

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISC. COMMERCIAL APPLICATION NO. 111 OF 2022**

**(Arising from Commercial Cause No. 213 of 2015)**

**BETWEEN**

**M/S ARDHI UNIVERSITY..... APPLICANT**

**VERSUS**


**M/S KIUNDO ENTERPRISES (T) LIMITED..... RESPONDENT**

**RULING**

**A.A. MBAGWA. J**

This is an application for extension of time within which to file a notice of appeal against the ruling and order of this Court in Miscellaneous Commercial Cause No. 272 of 2015 dated 15<sup>th</sup> February, 2017. The application was brought by way of chamber summons made under section 11(1) of the Appellate Jurisdiction Act, [Cap 141 R.E. 2019] and section 95 of the Civil Procedure Code [CAP 33 R.E. 2019]. The applicant prays the for following orders:

- i. That this Honourable Court be pleased to grant an order for extension of time in favour of applicant within which to appeal out

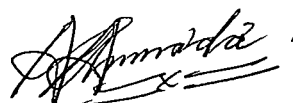


of time against the order of the High Court (Commercial Division) at Dar es salaam in Misc. Commercial Cause No. 213 of 2015 which resulted into the ruling in Misc. Commercial Cause No. 272 of 2015 dated 15<sup>th</sup> February, 2017.

- ii. Costs of this application to follow the event
- iii. That this Honourable Court be pleased to grant any other relief(s) for the interest of justice.

In support of the application is an affidavit sworn by Esther Raphael Meiludie, principal officer of applicant. On the contrary, the application was hotly contested by the respondent through a counter affidavit sworn by Fikirini Goodluck Moshi, the managing director of the respondent company.

The facts obtaining in this application as decerned from the depositions tell a chequered history of the matter. Sometimes in 2015 parties referred their dispute to arbitration. Upon winning the case, the respondent filed an application i.e., Misc. Commercial Cause No. 213 of 2015 for the registration of the arbitral award. During hearing of the application for registration, the applicant informed the Court that she had no objection against registration of the award but indicated that she was intending to file a petition to challenge the award. Consequently, the Court proceeded to register the arbitral award. As the applicant had intimated to the court earlier, no sooner




had the arbitral award been registered than the applicant filed a petition in Misc. Commercial Application No. 272 of 2015 challenging the registration of the award. After hearing the parties, the Court, in its ruling dated 15<sup>th</sup> February, 2017, struck out the petition.

Aggrieved, the applicant successfully applied for and was granted leave to appeal vide Misc. Commercial Application No. 52 of 2017 on 4<sup>th</sup> July, 2017. Consequently, the applicant filed Civil Appeal No. 58 of 2018. However, the said appeal was struck out on 7<sup>th</sup> June, 2022 for want of proper certificate of delay. Despite the striking out of appeal i.e., Civil Appeal No. 58 of 2018, the applicant is still determined to challenge the decision of this Court in Misc. Commercial Application No. 272 of 2015. As such, the applicant has filed this application to seek on extension of time within which to file the appeal.

When the matter called on for hearing, the appellant had the services of Mr. Edwin Joshua, learned State Attorney whilst the respondent was represented by Mr. Roman Masumbuko learned advocate. The hearing of the application proceeded *viva voce*.

Submitting in support of the application, Mr Joshua, the learned State Attorney told the Court that this application was pegged under the provisions of Section 11(1) of AJA. Expounding on the point, the learned State Attorney had it that, courts are enjoined to extend time if there is reasonable or



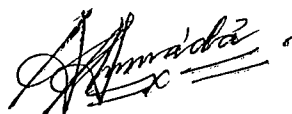
sufficient cause however, he was quick to point out that the term sufficient cause has not been defined. He contended that although there is no definition of the term sufficient cause, through case laws there are established circumstances or factors to be considered when granting extension of time. He buttressed his argument with the case of **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. The learned State Attorney clarified that the factors established in **Lyamuya** (supra) are that, the applicant must account for all period of delay, the delay should not be inordinate, the applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take and if the Court feels that there are other sufficient reasons, including the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged.

Submitting on technical delay, Mr. Webiro explained that, the delay was not caused by negligence or inaction by the applicant because the applicant being aggrieved by decision of this Court filed an appeal which was struck out on 7<sup>th</sup> June, 2022 and the applicant promptly brought the instant application on 4<sup>th</sup> July, 2022. According to Mr. Joshua Webiro, the period between delivery of the decision by this Court and striking out of the appeal for being



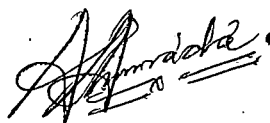
incompetent is what is called technical delay. Further, the learned State Attorney submitted that the decision sought to be challenged is tainted with illegalities while referring to paragraphs 19 and 25 of the applicant's affidavit. The applicant's counsel submitted that, illegality is a sufficient ground for extension of time as it was held in the case of **Attorney General vs Emmanuel Marangakis & 3 Others**, Civil Application No 138 of 2019 CAT at Dar es salaam. Mr. Webiro added that the applicant was denied the right to be heard which itself is an illegality in view of the case of **Attorney General vs Electronic International Limited & Another, Civil Application No. 479 of 2016 CAT Dar es Salaam**. On the above reasons, the learned State Attorney urged the Court to grant the application.

In rebuttal, Mr. Roman Masumbuko, learned counsel for the respondent strongly contested the application. He opined that this application cannot be granted in that it is against two orders of different two cases namely, Misc. Commercial Cause No. 213 of 2015 dated 16<sup>th</sup> September, 2015 and Misc. Commercial Cause No. 272 of 2015 dated 15<sup>th</sup> February, 2017. The respondent's counsel said that the two cannot be combined in one application. Expounding on the point, the learned counsel had it that, section 11(1) is very clear that court can extend time for giving notice to appeal and not time to appeal out of time against the decision of the High Court. He



added that, the submission by the applicant does not tally with what is being sought in the chamber summons.

In addition, the learned counsel for respondent urged this Court to restrain from granting this application because of negligence. He explained that, on 16<sup>th</sup> September, 2015 when Misc. Commercial Application No. 213 of 2015 called on for orders, Mr. Mkombozi said that he had no problem with the prayer for registering the award. According to Mr. Masumbuko, that is negligence because if one does not object registration of the award means the same cannot be challenged. Mr. Masumbuko further submitted that, the applicant was negligent twice in the prosecution of Civil Appeal No. 58 of 2018. More so, the learned counsel for the respondent lamented that the applicant has failed to account for each day of delay as such, there is no technical delay. His reliance was placed on the case of **Jubilee Insurance Company (T) Limited vs Mohamed Sameer Khan**, Civil Application No. 439/01 of 2020 and the case of **Tauka Theodory Ferdinand vs Eva Zakayo Mwita (as administrative of the estate of the late Albinus Mwita) & 3others**. The learned counsel insisted that this application should not be granted for it will prejudice the respondent because the matter has been in this Court for more than eight years.



Replying on illegality, the respondent's counsel had it that, there was no illegality on the face of the record because the complaint that applicant was not afforded right to be heard is unfounded. Mr. Masumbuko argued that Mr. Mkombozi said that he had no objection to the registration of the award in Misc. Commercial Application No. 213 of 2015 and Misc. Commercial Application No. 272 of 2017 was filed after the registration of the award. He relied on the case of **Godwin Lyaki and Another vs Ardhi University**, Civil Application No. 491/01 of 2021 CAT at Dar es Salaam where the Court held that, the fact that the party is not satisfied with the decision of the court is not sufficient to constitute a point of law.

In brief rejoinder, Mr. Joshua Webiro, reiterated his submission in chief and added that as long as the enabling provision is proper there is no harm in the chamber summons. Mr. Webiro further clarified that the intended appeal is against the decision in Misc. Commercial Application No. 272 of 2017 and not Misc. Commercial Application No. 213 of 2015.

Upon canvassing the parties' depositions and their rival submissions, the pertinent issue in this matter is whether the applicant has demonstrated sufficient grounds to warrant extension of time in the circumstances of this matter.





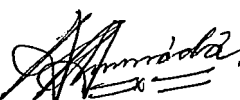
2018, CAT at Dar Es Salaam and **Ludger Bernard Nyoni vs. National Housing Corporation**, Civil Application No. 372 of 2018, CAT at Dar Es Salaam.

Thus, considering that the applicant has been eagerly pursuing the appeal right from the beginning and cognisant of the overriding objective principle, I am constrained, after applying the above factors, to find this application meritorious. This application is therefore allowed. The applicant is given thirty (30) days from the date of this ruling to file the notice of appeal against the ruling and order of this Court in Misc. Commercial Application No. 272 of 2017. Each party should bear its own costs.

It is so ordered.

The right to appeal is explained.



  
**A.A. Mbagwa**

**JUDGE**

**11/09/2023**

