

TANZANIA / JUDGMENT

wilseck kiondo vs elly mtangi

2021 tzhc 2208 19 january 2021

COURT
TZHCDECIDED
19 January 2021

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IN THE HIGH COURT OF TANZANIA (DAR ES SALAAM DISTRICT REGISTRY) AT DAR ES SALAAM
MISC. CIVIL APPLICATION NO. 149 OF 2019 WILSECK KIONDO.....
APPLICANT VERSUS ELLY MTANGI..... RESPONDENT (Arising
from the decision of the Judgement and Decree of this Court) (Sameji J.) Dated 20th April 2019 in
Civil Appeal No. 147 of 2017

RULING

30th November 2020 & 19th January 2021 AK. Rwizile, J This application is filed under section 11(1) and 5(1)(c) of the Appellate jurisdiction Act, Rules 45(a) and 47 of the Court of Appeal Rules 2009. 1 The applicant is mainly seeking for two main orders; extension of time to appeal to the Court of Appeal, and leave to appeal to the Court of Appeal. He has also asked for costs and other reliefs. The application is accompanied by an affidavit sworn by Mr. Charles G. Lugaila who is also advocating for the applicant. MS Rehema Mrangu advocated for the respondent resisted the application by a counter-affidavit sworn by Mr. Julius B. Kirigiti. This application was by agreement heard by written submissions. On his party, Mr. Lugaila submitted that this application combines two prayers; for extension of time to file leave to appeal to the Court of Appeal and leave to appeal to the court based on the principle developed in the case of Mic Tanzania Ltd vs Minister for Labour and Youth Development and Another, Civil Appeal No. 103 of 2004. (CAT- unreported). According to his submission, the first prayer for extension of time has reasons stated under paragraph 5-11 of the affidavit. The same shows, after the decision to be appealed against was made on 20th April 2018, an application for leave was filed in time, i.e on 2nd May 2018. The same however, was struck out with costs. Another attempt was then made. He filed another application three days later, upon being supplied with copy of the ruling that struck the previous application out. After filing, it was discovered that the same had a wrong citation and it was struck out on 15th May 2019. The learned advocate went on submitting that this application was then filed in less than 14 days. He asked this court to hold that all the time he was dealing with those applications in court, is excusable, as held in the case of Benedict Shayo vs Consolidated Holdings Corporation, Civil Application No. 366/01 of 2017. 2 On the second prayer, the learned counsel asked this court to grant leave to appeal to the Court for the points averred

under paras. 13.1 – 13.3 of the affidavit supporting this application. His assertion on this point is clear that the trial court ruled without evidence that the amount of 12,000,000/= was proved paid to the applicant. This, according to him, was contrary to section 110(1) of the Evidence Act. He went on submitting that this court did not consider the same thereby dismissing his case. It was further submitted that this court, ruled that he was duty bound to prove general damages when evidence shows the respondent had breached the agreement and trust. He asked this court to consider the decision in the case of *General Marketing Ltd v Sharif* [1980] TLR 61, where it was held that rules of procedure are handmaids of justice and should not be used to defeat ends of justice. MS, Rehema Mrangu started by submitting that the applicant is to blame for delay. She was vehement in her submission that due to the applicant's lawyer's negligence, such as failure to attach the judgement and making wrong citations, he is to blame for the same, because they attracted objections. She further submitted that the applicant was not serious in prosecuting the application, that it is why it took too long to obtain copies of necessary papers for that matter. To supplement her argument, the learned advocate referred this court to the decision in the case of *Lyamuya Construction Company Ltd v Registered Trustees of the Young Women's Christian Association of Tanzania*, Civil Application No. 2 of 2010 (CAT-unreported) where guiding principles within which to grant extension of time were propounded to include; accounting for all days of delay, that delay should not be inordinate, 3 that the applicant should show diligence and not apathy in prosecuting the case and other reasons that the court will feel to consider, such as illegality. He therefore asked this court to dismiss the first prayer of extension of time. Submitting on the second prayer, it was the learned counsel's view that there is no point of law that has been clearly shown in record to be granted leave. She supported her point by the case of *Ngao Godwin Losero vs Julius Mwarabu*, Civil Application No. 10 of 2015, which cited the case of *Lyamuya Construction* (supra). When given a chance to rejoin, the learned counsel for the applicant had nothing material to submit. He only submitted that delay referred in this application is a technical one as per the case of *Fortunatus Masha v William Shija and Another* [1997] TLR 154. On the second prayer, it was his submission that the finding on damages by the first appellate court is not in line with the decision in *TUCTA vs Engineering Systems consultants Limited and 2 Others* (CAT), Civil Appeal No. 51 of 2016. I was asked to grant the application. Upon going through submissions of both sides, I have to state at once that reasons for granting extension of time were clearly stated in the case of *Lyamuya Construction* (supra). The reasons may include; accounting for all days of delay, that delay should not be inordinate, that the applicant should show diligence and not apathy in prosecuting the case and other reasons that the court will feel to consider, such as illegality. It is therefore settled in law that the applicant has the duty to prove the above. 4 The record shows, which I think is important to note, that the applicant was not sitting on her right of appeal all that time. He was trying to pursue it but due to technical issues embodied in our civil procedure, his efforts were facing problems. This cannot be called an inordinate delay, or lack of diligence or apathy in prosecuting this application. I therefore agree that since the previous applications in the same subject were abortive, it constitutes a technical delay as held in the case of *Benedict Shayo* (supra). In line with that, I have also to take it that there is no great amount of prejudice, if the application for extension of time is granted than it would be, if refused as in the case of *Joel Silomba vs R*, Criminal

Application No.5 of 2012 (CAT) unreported. Having granted an extension of time, it is now opportune to deal with whether the applicant has demonstrated reasons for granting leave to appeal to the Court of Appeal. In principle, as applied for, leave to appeal to the Court is due to section 5 of the Appellate Jurisdiction Act. The applicant has stated in his affidavit that he is seeking leave because the learned judge held that the applicant was only able to prove the respondent owed him a sum of 22,030,000/=, and that the applicant was bound to prove general damages. These points, according to him, are the basis for applying for leave. The grounds shown above, are the issues that led to the dismissal of his cross appeal. I have gone through the judgement of this court. One thing that is apparent is that the court did not say he needed to prove general damages but had to prove how he suffered such damages. I do not think, the applicant has sufficiently shown why he is entitled to be granted leave to the court appeal. 5 Before concluding, I have to note that the respondent cited the case of Ngao Godwin Losero (supra) as to have dealt with matters of leave to the Court of Appeal, at page 8. With due respect, this case dealt with an issue of extension of time. Therefore, the same is distinguishable and does not support her position. From the foregoing, I see no merit in the second prayer for leave to appeal to the Court of Appeal. It is therefore refused. That being the case therefore, the applicant has to pay costs of this application. ACK. Rwizile Judge 19.01.2021 Recoverable Signature X
Signed by: A.K.RWIZILE 6

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