

IN THE HIGH COURT OF ZANZIBAR
HELD AT TUNGUU
CIVIL APPLICATION NO. 77 OF 2023
FROM CIVIL APPEAL NO. 33 OF 2020
ORIGINATED FROM CIVIL CASE NO 17 OF 2017

BETWEEN

FAKHRUDIN TAYABALI ALIBHAI APPLICANT

VERSUS

1. SAID ABRAHMAN JUMA

2. AKRAM SAID.....RESPONDENTS

RULING

2nd August, 2024 & 30th August, 2024.

M.A.M SHEIN, J.

This ruling arises out of the application made by the Applicant under section 11 (3) of the Appellate Jurisdiction Act Cap 141 of the laws of Tanzania and Rule 47 of the Tanzania Court of Appeal Rules, 2009 as amended. The applicant has submitted his application with chamber summons along with affidavit.

In Chamber Application the applicant asked the court for two things: -

1. That, the court be pleased to extend time to the applicant to file notice of intention to appeal against the Judgment and decree of the High Court of Zanzibar dated on 29th January, 2021 in Civil Appeal No. 33 of 2020.
2. That, the court be pleased to extend time to the applicant to file an application for leave to appeal against the Judgment and decree of the High Court of Zanzibar dated on 29th January, 2021 in Civil Appeal No. 33 of 2020.

The applicant on this application was represented by the learned counsel Mr. Emmanuel Sammuel and other side of the respondent was led by learned counsel Mr. Ishaq Sharif who opposed the application.

On hearing of this application, the issue emerged that the counsel for the applicant asked the court to eradicate paragraph (b) of the chamber application for extension of time to the applicant to file an application for leave to appeal against the Judgment and decree of the High Court dated on 29th January, 2021 in Civil Appeal No. 33 of 2020. Without affecting this application, Mr. Ishaq Sharif agreed with the applicant's side to be considered the decision of the Court of Appeal of Tanzania that has already given the judgment on the application for leave to appeal that it is no longer necessary. Therefore, part (b) of the chamber application, by order of the court splashed out and the court proceeded for the application to extend time to the applicant to file notice of intention to appeal against the Judgment and decree of the High Court of Zanzibar dated on 29th January, 2021 in Civil Appeal No. 33 of 2020.

In submitting his application Mr. Samuel asked the court to adopt his affidavit in this application that the applicant to file notice of intention to appeal out of time. He submitted that this case is not for the first time it has been brought to court by asking for an extension of time and that in this case it got a chance by being able to appeal the case No. 64 of 2022 of the Court of Appeal of Tanzania. Mr. Samuel has submitted that during the hearing of the appeal case No. 64 at the Court of Appeal, the respondent was able to raise objections and then the appeal was striking out. The learned counsel for the applicant submitted that due to the Court of Appeal striking out an appeal No. 64, it is clear that the notice of appeal that was attached with the appeal also left. Mr. Samuel has submitted that since that notice no longer exists, now he is asking the court that the applicant will have to be given another chance to file notice of intention to appeal. For being able to support his argument he cited the case of **Mohamed Suleiman Mohamed v. Amne Salum and others 10**, Civil Appeal No. 87 of 2019 (Unreported).

Mr. Samuel has submitted that in order for this application to be accepted by the court, it must be touched by basic factors based on three principles but each case is decided on its own merits. He mentioned that principles as follows: -

1. The first, If the court think there is a specially circumstance
2. The second issue to be consider public importance and,
3. The third is the irregularity.

In his presentation the learned counsel Mr. Sammuel told the court that all three basic principles in this application have touched. He submitted the first issue, that this case it went to the Court of Appeal and it was striking out. Secondly, he submitted that based on the grounds of paragraphs no. 11, 12, 13 and 14 of the affidavits in support of the application it is clear that the issue of public importance has been considered. In support of his argument, he was cited the case of **Palumbo Reef Limited v. Jambo Rafiki Bungalow**, Civil Application No. 94 of 2020. On issue of irregularity, he has submitted that para 10 up to 15 of the affidavits to be considered the same. The learned counsel for the applicant submitting that this application has brought before court 14 days from the day the decision was made by the Court of Appeal.

Finally, Mr. Sammuel humbly prayed by order of the court he should be given another chance for opportunity to allow and proceed for the applicant to extend time to file notice of intention to appeal against the Judgment and decree of the High Court of Zanzibar dated on 29th January, 2021 in Civil Appeal No. 33 of 2020 to the Court of Appeal of Tanzania so that the applicant to be fulfill his justice.

On the side of the respondent led by the learned counsel Mr. Ishaq Sharif requested that the replied affidavit of the respondent be adopted, and he submitted that the litigation must come to an end by saying that this case has been going on for a long time, and it is true that this case went to the Court of Appeal of Tanzania, but due to the defects that appeared on the learned counsel of the applicant that failure to follow the procedure of the law then the application was struck out. Mr. Ishaq Sharifu submitted that based on the decision of the CAT, that this application be dismissed and the court should not consider to admit.

The learned counsel for the respondent has submitted the followings reasons for the rejection of this application and they are: -

1. In the affidavit paragraph no. 7, the applicant has admitted that the decree no. 33 of 2020 has different date. He has said that the rules are very clear that any application must be accompanied by a decree and court decision and as such this application has failed to be attached with, automatically the application was not suitably and must be rejected.
2. That the extension of time it is the matter of the court discretion but it be considering judiciously, and it must be observed carefully. In support of this argument, he cited a case of **Wakf Commission and Trust Property v. Nassor Abubakar Khamis**. Mr. Sharif has submitted the applicant at that time had the opportunity to request a proper decree and supplement the same so as to get that remedy to filed at the CAT.
3. Finally, on issue of public importance, he said it was the criterion for the extension of time and he submitted that he had no further argument that this application be dismissed.

In rejoinder, Mr. Emmanuel said that on paragraph 7 and 8 of the affidavits they disclosed the facts and they are aware of the argument of unreasonable delay. He has submitted that for the purposes of the supplementary record of the Court of Appeal of Tanzania, the only remedy is for that submission.

Finally, the learned counsel for the applicant asked the court to grant this application so that they have the ability to re-institute the appeal to the Court of Appeal of Tanzania.

In observing this application, I have seen the point to determine is whether the applicant has the basic reasons to grant an extended time to file notice of intention to appeal against the judgment and decree of the civil appeal case No. 33 of 2020. To be able to reach the decision of this application, I have once again looked the affidavit of the applicants to see what kind of weight it has. In the applicant's affidavit paragraph no. 7, has stated that the strike out of civil appeal No. 64 of 2022 by the court of appeal of Tanzania implies that the notice of appeal to court of appeal and

its leave to appeal to court of appeal was strike out. Further the judgment and decree in civil appeal No. 33 of 2020 differ in dated which need to corrected in order to reflect with the judgment. So, the applicant decided to sates the situation and to proceed so as to save the time and avoid unreasonable delay for the purpose of filling the supplementary record in court of appeal. The motion was argued by the learned counsel Mr. Ishaq Sharif has said that the rules are very clear that any application must be accompanied by a decree and court decision and as such this application has failed to be attached with, automatically the application was not suitably and must be rejected. But in this situation the learned counsel for the respondent Mr. Sharif failed to guide the court which rule can prohibit the existing argument.

Such situations of the argument that appeared to this application for want to re-institute the appeal in the court of appeal just from the point of view that the notice of appeal has been strike out such circumstances have been described in different cases including **Tanganyika Cheap Store v. National insurance Corporation of Tanzania Limited, Civil Appeal No. 51 of 2005**. It was held that in re-filing the appeal, the applicant ought to have complied with the requirement of filing a notice of appeal and obtaining leave to appeal. Another case is **Robert John Mugo (Administrator of the Estate of the late John Mugo Maina) v. Adam Molel, Civil Appeal No. 2 of 1990**.

In this application we have, the applicant faced with a situation similar to the above-mentioned cases that the applicant wants the notice of appeal to be extended. Since, the Court of Appeal of Tanzania striking out of a civil appeal No. 64 of 2022 it implies that the notice of appeal to court of appeal and its leave to appeal was totally strike out. Therefore, it means that since the application was strike out by the court of appeal, the applicant must start a new or a fresh step of the appeal process by making another notice of appeal, because the notice of appeal initiate the appellate process. Along with other things the learned counsel for the applicant explained the basic ground is that there is a need to look for the specially circumstances and one among the special circumstance of this case that the applicant filed an application to the court of appeal and it was struck out on legal technical grounds, and another issue to be considered is public importance. See the case of **Palumbo Reef Limited v. Jambo Rafiki Bungalow, Civil**

Application No. 94 of 2020. From the affidavit of the applicant paragraph 11, 12, 13 and 14 show the reasons for this application and paragraph no. 3 it shows irregularity. However, this application has been brought in court within 14 days from the date of the decision of the court of appeal.

The view of the court that the argument of delay in the application is very important to look, and if it will be disciplinary, the applicant must be account for each day the reason of his delay as the requirement of the law. Since, on this application the decision of the court of appeal held on 7th day of June, 2023 and the application filed on 21st day of June, 2023. See the case of **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Woman's Christian Association of Tanzania**, Civil Application No.2 of 2010 CAT Arusha, which set the principles for the aspects to be considered by the court in the exercise of its discretion to extend the time or not.

On our case we have, the applicant filed an appeal to the court of appeal, only the court was struck out due to the incompetent appeal for being time barred. And the applicant has considered that the striking out of his application it amounts to technical where he has not complained. There is no defect in this court being able to grant the applicant for another time so that he can re-start the procedure of his appeal.

I therefore, allow this application and grant the applicant twenty-one days from the date of delivery of this ruling within which he has lodged his intended appeal. No order to costs.

It is so ordered.

DATED at TUNGUU this 30th day of August, 2024.



M.A. M Shein
JUDGE
30.08.2024.