

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF TANZANIA (DAR ES SALAAM SUB-REGISTRY) AT DAR ES SALAAM
MISC. CIVIL APPLICATION NO. 146440 OF 2024 (Arising from District Court of Kinondoni in Civil
Appeal No. 72 of 2023) RANDA MICROFINANCE APPLICANT
VERSUS HELLEN ALOYCE BUPAMBA 1ST RESPONDENT WITNESS
ELIBARIKI..... 2ND RESPONDENT

RULING

17th September & 17th December, 2024 BWEGOGGE, J.: This is an application for an extension of time within which to file an appeal in this court against the decision of the District Court of Kinondoni in Civil Appeal No. 72 of 2023. The application is brought under the provision of section 25(1)(b) of the Magistrates' Court Act (Cap. 11. R.E

2019) and supported by the affidavit of Raphael Alex Ndamalya, the applicant's principal officer. 1 The pleadings filed before this court entails that the applicant herein commenced civil proceedings against the respondents herein in the Primary Court of Kinondoni in Civil Case No. 114 of 2022 for recovery of debt to the tune of TZS. 6,844,400/= arising from a contract executed with the 1st respondent herein. The 2nd respondent stood as a guarantor to the 1st respondent in the respective loan agreement executed between the applicant and respondent herein. At the conclusion of the trial, the trial court found that the applicant herein proved his claim to the required standard and ordered the respondents herein to repay the applicant the claimed amount with costs of litigation. The respondents were aggrieved with the decision of the trial court and appealed to the District Court of Kinondoni in Civil Appeal No.72 of 2023. The first appellate Court overturned the decision of the trial court on the ground that there was no board resolution which permitted the applicant to initiate the civil proceedings against the respondents. Hence, this application. The applicant herein was represented by Mr. Buberwa Abdul, learned advocate; and the respondents had the services of Mr. Andrew Mathew Chima, learned advocate. Both counsel preferred to argue the application by way of written submissions. 2 Submitting in chief, Mr Abdul argued that consequent to the pronouncement of the impugned judgment on 09/04/2024, the applicant instructed his previous counsel, Mr Elisha Daniel to prepare an appeal. However, the said advocate didn't take any action. Upon follow-up, the applicant's principal officer came to realize that no appeal was lodged. Hence, he

proceeded to request a copy of the judgment from the trial court which was supplied on 22nd May, 2024. And when the counsel herein was engaged to take legal action, he realized that the time to appeal had elapsed; hence, he preferred this application. Further, the counsel submitted that the law allows the applicant to seek and obtain leave to file the appeal beyond the prescribed time upon showing good cause. That the impugned decision was pronounced on 09th April, 2024 and the thirty days within which to appeal expired on 08th May, 2024. And the applicant was supplied with the copy of the judgment on 22nd May, 2024 and engaged the counsel herein on 29th May, 2024 who filed this application on 12th June, 2024. Hence, the delay in filing this application is not inordinate. The counsel shouldered blame to the advocate previously engaged by the applicant for failure to take appropriate legal action against the impugned decision. Hence, the applicant should not be punished for the mistakes of his counsel. The 3 case of Cuthbert Robert Kajuna t/a C.R. Kajuna & Company vs. Equity Bank Tanzania Limited, (Civil Appeal No. 137 of 2022) [2024] TZCA 206 was cited to reinforce his point. Likewise, the counsel opined that in the application of like nature, the more persuasive reason an applicant can show is that the delay has not been caused or contributed by dilatory conduct on his part. The case of Shanti vs. Hindocha & Others [1973] E.A. 207 was cited to validate the point. In tandem with the above, the counsel alleged that the impugned decision is tainted with serious illegalities and irregularities as the first appellate court decided the appeal based on the wanting board of resolution authorizing the applicant to commence civil proceedings against the respondent which was neither raised nor decided by the trial court. The case of Hotel Travertine Limited & Others vs. National Bank of Commerce Limited (Civil Appeal 82 of 2002) [2006] TZCA 16 was cited to buttress the point. The counsel concluded by opining that based on the foregoing, this court be pleased to grant the extension sought as the respondents herein would not be prejudiced in any way with grant of this application. In reply, Mr. Chima admitted that this court has discretion to grant enlargement of time within which the applicant may take the intended 4 legal action. However, the discretion vested to this court should be exercised judiciously based on well-understood principles of the law in the interest of justice. The case of Insignia Ltd vs. Commissioner General Tanzania Revenue Authority, Civil Application No. 2 of 2007, CA (unreported) was cited to bring the point home. In the same vein, the counsel contended that that extension of time can only be granted upon the applicant furnishing sufficient cause for delay. That in this matter, the applicant herein has not established sufficient reasons to warrant grant of the extension order sought herein. The cases of Lyamuya Construction Company Limited vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania (Civil Application 2 of 2010) [2011] TZCA 4; Kalungs & Company Advocates vs. National Bank of Commerce [2006] TLR 235; Tanga Cement Co. Ltd vs Jumanne D. Masangwa & Another (Civil Application 6 of 2001) [2004] TZCA 45, among others, were cited to reinforce the point. Further, the counsel charged that the negligence and inaction of the applicant's former advocate do not constitute sufficient cause for grant of extension of time sought herein. The case of Bahati Ngowi vs. Paul Aidan Ulungi (Misc. Civil Application 490/13 of 2020) [2023] TZCA 17503 5 was cited to bolster the point. Likewise, the counsel contended

that the application for extension of time shall not be granted where the delay is due to indolent inaction and, or lack of vigilance on the part of the applicant or his counsel. The case of *Loswaki Village Council & Another vs. Shibeshi Abebe* [2000] T.L.R 204 was cited to persuade this court. The counsel opined that in determining this application, this court should consider the following; one, the reason for the delay; two, the length of delay from the date when the judgment was delivered to the date of filing this application; three, the conduct of the applicant; and four, the circumstances of this case. The counsel enlightened this court that the applicant herein filed this application on 12th June, 2024, whereby the judgment was delivered on 9th April, 2024. Hence, the delay is inordinate whereas the applicant failed to account for 65 days of delay which is approximately two months. The cases of *Lyamuya Construction Company Limited vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania* (supra) and *Bahati Ngowi vs. Paul Aidan Ulungi* (supra) were cited to buttress the point. Based on the above premises, the counsel prayed this application to be dismissed with costs. 6 In rejoinder, Mr. Abdul reiterated his submission in chief which I find needless to replicate herein. The issue for determination is whether the application herein is merited. The applicant initiated this application under the provision of section 25(1)(b) of the Magistrate's Court Act which enjoins this court with power to grant extension of time within which the applicant may appeal against the decision of the district court. It is trite law that extension of time is granted upon the applicant furnishing good cause for delay. See the cases: *Lyamuya Construction Company Limited vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania* (supra); *Laurent Simon Assenga vs. Joseph Magosso & Others* (Civil Application 50 of 2016) [2016] TZCA 330; *Mohamed Salimin vs Jumanne Omary Mapesa* (Civil Application No. 103 of

- 2014) [2014] TZCA 302; and *Wambele Mtumwa Shahame vs Mohamed Hamis* (Civil Reference No. 8 of 2016) [2018] TZCA 39 among others. In substantiating the application for grant of extension sought herein the applicant advanced two grounds; first, she acted promptly and; secondly, the impugned decision sought to be challenged is tainted with illegality. In determining whether to grant the extension sought or 7 otherwise, I am obliged to consider the following factors; first, whether the applicant accounted for each and every day of delay; secondly, the delay should not be inordinate; thirdly, the applicant demonstrates diligence and not inaction or negligence in prosecution of the action he intends to take; and fourthly, the existence of a point of law of sufficient importance, such as illegality of the decision sought to be challenged. See the case of *Lyamuya Construction Company Limited vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania*, Civil Application 2 of 2010) [2011] TZCA 4 among others. As rightly contended by the respondent's counsel, in accounting for the period of delay, the applicant blamed the negligence and, or inaction of his former advocate for the delay to take appropriate legal action within the prescribed time. I would hastily opine that the negligence of the advocate has never been a sufficient cause for extension of time. See the cases; *Mwananchi Engineering &Constructing Corporation v. Manna Investment (PTY) Limited & Holtan*

Investments Company Limited, Civil Application No. 5 of 2006, CA (unreported), Bahati Ngowi vs. Paul Aidan Ulungi (supra) and Lim Han Yung and Another vs. Lucy Treseas Kristensen, Civil Appeal No. 219 of 2019

[2019] TZCA 400, among others. In this respect, I am constrained to borrow a leaf from the case of Lim Han Yung and Another vs. Lucy Treseas Kristensen (supra) wherein the superior Court opined: "We think that a party to a case who engages the services of an advocate, has a duty to closely follow up the progress and status of his case. A party who dumps his case to an advocate and does not make any follow-ups of his case, cannot be heard complaining that he did not know and was not informed by his advocate the progress and status of his case." With due respect, the case of Cuthbert Robert Kajuna t/a C.R. Kajuna & Company vs. Equity Bank Tanzania Limited, (supra) cited by the counsel in establishing that the applicant should not be associated with negligence of his previous counsel doesn't apply in the circumstances of this case. In the respective case, the Court didn't impute the applicant's counsel with negligence but a bonafide mistake which is excusable in law. In tandem with the above, it is apparent on record that the applicant's counsel herein having been engaged on 29th May, 2024, expended 14 days before instituting this application. Hence, it cannot be said that the later counsel acted promptly either. Thus, the first ground for extension of time advanced by the applicant fails. In the second ground, the applicant alleged illegality for the reason that the 1st appellate court erred in law by basing its decision on the lacking board resolution to sue on the part of the applicant which was neither raised nor discussed in the trial court. Admittedly, illegality of the decisions sought to be challenged constitutes sufficient cause for the grant of extension of time notwithstanding the failure of the applicant to account for the delay. See the cases; Laurent Simon Assenga vs. Joseph Magosso & Others (supra); Lyamuya Construction Company Limited vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania (supra); VIP Engineering and Marketing Limited and Two Others vs. Citibank Tanzania Limited, Consolidated Civil Reference No. 6, 7 and 8 of 2006, (2007) TZCA 165 and Mathew Kitambala vs Robson Grayson and Another, Criminal Appeal No. 330 of 2018(2022) TZCA 572, among others. It is apparent on the face of the record of the 1st appellate court that the respective court nullified the decision of the court of first instance based on the wanting board resolution sanctioning the applicant to commence civil proceedings against the respondent herein. Based on the current position of law, it is not mandatory that the company should obtain board resolution before instituting legal proceedings in classical court save where the matter involves disputes within the company. See the cases: Simba Papers Converts Ltd vs. Packaging and Stationery Manufactures Ltd & Another (supra) and Mohan's Osterbay Drinks 10 Limited vs. American Tobacco Kenya Limited (Civil Application 70/01 of 2022) [2024] TZCA 159. Specifically, in the case of Mohan's Osterbay Drinks Limited vs British American Tobacco Kenya Limited (supra), at page 12, the Apex Court expounded: "Mr. Nyangarika would have us construe the rule such that a board resolution is a mandatory requirement regardless whether a corporation appears through an advocate or director, manager or secretary

relying on the Court's decision in Ursino Palms Estates Limited (supra). With respect, we take a contrary view since we are satisfied that that decision is distinguishable from the instant application neither is it an authority for the proposition that absence of a board resolution is a fatal irregularity. We say so considering that the decision relied upon by the learned single Justice, to wit, Bugerere Growers Ltd

- v. Sebaduka & Another [1970]I EA 147, was held to be of limited application to cases involving disputes within the company. “ [Emphasis mine]. Moreso, the Court appositely asserted: “The suit from which the appeal arose did not involve internal squabbles within the applicant, rather, breach of contract between herself and the respondent..... Neither do we subscribe to the argument that appearance by a company through an advocate requires a board resolution..... What emerges from the above is that the mere absence of a board resolution does not invalidate a thing done by an advocate...” [Emphasis mine]. 11 Thus, based on the foregoing, I would not tarry to point out that the trial resident magistrate strayed in an error in holding that procuring the board resolution was a condition precedent for the applicant to sue; hence, arrived at the erroneous conclusion. I find the allegation of illegality of the decision sought to be challenged with substance. In fine, I find that the applicant has succeeded in demonstrating that the decision sought to be challenged is tainted with illegality which is sufficient cause for grant of enlargement of time within which to appeal against the impugned decision. I find the application herein meritorious. Accordingly, the application is hereby allowed. The applicant herein to file the intended appeal within 14 days. Order accordingly. DATED at DAR ES SALAAM this 17th December, 2024. O. F. BWEGOGUE JUDGE 12 13

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