IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MAIN REGISTRY

AT DAR ES SALAAM

CONSOLIDATED MISC. CIVIL APPLICATION NO. 14 OF 2022 & MISC. CIVIL APPLICATION NO.28 OF 2022

(From Misc. Civil Application No. 4 of 2021, High Court of the United Republic of Tanzania, Main Registry, Dar es Salaam.)

DR. HAMIS SAIDI KIBOLA .....APPLICANT

VERSUS

ANTHONY GOODLUCK SHUMA.....1ST RESPONDENT

HADIJA TATI.....2ND RESPONDENT

THE ADVOCATES COMMITTEE.....3RD RESPONDENT

RULING

26/09/2022 & 11/11/2022

MZUNA, J.:

This ruling is in respect of the consolidated applications for extension of time for leave to appeal to the Court of Appeal (Misc. Civil Application 14/2022) and leave to appeal to the Court of Appeal (Misc. Civil Application No. 28 of 2022). Both applications are against the Ruling of this court in Misc. Civil Application No. 4 of 2021 (Laltaika, J). The applications have been preferred under section 11(1) of the Appellate Jurisdiction Act, Cap 141 RE 2021 (AJA); And section 5 (1) (c) of AJA and Section 95 of the Civil Procedure Code [Cap 33 RE 2020] respectively.

The background story to this dispute is that the above mentioned applicant sought for an order against the first and second respondent (on

two different applications), on allegation of professional misconduct as Advocates in relation to the attestation of an agreement. He sought for their removal from the roll of advocates due to unethical conducts. The matter was found by the Advocates Committee, the third respondent not proved. He lodged an appeal before the High court. The court on 14th December, 2021 dismissed it based on one of the two raised preliminary points of objection that he had no *locus standi* to appeal, he being not an Advocate and therefore not covered under Section 24 A of the Advocates Act, Cap 341 RE 2019. The appeal was accordingly dismissed.

Undaunted, the applicant intended to appeal to the Court of Appeal but was found out of time hence the two applications (now under consideration). Hearing of the consolidated applications proceeded orally. Mr. Harrison Lukosi, the learned Advocate appeared for the applicant whereas Mr. Godwin Nyaisa, Advocated for the 1st and 2nd respondent. On the other hand, Ms. Lightness Msuya, learned State Attorney appeared for the 3rd respondent.

I propose to start with the *first issue on extension of time to file leave to appeal out of time, relevant for Application No. 14 of 2022.* The main issue is whether there are sufficient reasons which have been advanced for the delay to file leave to appeal within time?

Mr. Lukosi adopted the applicant's affidavit to form part of his submission. He submitted two reasons for the applicant's delay to file leave to appeal to the Court of Appeal:- **One,** late supply of copies of ruling and drawn order. He submitted that the impugned ruling was delivered on 14th December, 2021 but copies were availed to the applicant on 11th February 2022 which was after a lapse of 30 days. All the same it was improperly dated.

He insisted that it is a requirement of the law that the application be accompanied with copy of the ruling. The case of **Grace Fredrick Mwakapiki v. Jacklin Fredrick Mwakapiki & Another,** Civil Application No. 51/6 2021, CAT (unreported) at page 5 was cited in support thereof. He is of the view that the delay was not caused by the applicant but the court.

On the point that a drawn order had variance on the date of the ruling when it was delivered, it was ably communicated to Registrar so as to rectify it. The rectified copy was supplied to the applicant on 23rd May, 2022. The instant application was filed on 3rd June 2022.

The second reason is on illegality. The applicant alleged that the ruling delivered by Hon. Laltaika, J was tainted with illegality which by itself constitute a sufficient reason to grant leave to appeal out of time.

In support thereof, he cited the case of **Johan Harald Christer Abrahsson v. Exim bank (T) Limited & 3 Others,** Civil Application No. 224/16 of 2018 CAT (Unreported) at page 9-10.

He proceeded further that, the right to appeal is the constitutional right enshrined under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania 1977 (as amended). He challenged the quorum during the hearing, that the matter had to be determined by three Judges not a single judge as it is the case here. That, the ruling was based on presumption as the matter was not determined on merit but on the preliminary objection.

Concluding his submission, Mr. Lukosi submitted that the applicant managed to account for each day of delay and to show sufficient cause warranting an extension of time. He therefore urged this court to grant the application.

In reply, both Mr. Nyaisa the learned Advocate and Ms. Lightness Msuya the learned State Attorney relied on the filed counter affidavits. They insisted that the application for leave need not be formal but informal. That the allegation that there were missing documents cannot be a good cause as he had an alternative which is to file the application informally. That Rule 45 (a) of the AJA provides that the application for

leave can be made informally within 30 days of the decision. That, the cited case of **Mwakyambiki** (supra) cited by the Applicant is distinguishable as its decision was based on the requirement of Rule 19(3) of the Court of Appeal Rules.

Given the fact that the decision of the High Court was delivered on 14th December, 2021, the application ought to have been preferred on 15th January 2022 within 30 days either formally or informally. Ms. Msuya was even more particular that the applicant's application was lodged on the 7th August, 2022 not 3rd August 2022 as alleged in the submission of the applicant.

It is further submitted that, in the application of this nature attaching a copy of the decision is not a requisite. Therefore, the reason of waiting for copies of ruling and drawn order is not good cause. Buttressing their submission, the case of **Tumaini Nikodemu v. Olam Tanzania Limited,** Civil Application No.32 of 2021 High Court at Bukoba (Unreported) at page 9 was cited. That the cited cases on the requirement to attach copies are distinguishable. There was no need to attach it. They insisted that the applicant was negligent.

In regard to reasons of delay, the applicant must account from each day of delay. That the impugned decision was delivered on 14th

December, 2022, however, the letter requesting copies of the decision and drawn order is after a lapse of 21 days. The 21 days are not accounted for in the applicant's affidavit. Copy of the ruling was supplied on 11th February, 2022, but sought rectification for drawn order on 21st April 2022 which was almost after sixty days. In total there is a lapse of unaccounted 81 days.

On the issue of illegality to constitute sufficient cause, the illegality must be apparent on the face of record not from long drawn argument. Reference was made to the case of **Lyamuya Construction Limited v. Board of Registered Trustees of Young women's Christian Association of Tanzania,** Civil Application No. 2 of 2010, CAT at Arusha (unreported) at page 8 to 9. That before the Advocates Disciplinary Committee, there were three persons chaired by a Judge.

The ruling on the Preliminary objection was determined by a single judge which is proper per the known procedure. Issue of quorum is not a pure point of law as the impugned decision was determined by a single judge at the preliminary objection stage. The allegation on the presumptive of substantive part at the preliminary objection stage, is a long-drawn argument. It is not apparent on the face of the record, citing the case of **Omary Ally Nyamalege *(as the Administrator of the***

Estate of the late Seleman Ally Nyamalege) **& 2 Others v. Mwanza Engineering Works,** Civil Application No. 94/08 of 2017, CAT at Mwanza (Unreported).

That, the case of **Johan Abrahsson** (Supra) is also distinguishable because its illegality is not apparent on the face of record. The case concerned illegality and fraud during execution, while in the case at hand the issue of substantive merit and quorum are not on the face of it. They insisted that there is no point of illegality which was cited in support thereof.

For the court to grant an extension of time, the applicant must account for each day of delay as articulated in **Lyamuya Construction case** (Supra) at page 6 that the applicant must account for all the period of delay, the delay should not be inordinate, the applicant must show diligence not negligence and issue of illegality as a point of law.

Ms. Msuya argued that, the applicant has not accounted for each day of delay from the date of ruling to the date of requesting the same and the date in which the copies were supplied with the certificate of delay on 12th April, 2022 to the date this application for extension of time was filed on 7/6/2022. There is a delay of 35 days in the application for

extension of time to file leave to appeal while in the application for leave there is a delay of 72 days, they submitted.

They insisted that the requirement to comply with the limitation of time is well articulated in the case of **M/S P & O International Ltd v. The Trustees of Tanzania National Parks (TANAPA)**, Civil Appeal No. 265 of 2020 CAT at Tanga (unreported) at page 11 where it was held among others that law of limitation is "a merciless sword." Therefore, the two applications have no merit. They should be dismissed with costs.

In his rejoinder submission, Mr. Lukosi submitted that, the law does not compel the applicant to opt for informal application. The applicant should not be penalized because the application was formal. He cannot be held negligent on the wrong done by the court for the late supply of the necessary documents. He insisted that the applicant has complied with all prerequisite conditions for grant of leave to extend time. The applicant has accounted for each day of delay, acted diligently in prosecuting this application. That, the discretion of the court should be exercised in favour of the applicant.

On account of the above submissions of both parties, the question to ask is, *has the applicant demonstrated sufficient reasons warranting extension of time for leave to appeal to the Court of Appeal?*

It is the general principle of the law that for the court to grant extension of time the applicant must demonstrate sufficient reasons. It was held in the case of **Lyamuya Construction Company Limited v. Board of Trustee of Women's Christian Association of Tanzania** (Supra) that extension of time is subject to the applicant advancing sufficient reasons for the delay and that he must account for "all the period of delay" failure of which it amounts to "negligence" or "sloppiness" in the prosecution of the action that he intends to take.

Reading the applicant's affidavit and in his submission, he has demonstrated that the delay was caused by the court which delayed in supplying necessary documents. This fact had been strongly objected by Mr. Nyaisa the learned Advocate and Ms. Msuya, learned State Attorney. They argue that there was no need for the copy of the decision to be attached pursuant to Rule 45(a) of the Court of Appeal Rules 2009.

That provision reads;

In Civil matters;

a) *Notwithstanding the provisions of rule 46(1) where an appeal lies with the leave of the High Court, the application for leave may be made informally, when the decision against which it is desired to appeal is given, or by chamber summons according to the practice of the High Court, within thirty days of the decision.*

In the case of **Grace Fredrick Mwakapiki v. Jacklin Fredrick Mwakapiki & Another,** (supra) page 5, the Court of Appeal emphasized based on rule 49 (3) of the Court of Appeal Rules that ***"copy of the order of the High court"*** must be annexed when applying for leave to appeal to the Court of Appeal in terms of rule 45 (b) of the Rules. The respondents insisted that the applicant ought to have opted for an informal application where there is no requirement to annex such order. In my view and based on the above case law of **Grace Fredrick Mwakapiki v. Jacklin Fredrick Mwakapiki & Another,** (supra) such document is required as "a decision from which an appeal is to be preferred, should leave be granted." Currently we are dealing at leave stage not appeal stage. So it is not a mandatory requirement to annex it if made informally as indeed did find my brother Mwenda, J in the case of **Tumaini Nikodemu v. Olam Tanzania Limited,** (supra). I rule in favour of the respondents that there was no need to wait for such copy while the law allows to apply informally.

Now, assuming that the applicant is allowed to annex such copy of the decision for arguments sake, has he accounted for the delay? Counting from 14th December, 2021 when the ruling was delivered, the 30 days lapsed on 13th January 2022. The present application was filed on 07/06/2022 as per receipt No. EC1013604422101P. Copy of the ruling was supplied on 11th February 2022. A rectified copy was supplied on 23rd May, 2022. Date of supply of certificate of delay was on 12/04/2022 which if counted up to the date of filing the application on 7/6/2022, there is a delay of 57 unaccounted days.

The learned counsel for the applicant has attributed reasons for the delay to be late supply with copy of the decision. All the same, application for the same was made after 21 days. Even after being supplied with copy of the decision on 11th February with some defects, he applied for rectification on 21st April 2022 almost after a lapse of 60 days which the respondents say, and I think rightly so, had never been accounted for. Surely there are about 81 unaccounted days of delay which amounts to "negligence or sloppiness" in the prosecution of the action that he intended to take.

There was also advanced another ground of illegality of the decision sought to be challenged. The position of the law on illegality is well settled

in our jurisdiction. It is one of the factors constituting good cause for extension of time. It was held in the case of **Principal secretary, Ministry of Defence & National Service v Devram Valambhia** [1992] TLR 185, 189 that:-

> *"In our view when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and the record right."*

Allegation that the matter presupposes determination on substantive merit while it ended at the preliminary objection stage and that the quorum ought to have been a panel of three judges not a single judge, are matters which is not an error apparent on the face of the record but it arises from "*a long process of argument being involved."*

It was held in the case of **Yazidi Kassim t/a Yazidi Auto Electric Repairs v. The Hon. Attorney General,** Civil Application No. 354/04 of 2019, CAT at Bukoba (Unreported) at page 17 that:-

> *"What amounts to an error apparent on the face of the record has long been established as being an error which is easy to spot at a glance without a long process of argument being involved."*

That ground which could have allowed the application even if there is failure to account for the delay is not substantiated. As well submitted by

the respondents, such arguments on illegality are from a long drawn argument not from the face of the record. Application for extension of time for leave to appeal stands dismissed.

Now, I move to determine *the application for leave to appeal to the Court of Appeal* relevant for Misc. Cause No. 28 of 2022. This issue is primarily dependent on the first issue if it is answered in the affirmative as to whether there are sufficient reasons upon which leave to appeal to the Court of Appeal can be granted out of time.

Section 5(1) (c) of the AJA clearly provides that leave must be sought first in an application of this nature:-

"In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal-

a) …(N/A);
b) …(N/A)
c) ***with the leave of the High Court or of the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court."*** (Underscoring mine).

The applicant has demonstrated what he thinks are arguable grounds worth consideration by the Court of Appeal stated under paragraph 8.1-8.3 of the applicant's affidavit on the complained illegality:-

That, *the impugned ruling is tainted with illegality by holding that the applicant has no right of appeal.*

That, *Quorum was not properly constituted in the hearing and determination of the appeal.*

That*, the Ruling/Drawn order is presumptive of substantive matters while the appeal was heard and determined on Preliminary Objection only.*

In view of the above cited provision of the law, although the right to appeal is the constitutional right, nevertheless it is not automatic. It is subject to limitations as well stated in the case of **British Broadcasting Corporation vs. Eric Sikujua Ng'maryo,** Civil Application No. 138 of 2004, CAT at DSM (Unreported) (cited also in the case of **Rutagatina C. L. vs The Advocates Committee and Another,** Civil Application No. 98 of 2010)**.** The Court of Appeal stated that;

> *"As a matter of general principle, leave to appeal will be granted where the grounds of appeal* ***raise a general importance or a novel point of law or where the grounds show a prima facie or arguable appeal*** *(see: Buckle v Holmes (1926) ALL ER. Rep. 90 at page 91). However, where the grounds of appeal are frivolous, vexatious or useless or* ***hypothetical, no leave will be granted."*** (Emphasis mine).

The alleged grounds on issue of illegality is almost a replica of what the applicant said under the first issue. It is more "hypothetical" and therefore

no leave can be granted where the adduced reasons are as in this case, hypothetical.

The second reason which is equally important in disallowing an application for leave is the dismissal for extension of time to file leave. As indicated above, this application had been dismissed. Similarly, this application cannot be allowed.

To this end, both applications for extension of time for leave to appeal to the Court of Appeal and leave to appeal to the Court of Appeal lack merit. They stand dismissed with costs.

Dated at Dar es Salaam this 11th Day of November, 2022.

11/11/2022

X

Signed by: M G MZUNA JUDGE