

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

CIVIL APPLICATION NO. 140/02 OF 2018

1. LOSHILU KARAINÉ 2. JOHN MAKUPA 3. JOSEPH ANGERSON MUSHI 4. SAUTEU LAIZER	} APPLICANTS
VERSUS		

**ABRAHAM MELKIZEDECK KAAYA
(Suing as Legal Personal Representative
of Gladness Kaaya).....RESPONDENT**

**(Application for extension of time to institute an appeal against the
ruling of the High Court of Tanzania at Arusha)**

(Maghimbi, J.)

**Dated the 17th day of June, 2016
in
Misc. Land Application No. 26 of 2016
.....**

RULING

16th & 21st August, 2019

LILA, JA.:

A delay of eleven (11) days in instituting an appeal forms the subject of this application preferred by the applicants by way of a notice of motion predicated under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules). The applicants are seeking the time within which to file an appeal against the decision of the High Court (Maghimbi, J.) in Miscellaneous Civil Application No. 26 of 2016 dated 17/6/2016 be extended. The application is supported by an affidavit sworn by Christina Y. Kiwale, learned advocate for the applicants.

In order to appreciate the essence of the application, it is convenient to set out briefly the background. In the High Court sitting at Arusha, the applicants lost an application for restoration of Misc. Land Application No. 282 of 2014 which was dismissed for want of prosecution on 14/04/2015. The applicants' major contention in that application was that they were served with the notice of hearing just one day before the hearing date which time was too short for them to attend the hearing of that application. They argued that the learned advocate was served with the notice of hearing on 13/01/2015 and the hearing was scheduled on 14/01/2015 at around 3.00 o'clock. It was further contended that, on that hearing day, unfortunately, she faced a stomach upset hence failed to attend the hearing and the corresponding efforts to contact the applicants personally was unsuccessful due to a short notice. The learned Judge was not satisfied that the applicants had advanced sufficient reasons to warrant grant of an order restoring the dismissed application. She reasoned that if the applicants' advocate was sick at 3.00 a.m. in the morning, she had sufficient time to call for her clients who were four in number so that one or all of them could have attended in court and relay the information that the learned advocate had fallen sick. She accordingly proceeded to dismiss the application. The applicants were aggrieved hence, through the learned advocate,

they initiated the appeal process by lodging a notice of appeal and later on lodged an application for leave to appeal which was granted on 2/6/2017 and was supplied with the same on 5/6/2017. She was similarly issued with the requisite documents for appeal on 13/11/2017. Her quest to be served with the certificate of delay by the Registrar excluding the period of time spent to obtain the proceedings in the application for leave and other documents was turned down through a letter which she received on 19/01/2018. Having realised that she was late in lodging the appeal, the learned advocate filed the present application seeking for extension of time to do so.

As was before the High Court, at the hearing of this application before me the applicants were represented by Mrs. Kimale, learned advocate. The respondent had the services of Mr. John Materu, learned advocate.

Both counsel adopted the respective submissions they had earlier on filed and before me most of the facts above narrated were not in dispute. The counsel locked horns on the reason(s) for the delay, as hinted above, of eleven days from 19/01/2018 when Mrs. Kimale received the letter from the Deputy Registrar refusing issuance of a

certificate of delay to 01/2/2018 when the present application was lodged in Court.

From the affidavital information and the submission by Mrs. Kimale the eleven days' delay in lodging an appeal in this Court is explained as follows. **First**, that after receiving the letter from the Deputy Registrar refusing issuance of certificate of delay on 19/01/2018, the learned counsel started to prepare the record for the present application. **Second**, as she had prepared an appeal while waiting to be supplied with the certificate of delay, upon being denied, she had to abandon it and start preparing documents for the present application. In the course, she said, she spent eleven days to prepare the present application which period was not inordinate. To buttress her contention she cited the Court's decisions in the case of **Eliakim Swai and Another vs. Thobias Karawa Shoo**, Civil Application No.2 of 2016 and **Royal Insurance Tanzania Ltd vs. Kiwengwa Strand Hotel Ltd**, Civil Application No. 111 of 2009 (both unreported) in which the Court found that a delay of two weeks not to be inordinate and that where a party has been in court corridors in search of justice attempting to cure the defect amounts to good reason for delay, respectively. **Third**, that the decision sought to be challenged suffers from an

illegality in that the applicant was served with the notice of hearing of the application which was dismissed for want of prosecution just one day before the hearing date which time she said was too short to enable her communicate with the applicants to personally enter appearance on the hearing day ahead of her falling sick on the hearing date. She contended that Order V of the Civil Procedure Code, Cap. 33 R. E. 2002 (the CPC) which requires a party to the case be given a reasonable notice of hearing was violated. In support of her argument she referred me to the Court's decision in the case of **Lyamuya Construction Company Ltd vs. Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) cited in the case of **Eliakim Swai and Another vs. Thobias Karawa Shoo** (supra).

Reacting on Mrs. Kimale's submissions on the reasons for the delay, Mr. Materu hastened to dismiss the contentions fronting three reasons. **First**, that the factual allegations constituting reasons for the delay are not explained in the affidavit in support of the application. He contended that each of the eleven days was not accounted for. He cited the case of **Moto Matiko Mabanga vs. Ophir Energy PLC and 2 Others**, Civil Application No. 463/01 of 2017 (unreported) to buttress

his contention. **Second**, that the delay of eleven days is inordinate for preparation of the present application, for it could not take eleven days for an experienced counsel like Mrs. Kimale to prepare such a simple application. In support of that position he referred me to the case of **Farida F. Mbarak and Another vs. Domina Kagaruki and 4 Others**, Civil application No. 68/17 of 2018 (unreported) in which the Court found a delay of five days to be inordinate. **Third**, on the issue of illegality, M. Materu was emphatic that there is no any apparent illegality in the decision sought to be impugned and Mrs. Kimale was unable to state the law that has been violated by the honourable Judge as required for the applicants to succeed in this application. In bolstering his assertion he made reference to the Court's decision in the case of **Moto Matiko Mabanga vs. Ophir Energy PLC and 2 Others** (supra). He further attacked the cases cited by Mr. Kimale as having no relevance to the present case. In respect of the case of **Royal Insurance Tanzania Ltd vs. Kiwengwa Strand Hotel Ltd** (supra) in which the case of **Mrs. Kamiz Abdullah M.D. Kermali vs. The Registrar of Buildings And Miss Hawa Bayona** [1988] TLR. 199 is cited, he argued that it defeats Mrs. Kimale's case for it insists that there must be reasons for preventing one from filing the appeal within time which reasons are not explained in the present application. As for the

allegation that the decision sought to be challenged is tainted with illegality, he argued that according to the case of **Moto Matiko Mabanga vs. Ophir Energy PLC and 2 Others** (supra), the illegality must be apparent on the decision sought to be impugned which is not the case herein. In sum, he urged the Court to dismiss the application for want of good reason(s) for the delay.

As already shown above, the present application has been brought under Rule 10 of the Rules. The applicants are seeking enlargement of time within which to lodge an appeal. In a range of cases this Court has consistently explained the factors to be considered before grant of applications of this nature. Just to mention one, in the case of **Laurent Simon Assenga vs. Joseph Magoso and 2 Others**, Civil Application No. 50 of 2016 (unreported) the Court stated:-

"In determining an application under Rule 10, the issue that has to be resolved is always, whether the applicant has shown good cause for extension of time. What is good cause is a question of fact depending on the facts of each case. For that reason, many and varied circumstances could constitute good cause in any particular case."

Rule 10 of the Rules bestows the Court with discretionary powers to grant extension of time upon being satisfied that good cause has been shown for the delay. However, the scope of discretion was explained with lucidity in the case of **Henry Muyaga vs. Tanzania Telecommunication Company Ltd**, BK Civil Application No. 8 of 2011 (unreported) that:-

*"The discretion of the Court to extend time under Rule 10 is unfettered, but has also been held that, in considering an application under the Rule, the Court may take into consideration such factors as, the length of the delay, the reason for the delay, the chances of success of the intended appeal and the degree of prejudice that the respondent may suffer if the application is granted.[See **Tanzania Revenue Authority vs. Tango Transport Co. Ltd, Tango Transport Co. Ltd vs. Tanzania Revenue Authority**, Consolidated Civil applications No. 4 of 2009 and 9 of 2008 (unreported)]."*

In view of the clear provisions of rule 10 of the Rules and the Courts' decisions, it is not surprising that the grant of extension of time is wholly dependent on the reason explaining away the delay and the reason for delay depends on the circumstances of each case. This accounts for the reason why in the case of **Royal Insurance Tanzania**

Ltd vs. Kiwengwa Strand Hotel Ltd, (supra) the Court found a delay of two weeks not to be inordinate but in the case of **Farida F. Mbarak and Another vs. Domina Kagaruki and 4 Others** (supra) the Court found a delay of five (5) days was inordinate. Each case was decided according to its circumstances. The only issue considered by the court in applications of this nature is whether on the facts sufficient reason for the delay in lodging the appeal to this Court has been shown or rather whether the circumstances leading to the delay constitute sufficient reason within the provisions of rule 10. The Court has, accordingly, flexibly exercised its unfettered discretion depending on the facts of a particular case. This is purposely done to enable the Court exercise its discretionary powers to advance substantive justice (see **Dimension Data Solutions Limited vs. Wia Group Limited and 2 Others**, Civil Application No. 218 of 2016 (unreported)).

On how to account for the delay, the Court, in **Bushfire Hassan vs. Latina Lucia Masaya**, Civil Application No. 3 of 2007 (unreported) clearly stated 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 foregoing position has been restated in the case of **Mustafa Mohamed Raza Vs. Mehboob Hassanali Versi**, Civil Application No. 1168 of 2014 (unreported) and **Moto Matiko Mabanga vs. Ophir Energy PLC and 2 Others** (supra) rightly cited by Mr. Materu.

In the case under discussion, it is common ground that the applicants were late in filing the appeal for eleven days. I am in agreement with Mr. Materu that in the absence of any justifiable and acceptable predicament, the delay of eleven days may be inordinate and dilatory for, as stated above, each day of delay has to be accounted. However, each case has to be considered according to its circumstances.

I have given due consideration to the circumstances obtaining in the present case.

However, before I determine the merits of the application, I think I should at first consider Mr. Materu's contention that the facts narrated by Mrs. Kimale which form the basis of the applicants' reasons for the delay are not reflected in the affidavit in support of the application. I have fully examined the averments in the said affidavit and I find myself unable to agree with Mr. Materu. As rightly argued by Mrs. Kimale, such facts are well stated in paragraphs 8 and 9 of the said affidavit. Those paragraphs state:-

"8. That the applicants applied to be issued with certificate of delay vide letter with reference AR/ADV/GEN/CYK/52/17 dated 23/11/2017 and reminder letter with reference number AR/ADV/GEN/CYK/2/18 of 3rd January, 2018 but they were notified by letter from Deputy Registrar High Court Arusha on 17th January, 2018 that Certificate of Delay will not be issued. Photocopies of letters referred herein are annexed collectively marked L4.

9. That in the absence of Certificate of Delay an appeal could not be lodged in court without extension of to appeal be sought from and granted by this Court."

As evidenced by Mrs. Kimale's letters on behalf of the applicants to the Deputy Registrar requesting to be supplied with requisite documents for appeal and later a letter requesting to be supplied with the certificate of delay, it is clear that she relentlessly and tirelessly struggled to have the applicants' appeal lodged within time. It is obvious that had the Deputy Registrar supplied her with the certificate of delay as and when he served her with the letter denying her the same, she would have had filed the appeal within time. Unfortunately that was not the case. I entirely agree with Mrs. Kimale that the circumstances were that she

was waiting to lodge the appeal only to find that she had to abandon that and, instead, turn and prepare documents for the present application. That unexpected and unforeseen event definitely needed reorganization and, to be fair, a period of eleven days cannot be said to be inordinate in preparing and lodging the present application. Instead, I am convinced that she acted promptly and diligently.

This reason alone is sufficient to warrant the Court exercise its discretion and extend the time.

Before I conclude I find it pertinent to express my concern in respect of the conduct exhibited by the Deputy Registrar in the present matter. It needs no overemphasis that it is the duty of all judicial officers to ensure that an aggrieved party is availed with the requisite appeal documents within time and where, as was the case herein, such documents are delayed, to comply with the law so that the appeal process is not blocked and or delayed. I see no reason as to why in the present case the applicants were denied the right to be supplied with the certificate of delay in terms of rule 90(1) of the Rules when it was clear that the court had delayed supply of requisite documents for appeal purposes, that is the proceedings in respect of leave to appeal. The denial has not only delayed the lodging of the appeal but also has


caused unnecessary inconvenience to the applicants. This is a habit which should not be condoned.

All said, the application is hereby granted. The applicants are given thirty (30) days from the date of delivery of this ruling within which to lodge the appeal. As the lodging of the application was somehow contributed by inaction on the part of the Deputy Registrar, I hereby order each party shall bear its own costs.

DATED at **ARUSHA** this 20th day of August, 2019.

S. A. LILA
JUSTICE OF APPEAL

The ruling delivered this 21st day of August, 2019 in the presence of 2nd and 4th Applicants in person and Mr. Ombeni Kimaro learned advocate appeared for the respondent is hereby certified as a true copy of the original.



A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL

