

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

CIVIL APPLICATION NO. 20/01 OF 2018

MIRAJI AYUBU KIMEZA APPLICANT

VERSUS

JUMANNE MUSSA KIMEZA RESPONDENT

**(Application for Extension of Time to file an appeal from the
Judgment of the High Court
at Dar es Salaam)**

(Chinguwile, J.)

Dated the 5th day of October, 2012

in

PC. Civil Appeal No. 54 of 2009

RULING

5th & 25th October, 2018

MWAMBEGELE, J.A.:

The applicant Miraji Ayubu Kimeza, by a notice of motion taken out under the provisions of rule 10 of the Tanzania Court of Appeal Rules, 2009 – GN No. 368 of 2009 (hereinafter referred to as the Rules), applies for extension of time within which to lodge an appeal to the Court. It is supported by an affidavit duly sworn by the applicant. The same has been resisted by the respondent Jumanne Mussa Kimeza in a duly affirmed affidavit in reply.

In order to appreciate the setting of the present application, I find it apt to narrate, albeit briefly, the factual background to it as can be gleaned in the record. It is this: The applicant is the son of the late Ayubu Musa Kimeza to whom the respondent is a brother. Put differently, the late Ayubu Musa Kimeza and the respondent are sons of the same father; Mussa Kunga Kimeza. Upon the death of the late Ayubu Musa Kimeza, there emerged a squabble between the applicant and respondent over the landed property bequeathed to him (Ayubu Musa Kimeza) and the respondent by their father Mussa Kunga Kimeza. The misunderstanding culminated into Probate Cause No. 152 of 2002 in the Primary Court at Ilala in which the applicant unsuccessfully petitioned for letters of administration of the estate of his grandfather in place of his father. The applicant successfully challenged that decision by way of revision in the District Court which nullified the decision of the Primary Court. The respondent successfully challenged the decision of the District Court in the High Court vide PC Civil Appeal No. 54 of 2009. Dissatisfied, the applicant preferred a review against that decision vide a matter christened PC Civil Appeal No. 54B of 2009 but, again, that matter was struck out on a technicality to the effect that, on the authority of **Julius Petro v. Cosmos Raphael** [1983] TLR 346 that the Civil Procedure Code, Cap. 33 of the

Revised Edition, 2002 (the CPC), was not applicable to that appeal which originated from the Primary Court and on the authority of **Mabalanganya v. Sanga** [2005] 1 EA 236 that the High Court had no jurisdiction to review its decision made in appeal on a matter originating from the Primary Court. That application for review was thus struck out.

The applicant was still undeterred but did not do anything in the meantime due to what he stated in the affidavit supporting the notice of motion as ill health and negligence of his advocate he named as Roma. He later lodged Civil Application No. 187/01 of 2017 in the Court seeking enlargement of time to appeal to the Court. That application was marked withdrawn at the instance of the applicant on 31.10.2017. The present application was lodged on 05.02.2018 in its stead.

When the application was called on for hearing on 28.09.2018 the applicant appeared in person, unrepresented. Mr. Yahya Njama, learned counsel, advocated for the respondent who also attended.

At the hearing, the applicant adopted the notice of motion and affidavit filed in its support. He elaborated the grounds deposed in the affidavit that immediately after the decision intended to be challenged was delivered on 05.10.2012, he fell sick for two consecutive years and a

medical chit has been appended with the affidavit. In addition to the ground, the applicant deposes that the delay has also been caused by his advocate; a certain Roma, who did not prefer an appeal against that decision.

The applicant added that he preferred an application for Review in the High Court which was struck out. After that, he lodged in the Court Civil Application No. 187/01 of 2017 which he withdrew on 31.10.2017, hence the present application. He urged the Court to allow the application so that he challenges the decision of the High Court.

For the respondent, Mr. Njama vehemently resisted the application. He argued that the applicant has all along been in good health. After all, he argued the medical chit appended shows that he attended medical treatment and does not show he was excused from duty. On the alleged negligence of his advocate, Mr. Njama submitted that the advocate entered appearance all along in the review proceedings. Regarding Civil Application No. 187/01 of 2017 in the Court, Mr. Njama stated that the same was withdrawn on 31.10.2017 at the instance of the applicant having realized that it was defective.

On the strength of the above, Mr. Njama submitted that the applicant has not brought to the fore good cause to deserve the enlargement of time sought. He stated that even if we would say the explanation brought is sufficient to amount to good cause, the applicant has not accounted for the period of delay after Civil Application No. 187/01 of 2017 which he withdrew on 31.10.2017, was marked withdrawn, and the time he filed the present application. He thus urged the Court to dismiss the application.

In a short rejoinder, the applicant did not have anything useful to add. He only reiterated that he was in ill health after the decision of Chinguwile, J. in the decision he intends to challenge.

When I retreated for writing a Ruling on the application I realized one embarrassing aspect which made me resummon the parties to address me on it. This is whether the present application was preceded by a notice of appeal, for the record did not show if the applicant applied for one after PC Civil Appeal No. 54B of 2009 was struck out by the High Court for being incompetent. The parties were resummoned to appear for hearing on 05.10.2018 during which it was only the respondent and his advocate; Mr. Yahya Njama, who appeared. The respondent, though duly served with the notice of hearing, did not enter appearance. He, however, sent two

brothers to oversee what happened in Court on that date. In the circumstances, the application proceeded with the hearing in terms of rule 63 (2) of the Rules.

Prompted, Mr. Njama, learned counsel, intimated to the Court that there was no notice of appeal filed after PC Civil Appeal No. 54B of 2009 was struck out by the High Court. The learned counsel added that he was not aware of any application for extension of time to lodge a notice of appeal in the High Court. Mr. Njama submitted that the applicant should have started with filing a notice of appeal, or lodging an application for extension of time thereof, in the High Court before filing the present application in the High Court under section 11 (1) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002 (hereinafter referred to as the AJA). In the premises, the learned counsel submitted that the application was misconceived.

Having heard the learned counsel for the respondent on the competence of this application for extension of time to file the appeal, I find that it is incompetent because it lacks the pre-requisite notice of appeal. This is because when Chinguwile, J. struck out PC Civil Appeal No. 54B of 2009, and having been dissatisfied with the striking out order and

wished to challenge it in this Court by way of an appeal for which he seeks this extension of time, he ought to have first filed a notice of appeal. As the applicant claims to have been sick after the ruling intended to be challenged was delivered, that is perhaps the reason why he was not able to file the requisite notice in time, he ought to have first applied for enlargement of time thereof. That application, because this Court and the High Court have concurrent jurisdiction, by virtue of rule 47 of the Rules, ought to have been made in the first instance to the High Court. Thus, in the absence of the notice of appeal, the present application is incompetent. In **William Shija v. Fortunatus Masha** [1997] TLR 213 this Court, confronted with an akin situation, referred to its previous decision in the case of **Arusha International Conference Centre v. Damas Augustine Ndemasi Kavishe**, Civil Appeal No 34 of 1988 (unreported) and at p. 216 quoted the following excerpt from the latter case:

"The application for extension of time to file the memorandum and record of appeal presupposes that there is already a notice of appeal in existence. But the notice of appeal which brought into being the appeal which

has just been struck out, disappeared with the striking out of that appeal.” [Emphasis added].


For lack of the requisite notice of appeal which should have preceded the present application, this application for extension of time to file an appeal to the Court is misconceived. For this reason, I find myself loathe to go into the merits of application. This application is accordingly struck out with costs.

Order accordingly.

DATED at DAR ES SALAAM this 19th day of October, 2018.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL