

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(ARUSHA DISTRICT REGISTRY)
AT ARUSHA**

MISC.CIVIL APPLICATION NO. 27 OF 2020

(From the High Court of Tanzania at Arusha , DC Civil Appeal No. 2 of 2019; Originating from the Resident Magistrate Court of Arusha at Arusha in Civil Case No. 43 of 2015.)

OLOPONO PERMET APPLICANT

Versus

SLUIS BROTHERS LTD 1ST RESPONDENT

ABRAHAM SMITH 2ND RESPONDENT

RULING

3^d June & 7th August, 2020

Masara, J

1.0 Introduction

The Applicant brought this application under section 11(1) of the Appellate Jurisdiction Act, Cap. 141, R.E. 2002, seeking to be granted an extension of time to file an Application for leave to appeal to the Court of Appeal against the decision of this Court, Gwae, J, in DC Civil Appeal No. 2 of 2019 delivered on 6th September, 2019. The Application is supported by the affidavit sworn by the Applicant. The Respondents filed a counter affidavit which was sworn by Mr. Ruta Erneus Rugaigalila, learned advocate, opposing the Application. Before this Court, the Applicant was represented by Mrs. Christine Kimale, learned advocate, while the Respondents were represented by Mr. Ruta Erneus Rugaigalila and Mr. Abdon Rwegasira,

learned advocates. The application was heard by way of written submissions.

Briefly, this Application arise from the following facts. The Applicant was charged of the offence of malicious damage to property. He was said to have damaged beans worth Tshs 20,000,000/= and water sources at Lokisale area Monduli District sometimes in 2009. He was convicted and sentenced to 2 months jail imprisonment vide Criminal Case No. 46 of 2010 in Monduli District Court. His seized cows were ordered to be sold to compensate the victim. The cows were sold on 2nd November, 2010 and the victim was compensated Tshs. 20, 000,000/= as ordered. The Applicant successfully appealed to this Court vide Criminal Appeal No. 37 of 2011, and this Court, Sambo, J., ordered the money paid to the Respondents as compensation be returned to the Applicant.

Following that judgment, the Applicant sued the Respondents in the Resident Magistrate's Court of Arusha (the trial court) claiming for Tshs. 90,000,000/= as compensation (both Specific and General damages) for 70 herds of cows (35 cows and 35 calves) as well as 8 goats which were seized by the Respondents. The record shows that the Respondents were ordered by the Trial Court to hand over to the Applicant 18 cows as well as payment of Tshs 10,000,000/= as General damages. The Applicant was dissatisfied, he appealed to this Court vide DC Civil Appeal No. 2 of 2019. On 6th September, 2019, this Court, Gwae, J. partly allowed the appeal and directed the Respondents to either hand back to the Applicant a total of 24

herds of cattle or pay him the sum of Tshs 12,000,000/= in lieu thereof. The Court also ordered the Respondents to pay the Applicant the sum of Tshs 10,000,000/= as general damages. It is against that decision that the Applicant intends to contest before the Court of Appeal.

The Applicant lodged Notice of Appeal to the Court of Appeal on 17th September, 2019. Before knocking the doors of the Court of Appeal, one of the requirements of the law is to seek and be granted leave by the High Court. This requirement prompted the Applicant to file Civil Appeal No. 24 of 2019 aiming at moving the Court to grant him leave to appeal to the Court of Appeal. The said case was withdrawn after the Applicant's Advocate noted that the case was wrongly headed as Civil Appeal instead of Misc. Civil Application, the proper heading in Applications. The said application was withdrawn on 18th March, 2020 before Mzuna, J. After withdrawing the said application, and noting that the time to seek leave in the High Court had lapsed, the Applicant filed the instant application on 24th March, 2020 moving the Court to extend time for him to apply for leave to appeal to the Court of Appeal.

2. Submissions

Submitting on the substance of the Application, Mrs. Kimale prayed to adopt and sought to rely on the Applicant's affidavit. She submitted that in the course of applying for leave to appeal to the Court of Appeal, the application was headed Civil Appeal instead of Misc. Civil Application. Having noticed the defect, they decided not serve the Respondents avoiding wasting their time. By the time she was granted leave to withdraw

the application, the Applicant was out of time to file an application for leave to appeal to the Court of Appeal necessitating this application for extension of time. Mr. Kimale further contended that after she noticed the defect in the application, she made efforts to notify the Deputy Registrar of their intention to withdraw the application but she was advised to make the application before the presiding Judge. Unfortunately, the file was not assigned to any Judge for some months until 18th March, 2020 when it was placed before Mzuna, J., the same day that the prayer to withdraw it was granted. Mrs. Kimale averred that she was late for six months, from September, 2019 when the impugned judgment was delivered to March, 2020 when the defective application was withdrawn. She added that she could not procure the drawn order before filing the instant application due to the fact that she would be late in filing this application.

Submitting on the causes of delay, Mrs Kimale impressed that the sole reason for failure to file the application for leave on time was due to the time spent before the wrongly headed civil Appeal No. 24 of 2019 was marked as withdrawn. In her view, that amounts to good cause to warrant the extension of time sought. She stressed that the Applicant has been diligent in pursuing his rights and that the delay is a technical delay. She cited the case of ***Fortunatus Masha Versus William Shija and Another*** [1997] TLR 154 to back up her arguments. She implored the court to use its discretion to grant the prayer sought. On that basis, she cited a Court of Appeal decision in ***Juma Versus Diesel and Auto Electric Services Ltd and Others*** (2008) 1 E. A, page 148.

Contesting the application, Mr. Rugaigalila and Mr. Rwegasira submitted that the Applicant's application for extension of time was short of the standards laid by the Court of Appeal. They relied on the Court of Appeal decisions in ***Lyamuya Construction Company Ltd Versus Board of Registered Trustees of Young Women's Christian Association of Tanzania***, Civil Application No. 2 of 2010 and ***Ngao Godwin Losero Versus Julius Mwarabu***, Civil Application No. 10 of 2015 (Unreported) where guidelines in granting an application for extension of time were set; namely:

- a) *The Applicant must account for all the period of delay;*
- b) *The delay should not be inordinate;*
- c) *The Applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action he intends to take; and*
- d) *If the court feels that there are other sufficient reasons, such as existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged.*

The duo maintained that applying the above set principles, the application at hand must fail because the only reason raised for the delay is the defect in the heading of the previous application. They were of the view that the Applicant's advocate did not adduce sufficient grounds to warrant extension of time for various reasons; including: one, the application was filed on 18th September, 2019 and it was set for hearing on 29th October, 2019 but the Applicant attended the court alone without notifying the Respondents on the existence of that application. According to them, this implied that the Applicant acted in bad faith. They stressed that the Applicant came to equity with dirty hands deserving strong condemnation from the court. They also contested that the argument made by the

Applicant's advocate that she refrained from serving the Respondents to avoid wasting their time is an afterthought as it is not part of the affidavit in support of the application. Two, the Respondents' advocates argued that the fact that the previous application was headed Civil Appeal instead of Misc. Civil Application is nothing but negligence or oversight on the part of whoever drafted the documents. Therefore, that cannot constitute good cause to grant extension of time. They cited the case of ***Mwita Gabriel Wamahe Versus Andrew Wamahe Nyamamano***, High Court DSM, Civil Application No. 628 of 2015 (unreported), to bolster their argument.

Three, the Respondents' advocates contend that the application is not supported by a drawn order. They argue that the absence of a drawn order featured in the application indicating that the Applicant was granted leave to withdraw the previous application implies that the fate of the Applicant's application is yet to be known to date. Also, that Mrs. Kimale's argument that she would be late in filing the instant application had she taken time to make follow ups to procure the drawn order, is not pleaded in the Applicant's affidavit, rather it is an afterthought, they added. To that effect, they were of the view that the Applicant did not prove any effort in procuring the said drawn order.

In addition to the foregoing, the learned advocates for the Respondents challenged Mrs. Kimale's assertion that the delay was a technical delay. They were of the view that the cited case of ***Fortunatus Masha*** (supra) is distinguishable from the instant application. According to them, the

Applicant after withdrawing the defective application, delayed for six days, which he did not account for. They cited the Court of Appeal decisions in ***Athuman Mtundumya Versus the District Crimes Officer Ruhangwa and 2 Others***, Civil Application No. 1 of 2008 and ***Bushiri Hassan Versus Latifa Lukio Mashayo***, Civil Application No. 3 of 2007 (Both unreported). The learned advocates thus urged this Court to dismiss the application.

In a brief rejoinder, Mrs. Kimale argues that ***Lyamuya Construction Company, Godwin Losero*** and ***Mwita Gabriel Wamahe*** (supra), as cited by the Respondents' advocates, are distinguishable from the facts in the instant application. She insisted that the defect in the previous application is a human error which cannot render the Applicant negligent.

Reacting on her failure to feature the drawn order in the application, Mrs. Kimale argued that the drawn order was not made available for collection immediately after the Court allowed the withdraw of the application. She decided to annex a copy of the withdrawn order, but maintaining that it is not necessary to attach the drawn order in an application made within the same Court unlike in an appeal. On accounting for each day delay, she fortified that the delay for six days was accounted for. She spent four days in drafting the documents and the two days were a weekend. She also objected the assertion that she had ill motive for failure to serve the Respondents as serving them a defective application would not have been prudent.

3. Issue and Ratio Decidendi

Having outlined the facts and the submissions of the parties, it is apparent that the main point of contention in this application is whether the delay in filing this application was necessitated by sufficient cause to warrant the prayer for extension of time to apply for leave to Appeal to the Court of Appeal.

The law is settled that sufficient cause/good cause for the delay is *conditio sine qua non* for the extension of time to be granted. There is a litany of authorities to that effect. The Court of Appeal in ***Bharya Engineering & Contracting Co. Ltd Versus Hamoud Ahmed Nassor***, Civil Application No. 342/01 of 2017 (unreported), stated:

"The Court will only exercise its discretion in favour of an Applicant only upon showing good cause for the delay. What amounts to good cause cannot be laid by any hard and fast rules but is dependent upon the facts obtaining in each particular case."

Further, in ***Tumsifu Kimaro (The Administrator of the Estate of the Late Eliamini Kimaro) Versus Mohamed Mshindo***, Civil Application No. 28/17 of 2017 (unreported), the Court of Appeal held *inter alia*:

"Whereas it may not be possible to lay down an invariable definition of good cause so as to guide the exercise of the Court's discretion under rule 10, the Court must consider factors such as the length of the delay, the reasons for the delay, the degree of prejudice the respondent stands to suffer if time is extended, whether the Applicant was diligent, whether there is point of law of sufficient

importance such as the illegality of the decision sought to be challenged”

In the application at hand, Mrs. Kimale maintained under paragraphs 6, 7, 8, 9, 10 and 11 of the Applicant’s affidavit that the delay was due to improper heading of the application for leave, which rendered it defective. The Respondents’ advocates contested this ground for the reasons that the Applicant did not account for the delay and that the improper heading cannot amount to good cause rather negligence on the part of the Applicant’s advocate.

The record shows that, on 19th September, 2019, the Applicant filed Application No. 25 of 2019. I name it application since it was filed through chamber summons and affidavit, the necessary documents in filing applications in this Court. The first prayer in the chamber summons was to move the court to grant him leave to appeal to the Court of Appeal. Paragraph 5 of the Applicant’s affidavit in support of that application stipulates clearly that the Applicant was seeking leave to appeal to the Court of Appeal after being dissatisfied with the decision of this Court in DC Civil Appeal no. 2 of 2019. This clearly indicates that the Applicant was prudent, he had intention to pursue his rights as stated by his advocate. It is only the defect in heading the application which blocked him.

The fact that the application was placed before Mzuna, J. on 18th March, 2020 and the very same day the case was withdrawn, implies that having noted the defect the Applicant’s advocate acted promptly. It is not disputed

that said application was withdrawn on 18th Mach, 2020, and the instant application was filed on 24th march, 2020, six days later. In my view, the six days cannot be said to be inordinate as maintained by the Respondents' advocates. Further, as submitted by Mrs. Kimale, two days of the six fell on a weekend in which courts' registries are closed. I do not doubt her assertions that she utilised the remaining four days in drafting and filing the application. In my view, she accounted for each day of delay.

I am of the view that since the Applicant lodged a Notice of Appeal to the Court of Appeal within time and that his application to apply for leave was lodged in this Court within the prescribed time; save for the defects, the delay is both explainable and excusable. I also find the explanations given by Mrs. Kimale for not serving the defective application to the Respondents credible. After noting the defects in his application, it would have been futile to serve the same on the Respondents, invariably attracting unnecessary objections and unnecessary costs. That cannot be said to be a bad faith decision on the part of the Applicant as alleged. There is no prejudice suffered by the Respondents for not being served with the defective application by the Applicant.

The Applicant's advocate intimated that the defect was not attributed by her negligence. I agree with her because as soon as she discovered it, she made efforts to withdraw the application. She did not even serve the Respondents, to avoid unnecessary disturbances. In this view, I cannot hold her negligent. I have taken into consideration the fact that as soon as

the defective application was withdrawn, he immediately filed the instant application. These facts make me to believe that the Applicant did not sleep on his rights and was diligent. His main ground for delay is what we refer to in law as a technical delay which has been held to be sufficient ground for extension of time. In ***Fortunatus Masha Versus William Shija & Another*** (supra), cited to me by the Applicant's advocate, the Court stipulated:

"A distinction had to be drawn between cases involving real or actual delays and those such as the present one which clearly only involved technical delays in the sense that the original appeal was lodged in time but had been found to be incompetent for one or another reason and a fresh appeal had to be instituted. In the present case the Applicant had acted immediately after the pronouncement of the ruling of the Court striking out the first appeal. In these circumstances an extension of time ought to be granted."

4. Decision

On the basis of the reasons and authorities cited above, it is my finding that the Applicant's delay in filing application for leave in this Court to appeal to the Court of Appeal was necessitated by technical reasons which are explainable and excusable. Consequently, I allow the Application and order that the Applicant files the intended Application for leave to appeal to the Court of Appeal within 14 days from the day of this Ruling. Each party to bear their own costs for this application.

Order accordingly.



Y. B. Masara

JUDGE

August 7, 2020

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