

IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

MISC COMMERCIAL CASE NO 64 OF 2018

(Originating from Commercial Case No. 91 of 2011)

MUSTAFA EBRAHIM KASSAM t/a

RUSTAM & BROTHERS.....APPLICANT

VERSUS

MARO MWITA MARO.....RESPONDENT

RULING

B.K. PHILLIP, J.

Before me is an application for extension of time to file a notice of appeal to the Court of Appeal against the decision of this court, in Commercial case No 91 of 2011. The application is made under section 11(1) of the Appellant Jurisdiction Act, Cap, 141, R.E 2002 and section 95 of the Civil Procedure Code, Cap 33, R.E 2002, supported by an affidavit sworn by the applicant.

In his affidavit the applicant has briefly stated the sequence of events that lead to the filing of this application as follows; That he was aggrieved by the decision of this Court in Commercial Case no 91 of 2011. He lodged his appeal to the Court of Appeal vide Civil Appeal No 69 of 2012, however on 9th March 2018, the same was struck out for non-compliance with the requirements of rule 93 (3) of the Court of Appeal Rules, 2009 (the Rules)

which requires that a Memorandum of Appeal to be in substantial compliance with Form 'F' in the First schedule of the Court of Appeal Rules. The applicant stated that he is interested to pursue his appeal to the Court of Appeal.

The respondent filed a Counter Affidavit in opposition to this application. In his counter affidavit, the respondent stated that the applicant has not adduced any good reasons for failure to comply with the law and this application is a result of applicant's negligence, hence should not be entertained.

I ordered the application to be heard by way of written submission to enable the respondent to obtain legal assistance since he appeared in person. The applicant was represented by a law firm known as BLC Advocates.

In his written submission the applicant's advocate adopted the contents of the affidavit in support of this application and submitted further that the grant or denial of the relief sought in this application is within the court's discretion and the same has to be exercised judiciously. The applicant's advocate submitted further that the law requires the applicant to adduce sufficient cause for the delay, however what constitutes sufficient cause has not been defined. A number of factors have to be taken into account including whether or not the application has been brought promptly. He referred this court to the case of **Tanga Cement Co. Ltd Vs Jumanne D. Masangwa and Amos A. Mwalwanda, Civil Application No .6 of 2001** (unreported) and **Benedict Mumello Vs Bank of Tanzania, Civil**

Appeal No 12 of 2002. (Unreported). He contended that this application has been made promptly without any delay, in the sense that filing of the application was done immediately after obtaining a copy of the ruling from the Court of Appeal. He added that the applicant has adduced sufficient reason for the delay, that is, his appeal was struck out for failure to show in the memorandum of appeal the case number from which that appeal originated. To his view, that omission is a human error.

Responding to the applicant's submission, the respondent submitted that the applicant's appeal was struck out due to the applicant's sheer negligence for failure to comply with the law. He submitted further that negligence of a party to a suit to comply with the law cannot constitute a good cause or sufficient cause for the delay. He referred this court to the case of **Paul Martin vs. Bertha Anderson, Civil application No.7 of 2005.** (Unreported) to buttress his argument.

In his rejoinder the applicant's advocate submitted that the case of **Paul Martin** (Supra) is distinguishable from the instant application. He contended that, the instant application has been filed promptly after the decision of the Court of Appeal, while in the case of **Paul Martin** there was a delay of more than 4 years and the delay in filing the application was caused by the counsel's misplacement of some documents, which is not the case in the instant application.

In this application, it is a common ground that granting the orders sought by the applicant is entirely on the courts discretion, which, however has to be exercised judiciously. The position of the law is that the applicant has

to adduce sufficient reasons for the delay for this court to grant the orders sought and that there is no hard and fast rule on what constitutes sufficient cause. (see the following cases; **International Airline of the United Arab Emirates Vs. Nassor Nassoro, Civil Application No 263 of 2016** (unreported), **Irene Temu Vs. Ngasa M. Dindi, Kinondoni Municipal Counsel and Mohamed Esti Civil Application No.278//17 of 2017**, (unreported) and **Yusufu Same and Hawa Dada Vs. Hadija Yusufu, Civil Appeal No.1 of 2002** (unreported).

From the foregoing, my task in this application is to determine whether the applicant has adduced sufficient reasons for the delay to move this court to grant the prayers in the chamber summons. The respondent does not dispute the fact that the applicant did file his appeal to the Court of Appeal in time. The only concern of the respondent is that the applicant's Appeal was struck by the Court of Appeal due to the applicant's negligence as he failed to comply with the law. Looking at the circumstances of this case, I am of a considered view that the fact that the applicant's appeal was struck out due to non-compliance of the law, which the respondent contends that it reveals elements of negligence on part of the applicant, cannot be a fair basis to rely upon in determination of this application, since the penalty for the alleged negligence was already administered by the Court of Appeal by striking out the applicant's appeal. I think what should be looked at now is the applicant's actions thereafter. In the case of **Fortunatus Masha Vs William Shija and another, (1997) TLR, 154** the Court of Appeal allowed the application for extension of time similar to the instant application and had this to say;

*".....a distinction should be made between cases involving real or actual delays and those like the present one which only involve what can be called technical delays in the sense that the original appeal was lodged in time but the present situation arose only because the original appeal for one reason or another has been found to be incompetent and a fresh appeal has to be instituted. In the circumstances, the negligence if any refers to the filing of an incompetent appeal not the delay in filing it. **The filing of an incompetent appeal having been duly penalized by striking it out, the same cannot be used yet again to determine the timeousness of applying for filing the fresh appeal.** In fact in the present case, the applicant acted immediately after the pronouncement of the ruling of this Court striking out the first appeal."*
(Emphasis is mine)

As per the decision of the Court of Appeal in the case of **Fortunatus Masha** (Supra), the delay in this case can be classified as a technical delay. It is my finding that the applicant has provided sufficient reasons for the delay that is his appeal was struck out hence he is compelled to seek an extension of time to file another notice of appeal so that he can pursue his appeal.

Having said the above and looking at the time this application was filed, that is 14 days from the date the appeal was struck out, I am inclined to agree with the applicant's advocate that this application has been filed without undue delay. With due respect to the respondent, I find the case

of **Paul Martin** (supra) distinguishable from the instant application because the delay in Paul's case was more than 4 years.

In conclusion, it is my considered view that this application has merits. I hereby grant the applicant extension of time to file notice of appeal, the same should be filed within fourteen days from the date of this ruling.

Each party will bear its own costs.

Dated at Dar es Salaam this 21st day of January, 2019.



A handwritten signature in blue ink, appearing to read "B. K. Phillip".

B. K. PHILLIP

JUDGE