IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

MISC CIVIL APPLICATION NO 32 OF 2021

(C/f Misc. Civil Application No.8 of 2013 of High Court of Moshi; Original Civil Case No. 8 of 2004 of the High Court of Tanzania at Moshi)

MUSA MANYAKA----------APPLICANT

VERSUS

THE ATTORNEY GENERAL----------1ST RESPONDENT

THE INSPECTOR GENERAL----------2ND RESPONDENT

RULING

3/11/2021 & 3/12/2021

SIMFUKWE J.

The applicant filed this application under **section 11(1) of the Appellate Jurisdiction Act, Cap 141 R E 2002** seeking for extension of time to file Notice of Appeal to the Court of Appeal against the decision of **Honourable A.N.M Sumari, J.** delivered on 20th October, 2015. The application is supported by an affidavit sworn by the applicant himself, which was contested by joint counter affidavit sworn by Inspector Mussa John Chemu the Police Officer in Legal Department at Police Head Quarters.

During the hearing of this application the applicant was presented by Mr. Severin Lawena learned counsel, while the Respondents were represented by Mr. Yohana Marco learned State Attorney. The matter proceeded by way of written submissions.

The applicant started by giving a brief history of the matter which I find no need of reproducing it herein, but I will consider the same whenever necessary.

In support of the application, the applicant submitted that he has filed this application under **section 11(1) of Appellate Jurisdiction Act**. He further stated that the power to extend time is discretional. He made reference to the case of **Lyamuya Construction Company Limited vs Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No 2 of 2010** to support his point. He thus suggested that this court shall use its discretion to grant the extension of time.

It was Applicant's contention that he always acted diligently and has never been sluggish in prosecuting his case as he applied for the copies of documents and lodged the Notice in time only that he failed to serve the other party and the court failed to supply him with the relevant documents in time and even denied him the certificate of delay despite several prayers.

The applicant also stated that it has been the practice that the application for extension of time should show good/ sufficient cause for the delay as it was held in the case of **Mr. Robert Schelters versus Mr. Baldev Norataram Varma and Two Others, Court of Appeal**

of Tanzania at Dar es salaam Civil Application No. 536/16 of 2018 (Unreported).

In respect of this argument, the applicant contended that he filed his notice of appeal within time but on 12/7/2018 the same was struck out together with an appeal on technical grounds. He stated that he accounted for all days of delay since after his appeal had been struck out on 1/8/2018 he filed Misc. Civil Application No.26 of 2018 which was struck out on 8/7/2019 that he applied for the copies of ruling and on 30/7/2019 he filed the said Misc. Application No. 26/2018 to set aside dismissal order and on 1/8/2019 he filed Misc. Civil application No. 15 of 2019 which on 23/9/2020 was struck out. He again applied for copy of ruling which was issued on 3/10/2020 and filed Misc. Civil Application No. 39 of 2020 which was filed on 18/11/2020 before **Hon. Mkapa J** which on 28/7/2021 it was also struck out for technical reasons of failure to annex the copy of Drawn Order of Misc. Civil Application No. 8/2013 and he was given 21 days to file another application for extension of time to file Notice of Appeal. He thus preferred the instant application which was filed on 6/8/2021.

He also argued that there are sufficient reasons for the delay. To cement the point, he re-cited the case of **Lyamuya Construction** (supra).

Furthermore, the applicant submitted that there is illegality on the dismissal order since the court failed to consider the fact that he had exhausted all remedies of pursuing Civil Case No. 8/2004 which was struck out on the reason that the same was premature for failure to exhaust appellate remedies available while there was proof on record

that he appealed to the Minister who sustained the Commissioner's decision of dismissal.

In addition, the applicant submitted that in Misc. Civil Application No. 8 of 2013 he was seeking extension of time to file review before this court after discovering evidence on record but the same was dismissed for lack of merit which is contrary to the law. For him to obtain justice, it is only if the court allowed him to file Notice of Appeal and appeal.

He thus prayed for the court to grant this application.

On the other hand, Mr. Yohana Marco learned State Attorney disputed the submissions of the applicant but before submitting against the same submission, he noted three anomalies as follows;

First anomaly is to the effect that the summons was issued on 11/8/2021 which differ with the dates in the chamber summons which showed it was issued on 12/8/2021. This implies that the chamber summons was issued before filing the application and this questions the credibility of such documents and it is hard to account for the period of delay since the period prior to this application must be accounted for.

The second noted anomaly is that the affidavit's verification was on 29/7/2021 while the affirmation in jurat of attestation was on 30/7/2021 a day after which entails that the making of affidavit was not administered by the Commission for Oaths as per **section 8 of Notaries Public and Commissioner for Oaths Act, Cap 12 R.E 2019** which provides that:

> *"Every notary public and commissioner for oaths before whom any oath or affidavit is taken or made under this Act*

shall insert his name and state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made."

The learned State Attorney was of the view that the underlined clause connotes that the date on verification and jurat must be the same since making of affidavit is a process which involve all parts of affidavit including verification and jurat.

Mr. Yohana also noted that the affirmation in the said affidavit has not been signed by the deponent. The presence of signature only without showing whose signature it offends the principle in **DPP vs Dodoli Kapufi and Patson Tusalile, Criminal Application No. 11 of 2008,** CAT at Dodoma (unreported) which stressed that;

"The Notary Public and Commissioner for Oaths is required to certify in the jurat that the person signing the documents did so in his presence, that the signer appeared before on the date and at place indicated thereon; and that he administered the oath or affirmation to the signor, who swore to or affirmed the contents of the affidavit."

Basing on this authority, it was Mr. Yohana's argument that to be in a position to determine whether the affidavit was made before the Commissioner for oaths the jurat of attestation must be verified and as per the present jurat of the Applicant's affidavit it cannot be determined who signed it because there is no specification save for a signature.

The last noted anomaly is that the Applicant's affidavit has not been filed in court as per the copy served to the Respondents. This means the

Court fees were not paid and that accounting for days delayed shall be impossible since it is not clear when this matter was filed.

In respect of the noted anomalies, Mr. Yohana was of the view that this application is incompetent for being supported by incurably defective affidavit and the same should be struck out with costs.

In contesting the gist of the applicant's submission on account of days of delay the learned State Attorney submitted to the effect that, the decision the applicant seeks to challenge was made on 20/10/2015 and he was to lodge notice of appeal within 30 days as per **Rule 83 (2) of the Court of Appeal Rules, 2009** which expired on 18/11/2015 where the time was to be reckoned from 19/11/2015 to the date prior to filing of this application. Thus, the applicant has delayed for 2,019 days counting from 19th November, 2015 to 28th July, 2021

The learned Sate Attorney submitted further that these 2019 days of delay amounts to an ordinate delay. He referred to the case of **Lyamuya Construction** (supra) to support his argument. He opined that the requirement of a delay not to be inordinate aims at putting an end to litigation because the interest of the State requires that there should be an end to litigation *(interest reipubiicae ut sit finis litium).*

Mr. Yohana was of the view that since the applicant's delay is inordinate then it shall not be in line with public interest for it will set a bad precedent for a party who asks for endless extension of time for the reason that previous matters were struck out on legal technicalities like what the applicant is doing that, he has been litigating this matter for more than six times in this court.

The learned State Attorney argued that if the delay is not accounted then the court can extend time if there is point of illegality sufficient on face of record. In line with this contention, he stated that the alleged illegality has not been pleaded in the Applicant's affidavit. That, the same offends the cardinal principle that parties are bound by their pleadings. However, he challenged the alleged illegality on the ground that the ruling of Misc. Civil Application No. 8 of 2013 has not been attached as deponed under paragraph 5 of Applicant's affidavit. The same applies to annexures MU4 and MU5 as deponed under paragraph 7 and 8 of the affidavit. Basing on this query, the learned State Attorney was of the view that since the Applicant's Counsel asserts the existence of point of illegality in Misc. Civil Application No. 8 of 2013 then its ruling was supposed to be attached so as to ascertain the existence of the alleged illegality. This is because, considering a fact and making it a reason for a decision are two distinct exercises.

As to the proceedings and drawn order in annexure "MU 2" annexed to paragraph 5 of the Applicant's affidavit, Mr. Yohana stated that the same cannot show whether the trial judge failed to consider the facts the Applicant's Counsel alleges. Also, it can neither be used to ascertain the reasoning of the ruling and this pitfall made the Applicant's Misc. Civil Application No. 39 of 2020 to be struck out as per paragraph 23 and 24 of his affidavits as also seen under page 8 of the ruling in Misc. Civil Application No. 39 of 2020 annexed as "MU 14" under paragraph 24 of the Applicant's affidavit.

Mr. Yohana contended that even if the respondent was to side with the alleged illegality yet the same is not sufficient for the reason that, first there are no facts on record to show that the applicant exhausted all

available remedies, before instituting civil case No. 8 of 2004. Second even if he had exhausted then the remedy was to file judicial review and not the suit.

In conclusion, it was submitted that, the application must fail because the applicant cannot account for an inordinate delay and there is no point of illegality on face of the record. The available remedy is judicial review to challenge the decision of the Minister, if at all it was given. He added that for interests of justice this application has reached a time when public interest must be invoked to bring an end to it. The law does not aid a party who is not vigilant and in all the previous applications the Applicant has been unsuccessful on failure to follow procedural law which amounts to ignorance of the law.

Mr. Yohana thus prayed for the ruling and order that the application has been litigated long enough and now it must come to an end, the application be dismissed with costs for want of merit and any other relief the court deem fit and just to grant.

In rejoinder, the applicant noted that the respondent did not file counter affidavit and that the applicant's affidavit stands undisputed since it is trite law that failure to file counter affidavit is equally as the respondent has failed to appear and answer the allegations.

Responding to the claim that there is variance in dates of served chamber summons it was argued that the same did not jeopardise the rights of other party since they appeared on the incumbent date and they were ordered to file their counter affidavit but they did not comply.

Regarding the variance in the dates as appeared in jurat of attestation, the applicant argued that the same did not offend **section 8 of the**

Notaries Public and Commissioners for Oaths Act, since the two are one and the same thing. He added that the two are different parts of affidavit to the effect that the verification is to enable the court signify whether what is stated in the affidavit is true and whether it comes from the knowledge of the deponent or is the information obtained from a source that he believes to be true, while the Jurat of attestation shows that the deponent did attest before the Commissioner for oaths.

He cemented the above by referring to the case of **Sanyou Service Station Ltd vs. BP. Tanzania Ltd (Now Puma Energy (T) Ltd, Civil Application No. 185/17 of 2018,** CAT at Dar es Salaam (unreported).

He thus commented that in the two circumstances, the deponent may swear on any date convenient. He argued that the said contention is misleading, lacks merit and ought to be dismissed.

Regarding the claim that the affirmation was not signed, it was applicant's response that the cited case of **DPP vs Dodoli** (supra) is in his favour since it shows that the jurat shall be signed by deponent before Commissioner for Oath as it was done by the Applicant. In addition, the applicant added that the words signed, affirmed and delivered at Arusha by Musa Manyaka who is the deponent herein are enough to show that it is Musa Manyaka (the Applicant) who signed before such words. Thus, the respondent contention should be dismissed as it lacks merits.

As to the argument that the affidavit was not filed in court, the applicant contended that the same was electronically before presenting hard copy and being stamped on 6/7/2021 and he paid for filing fee via receipt No 25298484 dated 9/8/2021.

Countering the argument that the applicant failed to account for all days of delay, the applicant reiterated what he stated in his affidavit and submissions in chief. And that the **case of Lyamuya** quoted by Mr. Yohana works best in his favour. He reiterated what he had submitted earlier and added that the delay was technical delay and he had to start afresh the whole process of appeal and the respondent is accounting days of delay to file this application as if the applicant was doing nothing all this time.

The applicant further reiterated the point that he acted in time to have time extended so that he could file notice of appeal. He made reference to the case of **Zahara Kitindi and Another Versus Juma Swalehe and 9 others, Civil Application No. 1/05/2017, CAT at Arusha.** (unreported).

I have examined the submissions of both parties together with their respective affidavits. The issue for determination is ***whether the applicant has established sufficient grounds for extension of time to be granted.***

For the Applicant to succeed in this application, he ought to account for each day of delay, he ought to show good cause for the delay and for the issue of illegality, the same must be apparently pointed out in the application and that it is on the face of record. (See the case of Lyamuya Construction Company Limited (supra). In the case of **Airtel Tanzania Limited vs Misterlight electrical installation Co. Ltd and Another, Civil Application No 37/01 of 2020** the Court of Appeal stated inter alia that: -

"It may not be possible to lay down an invariable or constant definition of the phrase "good cause", but the Court consistently considers such factors like, the length of delay involved, the reasons for the delay; the degree of prejudice, if any, that each party stands to suffer depending on how the Court exercises its discretion; the conduct of the parties, and the need to balance the interests of a party who has a constitutionally underpinned right of appeal."

The applicant in his affidavit, has narrated the series of cases he had filed and averred that the delay was caused by these series of cases and so he termed the delay as technical one.

I have keenly passed through these cases, it is undisputed that prior to this application, there are series of cases which were filed by the applicant, among them is Misc. Civil Application No. 26/2018 seeking extension of time within which to file Notice of Appeal to the Court of Appeal *(the same application like the present one)* which was struck out on 8/7/2019. This court while striking out the application had this to say at page 6 -7 of typed proceedings;

***"State Attorney:** This matter is coming for hearing but we have noted that the applicant is absent. However we pray this application be struck out for want of prosecution because the applicant is absent without notice and not only that the applicant wants to lodge a notice of appeal out of time to appeal against the Order of the court refusing to grant extension of time to file an application for review of court's decision in Civil Case No.8 of 2004 and therefore this*

particular order of the court is not appealable under the law, thus the application is not appealable. The fact that this application is not appealable in law it makes the application frivolous, vexatious and hence an abuse of court process. We humbly pray this application be struck out for want of prosecution.

Court: *Having being satisfied with the submission by the responded (sic) to the effect that this application is not appealable, let the application be struck out.*

Order: *the application is struck out as per requirements of Order IX Rule 8 for want of prosecution."*

This Court ruled out that the order against which the applicant want to file the notice of appeal is not appealable. The applicant through the back door filed the same application for extension of time to file notice of appeal against the same decision which this court had ruled out that it is not appealable. In that respect, this court cannot grant extension of time to file notice of appeal on the same case which this court has already decided that it is not subject of appeal.

I am of settled view that as a matter of law and practice what the applicant has been doing amounts to **forum shopping** which is not allowed. Worldwide, courts of law have been discouraging litigants to act in a manner which may amount to abuse of court process. In the case of **SH. RANBIR SINGH AND ANOTHER VS. SH. NARESH KUMAR AND OTHERS (2019);** High Court of Himachal Pradesh, (India), Tarlok Singh Chauhan J. stated that: -

> *"**The Supreme Court Practice 1995,** published by sweet and Maxwell, in paragraph 18/19/33 (page 344) explains the phrase "abuse of the process of the court" thus: This term connotes that the process of the court must be used bona fide and properly and must not be abused. **The Court will prevent improper use of its machinery and will in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation ..."** (Emphasis mine).*

In Nigeria in the case of **SARAKI VS. KOTOYE (1992) 9 NWLR (part 264) 156 at 188** when discussing the issue of abuse of court process, it was held among other things that:

> *"This will arise in instituting a multiplicity of action on **the same subject matter** against **the same opponent** on the **same issue."** (Emphasis mine).*

As per applicant's affidavit, it is true that the applicant has been struggling to make follow up of what he believes to be his right. However, all those struggles cannot move the court to act out of sympathy to grant what was sought. The same position was stressed in the case of **Mohamed Hassan Hole vs Keya Jumanne Ramadhan, Civil Appeal No.19/1992)** (CAT Dodoma) (Unreported) where the Court of Appeal of Tanzania held that:

> *"It is trite law that when it comes to limitation of time the court cannot extend even a grain however it may be to the applicant/litigant. Limitation of time is a merciless monster*

that entertain no speak of sympathy whatsoever unless the leeway is provided by the law."

This suffices to conclude that this application is wrongly filed before this court since this same court has already decided on the same.

Regarding the illegality as the factor to grant extension of time, I will make reference to the the case of **Fatma Hussein Shariff v Alikhan Abdallah (As Administrator of the Estate of Sauda Abdallah) & 3 Others (Civil Appeal No.536/17 of 2017,** in which the Court of Appeal of Tanzania at page 13 held that:

"It should be noted that, for illegality to be considered as a good cause for extending time, it has to be on point of law of sufficient importance and it must be apparent on the face of record and not one that would be discovered by a long-drawn argument or process."

The Applicant pointed out the illegality that the court was wrong to hold that he did not exhaust local remedy while he did. This pointed-out illegality was not raised in the applicant's affidavit as rightly submitted by Mr. Yohana. Raising it during submission is taking the court as well as the respondent by surprise.

Even if we assume that the same was stated in applicant's affidavit, yet the same does not fall under the category of point of law and for that it does not fit to be the factor for extension of time.

In the upshot, I find no reasons for extending time to file notice of appeal appeal and I hereby dismiss this application with. No order as to costs

It is so ordered.

Dated and delivered at Moshi this 3rd day of December 2021

S.H. SIMFUKWE

JUDGE

3/12/2021