

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CIVIL APPLICATION NO. 421/08 OF 2021

BRAZAFRIC ENTERPRISES LIMITED.....APPLICANT

VERSUS

KADERES PEASANTS DEVELOPMENT (PLC).....RESPONDENT

**Application for Extension of time to file an Appeal out of time from the
Ruling of the High Court of Tanzania, Commercial Division at Mwanza
(Phillip, J.)**

dated the 15th day of November, 2018

in

Misc. Commercial Application No. 323 of 2017

.....

RULING OF THE COURT

5th & 13th October, 2022

LEVIRA, J.A.:

Brazafric Enterprises Limited through the services of Mr. Edward Peter Chuwa learned advocate, is seeking extension of time to file an appeal out of time against the decision of the High Court of Tanzania, Commercial Division at Mwanza (the High Court) in Miscellaneous Commercial Application No. 323 of 2017 dated 15th November, 2018. The application is made by way of a notice of motion supported by an affidavit deponed to by the applicant's counsel. The application is, however, opposed by the respondent through affidavit in reply deposed by Leonard Faustine Zimbehya Kachebonaho, the Principal Officer of the respondent.

A brief background of this matter is to the effect that, the parties to this application had entered in a contract where the respondent had to supply the applicant with a dry coffee processing mill at a cost of USD 566,376.00. The respondent effected a payment immediately after execution of the contract, but the applicant breached the terms of the contract as she failed to supply the said mill. As a result, the respondent instituted Commercial Case No. 3 of 2014 against the applicant in the High Court and obtained a default judgment following the applicant's failure to file Written Statement of Defence (the WSD). The applicant's efforts to set aside the default judgment proved futile. She tried through a number of attempts to lodge a notice of appeal with a view to challenge the decisions of the High Court with no avail. Tirelessly, the applicant unsuccessfully attempted by way of a second bite, to apply for extension of time to lodge notice of appeal as her application was found incompetent before the Court. Luckily, when she went back to the High Court on 3rd July, 2020, she obtained leave of 14 days to file a notice of appeal to the Court which she complied with. However, she was late to file the intended appeal, hence the instant application. In the present application, the applicant indicated that she intends to challenge the decision of the High Court refusing to re-extend time for her to lodge notice of appeal having been previously sought and

granted 14 days by the same court, but could not utilize those days accordingly. The grounds under which this application is brought are as follows:

1. *"That the applicant lodged a Notice of Appeal on 13th July, 2020 pursuant to the order of the High Court for extension of time and subsequent thereafter the applicant applied for leave to appeal which was granted on 28th July, 2021 but the time to file the appeal to the Court of Appeal has already expired.*
2. *That the Ruling and Drawn Order of the High Court is tainted with illegalities in that the Honourable High Court Judge has refused to entertain jurisdiction vested on the High Court.*
3. *That further, the decision of the High Court is tainted with illegalities as the applicant was denied the right to be heard.*
4. *That having opted to apply for extension of time to lodge a Notice of Appeal to the Court of Appeal as a second bite against the Ruling of Hon. Phillip, J; the applicant did not apply for the copies of proceedings to qualify for a certificate of delay."*

At the hearing of the application, the applicant was represented by Mr. Edward Peter Chuwa and Ms. Anna Lugendo, both learned

advocates, whereas, the respondent had the services of Mr. Jamhuri Johnson, also learned advocate.

Mr. Chuwa adopted the contents of the supporting affidavit and the applicant's written submissions at the commencement of the hearing of the application. Expounding the grounds advanced by the applicant herein, while making reference to paragraphs 14 and 15 of the supporting affidavit, he submitted that the impugned decision of the High Court is tainted with illegalities in two aspects, **first** the denial of the High Court Judge to enlarge time within which the applicant could file a notice of appeal on account that she had no jurisdiction as the time had already been enlarged by another Judge of the same court. According to Mr. Chuwa, that decision was tainted with illegalities because in the first place, it was incorrect for the learned Judge to hold that she had no jurisdiction while that was not the case. **Second**, he claimed that the applicant was denied the right to be heard as the learned Judge entertained an informal point of preliminary objection raised by the respondent regarding the High Court's power under section 93 of the Civil Procedure Code, Cap 33 R.E. 2019 and section 11 of the Appellate Jurisdiction Act, Cap 141 R.E. 2019. It was his argument that although the counsel for the applicant responded to the raised point of objection, he was not accorded opportunity to prepare

and make a meaningful response which amounted to denial of a right to be heard. He cited the case of **Mbeya – Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** [2003] T.L.R. 251.

As regards the reasons for the delay to file appeal, Mr. Chuwa averred that the appellant accounted for the delay; particularly, from the time she was notified by the Court that the route she took was wrong when she made a second bite application for extension of time. Thereafter, the applicant had to go back to the High Court to apply for leave to appeal to the Court as the appeal could not be filed without leave. According to him, on 28th July, 2021 leave was granted and on 5th August, 2021 the present application was filed and thus the delay is not inordinate. Mr. Chuwa further submitted that the applicant was occupied by several applications before the court that is why she could not appeal on time. He urged me to find this as a good cause for the delay and grant the application. He supported his submissions with the decision of the Court in **Mary Mchome Mbwambo and Another v. Mbeya Cement Company Ltd**, Civil Application No. 271 / 01 of 2016 (unreported).

In reply, Mr. Johnson adopted the affidavit in reply and proceeded to submit that in order for an application for extension of time to

succeed the Court has to consider the length of delay, reasons of delay, the degree of prejudice to the other party and the chances of success, if the application is granted as per the decision of the Court in **Wambele Mtumwa Shahame v. Mohamed Hamis, Civil** Reference No.8 of 2016 (unreported).

As far as the length of delay is concerned, Mr. Johnson argued that what has been submitted by Mr. Chuwa was just a narration of sequence of events of what had happened from the date of the impugned decision to the date of filing the current application. He faulted the applicant for failure to take prompt action after the decision of the Court of 9th October 2019 on second bite application for extension of time. He further argued that the excuse advanced by Mr. Chuwa that the applicant was delayed by an application for leave which he lodged to the High Court is immaterial. This, he said, is due to the fact that the said application could not hinder the applicant from filing the application for extension of time to file an appeal. According to him, the current application came as an afterthought and failure by the applicant to file an appeal within time was occasioned by negligence; and thus, it cannot be considered as a good cause for extending time. He supported his argument with the decision of the Court in **Zuberi Nassor Moh'd v.**

Mkurugenzi Mkuu Shirika la Bandari Zanzibar at Zanzibar, Civil Application No. 93 / 15 of 2018 (unreported).

Mr. Johnson submitted further that the intended appeal has no greater chances of success contrary to what the counsel for the applicant has submitted. He clarified that the impugned decision of the High Court was the outcome of the application which was wrongly preferred under section 93 of the CPC and section 11 of the AJA. Therefore, he argued that the counsel for the applicant failed to establish sufficient reasons for the delay to file the intended appeal. In support of his arguments, he cited the case of **Hirji Abdallah Kapikulila v. NCBA Bank Tanzania Limited**, Civil Application No.489/16 of 2021 (unreported).

In his conclusion, Mr. Johnson submitted that the applicant has failed to advance sufficient grounds for the Court to grant the application. He therefore prayed for the application to be dismissed with costs.

Mr. Chuwa made a brief rejoinder reiterating his submission in chief and insisted that the applicant is supposed to account for the delay from the period of time when she filed the notice of appeal and not otherwise. He was of the view that the case of **Hirji Abdallah**

Kapikulila cited by the counsel for the respondent is distinguishable from the current case. Finally, he prayed for the application to be granted with costs.

Having carefully considered the notice of motion, parties affidavits' written and oral submissions by the counsel for the parties, the main issue for consideration is whether the applicant has demonstrated good cause to warrant the grant of extension of time to file an appeal out of time. Rule 10 of the Rules under which this application is brought requires good cause to be shown for the Court to grant extension of time. For ease of reference, it reads:

"The Court may, upon good cause shown, extend the time limited by these Rules or by any decision of the High Court or tribunal, for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to that time as so extended."

It is noteworthy that there is no universal definition of the term "*good cause*". Therefore, good cause may mean among other things, satisfactory reasons of delay or other important factors which needs

attention of the Court, once advanced may be considered to extend time within which a certain act may be done. Good cause may include, but not limited to, allegation of illegality committed by the lower court – See for instance **Principal Secretary, Ministry of Defence, National Services v. Devram Vallambhia** [1992] T.L.R. 185.

Being guided by the above position of the law, I now move to consider the grounds raised by the applicant in the instant application. I will start with the reasons of the delay. The applicant claimed that he has been in courts all along trying to challenge the impugned decision, but he could not succeed. Eventually, on 3rd July 2020 he was granted leave to lodge the Notice of Appeal which he filed on 13th July, 2020 but could not lodge an appeal without leave which was granted on 28th July, 2021. Thereafter, she filed the current application on 5th August, 2021 as she found that the time to appeal had already expired. The reason for the delay advanced by the applicant was strongly opposed by the counsel for the respondent on account that it does not qualify to be termed “a sufficient reason for delay.” Instead, he said, it was a narration of sequence of events which does not fall squarely under the requirement of Rule 10 of the Rules.

Having thoroughly perused the record, the applicant's submissions and the supporting affidavit, it is clear that the applicant has been in courts all along as she narrated. However, in the circumstances of the current application where for instance, the applicant does not state why the appeal was not instituted immediately after obtaining leave, I find that narration of sequence of events alone does not constitute good cause for extension of time, as correctly, in my view, stated by the counsel for the respondent.

I will now turn to considered the second ground on a complaint that, the impugned decision is tainted with illegalities. The counsel for the applicant indicated that, it was wrong for the learned Judge to hold that she had no jurisdiction to entertain the applicant's application and finally strike it out instead of dismissing the same. Similarly, the applicant complained that she was denied the right to be heard as the High Court entertained the point of preliminary objection which was raised as a surprise to the applicant. As intimated above, once illegality is raised and established, it also constitutes a good cause for extending time, as it was held in **Principal Secretary, Ministry of Defence, National Services** (supra), thus:

"...when the point at issue is one alleging illegality of the decision being challenged, the court has a

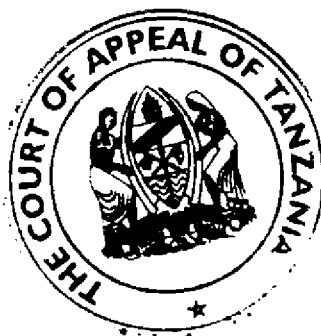
duty, even if it means extending the time for the purpose, to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and the record right.”


In the light of the above decision, I find that the ground of illegality, raised by the applicant, constitutes good cause for extension of time. Accordingly, I grant the application and order the applicant to file the intended appeal to the Court within thirty (30) days from the date of delivery of this ruling. Order accordingly.

DATED at DAR ES SALAAM this 11th day of October, 2022.

M. C. LEVIRA
JUSTICE OF APPEAL

The Ruling delivered this 13th day of October, 2022 in the presence of Ms. Anna Lugendo, learned counsel for the Applicant and in the absence of the Respondent, is hereby certified as a true copy of the original.




S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL