

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

MISC. CIVIL APPLICATION NO.562 OF 2022

*(Arising from Civil Appeal No.302 of 2021 High Court Dar es Salaam
District Registry, Originating from Misc. Civil Application No. 63 of
2021 Kinondoni District Court)*

MABULA MICHAEL SHIMBA.....APPLICANT

VERSUS

SUMWIKE B. MWAMBIJE.....1ST RESPONDENT

DEUSDEDIT NCHIMAYI.....2ND RESPONDENT

RULING

15/03/2023 & 21/4/2023

POMO, J

In this Application, Mabula Michael Shimba, is seeking indulgence of the court to apply out of time for leave to appeal to the Court of Appeal against the decision of this court in Civil Appeal No. 302 of 2021 delivered on 10th October, 2022. He is moving this court under section 14(1) of the Law of Limitation Act, [Cap.89 R.E.2019]; section 5(1)(c) of the Appellate Jurisdiction Act, [Cap. 141 R.E.2019]; Rules 4(1), 2(b) and 45(a) of the Tanzania Court of Appeal Rules,2009 as amended.

In my view, the above provisions of the law are cited in misconception of the law as the same cannot move the High Court to grant the prayer sought. Power to extend time to the Applicant seeking extension of time to apply out of time for leave to appeal to the Court of Appeal vests in this court under S.11(1) of the Appellate Jurisdiction Act, [Cap 141 R.E.2019] which proved thus: -

*"s.11(1) – Subject to subsection (2), **the High Court** or, where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned, **may extend the time** for giving notice of intention to appeal from a judgment of the High Court or of the subordinate court concerned, **for making an application for leave to appeal** or for certificate that the case is a fit case for appeal, notwithstanding that the time for giving the notice or making the application has already expired". [Emphasis in bold supplied]*

From the above, there is no gainsaying that the Applicant has wrongly moved this court for the prayer sought. Nevertheless, I will take inspiration from the proviso to Rule 48(1) of the Court of Appeal Rule, 2009 (The Rules) which allows the court to ignore omission or wrong citation as long as the court has jurisdiction to grant the order sought. The proviso reads thus: -

*"48(1) Provided that **where an application omits to cite any specific provision of the law or cites a wrong provision, but the jurisdiction to grant the order sought exists, the irregularities or omission can be ignored** and the court may order that the correct law be inserted".*

Taken inspiration from the above Rule, I therefore ignore the wrong citation made by the Applicant as long, under section 11(1) of the Appellate Jurisdiction Act, this court is vested with power to grant the order sought.

Now, back to the application. In this Application, which seeks for extension of time to apply out of time for leave to appeal to the Court of Appeal, facts obtaining under paragraph 19 of the affidavit supporting the Application, is that, the Applicant lost his appeal, Civil Appeal No.302 of 2021 before this court, on 10th October,2022 which was dismissed with cost for want of merit, Hon. H. Mwanga, J. And that, it took him long to be availed by the court the certified copy of judgment which came to be supplied to him on 03/11/2022 but with clerical errors in that the appeal was identified as Miscellaneous Civil Appeal No.302/2021 instead of Civil Appeal No.302/2021 and henceforth wrote a letter to this court to have it corrected.

Again, the Applicant is alleging existence of illegalities of the impugned decision. The allegedly illegalities are listed, in form of issues, under paragraph 20 of the affidavit supporting the application.

The respondents filed their respective counter affidavits. Whereas the 2nd Respondent supports the Application the 1st respondent strenuously opposed it. Responding to paragraph 19 and 20 of the applicant's affidavit, the 1st Respondent, under paragraph 19 of his counter affidavit gave an account as follows: that, since 25/10/2022 the judgment was read for collection but the applicant, on the reason best known to him, collected it on 3/11/2022. That, until 23/11/2022 is when he wrote to the court asking for correction of clerical error which signifies his inaction. That, if it was possible to file this application without attaching the judgment and decree it is not known as to why he filed this application and lastly, that the applicant has failed to show effort in collecting the impugned decision.

When the Application came for hearing on 15/3/2023 the Applicant was represented by Kelley Mwitasi, learned advocate while Lutufyo Mvumbagu and Ocheng' Felix Okombo learned advocates represented the 1st and 2nd Respondent respectively. I ordered the Application be argued by

way of written submission. I thank counsel for complying the order and their industrious research for and against the Application.

The issue before this court is only one. That, whether the Applicant has adduced sufficient cause for the delay to warrant this court grant him extension of time to apply out of time for leave to appeal to the Court of Appeal against Civil Appeal No.302 of 2021.

I will begin with the law concerning leave to appeal in civil matters. Leave to appeal to the Court of Appeal is provided under **Rule 45(a) of the Rules** which provides as follows: -

"Rule 45. In civil matters: -

*(a) Notwithstanding the provision of rule 46(1), where an appeal lies with the leave of the High Court, **application for leave may be made informally**, when the decision against which it is desired to appeal is given **or by chamber summons according to the practice of the High Court**, within thirty days of the decision".*

The first limb of the Applicant's ground relied upon for the delay is that the time within which to apply for leave to appeal lapsed while he was making follow-up in court to be supplied with the impugned decision. And,

per paragraph 10 of the affidavit in reply to the counter affidavit, he came to be supplied with the same on 11th February,2023

My understanding of rule 45 (a) of the Rules (Supra), the rule which carters for application for leave to appeal to the Court of Appeal, attaching the impugned decision in an application for leave to appeal is not such a requirement. It is therefore, in my considered view , that waiting to be supplied with the impugned decision was nothing but wastage of time because attaching it is not such a legal requirement set by the law when one applying before High Court for leave to appeal to the Court of Appeal. That said, I decline to accept it as good cause for extension of time.

The second limb of ground advanced in supporting the application for extension of time is the allegations of existence of illegalities to the impugned decision intended to be appealed against. He has so stated under paragraph 19(i)-(v) of the affidavit supporting the application. As correctly submitted by both parties, in my view, illegalities of the challenged decision constitute good cause for extension of time by the court. See the **Principal Secretary, Ministry of Defence and National Service Vs Davram P. Valambhia** [1992] TLR 387; **Mgao Godwin Losero Vs Julius Mwarabu**, Civil Application No.10 of 2015 CAT at Arusha (Unreported); **Shelina Midas**

Jahanger & 4 Others Vs Nyakutonya NPF CO LTD, Civil Application No. 186 of 2015 CAT at Mwanza (Unreported), to mention but a few.

What constitute an illegality was stated by the Court of Appeal in **Charles Richard Kombe Vs Kinondoni Municipal Council, Civil Reference No.13 of 2019 CAT at Dar es Salaam (unreported)** the decision which is cited by the 1st Respondent. in that decision the Court of Appeal had this to state at page 7 – 8 in respect of illegalities:

*"The term **illegality** as defined in Black's Law Dictionary 11th Edition, page 815, means:*

- "1. An act that is not authorized by law*
- 2. The state of not being legally authorized"*

The above definition is consistent with Mulla's Code of Civil Procedure where the learned authors wrote at page 1381 that: -

"It is settled law that where a court has jurisdiction to determine a question and it determine that question, it can not be said that it has acted illegally or with material irregularity, merely because it has come to an erroneous decision on a question of fact or even of law"

The Court of Appeal went on holding at page 8 that:

"From the above definitions, it is our conclusion that for a decision to be attacked on ground of illegality, one has to successfully argue that the court acted illegally for want of jurisdiction, or for denial of right to be heard or that the matter was time barred".

[Also See: **Lyamuya Construction Company Ltd Vs Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No.2 of 2010 CAT at Arusha (Unreported)].

Guided by the above, I have gone through the allegedly illegalities complained of against the impugned decision as stated under paragraph 19(i)-(v) of the applicant's affidavit, in my view, none of them qualify to be an illegality of the impugned decision rather are normal grounds of appeal.

Consequently, I find the application to be unmerited and thus dismiss it with costs.

It is so ordered.

Dated at **DAR ES SALAAM** this 28th day of April, 2023.



MUSA K. POMO

JUDGE

28.04.2023

Ruling delivered in presence of Andrew Tamete, learned advocate for the Applicant and in presence of the Respondents and Farida Ibrahim Kerenge, Advocate holding brief of Ocheng' Felix Okombo, learned Advocate for the 2nd Respondent.



MUSA K. POMO

JUDGE

28.04.2023

