

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

**AT DAR ES SALAAM**

**MISCELLANEOUS CIVIL APPLICATION NO. 479 OF 2022**

*(Originating from the High Court of Tanzania, Dar es Salaam  
District Registry in Civil Case No 167 of 2016)*

**CRDB BANK PLC..... APPLICANT**

**VERSUS**

**TIMOTH DANIEL KILUMILE CO. LTD.....1<sup>ST</sup> RESPONDENT**

**DAWSON BUBERWA ISHENGOMA..... 2<sup>ND</sup> RESPONDENT**

**RULING**

*12/12/2022 & 23/02/2023*

***BWEGOGGE, J.***

The applicant above named has lodged an application in this court praying for an extension of time under section 11(1) of the Appellate Jurisdiction Act, (Cap 141 R: E of 2019) within which the same may file notice of appeal before the Court of Appeal against the judgment and decree delivered by this court in Civil Case No. 167 of 2016 dated 11<sup>th</sup> March, 2019. The application lodged hereto is supported by an affidavit deposed by the principal officer of the applicant.

The background of this matter, albeit briefly, is as thus: On 31<sup>st</sup> August 2016 the respondents commenced civil proceedings in this court against the applicant for payment of a sum of TZS 7, 778, 718.40 being the amount withdrawn from the account of the 1<sup>st</sup> respondent at the applicant's Bank; payment of a sum of TZS 120,000,000/= being special damages, general damages, punitive damages, costs and interest. On 11<sup>th</sup> March, 2019, this court decided in favour of the respondents. It was decreed that the 1<sup>st</sup> respondent was entitled to be refunded TZS 7, 778, 718.40 which was unlawfully deducted from her account; general damages at the tune of TZS 100,000,000/=, interest at 7% from the date of judgment to payment in full and costs of a suit.

The applicant was not amused with the decision of this court; hence appealed to the court of appeal. The appeal was scheduled for hearing on 4<sup>th</sup> October, 2022, but in the due course, it was found that the certificate of delay was defective. On that basis, the applicant's counsel was constrained to withdraw the appeal. Hence, the application herein for extension of time to file notice of appeal before the Court of Appeal against the judgment and decree delivered by this court was lodged.

The applicant and respondents herein were represented by Mr. Stephen Axwesso, and Mr. Thomas Eustace Rwebangira, the learned advocates.

The counsel representing the parties herein argued for and against this application through written submissions. The submissions made by both counsel are recounted hereunder, albeit briefly.

Mr. Axwesso, counsel for the applicant, submitted that this court is empowered to grant extension of time to lodge notice of appeal when the applicant furnishes sufficient reasons; and what amount to sufficient reasons depends on the particulars of each application. The counsel referred the case of **Lyamuya Construction Company Limited vs the Board of Registered Trustees of Young Women's Christian Association of Tanzania** (Civil Application No.2 Of 2010) TZCA 4 to make his point. Further, the counsel submitted that the Court in the above cited case established four factors in establishing sufficient reasons, namely; **one**, the applicant must account for all periods of delay; **second**, the delay should not be inordinate; **third**, the applicant must show diligence and not apathy, negligence or sloppiness of the action that intends to take; and **fourth**, if the court feels that there are other sufficient reasons, such as existence of point of law of sufficient importance such as illegality of the decision sought to be challenged.

In an attempt to account for each day of delay, the counsel submitted that, from paragraphs 1 to 20 of the affidavit, the applicant has accounted for

each day of delay; the judgment was delivered on 11<sup>th</sup> March 2019, the applicant filed notice of appeal on 12<sup>th</sup> March, 2019 and on 22<sup>nd</sup> March, 2019 requested to be supplied with the necessary documents, the same was availed with relevant documents on 30<sup>th</sup> August 2019. Then the applicant sought and obtained the certificate of delay, but the same mistakenly indicated that the applicant requested copies of necessary documents on 26<sup>th</sup> March, 2019 instead of 12<sup>th</sup> March, 2019. Likewise, the certificate mistakenly indicated that the notification letter from the registrar was dated 14<sup>th</sup> August, 2019 instead of 30<sup>th</sup> August, 2019. Unfortunately, the applicant didn't notice the mistaken dates until the same were identified by justices of appeal which resulted in the applicant's counsel withdrawing the appeal. The applicant was aware of the withdrawal of the appeal on 5<sup>th</sup> October, 2019 then sought the opinion from in-house lawyers before engaging her counsel herein to pursue her legal rights. Thus, opined the counsel, with the above facts, the applicant has accounted for each day of delay and it shows that the applicant acted proactively and diligently.

And, in an attempt to establish that delay was not inordinate, the counsel submitted that the applicant was notified about the withdrawal on 5<sup>th</sup> October, 2022 and thereafter reviewed the withdrawal order, judgment, decree and records of appeal. And, upon approval by her in-house lawyers, the applicant engaged Messrs B & E Ako Law on 21<sup>st</sup> October to pursue the

case whereas the application herein was filed on 28<sup>th</sup> October, 2022. Therefore, the counsel opined, in a total of 23 days the applicant exercised promptness, not tardiness.

Further, the counsel argued that the delay was a technical delay caused by the defective certificate of delay issued by the registrar. Thus, this is a sufficient cause for extension of time. The case of **Fortunatus Masha vs William Shija and Another**, [1997] TLR 41 was cited to bolster the point. In the totality of the above, the counsel for the applicant opined that the applicant has proved diligence and never slept on her right.

Lastly, in establishing the plea of illegality in the impugned decision, the counsel submitted that, there are other reasons which are matters of degree to justify extension of time such as the claim of illegality in the impugned decisions. The case of **Principal Secretary, Ministry of Defense and National Service vs Devram Valambia** [1992] TLR 185 and **Transport Equipment Ltd vs D.P Valambia** [1993] TLR, 91 were referred to validate the point.

The counsel directed the mind of this court to the purported serious illegalities in paragraph 18 of the affidavit which necessitated the extension of time so that the court may put the records right. And, the counsel opined, time limitation is a procedural issue which should not impede justice,

especially where the party has taken steps to take legal action.

On the other hand, Mr. Rwebangira, counsel for the respondents, contended that the submission by the counsel for the applicant be ignored for lacking evidence. The counsel cited the case of **Mohamed Salimini vs The Assistant Registrar of Titles** (Civil Application No. 31/03 of 2021) TZHC 2015 to validate his point. That the applicant has not accounted for days of delays but deponed facts pertaining to the historical background of the case which is not relevant to this application for extension of time. That the technical delay was not pleaded for in the counter affidavit. The counsel opined that, be that as it may, the defect in respect of the exclusion dates on the certificate of delay was initiated by the applicant, and this amount to negligence which is not good cause for extension of time.

Further, the counsel opined that the applicant failed to account for a total of 24 days from the time the appeal was withdrawn until the filing of this application. That it is strange for a two paged withdrawal order to be reviewed in 16 days and took 7 days for the counsel for the applicant to lodge this application. The counsel reminded this court that every single day must be accounted for. The case of **Hawa Issa Nchirya vs Ramadhani Iddi Nchirya** (Civil Application No 27/03 of 2021) [2021] TZCA 450 was cited to bring home the point. Further, the counsel asserted



that in the case of **Mathew Kitambala vs Robson Grayson and Another** (Criminal Appeal No. 330 of 2018 ) TZCA 572 the extension of time was refused for failure to account for 3 days of delay.

In tandem with the above, the counsel contended that the alleged illegality, for it to be a reason for extension of time, has to be clear on the face of the record without requiring a long process to decipher them. That the facts purporting to establish illegality in paragraph 18 of the counter affidavit do not establish the alleged illegality as the words used are as thus: "*learned judge erred in law and facts...*" which requires scrutiny of evidence and records. The case of **Jubilee Insurance Co. (T) Limited Company (T) Ltd vs Mohamed Sameer Khan** (Civil Application No. 439/01 Of 2020) [2022] TZCA 623 was cited to buttress the point. On the above premises, the respondent's counsel prayed this application be dismissed with costs.

In rejoining what was submitted earlier, Mr. Axwesso reiterated what was submitted in the submission in chief and added, his mistake in the letter requesting for certificate of delay should not be used as a weapon to punish the applicant as there are circumstances where negligence on part of the counsel may be tolerated. The case of **Yusufu Same and Another vs Hadija Yusuph** [1996] TLR 347 was cited to make the point.

Further, the counsel submitted that the applicant is an institution whose decision doesn't come from a single person, it had to review not only the withdrawal order but other court records which are voluminous in nature before his firm was instructed to take legal action. This is all about the submissions of the counsel herein.

The issue for determination is whether the application herein is merited.

This court is enjoined with discretionary power to extend time for filing notice of appeal upon the applicant furnishing good cause [**African Banking Corp. (T) LTD vs George Williamson Ltd** Civil Application No. 349/ 01 of 2018 CA (unreported)]. The said discretion is to be exercised judiciously depending on the materials before the court [**MZA RTC Trading Company LTD vs Export Trading Company LTD**, Civil Application No. 12 of 2015, CA (unreported)].

As rightly submitted by the counsel for the applicant, what amounts to good cause depends on the circumstances of the particular case. However, the factors to consider, among others, are the length of delay, reasons for the delay, and the degree of prejudice to the other party, if granted. See the cases of **Wambele Mtumwa Shahame vs Mohamed Hamis** (Civil Reference No. 8 of 2016) [2018] TZCA 39. In addition to the above, diligence and promptness, not tardiness, in taking legal action, and



existence of a point of law of sufficient importance such as illegality of the impugned decision may entitle the applicant for grant of extension. See the case of **Lyamuya Construction Co. Ltd vs the Board of Registered Trustees of Young Women's** (supra).

From the outset, as far as the application of the principle of technical delay is concerned, I find it pertinent to put it clear that for there to be a technical delay there must be evidence that the original appeal has been lodged in time. The principle is appositely stated in the case of **Fortunatus Masha vs William Shija and Another** (supra) cited in the case of **Yara Tanzania Limited vs DB Shapriya & Co. Limited** (Civil Appeal 245 of 2018) [TZCA] 565 as thus:

*"..... a distinction should be made between cases involving real or actual delays and those like the present one which 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. In the circumstances, the negligence if any really refers to the filing of an incompetent appeal, not the delay in filing it. The filing of an incompetent appeal having been duly penalized by striking it out, the same cannot be used yet again to determine the timeousness of applying for filing the fresh appeal."*

It is a fact that the appeal case instituted by the applicant in the Court of Appeal was withdrawn by reason that it was technically lodged out of time. Thus, the facts of this case gauged by the principle expounded in the above cited case, in strict sense, do not support the defence of technical delay invoked by the applicant's counsel. Nevertheless, I have taken into consideration the fact that save for the defect on the certificate of delay the counsel would have filed his record of appeal within the prescribed time. I, therefore, find it prudent not to subject the applicant to account for the time spent in prosecuting the purported appeal.

That said, I now proceed to determine whether the applicant accounted for the time taken to lodge the application herein following the withdrawal of an appeal from the superior court. It is now a well-settled principle that the applicant who seeks enlargement of time should account for each day of delay. There is a litany of decided cases in this respect, including the cases of **Jubilee Insurance Co. (T) Limited Company (T) Ltd vs Mohamed Sameer Khan** (Supra); **Hawa Issa Nchirya vs Ramadhani Iddi Nchirya** (supra) and **Mathew Kitambala vs. Robson Grayson and Another** (supra) cited by the counsel for the respondent, among others. Likewise, it is the settled principle that lack of diligence and, or inaction doesn't constitute sufficient ground for an extension of time. See in this

respect the cases of **Jubilee Insurance Co. (T) Limited Company (T) Ltd vs Mohamed Sameer Khan** (supra); **Omar Ibrahim vs Ndege Commercial Services Ltd**, Civil Application No. 83 of 2020 and **Wambura N.J. Waryuba vs The Principal Secretary Ministry of Finance & Another**, Civil Application No. 320 of 2020 (unreported).

It is uncontroverted fact that it has taken the applicant 23 days from the time the appeal was withdrawn until the filling of this application. Likewise, it is uncontroverted fact that it had taken the applicant 16 days to have the withdrawal order reviewed by her in-house legal practitioners before instructing her counsel to take legal action whereas it took 7 days for the counsel to lodge this application.

Based on the facts above, I purchase wholesale the assertion by the counsel for the respondents in that it doesn't ring into the mind of any legal practitioner that the withdrawal order would need 16 days of review for a decision to take legal action to ensue. It must be borne in mind that the applicant had already made up her mind to appeal against the decision of this court. And the appeal had already been filed to the superior court to be withdrawn upon the discovery of a technical fault. Therefore, I find no logic in that the applicant needed further time to ponder on whether to pursue an appeal or not. Be that as it may, it would not require such a

lengthy period to arrive to the conclusion of taking such legal action. In the same vein, I find it odd that the counsel for the respondent who was well conversant with the case, would require seven days to institute the application herein. I, therefore, refuse to subscribe to the assertion made by the counsel for the applicant in that the applicant herein has never slept on her right but acted diligently and vigilantly in instituting this matter. It is needless to state that the applicant acted vividly contrary to her counsel's assertion.

It is my considered opinion that the time spent by the applicant to institute the application herein after the appeal was withdrawn from the superior court is inordinate in the circumstances of this case. I reiterate that the applicant was legally obliged to account for the whole period of delay, specifically 23 days. In my considered opinion, the applicant has failed to discharge this obligation.

At this juncture, I proceed to find whether the plea of illegality advanced by the counsel for the applicant has substance. From the outset, I am on all fours with the counsel for the applicant in that it is a settled principle that when the point at issue is one alleging illegality of a decision being challenged, the court has a duty, even if it means extending time for the purpose, to ascertain the point. And, if the alleged illegality is established,

to take appropriate measure to put the matter and record straight  
[**Principal Secretary, Ministry of Defence and National Service vs. Devram Valambhia** (1992) TLR 182].

In the matter at hand, the particulars for the alleged illegality are deponed under paragraph 18 of the affidavit supporting the application herein. I find it pertinent to reproduce the relevant facts verbatim as thus:

*"18. That I have been advised.....that the judgment and decree in civil case No. 167 of 2016 is tainted with illegality on the following grounds;*

- 1. The learned trial judge erred in law and in fact in his conclusion that the respondent was denied access to his account for purposes of withdrawing the sum of TZS 40,000,000/.*
- 2. The learned trial judge erred in law by holding that the debit transaction of TZS 7,778,717.4 from the account of Timothy Daniel Kilumile Co. Ltd was illegal and unlawful.*
- 3. The learned trial judge erred in law and in fact in making wrong general assumption that the applicant cannot encounter a technical problem at its premier and vicinity branches and hence arriving at some erroneous conclusion.*
- 4. The learned trial judge erred in law and in fact in granting exorbitant general damages.*

Having scrutinized the purported particulars of the alleged illegality, I am inclined to agree with the opinion given by the counsel for the respondents in that what purport to be particulars of illegality would fit to be grounds for appeal. The same are based on facts which require scrutiny of evidence,

judgment and exhibits to substantiate the allegation. It suffices to point out that the facts deposed attract a long-drawn process to capture the alleged illegality.

It is a settled principle of law that the alleged illegality must be of sufficient importance, apparent on the face of the record and not that which would be discovered by a long-drawn argument or process. See the cases of **Lyamuya Construction Co. Ltd. vs the Board of Registered Trustees of Young Women's Christian Association of Tanzania** (supra) and **Jubilee Insurance Co. (T) Limited Company (T) Ltd vs Mohamed Sameer Khan** (Supra). In the same vein, the alleged illegality should not be such that:

*"...it will take long drawn process to decipher from the impugned decision the alleged misdirection or non-directions on points of law."* See the case of **Ngao Godwin Losero vs Julius Mwarabu**, Civil Application No. 10 of 2015 CA (unreported).

Based on the above principle, I am bent to conclude that the applicant has failed to establish the alleged illegality and, or point of law involved in the impugned decision to warrant the grant of enlargement of time.



Finally, the applicant having failed to account for the period of delay and, or otherwise demonstrate the point of law of sufficient importance to warrant grant of extension of time sought, I find the application herein without substance. I, therefore, hereby dismiss the application herein with costs.

Order accordingly.

**Dated at Dar es Salaam** this 23<sup>rd</sup> February, 2023.



A handwritten signature in blue ink, appearing to read "O.F. Bwegoge", is written over a horizontal line.

O.F. BWEGOGGE

**JUDGE**