**IN THE COURT OF APPEAL OF TANZANIA**
**AT MWANZA**

**CIVIL APPLICATION NO. 6/08 OF 2016**

**MATHIAS CHARLES KASELELE ..... APPLICANT**

**VERSUS**

**THE REGISTERED TRUSTEES OF THE ARCHDIOCESE**

**OF MWANZA ROMAN CATHOLIC ..... RESPONDENT**

**(Application for Extension of Time to file Notice of Appeal, letter applying for copy of proceedings and apply for leave to appeal to the Court of Appeal from the Ruling of the High Court of Tanzania at Mwanza)**

**(Ngwala, J.)**

**dated the 22nd day of February, 2012**
**in**
**Land Case No. 2 of 2007**

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# RULING

16th & 23rd May, 2017

## NDIKA, J.A.:

By notice of motion made under Rule 10 of the Tanzania Court of Appeal Rules, 2009 ("the Rules"), Mathias Charles Kaselele ("the applicant") prays against the Registered Trustees of the Archdiocese of Mwanza Roman Catholic Church ("the respondent") for the following reliefs:

*"(i) An application for extension of time to file NOTICE OF APPEAL in the Court of Appeal of Tanzania at Mwanza out of time be granted.*

*(ii) An application for extension of time to file a letter to obtain copies of proceedings, ruling and the extract order in the High Court Land Case No. 2 of 2007 out of time.*

*(iii) An application for extension of time to file application for leave to appeal to the Court of Appeal on a point of law out of time be granted.*

*(iv) Costs of and incidental to this application abide by the result of the said application."*

The application is supported by an affidavit deposed by the applicant. Resisting the application, the respondent filed an affidavit in reply deposed by Mr. Paulin R.K. Rugaimukamu, learned Advocate. In addition, the respondent filed a notice of preliminary objection raising two grounds as follows:

1. That the Notice of Motion is incompetent for non-citation of the enabling provisions on "Form of Application to Court", that is, Rule 48 (1) of the Rules.

2. That the Notice of Motion is incompetent in view of this Court's ruling in Mwanza Civil Application No. 9 of 2013 dated 23rd September 2013.

When the matter came up for hearing, the applicant appeared in person and fended for himself while Mr. Rugaimukamu, learned Counsel, represented the respondent. I directed the parties to address the Court on both aspects of the application, that is, the preliminary objection and the substance of the application.

I find it apposite at this juncture to give an account of the essential facts constituting the background to this application as can be gleaned from the materials lodged by the parties.

The applicant sued the respondent before the High Court at Mwanza in Land Case No. 2 of 2007. That action was struck out with costs by the High Court (Ngwala, J.) on 22nd February 2012 after the court had found that the plaint ought to be rejected under the provisions of Order VII, rule 11 (a) of the Civil Procedure Code, Cap. 33 RE 2002. Desirous of challenging the aforesaid decision to this Court, on 27th February 2012 the applicant lodged a notice of intention to appeal to this Court and applied

in writing for a copy of the proceedings, ruling and drawn order of the High Court. However, in a subsequent application to this Court (i.e., MZA Civil Application No. 2 of 2012) by the applicant for stay of execution, the Court (Massati, J.A.) held on 25th March 2013 that the aforesaid notice of appeal was invalid for its reference to wrong originating proceedings.

The applicant continued with his quest for justice. His next step was knocking at the doors of this Court once again – vide MZA Civil Application No. 9 of 2013 – praying for extension of time to lodge notice of appeal. On 23rd September 2013, this Court (Rutakangwa, J.A.) struck out the application upon sustaining the respondent's preliminary objection on the ground that the matter was incompetent in terms of Rule 47 of the Rules that whenever an application can be made either to this Court or the High Court such an application ought to be made at first instance to the High Court.

Following this Court's direction, the applicant moved the High Court vide Miscellaneous Land Application No. 151 of 2013, lodged on 11th October 2013, for the same reliefs he is now seeking. At that time there was another application by him – Miscellaneous Land Application No. 65 of 2012 lodged on 17th August 2012 – for extension to time to apply for

leave to appeal to the Court of Appeal still pending. Rather inexplicably and while the other two applications remained pending, the applicant, once again, moved the High Court vide Miscellaneous Land Application No. 71 of 2015 for the same reliefs he is now seeking. Having taken cognizance of the multiple applications that the applicant had lodged and upon the applicant's concession that two of his applications were an abuse of the judicial process, the High Court (Makaramba, J.) on 22nd April 2015 struck out Miscellaneous Land Application No. 65 of 2012 and Miscellaneous Land Application No. 151 of 2013 with costs. What remained for determination before the High Court was Miscellaneous Land Application No. 71 of 2015.

By its ruling dated 5th May 2016, the High Court (Mlacha, J.) dismissed the aforesaid application on the ground that it was time-barred. Following that dismissal, the applicant lodged the present application ostensibly as a second bite.

Having provided the above background, I now move on to deal with the preliminary objection.

Addressing the preliminary objection, Mr. Rugaimukamu canvassed the second point of objection only but abandoned the first point. He recalled that the applicant's initial quest for extension of time before this Court was doomed for non-compliance with Rule 47 of the Rules. He then argued that the dismissal by the High Court (Mlacha, J.) of Miscellaneous Land Application No. 71 of 2015 closed the option for the applicant to apply from this Court under Rule 10 of the Rules for the same orders. It was his view that the applicant's only viable option was to challenge the dismissal by the High Court by way of an appeal or revision. Sadly, the learned Advocate cited no authority to back up or illustrate his position although he indicated his belief that there existed plenty of authorities on that point.

The applicant's reply was, predictably, very brief. He disagreed that his motion was incompetent, contending that he was entitled to apply to this Court under Rule 10 of the Rules for the same reliefs following the dismissal of his initial application by the High Court.

Having heard the parties and evaluated their submissions, I am of the firm view that the preliminary objection on the second point is completely misconceived. First and foremost, I am mindful that while the

High Court is empowered under section 11 (1) of the Appellate Jurisdiction Act, Cap. 141 RE 2002 to grant extension time for giving notice of intention to appeal from its decision or for applying for leave to appeal, this Court's broad powers under Rule 10 of the Rules encompass the grant of such reliefs. In terms of Rule 47 of the Rules, whenever an application may be made either to this Court or to the High Court, it ought, in the first instance, to be made to the High Court. Indeed, it was on this basis that the Court (Rutakangwa, J.A.) struck out the applicant's motion (i.e., MZA Civil Application No. 9 of 2013) for non-compliance with Rule 47. Secondly, it is trite that if an applicant is unsuccessful in the High Court, the door is open to this Court for a "second bite" by filing a fresh application under Rule 10 of the Rules as opposed to appealing or applying for revision of the dismissal by the High Court (see e.g., **Olympa Lema v Abdallah Juma**, AR. Civil Application No. 1 of 2003 (unreported); **Janeth D. Mmari v International School of Tanganyika**, Civil Application No. 103 of 2001 (unreported); **William Shija v Fortunatus Masha** [1997] TLR 213 and **Tanzanian Revenue Authority v Tango Transport Co. Ltd**, AR. Civil Application No. 5 of 2006. It should be noted that all these decisions interpreted Rules 8 and

44 of the Court of Appeal Rules, 1979 which are replicated by Rules 10 and 47 of the Rules respectively).

As already indicated, the applicant lodged the existing application after the High Court had dismissed his application for the extension of time to file notice of appeal and apply for leave to appeal (i.e., Miscellaneous Land Application No. 71 of 2015) on 5th May 2016. It is my firm view that whether the dismissal was justified or not, the proper course for the applicant was what he did, that is, moving this Court under Rule 10 of the Rules for the same reliefs. Accordingly, the second and only remaining point of preliminary objection is devoid of merit. It stands dismissed.

Having disposed of the preliminary objection, I now proceed to deal with the substance of the application.

Arguing in support of the application, the applicant tersely urged the Court to grant it with costs based upon the supporting affidavit and the written submissions that he had filed. I should note here that in his affidavit the applicant partly explained the cause of delay as being the High Court's failure to supply him with a copy of the drawn order.

Conversely, Mr. Rugaimukamu submitted that the matter was devoid of merit because it showed no ground for the delay in taking the three essential steps for appealing to the Court of Appeal. He contended that the applicant's claim that he was frustrated to take the essential steps because he learnt from a Mrs. Mtaki, an official at the High Court's Registry, that the trial judge had left for Dar Es Salaam without having signed and issued the drawn order, was unreliable as it was not supported by any separate deposition from the said Mrs. Mtaki who was still available at the court and ought to have given her affidavit on that aspect.

In a brief rejoinder, the applicant maintained that the drawn order was not issued to him in time and that he was only supplied with a certified copy of it after Sumari, J. intervened and signed the order as successor judge.

Before dealing with the substance of this application in light of the contending submissions of the parties, I find it pertinent to restate that although the Court's power for enlarging time under Rule 10 of the Rules is both broad and discretionary, it can only be exercised if good cause is shown. While it would not be possible to lay down an invariable or constant definition of good cause so as to guide the exercise of the Court's

discretion in this regard, the Court must consider the merits or otherwise of the excuse cited by the applicant for failing to meet the limitation period prescribed for taking the required step or action. Apart from valid explanation for the delay, good cause would also depend on whether the application for extension of time has been brought promptly as well as whether there was diligence on the part of the applicant (see, e.g., this Court's decisions in **Dar Es Salaam City Council v Jayantilal P. Rajani**, Civil Application No. 27 of 1987 (unreported); **Tanga Cement Company Limited v Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001 (unreported) and **Regional Manager, TANROADS Kagera v Ruaha Concrete Co. Ltd.**, Civil Application No. 96 of 2007 (unreported)).

The question now before the Court is determining whether the applicant has, in accordance with Rule 10 of the Rules, shown good cause for granting his solicitation for extension of time in respect of filing notice of appeal, lodging a letter requesting for certified copy of proceedings and applying for leave to appeal to the Court of Appeal.

I propose to begin with the prayer for enlargement of time to lodge notice of appeal. On this plea, I am mindful that it is undisputed that the

applicant initially lodged a notice of appeal on 27th February 2012, just five days after his suit was struck out by the High Court. In terms of Rule 83 (2) of the Rules requiring notice of appeal to be lodged within thirty days of the delivery of the decision, the said notice was lodged within time. Nonetheless, the aforesaid notice was subsequently held on 25th March 2013 by this Court (Massati, J.A.) in MZA Civil Application No. 2 of 2012 as being invalid for its reference to wrong originating proceedings. Since then, the applicant made about four botched applications for leave to lodge notice of appeal out of time. His final attempt before the High Court culminated with the dismissal on 5th May 2016, and thereafter he lodged the present application on 2nd June 2016. I am disposed to excuse the delay between the date of the delivery of the impugned decision and 5th May 2016 because it constitutes a technical delay. In this regard, I would like to cite the decision of a single Justice of this Court in **Fortunatus Masha v William Shija and Another**, [1997] TLR 154 thus:

> *"I am satisfied that 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 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."*

Nonetheless, what I find rather troubling is that the applicant did not state anywhere in the supporting affidavit as to why he did not act promptly in applying to this Court for lodging the notice of appeal out of time following the dismissal by the High Court. It is evident that he waited for over twenty-seven days to lodge this application. I am mindful that it is the firmly entrenched position of this Court that any applicant seeking extension of time is required to account for each day of delay. Indeed, the Court has reiterated that position in numerous cases including **Bushiri Hassan v Latifa Lukio Mashayo,** Civil Application No. 3 of 2007 (unreported) by stating that:

*"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."*

The applicant might have not been versed in legal matters and procedure but his failure to account for each of the twenty-seven days of actual or real delay would militate against acceding to his solicitation of leave to lodge the notice of appeal out of time. I thus reject it.

Next for consideration is the applicant's plea for leave to lodge a letter applying for a certified copy of the proceedings, ruling and drawn order in respect of Land Case No. 2 of 2007. There is no doubt that the applicant's plea is premised upon his awareness of the requirement under Rule 90 (1) of the Rules exempting from computation of the sixty-days limitation period for lodging an appeal the time requisite for obtaining a copy of proceedings if a written request is made within thirty days of the delivery of the decision. The aforesaid provisions stipulate thus:

*"90.-(1) Subject to the provisions of Rule 128, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged with –*

*(a) a memorandum of appeal in quintuplicate;*

*(b) the record of appeal in quintuplicate;*

*(c) security for the costs of the appeal,*

*save that* ***where an application for a copy of the proceedings in the High Court has been made within thirty days of the date of the decision against which it is desired to appeal,*** *there shall, in computing the time within which the appeal is to be instituted be excluded such time as may be certified by the Registrar of the High Court as having been required for the preparation and delivery of that copy to the appellant."*

Nevertheless, what baffles me is that the applicant now seeks enlargement of time to lodge a letter for the supply of a copy of the proceedings while he deposes in Paragraph 2 of his affidavit that he actually applied for the said proceedings on 27th February 2012, which was five days after the impugned order was made. In terms of Rule 90 (1) of the Rules, the said letter, a copy of which is annexed to the supporting affidavit, meets the requirement of the law. In the circumstances, it is naturally incomprehensible why the applicant needed to apply for

enlargement of time to lodge a document that he had already lodged timeously. Accordingly, I find this plea misconceived and proceed to dismiss it.

Finally, I deal with the prayer for enlargement of time to apply for leave to appeal to this Court.

I am mindful that since the order of the High Court intended to be challenged arose from a land dispute, the applicant had to seek leave to appeal to the Court of Appeal pursuant to the provisions of section 47 (1) of the Land Disputes Courts Act, Cap. 216 RE 2002. In terms of Rule 45 (a) read together with Rule 46(1) of the Rules, the applicant ought to have applied for such leave within fourteen days of the delivery of the impugned order by the High Court and that the said application ought to have made after notice of appeal was lodged. It is evident that while the applicant lodged the initial notice of appeal on 27th February 2012, he did not lodge any application for leave by the expiry of the prescribed fourteen days limitation on or about 7th March 2012. As a matter of fact, he waited for over seven months (i.e., until 17th October 2012) to lodge a formal request for extension of time to apply for leave vide Miscellaneous Land Application No. 65 of 2012, which was struck out by the High Court

on 22nd April 2015. The excuse he has offered for not applying for leave within time is that he was not furnished with the drawn order of the High Court in time to accompany his formal request for leave. This explanation is profoundly implausible and unacceptable. For since the application was to be made to the court that issued the order intended to be challenged, there was no need to attach a copy of the drawn order to the chamber application. In this regard, the applicant's explanation is nothing short of a smokescreen for indolence. I would, therefore, reject the prayer for extension of time to apply for leave.

In the premises, for the reasons I have given, I dismiss the application in its entirety with costs.

DATED at MWANZA this 22nd day of May, 2017.

G. A. M. NDIKA
**JUSTICE OF APPEAL**

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

P.W. BAMPIKYA
**SENIOR DEPUTY REGISTRAR**
**COURT OF APPEAL**