

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

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 353 OF 2022

(Arising from Kinondoni District Court in Civil Appeal No. 107 of 2021)

EMIRI WILLISON SANGA APPLICANT

VERSUS

FROSHARE CAPITAL LTD..... RESPONDENT

RULING

31st March & 24th April, 2023

BWEGOGGE, J.

The applicant above named has instituted an application in this court praying for an extension of time in which he may file an appeal against the decision of the Kinondoni District Court in Civil Appeal No. 107 of 2021 dated 25th April, 2022. The application is brought under s. 25(1)(b) of the Magistrates

Courts Act [Cap 11 R.E of 2019] and supported by an affidavit duly deposed by the applicant's counsel.

The background of this application, as depicted by the record of lower courts, may be briefly stated as thus: The applicant executed loan agreement with the respondent herein and pledged his motor vehicle as a security. Allegedly, the applicant failed to honour the contract. Hence, the respondent attached the pledged motor vehicle. Consequent to the attachment of the pledged vehicle, the applicant filed a civil case in Sinza Primary Court whereas the trial magistrate found the agreement entered void on the ground of forgery and ordered immediate the release of the attached motor vehicle. The respondent herein was not amused by the decision of the trial court and lodged an appeal in the Kinondoni District Court. In allowing the appeal, the 1st appellate court opined that the trial magistrate erred in law by nullifying the contract which was legally binding between the parties herein. Consequently, the judgment of the trial court was varied and orders entered thereon were set aside. The applicant herein was aggrieved with the decision of the first appellate court. Hence, this appeal.

The applicant and respondent were represented by Mr. Mohamed Mkali and Ms. Pendo Charles Advocate, learned advocates. Both counsels preferred to argue the appeal herein by written submissions.

In elaborating the affidavit supporting the application, Mr. Mkali submitted that he delayed to lodge the application herein on the ground that the judgment was delivered in the absence of the applicant and his advocate whereas on the date of delivery of judgment, the principal officer for the respondent held brief for the applicant's counsel but the same failed to inform the applicant and, or his counsel. That the applicant became aware of the pronounced judgment on 27th June, 2022 when he was supplied with a copy of judgment. The counsel further asserted that the applicant could not know the existence of the decision of the first appellate court unless he was informed to that effect.

In tandem with the above, the counsel submitted that the impugned judgment is tainted with illegality as it quashed the judgment of the trial court and set aside its orders without determining the controversy between the parties.

In reply, Ms Charles submitted that the applicant has not advanced sufficient reason for this court to grant extension of time sought. That the record of the trial court depicts that there was an appearance by one Maulid Mohamed, holding brief for the applicants herein. Otherwise, the counsel contended that the applicant was duly represented and was aware of the judgment date. Hence, it was their duty to make follow-up as the judgment was available for collection on the date it was delivered. Therefore, opined the counsel, the applicants failed to advance sufficient reasons for extension of time and, likewise, failed to account for each day of delay as the judgment was delivered on 25th April, 2022 and this application was filed on 18th August, 2022. The counsel cited the cases **of Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young Women's Christian Association**, Civil Application No.2 of 2020 and **Tanzania Coffee Board vs Rombo Millers Ltd(unreported)** civil application no 13 of 2015(unreported) to bolster her point.

In respect of the plea of illegality, the respondent's counsel submitted that what the applicant's counsel advanced as illegality fit to be a ground of appeal. The counsel opined that to his understanding, the decision of the first appellate court conclusively resolved the controversy between the

parties. On the above premises, the counsel prayed the application herein to be dismissed with costs.

The issue for determination is whether the applicant has advanced sufficient cause to warrant grant of extension of time in which the intended appeal against the impugned decision of the lower court may be lodged.

I have carefully examined the records of this case and pleadings filed by both parties and considered the respective submissions augmenting the affidavit and counter affidavit filed hereto. Unarguably, extension of time can only be granted for good and, or sufficient cause. The factors to be considered by this court in deciding whether the grant of extension issue are listed in the case of **Lyamuya Construction Co. Ltd vs Board of Registered Trustees of Young Women's Christian Association** (supra) as thus:

- i) The applicant must account for all the period of delay;
- ii) The delay should not be inordinate;
- iii) The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take and;

- iv) If the court feels that there are other sufficient reasons, such as the existence of point of law of sufficient importance; such as illegality of the decision sought to be challenged.

It is common ground in this case that the first appellate court pronounced judgment on 25th April, 2022 whereas the application herein was lodged in this court on 18th August, 2022. It was argued by the applicant's counsel that he became aware of the pronounced decision on 27th June, 2022 and exercised due diligence to file the application herein electronically on 11th July, 2022. Assuming the application herein was duly filed on 11th July, 2022 then it follows that the application herein was filed after an expiration of 75 days from the date of delivery of the impugned judgment. The law obliges the applicant who seeks extension of time to account for each day of delay. See in this respect the cases of **Jubilee Insurance Co. (T) Limited Company (T) Ltd vs Mohamed Sameer Khan** (Civil Application No. 439/01 of 2020) [2022] TZCA 623; and **Mathew Kitambala vs Robson Grayson and Another** (Criminal Appeal No. 330 of 2018) TZCA 572.

The main reason given for delay is that the applicant and his counsel were not aware of the judgment of the 1st appellate court pronounced on 25th April, 2022. The respondent's counsel submission in that the applicant and

his counsel were aware of the date scheduled for the judgment was not controverted. I subscribe to the respondent's counsel submission in that the applicant and his counsel were obliged to follow up their case. I find it strange that the counsel for the applicant blames the respondent and her counsel for not informing him of the availability of the copy of judgment issued. The inaction on part of the applicant and his counsel for over a period of two months amounts to negligence. It is a rule of law that *"lack of diligence on part of the counsel is not sufficient ground for extension of time."* See the case of **Omar Ibrahim vs Ndege Commercial Services Ltd**, Civil Application No. 83 of 2020 (unreported). It is my settled view that the applicant has failed to account for delay.

The second ground advanced by the applicant for grant of extension of time is that the impugned judgment is tainted with illegality on the reason that the impugned decision didn't conclusively determine the controversy between the parties. The respondent's counsel opined that the appellate court determined all the issues between the parties and what is raised by the applicant's counsel fit to be the ground of appeal, not illegality.

It is settled law that when the point at issue is one alleging illegality of the decision being challenged, the court has to allow the extension of time to

provide room for ascertainment of the point and take requisite measures to put the record right [**VIP Engineering and Marketing Limited and Two Others vs. City Bank Tanzania Limited**, Consolidated Civil Reference Nos. 6,7 and 8 of 2006, CA (unreported)]. However, it is likewise the rule of law that the alleged illegality in question 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 [**Lyamuya Construction Co. Ltd. vs the Board of Registered Trustees of Young Women's Christian Association of Tanzania** (supra)].

The ground advanced by the applicant's counsel for alleged illegality is an assertion that the decision of the first appellate court didn't conclusively determine the controversy between the parties herein. No further particulars were given in respect of the purported illegality. It is deponed by the counsel for the applicant that further particulars would be adduced during the hearing of intended appeal. This court cannot determine the plea of illegality without materials to act upon.

Be that as it may, the record depicts that the applicant had commenced civil proceedings against the respondent at the court of first instance alleging that his vehicle was unlawfully attached by the respondent and prayed for

immediate release of his vehicle. The action succeeded. On appeal, the 1st appellate court found that the respondent lawfully enforced his recovery rights under the contract whereas the decision of the lower court was vacated and orders entered thereon set aside. I am at loss how the decision of the 1st appellate court amounts to illegality. It is vividly clear that the plea of illegality advanced by the counsel for the applicant was misconceived.

In sum, I find that the applicant has failed to advance sufficient cause to warrant grant of extension sought. The application herein is found without substance, doomed to be dismissed, as I hereby do. The respondent shall have her costs.

Order accordingly.

DATED at DAR ES SALAAM this 24th day of April, 2023.



A handwritten signature in blue ink, appearing to read "O.F. Bwego", is written over the printed name.

O.F. BWEGOGUE

JUDGE