

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

MISC. CIVIL APPLICATION NO. 23 OF 2022

(Originating from PC. Civil Appeal No. 30 of 2019 of the High Court of Tanzania at Mbeya in Civil Appeal No. 20 of 2019 of the District Court of Mbeya

In original Civil Case No. 30 of 2019 of the Mbeya Primary Court at Mwanjelwa.)

SIMON ARONAPPLICANT

VERSUS

JANE JOSHUARESPONDENT

RULING

Date of last order: 8th March, 2023

Date of ruling: 29th March, 2023

NGUNYALE, J.

The applicant has filed the present application seeking extension of time within which to apply for a certificate on a point of law. The application is made under section 11(1) of the Appellate Jurisdiction Act [Cap 141 R: E 2019]. It is supported by the affidavit of advocate Justinian Mshokorwa and resisted by a counter affidavit of advocate Josephat Kazaura.



When the application came up for hearing, the applicants were represented by Mr. Justinian Mshokorwa before his demise, whereas the respondent had the services of Mr. Japhet Kazaura, both learned counsels. Hearing proceeded through written submission. Both parties dutifully complied with scheduling order.

Counsel for the applicant submitted that Hon. Utamwa, J (as he then was) raised the issue of validity of the contract *suo motto* in the judgment without affording parties right to be heard and he based his decision on that point. He said that the point was not among the grounds of appeal.

He further pointed that the Judge committed an error in not holding that the transaction between parties was a contract and that decision was reached without considering evidence that the respondent admitted to have taken a loan and partly paid it. He contended that these two errors have to be corrected by the Court of Appeal, he cited the case of **Principle Secretary, Minister of Defence vs Valambia** [1992] TRL 185 to bolster the argument. Based on the above he prayed application to be granted.

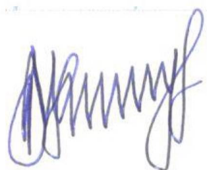
In reply Mr. Kazaura submitted that for extension of time to be granted the applicant must demonstrate sufficient reason. He contended that although what amount to sufficient reason cannot be laid by had and fast rule but the applicant had failed to demonstrate one. He said; the Judge

interpreted rightly the contract and came to the conclusion that it was not a normal contract as the respondent disputed to have entered the same.

He further submitted that the applicant did not account each day of delay but just provided general explanation to the respective days.

On existence of illegality, he submitted that the decision was fair as required by the law as the suit was filed within time, adding that the question of illegality need not to be discovered by long drawn argument or process. He referred to me the case of **Stephen B.K. Mhauka vs The Director of Morogoro District Council**, Civil Application No. 68 of 2019. He contended that there was no any illegality in the impugned judgment. He thus, prayed the application to be dismissed.

In rejoinder counsel for the applicant stated that under para 1 to 4 of the affidavit circumstances leading to delay is well narrated, the averment not controverted in the counter affidavit filed by the respondent. From there he said that he had managed to account each day of delay from the first application which he applied for certificate on point of law. The very application was struck out hence lodging this application viewing it as a technical delay which is excusable. For illegality he contended that it has not been rebutted by the respondent in the reply submission.



Having read the application documents and rival arguments of both counsels, the issue is whether the applicant has met the necessary conditions to warrant the grant of extension of time. This Court is vested with unfettered discretionary powers to grant extension of time. However, those discretionary powers must be judiciously exercised according to the rules of reason and justice, not personal whims. Although there is no universal definition of what constitutes good cause, in exercising such powers, the Court is required to consider the prevailing circumstances of the particular case guided by a number of factors such as the length of the delay, the reasons for the delay, the degree of prejudice the respondent stands to suffer if time is extended, whether the applicant was diligent and whether there is a point of law of sufficient importance such as illegality of the decision sought to be challenged. See **The Principal Secretary, Ministry of Defence and National Service v. Devram P. Valambhia** [1992] T.L.R 387 and **Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

In this application the applicant has advanced two reasons **one**; technical delay after application for a certificate of point of law was dismissed by this court (Karayemaha, J). The position of the law is settled that where a party has been diligent in taking essential steps in the furtherance of his

intended appeal but, on the way, he is caught up in the web of technicalities, sufficient cause is to be taken to have been shown for the delay. See **Fortunatus Masha vs William Shija and Another** [1997] T.L.R. 154 and **Dalia Burhan Nindi vs Zainab Ismail Msami**, Civil Application No. 235/17 of 2021 (unreported).

Under paragraphs 2 and 5(a) of the affidavit the applicant has deponed that he lodged Misc. Application No. 25 of 2021 for a certificate on point of law but it was truck out on 18/3/2022 by the court (Karayemaha, J) on technical error. The averment was not disputed by the respondent in the counter affidavit. This implies that the period used in pursuing Misc. Land Application No. 25 of 2021 up to 18/3/2022 suffices to demonstrate that she was diligent in pursuing her rights in the court and therefore excusable.

The flowing question is whether the applicant has accounted the period from when ruling was delivered on 18/3/2022 up to when the present application was filed. It is settled that in applications for extension of time, the applicant is required to account for each day of delay. This was emphasized by the Court in **Elius Mwakalinga vs Domina Kagaruki and 5 Others**, Civil Application No. 120/17 of 2018 (unreported) where it was stated that:

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

In his submission, Counsel for the applicant argued that he managed to account for each day of the delay, the averment which was strongly resisted by the respondent. It is to be noted that the period spent in prosecuting Misc. Civil Application No. 25 of 2021 before Karayemaha J. has been explained away and therefore excusable. The applicant has to account from 18/3/2022 to 30/6/2022 when the present application was filed. Under para 2 of the affidavit, it was averred that he applied for copy of ruling on 21/3/2022 and obtained it on 28/3/2022. As the record tell a copy of the letter requesting the copies was not attached.

There is Misc. Civil Application No. 8 of 2021 which was struct out on 8/6/2022 a letter requesting copies of the ruling or drawn order deponed in para 3 of the affidavit but the affidavit is silence on what was the purpose of that application. The applicant having failed to explain the period from 18/3/2022 to 30/6/2022 when this application was filed, entitles this court to conclude that he has failed to account each day of delay.

Another reason advanced is existence of illegality in that the judge *suo motto* raised the issue of validity of contract without parties being afforded chance to be heard. In law failure to afford parties a right to be heard



constitutes good cause for the grant of extension of time. See **Chausiku Kitwana Maboga vs Victor Benard (Administrator of the Estate of Hamisi Kowelo)**, Civil Application No. 336/17 of 2021 (Unreported).

For the said illegality to constitute good cause it must be apparent on the face of records. That is to say it must not be discerned by long drawn argument or process of reasoning. In the submission Counsel for the applicant argued that Judge Utamwa raised *suo motto* the issue of validity of contract between the parties. In rebuttal, Mr. Kazaura argued that it was not apparent on the face of record.

I have perused the affidavit of the applicant and the impugned decision of Utamwa, J. which is a subject in this application. The impugned judgment show that two grounds of appeal were raised one of them being that the learned Magistrate erred in not holding that the respondent was not owed anything by the appellant on the preponderance of evidence at the trial court and submission on appeal. It is from this issue, the agreement between the litigants cropped, the judge inferring from evidence recorded in the trial court. Having considered the judgment I have come to the conclusion that the same is not on the face of record. In **Tanzania Harbours Authority vs Mohamed R. Mohamed** [2003] TLR 76 the court stated;

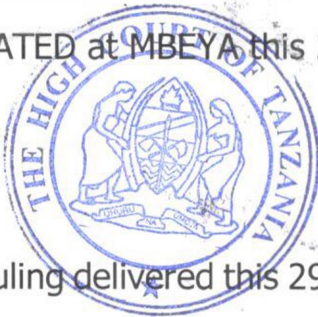


'... that time will not be extended in every situation whenever illegality is alleged as an issue by the applicant. It all depends on the circumstances of each case and the material placed before the court.'

The record is clear that the judge imported the issue of contract when answering the second ground of appeal and there is no any material showing the issue was raised *suo motto* by the court. This entails that to discover the alleged illegality will require a long-drawn process to be discovered from the impugned decision. The applicant has failed to establish existence of illegality.

In the totality of the foregoing, the applicants have failed to account for each day of delay and establish illegality as good cause for this Court to extend time within which to file an application for a certificate of point of law. The application is hereby dismissed with costs.

DATED at MBEYA this 29th day of March, 2023



D.P. Ngunyale
Judge

Ruling delivered this 29th day of March 2023 in presence of the respondent in person.

D.P. Ngunyale
Judge