

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

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 319 OF 2023**

*(Originating from the decision of High Court in Misc. Civil Application No. 415 of 2022  
dated on 4<sup>th</sup> April, 2023 by Hon. Nkwabi, J)*

**LYDIA YOSIA PAYOVELA (Administratrix of  
the Estate Of Ayoub Payovela).....1<sup>ST</sup> APPLICANT**

**EMMANUEL YOSIA PAYOVELA (Administrator of  
the Estate of Ayoub Payovela) .....2<sup>ND</sup> APPLICANT**

**VERSUS**

**BUMACO INSURANCE CO. LTD ..... RESPONSENT**

**RULING**

Date of Last Order: 24/08/2023.

Date of Ruling: 01/09/2023.

**E.E. KAKOLAKI, J.**

In this application the Court is moved by the applicants to extend them time within which to file a Notice of Appeal and Appeal to the Court of Appeal against the decision of this Court in Misc. Civil Application No. 415 of 2022, that was handed down on 4<sup>th</sup> of April, 2023 dismissing the said application for want of proof of service, in absence of the applicant when the said

application was called for mention. The application is preferred by way of chamber summons, under section 11 (1) of the Appellate Jurisdiction Act [Cap. 141 R.E 2019] (the AJA), supported with the affidavit duly sworn by one **Edson Kilatu**, applicant's advocate, mainly advancing two reasons as to why this Court should exercise its discretion to grant the sought prayers. **Firstly** that, there was delay in supply of the copy of impugned order of the Court as the supplied copy at first though lately done was a wrongly copy hence returned for substitution with the correct one and **secondly**, illegality of the decision sought to be challenged.

When the respondent was served with the application she defaulted appearance in Court to challenge competence of this application. And upon this court's satisfaction through returned summons accompanied with the affidavit duly by Waiver M. Indah, court process server that, service was effectively served to the respondent, ordered for the hearing of matter to proceed ex-parte against her. Hearing proceeded in the form of written submission and the applicant complied with the filing schedule, as the same were prepared and filed by Mr. Emmanuel P. Ukashu, learned advocate.

Briefly the factual background story of the matter as discerned from the affidavit goes thus, the applicants being administrators of the estate of the

late Ayoub Payavela had filed their application vide Misc. Civil Application No. 415 of 2022, which was pending before this Court and the same was set to come for mention on 4<sup>th</sup> April, 2023 for the purposes of ascertaining whether re-service of summons had been prudently effected to the respondent before the hearing date could be fixed or any other necessary orders issued, but to the contrary on that date the same was dismissed for want of proof of service. Efforts to obtain the copy of court's order for appeal purpose were employed but the same was supplied when the time for doing so had lapsed, the result of which this application was preferred to salvage the situation and pave the way to the applicant to access the Court of Appeal corridors. It is so as the applicants in terms of Rule 83 (2) of the Court of Appeals Rules, 2009 (the rules), ought to have lodge a written Notice of appeal to the Court of Appeal within **thirty days** of the date of the decision or order and institute the appeal within **sixty days** as per Rule 90 (1) of the Rules.

It is settled law under section 11(1) of AJA that this Court is crowned with jurisdiction to entertain and extend time for filing Notice of appeal to the Court of Appeal notwithstanding the fact that time for giving such notice or making the application has already expired. And in so doing the applicant has to assign sufficient or good cause. As to what amounts to sufficient or

good cause there is fast and hard rule since from the decided cases a number of factors has to be taken into account, including whether or not the application has been brought promptly; the absence of any or valid explanation for the delay; lack of diligence on the part of the Applicant, negligence or sloppiness in prosecution of the action taken in court and the degree that the respondent may suffer if the application is granted. See the cases of **Tanga Cement Company Limited Vs. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001, **Mashaka Juma Shabani and 42 Others Vs. The Attorney General**, Civil Application No. 279/01 of 2016 and **National Housing Corporation Vs. Tahera Somji**, Civil Application No. 344/17 of 2018 (All CAT-unreported). Further to that the applicant has to account for each and every day of delay, as even a single day must be accounted for, otherwise there would be no meaning of having rules prescribing periods within which certain steps have to be taken. See the cases of **Bushiri Hassan Vs. Latina Lukio, Mashayo**, Civil Application No. 3 of 2007 and **Tanzania Coffee Board Vs. Rombo Millers Ltd**, Civil Application No 13 of 2015 (both CAT-unreported).

The above notwithstanding it is also trite law that, where illegality of the decision sought to be impugned is pleaded, the court is enjoined to grant

extension even when the delayed period has not been accounted for, the rationale being to avail the higher court with opportunity to ascertain the alleged illegality and make it good. See the cases of **The Principal Secretary, Ministry of Defence and National Service Vs. Dervan P. Valambhia** (1992) TLR 387 (CAT), **VIP Engineering and Marketing Limited and Two Others Vs. Citibank Tanzania Limited**, Consolidated Civil Reference No. 6,7 and 8 of 2006 and **TANESCO Vs. Mfungo Leonard Majura and 15 Others**, Civil Application No. 94 of 2016, (both CAT-unreported). It is however noteworthy that, mere raising or pleading illegality of the decision is insufficient to justify grant as the same must be apparent on the face of record. See the cases of **Ngao Godwin Losero Vs. Julius Mwarabu**, Civil Application No. 10 of 2015 and **Moto Matiko Mabanga Vs. Ophir Energy PLC and 2 Others**, Civil Application No. 463/01 of 2017 (both CAT-unreported).

With the above guiding principles in mind, I am now set to examine and determine whether in this matter the applicants have demonstrated sufficient or good cause warranting this Court grant them extension of time as prayed. Essentially the applicant have to account for a period of 79 days

from 4<sup>th</sup> of April, 2023 when the sought to be impugned decision was issued until 23<sup>rd</sup> June, 2023 when this application was preferred.

Accounting for the delay in filing the application, having adopted applicants' affidavit to form part of his submission Mr. Ukashu contended that, the delayed period was accounted for as the applicants at all-time acted diligently in prosecuting their application. He said upon noticing on 4<sup>th</sup> April, 2023 that, the application was dismissed advocate for the applicants paid courtesy visit to the trial judge to establish cause of dismissal of the matter only to be informed that, it was for want of prosecution before he applied for issue of the copy of that court's order on 5<sup>th</sup> April, 2023, intending to file an application for setting aside the dismissal order but later on learnt that, dismissal was due to applicants' failure to serve the respondent or provide proof of service. He echoed that, when the said copy was supplied to them through intern, it was noted to be a wrong copy for referring to a different case of **Gulf Badr Group (Tanzania) Limited Vs. Swalehe Said Mohamed**, obtained on 9<sup>th</sup> May 2023, hence decided to return it back and write a new letter requesting for a correct copy which was availed to them on 13<sup>th</sup> June 2023 as per paragraph 8 of the affidavit, when by then time to make an appeal was already out. Mr. Ukashu intimated that, in the period

between 9<sup>th</sup> May, 2023 and 15<sup>th</sup> May, 2023, all advocates in the firm handling appellants' matter were attending Tanganyika Law Society Annual Meeting at Arusha, before they started making a follow up of the correct copy of the impugned order/ruling after return which was obtained on 13<sup>th</sup> June, 2023, hence a delay in filing this application.

Having considered the applicants submission and thoroughly perused the affidavit with its annexures this Court is satisfied that, the period from when the sought to be impugned decision was rendered on 4<sup>th</sup> April, 2023 to 9<sup>th</sup> May, 2023 when the applicants returned the wrongly supplied copy of ruling/order and requested for the correct one until 13<sup>th</sup> June, 2023, when allegedly were supplied with the correct ruling or order has not been accounted for. I am alive to the position of the law that, the time within which the applicant was waiting for supply of the copy of decision necessary for enabling him to pursue a certain action has to be excluded from being reckoned. See the case of **Dephia Parry Vs. Murry Alexander Carson** (1963) EA 546. However, in this matter apart from the letter of 9<sup>th</sup> May, 2023, (annexure LEP 3) requesting for correct ruling/order, there is nothing proving that the said order/ruling of 4<sup>th</sup> April, 2023 (annexure LEP 04) was issued to the applicants from the Court registry on 13<sup>th</sup> June, 2023 as

claimed, since the same seem to be a scanned copy suggesting to have been scanned and sent to them electronically by unknown person and on undisclosed date but not collected by advocate from the court registry on the claimed date after coming from Arusha to attend TLS AGM as Mr. Ukashu would want this Court to believe.

In view of that fact, I am convinced that, the period of 39 days from 16<sup>th</sup> May, 2023, when the advocates for the applicant returned from Arusha to 23<sup>rd</sup> June, 2023, when this application was filed in Court has not been accounted for. Thus, the first ground by the applicant therefore fails.

I now move to the second ground on illegality of the decision sought to be impugned. It is Mr. Ukashu's argument on this ground that, the illegality is apparent on face of record as the matter was dismissed for want of proof of service of the respondent when the same was set for mention to ascertain whether the summons were effectively served to the respondent or not and/or any other necessary order such as hearing of the case. He held the view that, the case cannot be dismissed on the mention date as parties must be heard before determination of the case, this being ***fundamental right*** born out of the Constitution of United Republic of Tanzania under Article 13 (6) (a) which provide for fair trial. To him, in the case at hand in which the



applicants are appealing from, the Honorable Judge acted wrongly and illegally by dismissing the case on mention date without giving parties the right to be heard which is very fundamental right. The learned counsel fortified his stance by referring the Court to the cases of **Shengena Ltd Vs. National Insurance Corporation and Another**, Civil Appeal No 9 of 2008 (CAT Unreported) and **Mr. Lembrice Issrael Kivuyo Vs. Ms.DHL Worldwide Express and Another**, Civil Appeal No. 83 of 2008. In the case of **Shengena Ltd** the Court held that:

*"... It is therefore, a practice before courts of law whereby parties to a case appear before the court to ascertain the state of pleadings or stage reached in the trial and then proceed to make necessary orders. It is not the practice of courts in our jurisdiction to dismiss or make other orders that substantially bring a case to finality on a day fixed for Mention. In our considered view, **therefore a case can be dismissed on various, legally recognized grounds when it comes up for hearing not Mention.** In our present case, we find it improper for the trial judge to have dismissed the case when it came up for Mention". (Emphasis supplied).*

Similarly in the case of **Mr. Lembrice Issrael Kivuyo** (supra) the Court of Appeal observed thus:

***"In fact, if we may disagree here a bit, we think it is common knowledge that when a case is set down for mention at the back of a party's mind there will be an expectation that the case will come up for necessary orders only. A party or parties in the circumstances will not expect the same to be dismissed on such a mention date."*** (Emphasis supplied).

Having internalised the submission by Mr. Ukashu on this ground and having a glance of an eye to the intended to impugned order/order, I find the applicants have convincingly demonstrated to this Court that, there is a need for the higher court to intervene so as establish whether the alleged illegality exists and make it good as it is not in this Court's power to do so but rather to satisfy itself that the same is apparent on face of record. I am therefore satisfied that this Court has discharged its duty and proceed to hold that, the ground of illegality in this matter has met the threshold for constituting good cause warranting the Court to exercise its discretion and proceed to grant the application.

In the premises the application is meritorious and thus allowed. Time is extended to the applicants for 14 days within which to file the Notice of

Appeal to the Court of Appeal in respect of Misc. Civil Application No. 415 of 2022 dated 4<sup>th</sup> April, 2023 and the Appeal within the specified time limitation.

Each party to bear its own costs.

It is so ordered.

Dated at Dar es Salaam this 01<sup>st</sup> September, 2023.



E. E. KAKOLAKI

**JUDGE**

01/09/2023.

The Ruling has been delivered at Dar es Salaam today 01<sup>st</sup> day of September, 2023 in the presence of Mr. Emmanuel Ukashu, advocate for the applicant and Mr. Oscar Msaki, Court clerk and in the absence of the respondent.



E. E. KAKOLAKI

**JUDGE**

01/09/2023.

