

IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM

CIVIL APPLICATION NO. 93 OF 2016

1. M.A. SULEIMAN AND SONS LTD  
2. ASHRAF G. ABDULLAH  
3. FEMIDA G. ASHRAF ABDALLAH

..... APPLICANTS

VERSUS

THE REGISTERED TRUSTEES OF  
ANGLICAN CHURCH TANZANIA ..... RESPONDENT  
(Application for extension of time to lodge appeal from the decision of the  
High Court of Tanzania at Dar es Salaam)

(Mziray, J.)

dated the 21<sup>st</sup> day of April, 2010

in

Land Case No. 15 of 2009

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RULING

14<sup>th</sup> September & 3<sup>rd</sup> October, 2016

LILA, J.A.:

By way of a notice of motion filed on 5/2/2016, M.A. SULEIMAN AND SONS LTD, ASHRAF G. ABDALLAH and FEMIDA G. ASHRAF ABDALLAH, the applicants, are moving the Court to extend time within which to lodge the appeal out of time from the decision in Land Appeal No. 15 of 2009 of the

High Court of Tanzania (Land Division) at Dar es Salaam dated 21/4/2010. The application is supported by two affidavits one affirmed by Abdulsalami Mohamed and another jointly affirmed by Ashraf G. Abdullah and Femida G. Abdallah.

The application is brought under Rules 10 and 48(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and Section 4(3) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002. The major reason for delay to file the appeal given in both the notice of motion and the two affidavits in support of the application is that Mr. Jerome Msemwa who was instructed to institute the appeal on 15/1/2011 was in Njombe Region taking care of his sick father who later died. The application is resisted by THE REGISTERED TRUSTEES OF ANGLICAN CHURCH OF TANZANIA (the respondent) through the affidavit in reply filed on 2/9/2016 and sworn by Bernard Ngatunga, learned advocate.

At the hearing of the application, Mr. Augustino Kusalika, learned advocate, appeared for the applicants and Mr. Bernard Ngatunga, learned advocate, represented the respondent.

Amplifying on the reasons for delay in filing the appeal, Mr. Kusalika urged this Court to adopt the written submissions earlier on filed as part of his submissions. He added that Mr. Msemwa, learned advocate, who was fully instructed to handle the matter was at Njombe attending his father starting from 15/1/2011 and when he came back he filed the appeal (Civil Appeal No. 14/2011) on 2/2/2011 which was only three to four days after the expiry of the sixty days required by law within which to file the appeal. He stated that when the appeal was called on for hearing on 19/2/2011 the Court *sup motu* raised issue that it was filed out of time and the same was struck out. He said attending a sick person caused psychological torture hence failure by the learned advocate to ascertain time to file the

appeal. He said the case of **Tanzania Fish Processors Ltd v Christopher Luhangangula, Civil Appeal No. 161/1994** (Mwanza Sub-registry) (unreported) cited by the advocate for the respondent which held that "limitation is a material point in speedy administration of Justice and that limitation is therefore to ensure that a party does not come to court as and when he chooses" is not applicable in the circumstances of this case because the reasons for delay in filing the appeal within time are well stated in the affidavit. He said the applicant, therefore, did not choose when to come to court.

Regarding failure by the applicant to take necessary steps timely he contended that the appeal which was filed outside the prescribed time limit was struck out on 19/2/2016 and the applicants filed this application on 5/4/2016 almost 1 ½ months after the appeal was struck out.. he said this was a reasonable time taken by the applicants because after the appeal

was struck out the applicants had to reorganize themselves financially before filing this application. He thus stated that the time taken by the applicants to file this application is reasonable. On the need to need to explain the cause of delay for each day as stated in the case cited by the respondents advocate of **Daudi Haga v. Jenitha Abdan Machanju**, Civil Reference No. 1 of 2000, Mr. Kusalika contended that the applicants have explained what caused them fail to file the appeal within time in their affidavits. He ultimately prayed the application be granted with costs.

Responding to Mr. Kusalika's submissions, Mr. Ngatunga urged this Court to adopt the written submission resisting the application and he added that it is not open how long Mr. Msemwa took to attend his sick father as Mr. Kusalika said Mr. Msemwa started attending his father from 15/1/2011. He insisted that the case of Daudi Haga (supra) requires each day of delay be explained. He contended that even, if it is taken that Mr.

Msemwa was attending his sick father, there is no reason why he went to file an appeal out of time instead of filing an application for extension of time as he has done now. He said there was unexplained time waste. He went further to argue that after the appeal was struck out by the Court on 19/2/2016 the applicants took over a month to institute this application. He contended that this was inordinate delay hence the Court's decision in Tanzania Fish Processors Ltd (supra) is relevant and applicable in this case. Regarding the issue of the applicants reorganizing financially after the appeal was struck out, Mr. Ngatunga, contended that it is not among the grounds in the notice of motion or applicants' affidavits in support of the application but the counsel's concoction. He concluded by stating that there are unexplained gaps in the reasons for delay to file the appeal within time and also laxity on the part of the applicants. He accordingly prayed the application be dismissed with costs as the applicants have not advanced good cause for the delay.

In his short rejoinder Mr. Kusalika insisted that the former appeal was struck out on an issue raised by the court. That, though Mr. Ngatunga was then representing the respondent he did not notice the defect. He contended that after such appeal was struck out by the Court the applicants had to reorganize themselves financially and psychologically hence the 1 ½ months time taken to file this application is reasonable. He insisted that the applicants have showed good cause for the delay and he urged this application be granted with costs.

In have given due consideration to the parties rival arguments. While the conditions for the grant of application of this nature is provided in Rule 10 of the Court of Appeal Rules, Rule 48 (1) of the Rules provides for the form of the application for extension of time. It requires the applicant to file notice of motion citing the specific rule under which the application is brought and the grounds for the relief sought. As

demonstrated above the applicants duly lodged a notice of motion in which rule 10 and 48(1) of the Rules are cited. In the notice of motion the grounds for making this application are stated and are quoted herein. The application, accordingly, meets the requirements of rule 48(1) of the Rules.

The condition for grant of application for extension of time is provided under Rule 10 of the Rules. That Rule states:-

*"10. 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 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 mine]*

Basing on the above exposition of the law, in determining applications of this nature the issue for consideration is whether the circumstances leading to the delay constitute sufficient reason (good cause) for this Court to exercise its discretion and allow extension of time.

From the affidavit and submissions by counsel for both sides it is not in dispute that the applicant’s former appeal was struck out by the Court on 19/2/2016 for being filed out of time. It is also not in dispute that the present application was filed on 5/4/2016. The only explanation given for the delay in filing the appeal was that Mr. Msemwa, learned advocate who was instructed to handle the matter was attending his sick father at Njombe who thereafter passed away. Paragraph 11 of the applicants’ affidavits in support of the application that:-

*"11. That the delay in filing the appeal out of time was not maliciously or negligently done but rather was due the reason that on 15<sup>th</sup> January 2011, Mr. Msemwa Advocate for the applicant was in Njombe taking care of his father the late Joseph Msemwa, consequently filed the same on 2/2/2011, 4 days after expiry of 60 days thereto."*

In their written submissions in support of the application, at page 2, accounting for delay, it is indicated that:-

*"...the appeal was filed out of time due to the reason that, Mr. Jerome Msemwa who was instructed to institute this appeal on 15<sup>th</sup> January, 2011 was in Njombe region taking care of his father*

*and consequently dies thus failed to file a record of appeal within 60 days as required by the law.”*

The same cause of delay by the applicants is repeated at page 3 of the written submissions stated:-

*“... the applicants herein through the affidavit of the Principal Officer of the 1<sup>st</sup> applicant and the affidavit of 2<sup>nd</sup> and 3<sup>d</sup> applicants have demonstrated the reasons for delay of lodging the appeal within the time on the ground that Mr. Jerome Msemwa advocate for the Applicant then who was instructed to institute this appeal on 15<sup>th</sup> January, 2011 was in Njombe region taking care of his father and consequently died thus failed to file a record of appeal within 60 days as required by the law...”*

Read closely and carefully considered the reason for delay to file the record of appeal within time accounts for only the 15<sup>th</sup> January, 2011. That was the day Mr. Msemwa, is said to have been attending his father in Njombe region.

Even the grounds of this application indicated in the notice of motion are a replica of what is stated in paragraph 11 of the two affidavits in support of the application and the contents of the applicants written submissions in support of the application.

As if the above is not enough, Mr. Kusalika, while amplifying the reasons for delay, stated that Mr. Msemwa was in Njombe attending his sick father *starting from 15/1/2011*. He did not account for the rest of the days till the 2/2/2011 when Mr. Msemwa Advocate filed the appeal which was found to be out of time by the Court.

The record vividly shows that the High Court decision sought to be challenged was delivered on 21/4/2010. Though the applicants did not attach a copy of the certificate of delay issued by the Registrar of the High Court (Land Division) but in paragraph 11 of the affidavits in support of the application, the applicants admits that by the time the former appeal was filed on 2/2/2011, they were late by four days. This fact is not controverted by Mr. Ngatunga. I accordingly take it that the 60 days within which the appeal ought to have been filed expired on 28/1/2011. It is apparent therefore that the applicants have not explained the causes of delay in filing the appeal for each of the days prior to 15/1/2011 and after 15/1/2011 assuming that it is true that Mr. Msemwa was at Njombe on 15/1/2011. It was insisted in the case *Daudi Hanga (supra)* which was rightly cited by Mr. Ngatunga that the causes of delay of each day that passes must be explained. But is it true that Mr. Msemwa was attending his father who later died at Njombe region at the material time? I doubt.

There is nothing showing that Mr. Msemwa's father was, by then, really sick and that he later passed away. A medical chit and/or a death certificate would have supported Mr. Kusalika's arguments. Such medical proof would have also enabled the court draw an inference that Mr. Msemwa attended his father up to the date when his father died and shortly thereafter. Apart from absence of proof that Mr. Msemwa was truly engaged by the applicants to lodge the appeal, the above shortcomings further weaken the contentions by Mr. Kusalika. Apparently this is a case of a counsel's lack of seriousness and negligence in handling the case that resulted in the delay. This, in **Abbas Yusufu Mwingamno v. Kigoma Aji Malima**, Civil Application No. 7 of 1987 (unreported) cited in said **Martini v. Betha Anderson & Another**, Civil Application No. 7 of 2005 (unreported) was held not constitute good cause for delay.

Apart from the above the second issue is whether, after the former appeal (civil Appeal No. 14 of 2011) was struck out by the Court on

19/2/2016 for having been filed outside the 60 days provided by the Rules, the applicants filed this application within reasonable time.

As indicated above, after the former appeal was struck out by the court on 19/2/2016, the applicants filed this application for extension of time to lodge appeal on 5/4/2016 which is about 1½ months after the appeal was struck out.

In an attempt to salvage the application Mr. Kusalika contended that time taken to file this application is reasonable. He contended that the striking out of the former appeal affected the applicants psychologically and they had to reorganize themselves both psychologically and financially before coming up with this application. Mr. Ngatunga is of the view that 1½ months time taken to file this application is inordinate delay.

It is my conviction that an aggrieved party whose appeal is struck out for being incompetent and who is serious to exercise his right of appeal will

not take a breath. He will promptly take necessary steps to rectify the defects. He will take reasonable time to access the court. In the instant application, after the appeal was struck out for incompetence on 19/2/2016, the applicant, lodged this application for extension of time to file appeal, as hinted above, on 5/4/2016. What is a reasonable time is nowhere explained. It is a question of fact depending on the circumstances of each case. All considered, 1½ months delay is not a short time. In the present application there is no explanation by the applicants in their respective affidavits why it took them 1½ months to file this application. It was during the hearing when Mr. Kusalika told this Court that the applicants were psychologically affected by their appeal being struck out on 19/2/2016 and they had to reorganize themselves both psychologically and financially. In the first place such reasons ought to have been part of their grounds for relief *sought* in the notice of motion and averments in the applicants affidavits in support of the application. A party is not allowed to



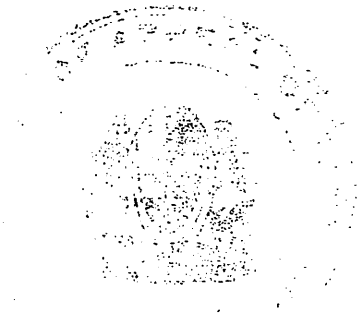
came up with new grounds during the hearing of an application. He is only allowed to amplify grounds contained in the notice of motion and stated in the affidavit in support of the application (see Rule 48(1) and 49(1) of the Rules). Psychological effects and financial difficulties are not contained in the grounds for relief sought in the present application. They have been wrongly raised by Mr. Kusalika at the stage of hearing as rightly submitted by Mr. Ngatunga. They should, as I hereby do, be disregarded. But of more important, I am settled in my mind that psychological infirmity and financial disability does not constitute good reason for delay in filling an application of this nature. Periods of psychological recovery and financial liquidity cannot be ascertained. Allowing them to be one will be disastrous to the timely dispensation of justice. Such reasons cannot therefore be incorporated in the list of good causes of delay.

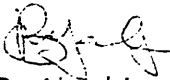
All said, I am satisfied that the applicants have not advanced good cause for delay in filing the appeal and also the application was not lodged within reasonable time. The application is hereby, accordingly, dismissed with costs.

**DATED** at **DAR ES SALAAM** this 28<sup>th</sup> day of September, 2016.

S.A. LILA  
**JUSTICE OF APPEAL**

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



  
B.R. Nvaki  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**