

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 168/01 OF 2018

PHILIMON SIMWANDETE MBANGA APPLICANT

VERSUS

THE PERMANENT SECRETARY, MINISTRY OF DEFENCE

THE ATTORNEY GENERAL

} RESPONDENTS

(Application for extension of time within which to appeal from the decision of
the High Court)

(Dyansobera, J.)

dated the 13th day of October, 2017

in

Civil Appeal No. 101 of 2016

RULING

30th April & 29th May, 2019

MWAMBEGELE, J.A.:

By a notice of motion taken out under rule 10 of the Tanzania Court of Appeal Rules, 2009 – GN No. 368 of 2009 (hereinafter referred to as the Rules), the applicant applies for extension of time within which to institute an appeal to the Court. The notice of motion is supported by an affidavit deposited by Philimon Simwandete Mbanga, the applicant.

When the application was placed before me for hearing on 30.04.2019, Ms. Joanitha Mutayoba, learned counsel from the Legal and

Human Rights Centre, appeared for the applicant. The respondents, though duly served through the office of the Solicitor General, did not enter appearance. Given the circumstances, Ms. Mutayoba snatched the opportunity to pray, and was granted, to proceed with the hearing in the absence of the respondent in terms of rule 63 (2) of the Rules.

The applicant had earlier filed written submissions in support of the application which she sought to adopt as part of her oral arguments during the hearing of the application. Together with defaulting appearance, the respondents never filed any affidavits in reply.

In the submissions, the learned counsel reiterated what has been deposed in the affidavit of the applicant in which it is deposed as follows: The applicant was employed by the Tanzania People's Defence Forces. Sometime in 1994, he was charged with and acquitted of the offence of rape by the District Court of Mafinga. Dissatisfied, the Director of Public Prosecutions successfully appealed to the High Court sitting at Iringa resulting in the applicant being convicted of the offence and sentenced to twenty years in prison.

where the applicant was awarded to serve a twenty-year jail term. He completed his sentence sometime in 2009. On 13.09.2009, he reported

to his employer with a view to being reinstated, he was told that he had long been terminated.

The applicant was not happy with the news broken to him by his employer. He thus, on 18.05.2016, filed a suit in the High Court against his employer; the first respondent, for unfair termination as, he claimed, the termination was done without being heard. On 13.10.2017, that suit was dismissed on a preliminary objection to the effect that it was time barred. That decision aggrieved him. He timeously filed a notice of appeal on 19.10.2017 and applied for the relevant documents for appeal purposes which were, subsequently, supplied to him on 08.03.2018 along with a certificate of delay by the Deputy Registrar of the High Court. He handed the documents to Mr. Evans Robson Nzowa; an advocate at the Legal and Human Rights Centre to prepare an appeal to the Court. However, the said Nzowa could not prepare the appeal because in the course of preparation, he discovered that the letter applying for documents for appeal purposes was not copied to the respondents. He thus advised him to file the present application as the intended appeal would be time barred because he would not be entitled to enjoy an exemption provided for by a

proviso to rule 90 (2) of the Rules, hence the present application which was filed on 18.05.2018.

Ms. Mutayoba, also submitted that the matter involved a technical delay which warrants the Court to grant the enlargement sought so as to avail the applicant opportunity to assail the decision of the High Court. She placed heavy reliance on the decision of the Court in **Fortunatus Masha v. William Shija and Another** [1997] TLR 154 to pray that on the ground that the applicant was diligently prosecuting his case, this application should be allowed.

I have subjected the arguments in the case to the proper sieve it deserves. It should now be elementary that the discretionary powers of the court to extend time under rule 10 of the Rules are very wide and will only be exercisable by the Court in favour of an applicant upon showing good cause for the delay. This is the tenor and import of the said rule 10 of the Rules. 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."

[Emphasis supplied].

The question which pops up at this juncture, is whether the applicant has shown good cause to warrant the Court exercise its discretion bestowed upon it by rule 10 of the Rules. Admittedly, the applicant has shown, sufficiently to my mind, that he was diligently pursuing his quest to challenge the decision of the High Court which dismissed his appeal on account that it was time barred. He timely filed his notice of appeal and applied for relevant documents for appeal purposes but upon the same being supplied to him, his advocate was of the view that the intended appeal would not sail through as there was no proof that the letter to the Deputy Registrar applying for documents for appeal purposes was copied to the respondents hence the present application which was filed on 14.05.2018. But the problem that lingers in this application is that the applicant does not explain away periods of delay. He does not, for instance, tell the Court when he handed over the documents to his advocate having obtained the same from the Deputy Registrar of the High

Court. Thus the applicant has not explained away the delay between 08.03.2018 when the certificate of delay was supplied to him by the Deputy Registrar of the High Court and 14.05.2018 when the present application was lodged. That is a span of about 66 days. There is a plethora of authorities of the Court which hold the view that failure by an applicant for extension of time to explain away every day of delay will not trigger the Court to grant the enlargement of time sought - see: **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007, and **Tanzania Coffee Board v. Rombo Millers Ltd**, Civil Application No. 13 of 2015, **Sebastian Ndaula v. Grace Rwamafa (legal personal representative of Joshua Rwamafa)**, Civil Application No. 4 of 2014, **Yazid Kassim Mbakileki v. CRDB (1996) Ltd Bukoba Branch & Another**, Civil Application No. 412/04 of 2018 and **Tanzania Bureau of Standards v. Anitha Kaveva Maro**, Civil Application No. 60/18 of 2017 (all unreported). In **Bushiri Hassan** for instance, the Court had an occasion to underline the dire need for litigants who seek to extend time in taking actions within which certain steps must be taken, to account for each and every day of delay in the following terms:

"Delay, of even a single day, has to be accounted for otherwise there would be no point of having

rules prescribing periods within which certain steps have to be taken”.

In the instant application, as already alluded to above, the applicant has failed to explain away the delay of about 66 days; between 08.03.2018 when he was availed with the certificate of delay and 14.05.2018 when the present application was lodged. In the premises, he is not entitled to be granted the enlargement of time sought.

For the avoidance of doubt, **Fortunatus Masha** will not apply in the instant situation. That decision of a single Justice of the Court, was followed in **Salvand K. A. Rwegasira v. China Henan International Group Co. Ltd.**, Civil Reference No. 18 of 2006; the decision of a full Court, **Zahara Kitindi & Another v. Juma Swalehe & 9 others**, Civil Application No. 4/05 of 2017, **Yara Tanzania Limited v. DB Shapriya and Co. Limited**, Civil Application No. 498/16 of 2016, **Vodacom Foundation v. Commissioner General (TRA)**, Civil Application No. 107/20 of 2017, **Samwel Kobelo Muhulo v. National Housing Corporation**, Civil Application No. 302/17 of 2017 and **Bharya Engineering & Contracting Co. Ltd v. Hamoud Ahmed Nassor**, Civil Application No. 342/01 of 2017 (all unreported), to mention but a few, and

is authority for what is referred to as technical as being excusable delay to warrant the Court grant extension of time. It applies when an applicant seeks extension of time after applications or appeals for which an extension of time is sought were struck out by a court of law. In **Fortunatus Masha**, in allowing an extension, the single Justice of the Court observed at p. 155:

*"... a distinction should be made between cases involving real or actual delays and those like the present one which only involve what can be called technical delays in the sense that the original appeal was lodged in time but the present situation arose only because the original appeal for one reason or another has been found to be incompetent and a fresh appeal has to be instituted. In the circumstances, the negligence if any really refers to the filing of an incompetent appeal not the delay in filing it. **The filing of an incompetent appeal having been duly penalized by striking it out, the same cannot be used yet again to determine the timeousness of applying for filing the fresh appeal.** In fact in the present case, the applicant acted immediately after the pronouncement of the ruling of this Court striking out the first appeal."*

[Emphasis supplied].

The decision of the single Justice of the Court in **Fortunatus Masha** was approved by the full court in **Salvand K. A. Rwegasira** wherein we observed:

"A distinction had to be drawn between cases involving real or actual delays and those such as the present one which clearly only involved technical delays in the sense that the original appeal was lodged in time but had been found to be incompetent for one or another reason and a fresh appeal had to be instituted. In the present case the applicant had acted immediately after the pronouncement of the ruling of the Court striking out the first appeal. In these circumstances an extension of time ought to be granted."

In the case at hand, it was the applicant's advocate who advised to file the present application when he thought the intended appeal would fall for being time barred as the applicant would not qualify for the delay as there was no proof that the letter applying for documents to the Deputy Registrar was copied to the respondents. It was not the court which "punished" the applicant. If anything, it was his advocate. In the

premises, I am disinclined to agree with Ms. Mutayoba that the case is one to which technical delay may be applicable.

The upshot of the above is that the application is wanting in merits and is hereby dismissed. As the applicant was on legal aid services, and, as the respondents did not enter appearance, I make no order as to costs.

Order accordingly.

DATED at DAR ES SALAAM this 24th day of May, 2019.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL