

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

MISC. CRIMINAL APPLICATION NO. 88 OF 2021

(Arising from the High Court of Tanzania, at Mbeya in PC. Criminal Appeal No. 10 of 2019 and in Criminal Appeal No. 39 of 2018 of the District Court of Mbeya District at Mbeya. Originated in the Primary Court of Mbeya District, at Urban in Criminal Case No. 715 of 2018)

AYUBU SIMKOKO.....APPLICANT

VERSUS

ZELA ROBERT.....RESPONDENT

RULING

Date of Last Order: 16.05.2022

Date of Ruling: 10.06.2022

Ebrahim, J.

The instant application is made under **section 11 (1) of the Appellate Jurisdiction Act, Cap. 141 R.E 2019**. The applicant, Ayubu Simkoko is seeking for an order this court to grant an extension of time within which to file an application for certificate on point of law so as to appeal to the Court of Appeal of Tanzania (the CAT).

The applicant intends to appeal to the CAT to challenge the decision of this court which was made in PC. Criminal Appeal No. 10 of 2019 confirming the decisions of the lower courts, both the District and the Primary Courts.

Originally, the applicant was arraigned before the Primary Court of Mbeya District for the offence of Cheating by obtaining money fraudulently styled in Kiswahili language as "Kujipatia pesa kwa njia ya udanganyifu" **contrary to section 304 of the Penal Code, Cap 16 R.E 2002 (now R.E 2019)**. He was convicted and sentenced to conditional discharge for six months. Aggrieved, he unsuccessfully appealed to the District Court. Still discontented, he again unsuccessfully appealed to this court.

The applicant has now lodged a notice of appeal to the CAT. Understanding that he has no direct right to appeal to the Court, he firstly applied for a certificate on a point of law vide Misc. Criminal Application No. 77 of 2020. It was however, struck out for being incompetent. He then filed an application for extension of time to file an application for a certificate on a point of law through Misc. Criminal Application No. 26 of 2021. The same was withdrawn with leave to re-file. He refiled it as per the order of the court vide Misc. Criminal Application No. 73 of 2021, unfortunately it was again struck out for being incompetent. The applicant thus filed the instant application.

The application was supported by an affidavit sworn by himself. The respondent vehemently protested the application.

At the hearing, the applicant appeared in person, unrepresented. Whereas advocate Joseph Kwilasa represented the respondent. The application was argued by way of written submissions.

Supporting the application, the applicant prayed to adopt the contents of the affidavit supporting the application. The reason for extension of time advanced in the affidavit was that his applications have been dragged in this Court for a long time which it was beyond his power and control. In his submissions, the applicant gave another reason that there is an illegality of the decision. He contended that the Court erred to uphold the decisions of the lower courts while the case emanated from a defective charge. He further argued that the court is bound to extend time if there is a serious point of law for determination. For that account he relied on the cases of **Principal Secretary, Ministry of Defence and National Service v. Deyram Valambhia** [1992] TLR 185 and **Kalunga and Company Advocates v. NBC Limited** [2006] TLR 235. He thus, prayed for this court to grant the application.

In counter reply, Mr. Kwilasa submitted that the applicant's affidavit did not disclose sufficient cause for this court to grant the application. According to him the applicant was supposed to follow the requirements for grant of applications of this nature as it was set in the case of **Lyamuya construction Company Ltd v. Board of Registered trustees of Young Women's Christian association of Tanzania**, Civil Application No. 2 of 2010 CAT (unreported).

Mr. Kwilasa submitted further that, though the applicant's applications have been struck out for being incompetent as they were handled by a layperson (the applicant) but it was upon him to account for all days of the delay. He contended that the applicant intended to hide under the technical delay principle but he was bound to account for 21 days which lapsed after the struck out of Misc. Application No. 73 of 2021 on 25/10/2021. That, it is the law that even a single day of delay must be accounted for as per the case of **Vedastus Raphael v. Mwanza City Council and two Others**, Civil Application No. 594/08 of 2021 CAT. Mr. Kwilasa further argued that the applicant's reason that there is illegality in the decision is not apparent on the face of record. According to

him the alleged illegality must be apparent on the face of record. To buttress his contention, he cited the case of **Secretary, Ministry of Defence and National Service v. Deyram Valambia**. Mr. Kwilasa therefore prayed for this court to dismiss the application for lack of merits.

In his rejoinder, the applicant insisted that point of law (illegality) was raised in his petition of appeal in this court that the conviction and sentence based on a defective charge. He thus insisted on his prayers.

Having considered the submissions by the parties, and having in mind that granting or refusing to grant extension of time is absolutely the court's discretion judiciously exercised upon sufficient cause being shown; the issue for determination thus, is whether or not this application is meritorious.

There is no hard and fast rule on what amounts to "sufficient/good cause". It depends on the circumstances of each case; see **Tanga Cement Company Limited v. Jumanne D. Massanga and Another**, Civil Application No. 6 of 2001 (unreported), where it was observed that:

"What amounts to sufficient cause has not been defined. From decided cases a number of factors have been taken into account including whether or not the application has been brought promptly, the absence of any valid explanation for delay or lack of diligence on the part of the applicant."

Yet, in the case of **Lyamuya Construction Company Limited v. Board of Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), the Court expounded the following principles to be taken into consideration when considering extending time:

"(a) That, the applicant must account for all the period of 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 sufficient reasons, such as the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged.

In the application at hand, the applicant has advanced a single ground that his applications were dragged in this Court for a

long time which was beyond his power and control. I say it is single ground since it is the one that has been raised in the applicant's affidavit. The law is clear that the reasons for extension of time are supposed to be given in the affidavit not in the submissions since submissions are not evidence. See the CAT observation in the cases of **The Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman Bunju Village Government and others**, Civil Appeal No. 147 of 2006 CAT at Dar es Salaam (unreported) and **Farida F. Mbarak and Another v. Domina Kagaruki and 4 Others**, Civil Reference No. 14 of 2019 (unreported).

Basing on that principle, this court will not therefore, consider the reason of illegality raised by the applicant in his written submissions.

As to reason that the applicant's applications were dragged into court, I concur with counsel for the respondent that the applicant intended to rely on the principle of "technical delay".

The principle "technical delay" was described in the case of **Furtanatus Masha vs, William Shija and Another** [1997] TLR 154, in the following words:

"... A distinction should be made between cases involving real or actual delays and those like the present on which only involve what can be called **technical delays** in the sense that the original appeal was lodged in time but the present situation arose only because the original appeal for one reason or another has been found to be incompetent and a fresh appeal has to be instituted."

Thus, in law a technical delay is excusable in opportune circumstances and constitutes a sufficient reason for granting the prayed extension of time. The principle of technical delay applies where the previously struck out matter had been filed timely nonetheless, is subject to the fact that, the affected party/applicant promptly moves the court upon the striking out order being made. See **Elly Peter Sanya v. Ester Nelson**, Civil Appeal No. 151 of 2018 CAT at Mbeya (unreported) and **Vedasto Protace v. John Joseph Mugango**, Misc. Land Application No. 115 of 2021 CAT at Dar es Salaam (unreported).

In the application at hand, it is undisputed that the applicant had been in this court prosecuting different applications which have been ending up either struck out or withdrawn. However, as

rightly argued by counsel for the respondent, the last application was struck out on 25/10/2021. The present application was filed in court on 16/11/2021 after a lapse of 21 days. Nonetheless, the applicant did not state/account as to what he was doing in those 21 days. The law is trite that even a single day of delay must be accounted for; see **Airtel Tanzania Limited v. Minister Light Electrical Installation Co. Ltd and Another**, Civil Application No. 37/01 of 2020.

Owing to the above reasons, the applicant has not demonstrated sufficient reasons for this court to grant the prayed extension of time. Consequently, I dismiss the application.

Ordered accordingly.



A handwritten signature in blue ink, appearing to read "R.A. Ebrahim".

R.A. Ebrahim
JUDGE

Mbeya
10.06.2022

Date: 10.06.2022.

Coram: Hon. A.E. Temu - DR.

Applicant: Present.

Respondent: Absent.

For the Respondent: Alfred Chapa h/b of Joseph Kwilasa.

B/C: Gaudensia.

Alfred Chapa: The matter is coming for Ruling, we are ready.

Court: Ruling delivered.



A.E. Temu

Deputy Registrar

10.06.2022

DEPUTY REGISTRAR
HIGH COURT OF TANZANIA
MBEYA