

IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

MISCELLANEOUS CIVIL APPLICATION NO. 23 OF 2023

(C/F Civil Appeal No. 07 of 2020 in the Hight Court of Tanzania - Moshi Sub Registry. Arising from Civil Case No. 04 of 2016 in the District Court of Hai at Hai)

RAMADHANI ABDI..... APPLICANT

VERSUS

EMMANUEL MARTIN SHUMA.....RESPONDENT

RULING

Date of Last Order: 12.12.2023

Date of Ruling : 13.02.2024

MONGELLA, J.

Ramadhani Abdi, the applicant herein, has preferred this application under **section 11 (1) of the Appellate Jurisdiction Act** [Cap 141 [R.E 2019]. He is seeking for this court to grant him extension of time to file notice of appeal and leave to appeal against the decision of this court rendered in Civil Appeal No. 07 of 2020. The application is supported by the applicant's sworn affidavit.

The application was argued in writing whereby the applicant was represented by Mr. Alfred Sindato and the respondent by Mr. Charles Mwanganyi, both learned advocates.

In his supporting affidavit, the applicant pleaded technical delay, sickness and illegality as reasons warranting grant of extension of time to him.

On technical delay, Mr. Sindato averred that from 26.10.2020 when the Judgement in Civil Appeal No. 07 of 2020 was delivered the applicant was prosecuting the following cases; Miscellaneous Civil Application No. 15 of 2020 and Civil Application No. 47 of 2020 from 28.10.2020 to 05.08.2021; and Miscellaneous Civil Application No. 08 of 2022 up to 17.05.2023.

He averred that the applicant was diligently pursuing his rights vide such matters and it is a ground warranting the grant of this application as cemented by the Court of Appeal in **Bahram Logistics and Another vs. National Bank of Commerce and Another**, Misc. Civil Application No. 506/17 of 2019, which he alleged was in Tanzlii, but I could not locate the same.

Concerning illness, Mr. Sindato alleged that from 17.05.2023 to 01.08.2023, the appellant had been sick and when he got slightly better, he sought this application.

As to illegality, he averred that this court erred in litigating only one ground of appeal to wit, the civil case was determined vide preliminary objection, hence not appealable while the same was heard vide full trial rendering its decree appealable. Further, he claimed that this court erred in upholding the decision of the district

court which was a nullity as the district court had no jurisdiction to determine the matter as it was out of time and concerned a landed property. He argued that presence of illegalities in impugned judgement is sufficient ground to grant extension of time. He supported his assertion with the case of **Costantine Victor John vs. Muhimbili National Hospital** (Civil Application 188/01 of 2021) [2022] TZCA 646 TANZLII.

Mr. Sindato held the view that the delayed days, that is, from 26.10.2020 when Civil Appeal No. 07 of 2020 was determined to 09.09.2023 when he filed this application, have been accounted for. He contended that the applicant's delay was not inordinate and he was able to elaborate sufficient cause for the delay. He referred this court to the following cases: **Benedicto Mumello vs. Bank of Tanzania** (Civil Appeal 12 of 2002) [2006] TZCA 12 TANZLII; **Republic vs. Yona Kaponda and 9 Others** [1985] TLR 84 (CAT) ; **Yazid Kassim Mbakileki vs. CRDB 1996 Ltd Bukoba Branch & Another** (Civil Application 412 of 2018) [2018] TZCA 359 TANZLII; **The Registered Trustees of Archdiocese of Dar es Salaam vs. Chairman of Bunju Village Government and 11 Others**, Civil Appeal No. 47 of 2006, CAT-DSM (unreported) and; **Lyamuya Construction Co. Ltd vs. Board of Registered of Young Women's Christian Association of Tanzania** (Civil Application 2 of 2010) [2011] TZCA 4 TANZLII. He was convinced that the applicant had satisfied factors for granting extension of time as laid out in **Lyamuya Construction company Ltd** (supra).

Mr. Mwanganyi commenced his reply by giving background of the initial suit. He submitted that the dispute originated from a loan the applicant secured from the respondent which was secured by a plot at Bomang'ombe. That, upon failure to pay the loan, the respondent took the suit land. The applicant's wife filed Application No. 36 of 2009 claiming the mortgage was illegal. The application was found in favour of the respondent, and the applicant's wife appealed to the High Court whereby it was decided that the matter be resolved vide civil suit. The respondent then filed Civil Case No. 4 of 2016 in the District Court of Hai at Hai which was determined in his favour. The applicant appealed against the decision vide Civil Appeal No. 07 of 2020, which was dismissed. The applicant then filed notice and leave to appeal, but the application for leave was dismissed on 05.08.2021 for being time barred and for improper citation. That there was no other application filed from thereon to date.

He averred that in applications for extension of time, the applicant has to prove that there are sufficient reasons and must account for each day of delay. He supported his averment with the case of **Godwin Ndewesi and Karoli Ishengoma vs. Tanzania Audit Corporation** [1995] TLR 200. He further cited the case of **Lyamuya Construction Ltd** (supra) in which the factors that ought to be considered in granting extension of time were established. He was of view that the applicant failed to demonstrate sufficient reasons for this court to grant him extension of time. He alleged that the application for leave to appeal and notice to appeal had to be

filed in 30 days from the date of decision as per **Rule 45 of the Court of Appeal Rules, 2007**, but the same was not done. He had the stance that the applicant failed to account for each day of delay.

On technical delay, Mr. Mwanganyi, averred that the reason was frivolous and unfounded since the applicant even failed to attach relevant rulings and judgment, which he alleged he was prosecuting. He further contended that the only technical delay that can be excused is the period when he was prosecuting Civil Application No. 47 of 2020, which was struck out on 05.08.2021. As to Miscellaneous Civil Application No. 15 of 2020 and Civil Application No. 47 of 2020, he contended that the two were filed in the district court of Hai and involved the applicant's wife. That, the cases were on a different cause of action, that is, objection proceedings and execution and thus not covering the alleged technical delay. He cited the case of **Salvand K. A. Rwegasira vs. China Henan International Group Co. Ltd**, (Civil Reference No. 18 of 2006) [2006] TZCA 43 TANZLII averring that for an applicant to benefit from technical delay, there must be the same series of applications instituted and struck out for one reason or another. That, the applicant cannot claim technical delay on unrelated applications prosecuted by his wife in Hai district court.

As to sickness, Mr. Mwanganyi, averred that the sick sheet from Scholastica Dispensary that was annexed to the applicant's affidavit displayed that he attended the hospital from April, 2023 to July, 2023 as an outpatient. In the premises, he contended that the

situation did not preclude the applicant from taking any steps to prosecute his case. While he agreed that sickness is a sufficient reason for extension of time, Mr. Mr. Mwanganyi, was of the view that there ought to have been a medical report issued explaining how the illness contributed to the delay. He was of the view that the sick sheet did not show the illness that he had for the court to analyze how the same contributed to the delay. He cemented his argument with the case of **Granitech (T) Company Limited vs. Diamond Trust Bank Tanzania Limited and 4 Others** [2023] TZCA 447 (sic).

He further argued that the sick sheet showed that the medical examination was held from April to July 2023, while this application was filed on 09.08.2023. In the premises, he had the contention that the applicant failed to account for the delayed days from 01.08.2023 to 09.08.2023. He argued that each day of delay ought to be accounted for as held in **Sebastian Ndaula vs. Grace Rwamafa**, Civil Application No. 04 of 2014 (CAT at Bukoba).

On illegalities, he averred that the same must be apparent on the face of record and not one drawn from long argument to establish its existence. He referred the case of **Wilson Sirikwa vs. Mikael Mollel** (Civil Application No.544/02 of 2021) [2023] TZCA 17583 TANZLII. He started addressing the 1st ground of illegality in which the applicant claimed that the trial court erred in litigating only one ground of appeal to the effect that the civil case was determined vide preliminary objection, hence not appealable, while the same was

heard on merit at full trial. On this, he averred that the argument was misconceived and does not constitute an illegality. He argued that the judgement was not determined on only one ground.

Mr. Mwanganyi then addressed the 2nd ground of illegality whereby the applicant claimed that this court erred in upholding the decision of the district court which was a nullity as the district court had no jurisdiction to determine the same as it was out of time. He challenged the argument on the ground that there was no any documentation showing that the case was filed out of time.

Mr. Mwanganyi concluded by praying for the application to be dismissed as the applicant failed to demonstrate sufficient reasons warranting this court to exercise discretion to extend time within which to file an application for leave to appeal to the Court of Appeal.

Rejoining, Mr. Sindato was of the view that Mr. Mwanganyi, in his submission, conceded to there being illegalities in the impugned judgement. He thus asked this court to treat the same as pre-judgment. As to accounting for each day of delay, he reiterated his arguments in his submission in chief. On issue of illness, he averred that the fact that the applicant was an outpatient does not mean that he could properly follow up on the matters in court. That, other factors like his age should have been considered given that he was 73 years old. He argued that the illegalities are apparent on the face of the record as was stated in **Wilson Sirikiwa** (supra).

Mr. Sindato further had the argument that Mr. Mwanganyi conceded to there being technical delay to the effect that the applicant was precluded from lodging this application on time, though he denied the series of applications whereby the applicant was sued. He had the view that the mentioned suits were instituted in court regardless of the fact that he was sued by his wife or anybody else. In his view, what amounts to prosecuting a case is regardless of who was sued or was suing.

Reacting to Mr. Mwanganyi's argument that on non-attachment of rulings and judgment, he contended that he attached the documents in the JSDS while filing this application or otherwise he should have sought for the same from Tanzlii. He maintained that all principles governing application for extension of time were well demonstrated in both, the affidavit and submission in chief supporting the application and prayed for the application to be granted.

I have considered the submissions of both parties. It is settled that the grant of extension of time is within the discretion of the court, but the same ought to be exercised judiciously. In **Lyamuya Construction Co. Ltd vs. Board of Registered of Young Women's Christian Association of Tanzania** (supra) the Court of Appeal presented a guideline to be observed in granting extension of time. However, prior to addressing the merits of this application. I will address the competence of this application. This follows the facts

deponed at paragraph 6 of the applicant's supporting affidavit, which states:

“6. That, on 28th December 2020 I preferred an application for leave to appeal in the High Court through Civil Application No. 47 of 2020 against the Judgment of the High Court's Civil Appeal No. 7 of 2020 only to find it was 62 days out time. It was struck out on 15th August 2021 and I was issued with a copy of Judgement on 26th August 2021.”

From the wording of the cited paragraph, as well as the submissions of both parties, it is clear that the applicant had preferred Civil Application No. 47 of 2020 before this court seeking for leave to appeal to the Court of Appeal. The same was allegedly struck out on 15.08.2021 for being preferred out of time.

Where a party intends to file his/her matter, but is out of time, he has the liberty to seek extension of time before the expiry of such time or after its expiry. If he does not comply with such requirement and instead files his matter out of time, the effects of the same is dismissal. This is a requirement set under **section 3 (1) of the Law of Limitation Act** [Cap 89 RE 2019].

This position was well expounded in **East African Development Bank vs. Blueline Enterprises Limited**, Civil Appeal 109 of 2009 (unreported) whereby the Court of Appeal addressed similar circumstances. In that case, the appellant had filed an application in the High Court to set aside an award which was dismissed and

thereafter, he filed another application in the same court seeking for extension of time. The Court stated:

“In this regard, in order to discern the intention of the legislature the above sections must be read and construed together. Without much ado we are of the view that in enacting the Limitation Act, specifically **sections 3 (1) and 14 (1)**, the legislature intended that there must be an end to litigation. Under **Section 14 (1)** an intended applicant may bring an appeal or an application before or after the expiry of the prescribed period. So, if an appeal or an application is instituted beyond that period it shall be dismissed under **Section 3 (1)**. An applicant who wishes to play it safe must bring an application for enlargement of time before or after the expiry of the stipulated award.”

It is well settled that where a matter has been dismissed for being time barred, the applicant does not have the room to apply for extension of time in the same court that issued such order. He can file either for review in the same court or appeal against the said decision. This was well explained in **Olam Uganda Limited (suing through its Attorney United Youth Shipping Company Limited) vs. Tanzania Harbours Authority**, Civil Appeal No. 57 of 2007(CAT-DSM) (unreported)whereby the Court of Appeal stated:

"In our considered opinion then, the dismissal amounted to a conclusive determination of the suit by the High Court as it was found to be not legally sustainable. The appellant cannot

re file another suit against the respondent based on the same cause of action unless and until the dismissal order has been vacated either on review by the same court or on appeal or revision by this Court..."

See also; **MM Worldwide Trading Company Limited & Others vs. National Bank of Commerce Limited** (Civil Appeal 258 of 2017) [2021] TZCA 192 TANZLII; and **Hashim Madongo and Two Others vs. The Minister for Industry and Trade & Two Others**, Civil Appeal No. 27 of 2003 (unreported).

The words used in context, that is, whether "dismissal" or "strike out" do not matter as the effect thereof is dismissal. This was well explained in **Ngoni-Matengo Co-operative Marketing Union Limited vs. Ali Mohamed Osman** [1959] E.A. 577 whereby the defunct East African Court of Appeal held:

"It is clear to us that irrespective of the words used, the final order amounted to a conclusive determination by the trial court disposing of the former suit being time barred. In our views, it was not open for the respondent to institute a fresh suit as it were, simply because the trial court struck out the former suit rather than dismissing it as mandated by section 3(1) of the Act"

In the foregoing circumstances and on the strength of the above referred to authorities, this application is found to be well improperly before this court. For having already decided that the applicant was time barred in his application for leave to appeal in Civil Application No. 47 of 2020 this court is rendered *functus officio* to entertain this application. In the premises, the application is struck out, with costs.

Dated and delivered at Moshi on this 13th day of February 2024.



X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA