IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 244 OF 2015

MR. MANSON SHABA & 143 OTHERS.....APPLICANT

VERSUS

1. THE MINISRTY OF WORKS AND ANOTHER
2. THE HON. ATTORNEY GENERAL **.....RESPONDENTS**

(Application for extension of time to file an application for leave to appeal to the Court of Tanzania against the decision of the High Court of Tanzania (Land Division) at Dar es Salaam).

(Ndika,J.)

dated the 9th day of March 2015

in

Land Case No. 201 of 2005

RULING

25th October, 2016 & 8th February, 2017

KIMARO, J.A:

The applicants filed Land Case No. 201 of 2005 in the High Court of Tanzania, Land Division contesting their right of occupation of land situated at Kibaha Municipality. The subject of the suit was an allegation by the respondents that the land the applicants occupied was a road reserve. The applicants were served with notice to vacate the land. That forced the applicants to sue the respondents claiming among others, lawful occupation

and compensation. The applicants lost the suit. The decision of the High Court was delivered on 15th March 2015. On 10th April, 2015 the applicants filed an application for extension of time within which to apply for leave to appeal to the Court of Appeal. The application was dismissed on 9th November, 2015.

On 24th November, 2015 the applicants filed this application seeking for extension of time to file an application for leave to appeal to this Court. The application is filed by a notice of motion under Rule 10 of the Court of Appeal Rules, 2009 (the Rules) and it is supported by a joint affidavit of Manson Shaba, Dr. Doroth Massoza, Mr. Paul Msilu, Mr. Job Mwakibuga Mrs Pertonila Kisalala, Mr. Godfrid Mbonde and Mr. Malick Mbonde. An affidavit in reply from the respondents opposing the application is sworn by Mr.Killey Mwitasi, learned Senior State Attorney.

The High Court delivered its ruling on 9th November 2015. The 14 days for filing the application in the Court within time expired on 22nd November, 2015. The application in this Court was filed on 24th November, 2015 and was filed out of time. The grounds given for filing the application out of time as per the application are:

1. The application to the High Court Land Division for extension of time within which to apply for leave to the Court of Appeal of Tanzania was dismissed on 9th November 2015 thus blocking the appeal process.
2. There are points of law fit for determination of the Court of Appeal of Tanzania, that is, the High Court has established two conflicting decisions based on similar facts.
3. There are points of law that need interpretation by the Court of Appeal of Tanzania, that is what happens when the law governing road reserves conflicts with the law governing land rights and establishment of local government authorities. Whether the law governing road reserves takes precedence of the law governing land rights or not.
4. The Applicants are desirous of pursuing the right of appeal to the Court of Appeal of Tanzania.
5. The delay to apply for leave was not caused by the Applicants dilatory conduct.

6. The delay is not inordinate.

7. The application for extension of time is not prejudicial to the respondents.

Both parties filed written submissions to support and oppose the application in compliance with Rule 106 of the Rules.

When the application came for hearing on Tuesday, 25th October, 2016 it was only Mr. Francis Stolla, learned advocate who appeared to represent the applicants. Although the respondents were dully served through the Hon. Attorney General on 22nd September, 2016 no learned State Attorney appeared in Court to represent the respondents. That however, was not a hindrance on the Court from proceeding with the hearing of the application. The written submissions by the parties to support the respective position of the parties helped the Court to determine the application.

The written submissions by the applicants raised the following issues:

(i) Whether the delay by the Applicants is inordinate or not?

(ii) Whether there is a reason for the delay by the Applicant or not?

(iii) Whether there is an arguable case or not?

(iv) Whether the Applicants are desirous of pursuing the right of appeal to the Court of Appeal of Tanzania or not?

(v) Whether the delay was caused by the Applicants dilatory conduct or not?

(vi) Whether there is a degree of prejudice to the defendant if application is granted or not?

The applicants relied on the cases of **Tanzania Revenue Authority V Tango Transport Co. Ltd, and Tango Transport Co V Tanzania Revenue Authority,** consolidated Civil Application No. 4 of 2009 (unreported). In the case, the Court in determining the issues before it cited with approval the case of **Mariaria & Others V Matondira** (2004) 2 EA 163 a case decided by the Court of Appeal of Kenya. The case laid some down some principles worthy of consideration in determining applications for extension of time. The listed principles are:

(a) the lengthy of delay.

(b) the reason for the delay.

(c) whether there is an arguable case, such as, whether there is a point of law on the illegality or otherwise of the decision sought to be challenged.

(d) the degree of prejudice to the defendant if the application is granted.

Citing the case of **Michael Lesani Kweka v John Eliafye** [1997] T.L.R. 152, the learned advocate submitted that the Court has power to grant extension of time if sufficient cause is shown by the applicant. The applicant in the case corrected the error immediately upon discovery of the same and that entitled him to get extension of time. Indeed there is no doubt that this is a correct position of the law. Rule 10 under which the application is filed requires the applicant to show sufficient cause for the delay in filing the application in time. The Rule reads:

> "*The Court may, **upon good cause shown**, extend the time limited by these Rules or 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 doing of the act; and any reference in these Rules to any such time shall be construed as reference to that time so extended."

Referring to the application which was filed in the High Court, the learned advocate said there was a delay of only 18 days. The suit was dismissed on 9th March 2015 but the application was filed on 10th April 2015 instead of being filed on or before 23rd March 2015 which would have made the application fall within the 14 days, the time limit for filing the application. He said the application was filed in the Court on 24th November, 2015 being eighteen days delay. With respect to the learned Advocate for the applicant, the period of delay for filing the application in this Court is not correct. Honourable Judge Ndika, as he then was, dismissed the application on 9th November, 2015. Fourteen days for filing the application to the Court within time ended on 22nd November, 2015. The application in the Court was lodged on 24th November, 2015. There is therefore a delay of two days. It

is a misdirection on the part of the learned advocate to peg the period of delay in the Court to that one which occurred in the High Court. The periods of delay must be calculated separately and reasons for each delay accounted for.

That said, let me proceed to the arguments raised by the learned advocate to explain reasons for the delay. He said the two days delay was not inordinate. Why, as said by the learned advocate, the proceedings involved 144 persons. There were difficulties in making them come together for explanation of the outcome of the case and reaching an agreement on the further steps the learned advocate would take to pursue the case plus payment of his fees. He said the time was consumed in other cases he had to attend to outside the jurisdiction where thise proceedings were filed and that was in Mwanza.

Another reason given why the Court should allow the application is that the decision given in the case (Land Case No.201 of 2005) is different from Land Case No. 80 of 2005 between **Proches Eleza Tarimo V The Permanent Secretary in the Ministry of Works and Another** while the cases are based on similar facts. He said the plaintiff in the latter case

won the suit. The two conflicting decisions require intervention by the Court for making a correct position of the law.

The filing of a notice of appeal, said the learned advocate is evidence of the desire by the applicants to pursue the appeal. He said the delay in filing the application was not caused by a dilatory conduct because the applicants started the appellate process early but communication problems between the representatives of the applicants and the advocate of their choice is what hindered the application from being filed in time. The opinion of the learned advocate for the applicant is that no prejudice will be occasioned to the respondent because it is important that interest prevails. He prayed that the application be granted with costs.

The respondents in their submissions filed by a Principal State Attorney who however has not disclosed his name, requested the Court to dismiss the application because the applicants have not given sufficient reasons for the Court to grant the application.

The learned Principal State Attorney earlier on made an undertaking to do a research on the competence of the application following an issue that was raised on whether a party who loses an application seeking for

extension of time in the High Court can come to the Court of Appeal for the same application or must come by way of appeal. The learned State Attorney went through the Appellate Jurisdiction Act [CAP 141 R.E.2002] and Rules 45(b) and 47 of the Court of Appeal Rules 2009 and the cases **William Shija V Fortunatus Masha** [1997] T.L.R. 213, **Thomas David Kirumbuyo and Abas S. Mhanga V TTCL** Civil Application No. 1 of 2005 and that one of **Tanzania Revenue Authority V Tango Transport Company Limited** (supra), (both unreported) and said the application is competent. I thank the learned State Attorney for the fulfillment of his undertaking to give the Court the correct position of the law in as far as the application is concerned. I have gone through all the cases cited and the provision of the law. I am satisfied that what the learned Principal State Attorney said is correct.

In as far as the merit of application is concerned, the learned Principal State Attorney submitted that the Court has jurisdiction to grant extension of time. However, the discretion must be exercised judicially. The application must only be granted where sufficient account is given for the delay in filing the application. Much as the learned Principal State Attorney admitted that what amounts to sufficient cause has not been defined, he

said it is important for the applicant to account for every delay made for the failure to file the application within the time given by the law. He referred to the cases of **Daud Haga V Jenitha Ab Don Machafu** Civil Reference No. 1 of 2000, **Lyamunya Construction Co. Ltd V Board of Registered Trustees of Young Women Christian Association of Tanzania** (Civil Application No. 2 of 2010(both unreported). He said negligence, laxity financial constraint and ignorance do not constitute sufficient reason for the Court to grant the application. He cited the cases of **Ali Vuai Ali and another V Sued Mzee Sued** Civil Application No. 1 of 2006, **Paulo Martin V Bertha Anderso**n Civil Application No. 7 of 2005, **A. H. Muhimbira and two others V John K. Mwanguku** Civil Application No. 13 of 2005 (all unreported).

The learned Principal State Attorney admitted that a party who is able to show that a point of law is involved in the appeal intended to be filed has a right to be granted extension of time. Such party however, must show that there is point of law involved of sufficient importance and must be apparent on the face of record. Such point of law may be jurisdiction, or other related points but it must not be one that has to be discovered through long arguments or process.

As he went through the reasons given by the learned advocate for the applicants, the learned Principal State Attorney was not satisfied that the problem of communication between the advocate for the applicant and his clients is good cause for accounting for the delay because Mr. Stolla is not the only advocate in the firm. The matter could have been taken over by another advocate from the firm. The opinion of the learned Principal State Attorney is that if the applicants were serious, the fourteen days period provided by the law for filing the application was sufficient for convening the meetings and filing the application in time.

On the part of the learned Principal State Attorney, the advocate for the applicants has demonstrated laxity, negligence and inaction in pursuing the application and in accordance with the case of **A.H. Muhimbira** (supra), that is not good cause for granting the application. More so, because there is no affidavit sworn by the learned advocate to support what the representatives of the applicants say in their affidavit, nor documentary evidence to show his travel to other regions to attend to other cases.

In as far as the assertion by the applicants on conflict of law between the two cases on the same subject matter is concerned, the learned Principal

State Attorney said no apparent conflict has been shown because the applicants case was dismissed because of lack of sufficient evidence to prove the case while the other case was founded on another cause of action altogether. The learned Principal State Attorney prayed that the application be dismissed with costs.

In all, that were the submissions made in support of the application and against the same. I have thoroughly gone through the same as well as the law governing granting of extension of time. Rule 10 of the Rules is specific. In granting of extension of time the applicant must satisfy the Court that he/she had good reasons for failing to file the application in time.

The applicant framed several issues as already reproduced in this ruling. In my reasoned opinion, the issue the Court has to consider is only one and that is whether the applicants have moved the Court with sufficient cause for failing to file the application within fourteen days from 9th November 2015 when the High Court refused to grant the application that was filed there. With respect to the learned advocate no reasons at all has been given to account for failure by the learned advocate for the applicants to file the application on or before 22nd November 2015 in conformity with

Rule 45 (b) of the Rules. No single paragraph in the 18 paragraphs joint affidavit of the nine applicants who deposed that they are representing the rest of the applicants shows the reason for the delay. As said before, paragraphs 1 to 7 give the history of Civil Case No. 201 of 2005 explaining the cause of action and the decision of the High Court. Paragraphs 8 to 13 explain what happened subsequently and the filing of the application in the High Court which eventually ended up being dismissed.

The paragraphs of the affidavit related to this application are 16, 17 and 18 but none of them explain why there was no compliance with Rules 45(b). The paragraphs read:

"16. *That we are desirous of pursuing the appeal to the Court of Appeal of Tanzania against the judgment referred to in paragraph 4 of the affidavit.*

17. That the application for extension of time to file an application for extension to appeal to the Court of Appeal of Tanzania is not prejudicial to the Respondents.

18. That the delay to file an application for leave to appeal was not caused by our conduct but was the process to make sure that every person interested in the case was duly informed and participated in the conduct of the case. "

It is a constitutional right of every aggrieved person to pursue an appeal against a decision determined against his/her favour. However, compliance of the procedure in the appeal process must be followed.

Looking at the three paragraphs of the affidavit reproduced above, none of them explain why the applicants failed to comply with Rule 45(b) of the Rules. By informing the Court that the applicant is desirous of filing an appeal against the case they lost in the High Court, that does not explain why they did not comply with rule 45(b) of the Rules. The applicants had to inform the Court what made them delay in the filing of the application.
The Court would then assess the reason(s) and see if it (they) justify the Court to grant the application. The same reasoning applies to what the applicants depose in paragraph 17 and 18. Even if the respondents are not prejudiced, is it a justification for the applicants to evade giving reasons for

the delay in filing the applications? The applicants have an obligation of complying with the law. Again paragraph 18 lacks substance in as far as the application is concerned. Participation of the applicants in the conduct of the case goes hand in hand with compliance of the appeal process. Reasons for the delay in filing the application had to be given. That is what would have enabled the Court to exercise its judicious discretion on whether or not to grant the application. The grounds given for filing the application are relevant to the application itself and not to this application which seeks for extension of time to file the application. In the case of **Wankira Benteel and Kaiku Foya** (supra), the Court held:

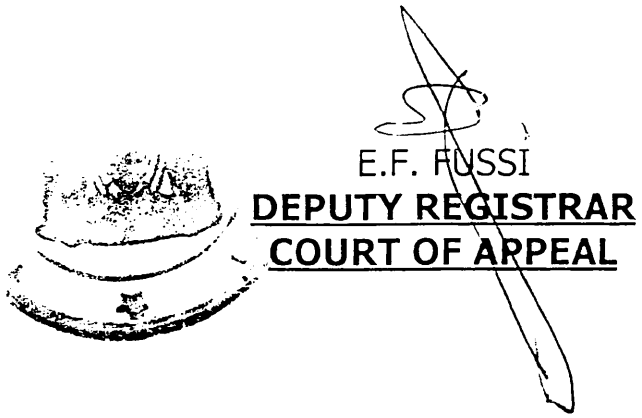
> *"In this case, the applicants' failure to apply for leave within the prescribed period of 14 days cannot by any stretch of imagination be regarded as minor or slight lapse. To hold otherwise, would in my view, render the Court's Rules 2009 ineffective which would be disastrous in the administration of justice because the rules are vehicles upon which the courts' business is conducted."*

The applicants' failure to account for the delay in filing the application in time deprives them of the right to get the extension of time they are applying for filing an application for leave to appeal to the Court. The application is hence dismissed with costs.

DATED at **DAR ES SALAAM** this 23rd day of January, 2017

N.P.KIMARO
JUSTICE OF APPEAL

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



E.F. FUSSI
DEPUTY REGISTRAR
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