discretionary powers to extend time upon good cause or sufficient cause demonstrated by the applicant. As to what constitutes "good cause" there is no laid down hard and fast rules as the term is a relative one and depends on the reason or material advanced by the party seeking extension of time in order to move the court to exercise its discretion. See the case of **Osward Masatu Mwizarubi Vs. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010, (CAT-unreported). In so doing the applicant is also enjoined to account for each and every day delayed even if it is a single day. The Court of Appeal in the case of **Bushiri Hassan Vs. Latifa Lukio, Mashayo**, Civil Application No. 3 of 2007 (CAT-unreported), while insisting on the duty of the applicant to account for each day of delay had this to stated:

*"Delay, even a single day, has to be accounted for otherwise there would be no meaning of having rules prescribing periods within which certain steps have to be taken." See also the case of **Alman Investment Ltd Vs. Printpack Tanzania and Others**; Civil Application No. 3 of 2003 (Unreported).*

This court is alive to the fact that, accounting for the delayed days is not the only ground for consideration whether to grant the application of this nature or not as the court must consider also reasons for extension of time as might

be reduced from the decision sought to be impugned such as the surrounding circumstances, and the weight and implications of the issue or issues involved in the said decision so as to allow the applicant to take the intended steps. See the cases of **R Vs. Yohana Kaponda and 9 Others** [1985] T.L.R 84 and **Victoria Real Estate Development Limited Vs. Tanzania Investment Bank and 3 Others** Civil Application No. 225 of 2014 (CAT-unreported).

In the present matter accounting for the days delayed in filing this application, Ms. Tenga relied on the reason of technical delay as adumbrated in the case of **Fortunatus Masha Vs. William Shija and Another** [1997] T.L.R 213. She told the court that, on 24/04/2021, the applicant inadvertently filed the appeal to the Court of Appeal without seeking first leave of this court to so do. Upon discovery of that omission promptly acted by withdrawing it on 25/06/2021, before the present application was filed on 06/06/2021 upon being limited by time to lodge the application for leave to appeal to the Court of Appeal. According to her, the applicant's act of withdrawing the appeal for want of leave of this court and his act of being in court's corridors pursuing his appeal at all that time are justifiable and excusable delays amounting to technical delay as this application was

promptly filed on 06/07/2021 after such withdrawal of the appeal which she submits, if granted will not prejudice the respondents anyhow as the omission was made without negligence or lack of diligence. Apart from accounting for such delay, Ms. Tenga contended, there is illegality and serious question of law worth attention of Court of Appeal in the decision sought to be impugned. She mentioned the question of law to be the issue as to whether parents are not entitled to priorities in matters concerning custody of their biological children, as this Court (Mlacha, J) denied the applicant custody of the child despite of being a biological father after wrong interpretation of the principle concerning best interest of the child by relying on foreign jurisdiction cases which were out of context and the court's act of terming him as American (Mzungu), while he is the Swahili of Indian origin from Kariakoo. On the illegality of the decision she argued, the High Court judge did not consider the irregularities of the earlier trial court decision which was obtained illegally ex-parte before reversing the later decision which was entered in his favour as biological parent. Ms. Tenga invited the court to find that the applicant has established sufficient reasons for extending him time and grant the application with costs.

In rebuttal, both counsels for the Respondents, with force of arguments attacked the submissions by the applicant's counsel as lacking in merits for want of sufficient reasons warranting this court exercise its discretion to extend him time as prayed. Their arguments were in five limbs. First, they contended the applicant having withdrawn the appeal, there was no any other Notice of Appeal filed in replace since the applicant's efforts in procuring extension for leave to appeal without first lodging the Notice of Appeal are useless as under Rule 46(1) of Court of Appeal Rules, 2009, an application for leave to appeal is preceded by the notice of appeal. They relied on the case of **Modestus Daudi Kangalawe (Administarator of the estate of the late Daudi Temaungi Kangalawe) Vs. Dominicus Utenga**, Civil Application No. 139 of 2020 (CAT-unreported). Secondly, relying on the later cited case which referred to the cases of **Ngao Godwin Losero Vs. Julius Mwarabu**, Civil Application No. 10 of 2015 (CAT-unreported) and **Mussa Msangi and Another Vs. Anna Peter Mkomea**, Civil Application No. 188/17 of 2019 (CAT-unreported), they argued, the applicant's omission to file the notice of appeal before seeking leave was reducible to negligence and ignorance of law which has never been accepted as sufficient reason or good cause for extension of time. Thirdly, is on the

doctrine of technical delay as relied on by the applicant to account for delay and demonstrate sufficient cause for extension of time. They countered, the same is inapplicable in the circumstances of this case as the doctrine is applicable only when the matter in which extension of time is sought in favour of, was struck out by a Court of law, thus punishment by the court as it was well stated in the case of **Fortunatus Masha** (supra) and not in a situation where the same is withdrawn by the party or his advocate. To reinforce their argument the court was referred to the case of **Philimoni Simwandete Mbaga Vs. The Permanent Secretary, Ministry of Defence and the Attorney General**, Civil Application No. 168/01 of 2018 (CAT-unreported). Forth, is on the assertion by the applicant that, the Judgment raises legal issues of sufficient gravity and the decision is marred with illegalities to warrant intervention of the Court of Appeal, where they submitted that, the applicant has failed to meet the requirement of the law regarding the ground of illegalities of the decision sought to be challenged as stated in the case of **Lyamuya Construction Company Ltd Vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (Unreported – CAT), in the sense that, illegalities must be apparent on the face of record and not drawn by

long process or arguments. Fifthly, they submitted that, the days from 25/06/2021 when the appeal was withdrawn to 06/07/2021 when this application was filed, ought to be accounted for in which the applicant failed to do. They relied on the case of **Oceanic Bay Hotel Vs. Real Insurance Tanzania Limited** [2013] EARL 214, where it was held that:

"The delay is delay even if is a single day of a delay must be accounted for."

In her rejoinder submission on the question of incompetence of the application for want of Notice of Appeal Ms. Tenga while admitting that existence of notice of appeal must be established during consideration of the application for leave to appeal to the Court of Appeal submitted, in this matter the respondents are aware that there is a pending Misc. Application No.521 of 2021 before this court for extension of time to file the Notice of Appeal to the Court of Appeal. She said, existence of Notice of Appeal at this stage of extension of time to file an application for leave, is not a mandatory requirement hence the said point is raised prematurely. Therefore the case of **Modestus Daudi Kangalawe** (supra) is inapplicable to the facts of this case as in the cited case the issue of Notice of Appeal was considered since it was an application for leave to appeal to the Court of Appeal against the decision of the High Court unlike in this case where the issue is extension of

time. On illegality of the decision, she rejoined and stressed on her earlier submission that, it is worth for the Court of Appeal to determine whether it was proper for the Appellate Judge to reverse the Juvenile Court ruling for Civil Application No. 194 of 2019 dated 18/12/2019 which reversed its own decision which was obtained ex-parte (Civil Application No. 139 of 2019 dated 17/07/2019). She contended the ruling blessed by the High Court judge was fraudulently obtained after the Respondents lied that the where about of the applicant was unknown. On the issue of submission of inexistence of technical delay as submitted by the respondents she said, the case of **Philimoni Simwandete Mbaga** (supra) is distinguishable from the present situation as in that matter the application was for extension of time to file Appeal and the Notice of Appeal was not yet filed while in the present matter, the application is for extension of time to file Application for leave to appeal in pendency of the application for extension of time to file the Notice of Appeal. She added, in that matter there was no issues of illegality and point of law worth determination of the Court of Appeal like in the present application. Finally on the submission of accounting for each and every day delayed she argued, each case must be decided on its own and that in this matter where the applicant acted promptly in filing this application the delay

of 11 days was reasonable and not inordinate as it was the case in **Emmanuel Rurihafi and Another Vs. Jonas Mrema**, Civil Appeal No. 314 of 2019 (CAT-unreported) where the Court of Appeal employed the test whether the applicant acted promptly to determine reasonableness of the time delayed. With that submission she reiterated that, the applicant has advanced sufficient reasons warranting this court grant him extension of time as prayed.

I have dispassionately considered the submissions by the learned legal minds for both parties as well as visited the pleadings and the decision sought to be impugned in the Court of Appeal, if this application is granted. Now the issue for determination by this court is whether the applicant has demonstrated sufficient cause or good cause to warrant this court exercise its discretion and grant him extension of time as prayed. To start with, is the issue as to whether failure of the applicant to indicate that, the Notice of Appeal exists renders the application for extension of time to file an application for leave to appeal to the Court of Appeal useless as submitted by the counsels for the respondent? I hasten to state that I don't find merit on that submission as I embrace Ms. Tenga's submission and make a finding that, the point has been raised prematurely, therefore I discount it. I so hold,

as since it is the Notice of Appeal which institutes the appeal and then the same is a mandatory document for determination whether the application for leave to appeal to the Court of Appeal should be granted or not, unlike in the present application where the requirement is accounting for the delayed days in filing this application or any other sufficient reason warranting grant of extension of time such as illegality of the decision sought to be impugned. The position on the need of proof of lodging Notice of appeal first before determination of the application for leave to appeal is settled as the Court of Appeal in the case of **Modestus Daudi Kangalawe** (supra) had the following to say on it:

*"...what is clear, is that after the delivery of the impugned decision, the applicant did not lodge the required notice of appeal which is imperative. Without first having lodged the notice of appeal the applicant's efforts in procuring leave to appeal were useless. **It's the requirement of the law that the notice of appeal should be lodged first before the application for leave.** This is provided by Rule 46(1) of the Rules that:*

*"Where **an application** for a certificate or **for leave** is necessary, it **shall be made after the notice of appeal is lodged.**" (Emphasis added)*

I now move to determine the reason of technical delay as raised by the applicant that, since the appeal was filed in time on 24/5/2021 but without

leave of this court or Court of Appeal before it was withdrawn on 25/6/2021 and promptly filed this application on 06/07/2021 the delayed time amounted to technical delay, thus such time should be considered as accounted for. I disagree with Ms. Tenga's submission as technical delay is so invoked in a situation where the applicant is already punished by the Court for having his appeal struck out by the Court of law on the basis of incompetence and not in a situation where the applicant has withdrawn it himself. This proposition was well stated by the Court of Appeal in the case of **Philimoni Simwandete Mbaga** (supra) when set a clear line as to the situation under which the doctrine of technical delay as enunciated in the case of **Fortunatus Masha** (supra) could not apply particularly where the applicant is not punished by the Court. The Court said:

*"For avoidance of doubt, **Fortunatus Masha, will not apply in the instant situation.** The decision of single justice of the Court, was followed in **Salvand K.A. Rwegasira Vs. China Henan International Group Co. Ltd**, Civil Reference No. 18 of 2006; the decision of a full Court, **Zahara Kitindi & Antother Vs. Juma Swalehe & 9 Others**, Civil Application No. 4/05 of 2017 (All CAT)..., to mention but a few, and **as authority for what is referred to as technical as being excusable delay to warrant the Court grant extension***

of time. It implies when an applicant seeks extension of time after application or appeal for which an extension of time is sought were struck out by a court of law.”

Under Rule 45(a) of the Court of Appeal Rules, 2009, the applicant was supposed to file the application for leave to appeal within 14 days of the decision of this court which was delivered on 30/10/2020, meaning by 14/11/2020. As in his attempt to rely on the technical delay to substantiate his inordinate delay in filing the application for leave to appeal to the Court of Appeal has failed, I hold he has failed to account for such delay and demonstrate sufficient reasons as to why he delayed to file this application. As alluded to above, it was the applicant who withdrew the appeal from the Court of Appeal for want of leave of this court allowing him to appeal to the Court of Appeal, which omission Ms. Tenga submits was made inadvertently and without negligence and lack of diligence, while counsels for the Respondents contend it was out of sheer negligence and ignorance of law on the procedures on the part of applicant's advocate, which do not constitute sufficient reason or cause of extension of time. It is true and I agree with the counsels for the respondents that, under the circumstances of this case the applicant's advocate experienced as she is and who was

supposed to read the law and understand it before filing the appeal was not expected to make such an obvious omission and therefore claim that it was made out of inadvertency. I therefore endorse their submission that, the learned advocate for the applicant acted negligently and in ignorance of the law governing the procedure for appealing to the Court of Appeal which acts as per the decision in **Modestus Daudi Kangalawe** (supra) and **Mussa Msangi and Another** (supra) are not accepted as sufficient or good cause for extension of time. In **Modestus Daudi Kangalawe** (supra), on ignorance of the law and negligence on the part of the applicant, the Court said:

*"It is settled that **ignorance of law has never been accepted as sufficient or good cause for extension of time.** See **Ngao Godwin Losero Vs. Julius Mwarabu**, Civil Application No. 10 of 2015 (CAT-unreported). **Likewise negligence never constitutes a good cause.**" (Emphasis added)*

Similarly in the case of **Mussa Msangi and Another** (supra) the Court of Appeal held:

"It is also a considered view of the Court that the attempt by the applicants to throw the blame on their former advocate cannot be accepted and it does not relieve them from being

*held responsible for whatever snag their wish to challenge the High Court decision in encountering. **Ignorance by an advocate of what procedure needed to be followed and the changing of hands of a case between advocates does not constitute a good cause for extension of time.***
(Emphasis supplied)

In light of the above cited authorities and given the fact that, the applicant's advocate acted negligently, without diligence and in ignorance of the procedural laws governing appeals to the Court of Appeal, I hold that does not amount to sufficient reason or cause for extension of time.

Next for determination is the issue as to whether the applicant has demonstrate that, there is illegality and serious point of law in the judgment of this court sought to be challenged in the Court of Appeal. As rightly submitted by counsels for the respondents, illegality of the decision must not only be alleged but should also be apparent on the face of record and not drawn from long process or procedure as held in the case of **Lyamuya Construction** (supra) when the Court of Appeal stated:

"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 VALAMBIA'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 record, such as the question of jurisdiction; not one would be discovered by a long drawn argument or process.***" [Emphasis supplied]

In this matter, the assertion by Ms. Tenga that, the High Court judge's failure to consider irregularities in the trial court's decision in the former application hence ended up reversing the decision in the later application that was entered in his favour constitutes illegality of the decision, in my opinion is far from convincing as the same is based on evaluation of evidence by the appellate court (High Court). There is nothing to show that, there was violation of law or procedural irregularity as rightly submitted by the counsels for the respondents. Assuming there was indicated violated law or procedural irregularity which is not the case still I would hold, the same does not qualify under the ground of illegality as it would still require long drawn discussion or process to establish it. As to the existence of serious point of law worth determination of the Court of Appeal I also hold, none has been convincingly demonstrated. The argument by the applicant that, the Court of Appeal is entitled to determine the issue as to whether it was proper for the Appellate

Judge to reverse the Juvenile Court ruling in Civil Application No. 194 of 2019 dated 18/12/2019 which reversed its own decision obtained ex-parte in Civil Application No. 139 of 2019 dated 17/07/2019, in my opinion does not qualify to be a point of law of sufficient importance for the purposes of extension of time as provided in the case of **Lyamuya Construction** (supra), but rather a ground to be raised for consideration during the application for leave to appeal to the Court of Appeal, if this application is granted. In that case the Court of Appeal when deliberating on the factors to be considered when determining an application for extension of time had this to state:

- (a) The applicant must account for delay for the period of the delay.*
- (b) The delay should not be inordinate.*
- (c) The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of 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 illegality of the decision sought to be challenged.** (Emphasis supplied)*

As the asserted serious question of law and illegality of the decision do not constitute point of sufficient importance in this application, I hold the applicant has failed to demonstrate sufficient cause to warrant this court grant him extension of time. Lastly is on the need of applicant to account for the delay of 11 days from the withdrawal date of the appeal on 25/05/2021 and the filing date of this application on the 06/07/2021, which the applicant says were reasonable and not inordinate on the reason that this application was promptly filed. It is the law that, in an application for extension of time even a single day has to be accounted for. The court of Appeal in the case of **Bushiri Hassan Vs. Latifa Lukio, Mashayo**, Civil Application No. 3 of 2007 (CAT-unreported), when deliberating on the factors to be considered for grant of extension of time stated thus:

"Delay, even a single day, has to be accounted for otherwise there would be no meaning of having rules prescribing periods within which certain steps have to be taken."

In this matter the applicant never even attempted to account for the delay of the said 11 days apart from claiming that, he promptly filed this application soon after withdrawal of the appeal while relying on the case of **Emmanuel Rurihafi and Another** (supra), that the delay was reasonable. As the applicant is represented, it was expect of him to explain as to when he

received the order withdrawing his appeal before he filed this application so that this court could be in a position to determine whether he acted promptly or not in filing this application as the test is that of reasonableness. In the **Emmanuel Rurihafi and Another** (supra) the Court of Appeal when determining whether the applicant acted promptly or not had the following observation:

*“...The test employed in determining **promptness** in our view is **that of reasonableness**. That, is **whether the time take by the appellants to file the application for extension of time was reasonable**. In our view, this is a question of fact which has to be decided on case-by case basis.”*
(Emphasis supplied)

In the above cited case, the Court of Appeal having considered the circumstances of the case and the fact that the appellants were unrepresented lay persons, and that 22 days was reasonable time for them to collect copies of ruling and drawn order in the struck out appeal for filing the meaningful application for extension of time granted them extension of time as they acted promptly without negligence.

In the present matter as alluded to, the applicant is represented unlike in the above cited case, and as held above was negligent and acted without diligence when filed the appeal without leave of this court. More so has failed

even to demonstrate to the court as to when the copy of order for withdrawal of the appeal was collected, so as to avail the court with sufficient information to determine whether he acted promptly or not. In absence of such account, I hold the applicant has failed to account for the delay of the said 11 days in filing this application.

All that said and done and for the fore cited cases and stated reasons, I am satisfied that the applicant has failed to demonstrate sufficient reasons or cause to warrant his court exercise its discretion and grant him extension of time. The application is therefore devoid of merits and the same is hereby dismissed with costs.

It is so ordered.

DATED at DAR ES SALAAM this 10th day of December, 2021.



E. E. KAKOLAKI
JUDGE
10/12/2021.

The Ruling has been delivered at Dar es Salaam today on 10th day of December, 2021 in the presence of the Ms. Nakazael L. Tenga assisted by Mr. Hamis Mfinanga, both advocates for the applicant, Ms. Maunda Raphael, advocate holding brief for Mr. Steven Urassa, advocate for the Respondents and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI
JUDGE
10/12/2021

