

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM
MISC.COMMERCIAL APPLICATION NO.182 OF 2020**

(Arising from Commercial Case No.47 of 2017)

LRM INVESTMENT CO. LTD.....1STAPPLICANT
CENTRAL PARIS COMPLEX CO. LTD 2NDAPPLICANT
DIDAS PATRICE MUSHI.....3RDAPPLICANT
AZILA DIDAS MUSHI.....4THAPPLICANT
CAROLINA DIDAS MUSHI.....5THAPPLICANT
LILIAN DIDAS MUSHI.....6THAPPLICANT

VERSUS

DIAMOND TRUST BANK (TANZANIA) LTD.....RESPONDENT

RULING

Date of the Last order: 6/12/2022

Delivering this Ruling: 14/3/2023

NANGELA, J.:

This application was filed under section 11 (1) of the Appellate Jurisdiction Act, Cap. 141 R.E 2019 and any enabling provision of the law. It was brought under a certificate of

urgency. The chamber summons is supported by a joint affidavit of the 3rd, 4th, 5th and 6th Applicants. The Applicants are praying for the following orders:

1. That, this Honourable Court be pleased to extend the period of time for the Applicants to file notice of Appeal to the Court of Appeal against the decision/ruling and decree of this Honourable Court in Commercial Case No.47 of 2017 (Hon. Madam Justice B.M.A Sehel, J. (as she then was), dated 14th November 2018.
2. Costs of this application.
3. Any other and further relief the Court may deem fit and just to grant.

On the 20th October 2022 the Respondent filed a counter affidavit to challenge the application and, on 3rd November 2022, reply to the Respondent's counter affidavit was filed.

Since the filing of the requisite documents coincided with the Court vacation, the Applicants were advised to argue the application by way of written submissions which they duly filed as directed by this Court.

In terms of legal representations, the Applicants enjoyed the services of Mr. Armando Swenya, learned advocate, while Mr. Laurent Leornard appeared for the Respondent. Submitting in support of the application, Mr. Swenya adopted the Applicants' affidavit as forming part of his submission and contended that, the application before this Court is for extension of time within which the Applicants will be allowed to file a Notice of Appeal to the Court of Appeal of Tanzania out of time.

He told this Court that, the application is premised on Commercial case No.47 of 2017 which ended in favour of the Respondent on 14th November 2018. He told this Court further that, subsequently, the Applicants commenced an appeal process intending to challenge the decision, and a Notice of

Appeal to that effect was filed at the Court of Appeal on the 20th November 2018.

A record of Appeal No.111 of 2019 was finally lodged at the Court of Appeal but when the appeal was called on for hearing, a discrepancy in the record of appeal was noticed by the Court of Appeal and the said Appeal ended up being struck out for being incompetent. He referred to this Court the averments in paragraph 5 and 6 of the supporting affidavit.

He submitted that, subsequent to the striking out of the appeal, the Applicants found another legal counsel who advised that an application to extend time within which a fresh notice of appeal could be filed out of time was necessary once an appeal has been struck out since every document in respect of the appeal struck out ceases to exist, hence this application.

To support his argument regarding why this Court should grant the application Mr. Swenya relied on the decided cases of **Cocacola Kwanza vs. Paulo Kingu and 4Others**, Misc. Labour Application No.22 of 2020 (HC, Dodoma Registry)

(unreported); regarding the factors to consider in granting an extension of time as well as the case of **William Shija and Another vs. Fortunatus Masha**, [1997] TLR. 213 concerning real or actual delays and technical delays.

Referring to paragraph 12 of the affidavit in support of this Application, Mr. Swenya did also submit that, the Applicants seek to challenge the decision of this Court as it has illegality which occasioned a gross injustice. He relied on the decision of the Court of Appeal in the case of **Principal Secretary Ministry of Defence and National Service vs. Devram Valambia** [1991] TLR 387 where the Court of Appeal discussed a situation where an illegality is pleaded in an application for extension of time and what the Court should do. He argued that, such a reason constitutes sufficient cause to grant the application.

He also relied on the case of **Bahati Mussa Hamisi Mtopa vs. Salum Rashid**, Civil Appl. No.112/07 of 2018 (unreported) and **Felix Tumbo Kisima vs. T.T.C and**

Another, [1997] TLR 57, (CAT) and **Juto Ally vs. Aloyce Msafiri Musika & Another**, Civil Application No.484/17 of 2019. He finally urged this Court to grant this application.

The Respondent's counsel filed a reply submission. He adopted the counter affidavit of the Respondent and submitted that, the Applicants lost an application for stay of execution, Appl. No.418/16 of 2019 and an appeal No.111 of 2019, which were lodged at the Court of Appeal but got struck out for being incompetent.

Mr. Leonard contended that, the Applicants were negligent and negligence of an advocate or his ignorance of the procedure is not an excuse and does not constitute a sufficient cause for extension of time. He relied on the case of **Jubilee Insurance Co (T) Ltd vs. Mohamed Sameer Khan**, Civil Appl. No. 439/01 of 2020.

He contended further that, there is nothing about illegality under paragraph 12 of the Applicants' joint affidavit and that, where it is raised, the Court must be satisfied that,

the claimed illegality really exists. He relied on the case of **Lyamuya Construction Ltd vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Appeal No.2 of 2010, (CAT) (unreported).

Mr. Leonard contended further that, delay even of a single day need to be accounted for. He relied on the case of **Karibu Textile Mills Ltd vs. Commissioner General of TRA**, Civil Appl.No.192/20 of 2016 and **Bushiri Hassan vs. Latifa Lukio Mashayo**, Civil Appl. No.3 of 2007 (unreported). He contended that, there are no good causes exhibited by the Applicants.

In his rejoinder submission, Mr. Swenya rejoined that, the submission file by the Respondent is defective as it contains annexures contrary to the rules governing written submissions. He relied on the case of **TUICO vs. NIC (T) Ltd** [2005] TLR 41. Re-joining on the issue of negligence, he negated it. He reiterated the case of **William Shija vs.Fortunatus Masha**(supra) contending that, what be-faced the present

application is a technical delay. He urged this Court to grant the application.

I have carefully examined the rival submissions filed by the learned counsels for the parties herein. In my humble view, I see no reasons why I should be detained in a long discourse regarding whether I should grant this application or not. As I read from the joint affidavit in support of the present application, I am in agreement that, the Applicants' previous appeal was struck out based on technicality and nothing else. Had it not been so, the appeal would have proceeded to its hearing.

The striking out of the appeal on the technical ground as demonstrated in the joint affidavit is therefore the main reason for the delay since, as rightly submitted by Mr. Swenya, once a matter such as an appeal is struck out from the Court, nothing is left which could be relied upon, be it a notice of appeal or otherwise which was erstwhile filed by a party. Since the previous Appeal No.111 of 2019 was struck out by the Court of

Appeal on technical ground, the only recourse was to file for extension of time to file a fresh Notice of Appeal and in my view, the citing of the case of **William Shija vs. Fortunatus Masha** (supra) is appropriate and, thus, explainable.

In view of the above and taking into account the reasons set out in the joint affidavit and the submission made by the Applicants, I find that, there is a good cause regarding why I should grant this application. In the upshot of all that, this Court settles for the following orders:

1. That, the prayer for extension of time within which the Applicants are to lodge a Notice of Appeal to the Court of Appeal out of time is hereby granted.
2. That, the Notice is to be lodged within 14 days from the date of this ruling.

3. That, in the circumstance of this application, each party shall bear its own costs.

It is so ordered.

**DATED AT DAR-ES-SALAAM ON THIS 14TH DAY OF
MARCH 2023**



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**DEO JOHN NANGELA
JUDGE**