

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

CIVIL APPLICATION NO. 367/17 OF 2018

**THE REGISTERED TRUSTEES OF ANJARAAPPLICANT
MUSLIM YOUTH CENTRE**

VERSUS

MOHAMED A. SINGORESPONDENT

**(Application for Extension of Time to file Leave to lodge an appeal out of
time against the Judgment and Decree of the High Court (Land Division)
Tanga)**

(Msuya, J.)

dated the 4TH day of April, 2016

in

Land Case No. 4 of 2011

**.....
RULING**

30th September, & 4th October, 2019

KOROSSO, J.A.:

Before me is an application made under Rule 10 of the of the Tanzania Court of Appeal Rules, 2009 (the Rules), where the applicant is seeking extension of time to lodge the appeal to this Court against the Judgment and Decree of the High Court of Tanzania (Land Division) at Tanga dated 4th April, 2016 in Land Case No. 4 of 2011. The application is supported by

an affidavit deponed by Protace Kato Zake, an Advocate duly instructed by the applicant. Other prayers are that costs and incidentals to this application to abide the results of intended appeal.

The respondent filed an affidavit in reply objecting to the application and disputing the averments in the affidavit supporting the notice of motion.

Reasons for which extension of time is sought found in the notice of motion are that:

- (a) The applicant after obtaining an extension of time to file a notice of appeal did file the same and was required to file an appeal within sixty days from the filing of the said notice but could not do so because the applicant was yet to obtain leave to appeal to the Court of Appeal.*
- (b) The applicant is yet to be supplied with the endorsed exhibits tendered during the trial and copies of Ruling of the High Court of Tanzania granting applicant leave to file notice of appeal and application for leave out of time to form part of the record of appeal.*

When the application came for hearing today, the applicant had the services of Mr. Nehemiah Nkoko learned Advocate, while the respondent was represented by Mr. Philemon Raulencio, learned Advocate.

Before venturing into the substance of the application, the learned counsel for the respondent submitted that after due reflection, the respondent has decided to withdraw the Notice of Preliminary objection filed on the 31st of August 2018 and there being no objection on the part of the applicant's counsel, the said Notice of Preliminary objection was marked withdrawn.

Proceeding to the application, Mr. Nkoko adopted the applicants' notice of motion and supporting affidavit together with the written submissions in support of the application. He submitted that the delay in filing the application was occasioned by a multitude of factors. The learned counsel stated that the applicants had earlier filed an appeal before this Court that is, Civil Appeal No. 178 of 2016 which was struck out. That the applicant was not deterred by this development and his interest in

processing the appeal not waned, he filed an application for extension of time to file Notice of Appeal and also an application for leave to file a fresh appeal to challenge the judgment and decree of the High Court Tanga, in Land Case No. 4 of 2011. The applicant was granted extension of time as sought and was thus required to file an appeal within sixty days upon filing a Notice of Appeal in line with Rule 90(1) of the Rules. The Notice of Appeal was filed on 28th September, 2017 and the application for leave to file an appeal was filed on 29th September 2017 and thus both applications were filed within time as ordered by the High Court in its Ruling dated 19th September, 2017.

Despite having stepped in the bandwagon again in terms of the appeal process, the applicant failed to file the appeal within the prescribed time of sixty days as prescribed by Rule 90(1) of the Rules. For reasons that, having filed the notice of appeal on the 28th September 2017, the appeal ought to have filed the appeal by the 27th November, 2017. The applicant unfortunately, was unable to file the appeal as required, because by the time the sixty days elapsed, he had yet to obtain leave to appeal, an essential document to support the application for intended appeal. That at

the same time, despite having requested for them with a letter applied for the same on the 22nd June 2018, the appellant had not been supplied with endorsed exhibits tendered during the trial at the High Court as well as copies of the Ruling of the High Court granting leave to file Notice of Appeal, and the application for leave out of time to file an appeal, so that these documents form part of the Record of intended Appeal. That again the applicant filed for extension of time to file appeal before sixty days of the leave to appeal and served the respondent on the 4th of August 2018.

The applicant counsel implored the Court to find that the applicant has taken all the necessary steps to ensure that the process to appeal is alive. That the applicant could not file the appeal without leave as alluded to above. Mr. Nkoko further contended that the applicant has exhibited good cause to lead the Court to exercise its discretion to grant the prayers sought in the obtaining application and that there is nothing to impute laxity or negligence on the part of the applicants in pursuit of the intended appeal.

To support the presented submissions the applicant counsel made reference to various cases, including **Stanzia Stanley Kessy vs The**

Registered Trustees of Agricultural Inputs and 3 Others, Civil Application No. 46 of 2005 (Unreported) and **David Malili vs Mwajuma Ramadhani**, Civil Application No. 210 of 2015 (unreported). Other cases include the one cited by the respondent, that of **William Shija vs Fortunatus Masha** [1997] TLR 213, where the Court held that where the applicant brought previously an intention to appeal and it was struck out, the second application will take into consideration the first application. Another case cited as relevant for the applicant is **Christmas Elimikia Swai and 2 others vs TANESCO Ltd and another**, Civil Application No. 559/01 of 2018 (unreported), that held that reasons for delay is not the only factor to be considered in applications for extension of time as no particular ground or reasons have been set out as good cause, and the Court went to consider illegalities in the decision and proceedings, that is whether there are apparent errors on the face of record which require intervention of the Court to remove possibilities of miscarriage of justice. Thus the applicant counsel argued that this is another reason for the Court to grant extension of time since there are apparent irregularities and errors in the judgment and impugned decree.

The counsel for the applicant also challenged the affidavit in reply filed by the respondent urging the Court to find the same inconsistent and incomprehensible and thus it cannot stand to oppose or resist the application and prayed that it should not be considered. The counsel thus entreated the Court to grant the prayers sought.

The respondent counsel vehemently objected to the application arguing that delay to file the appeal was caused by gross negligence and recklessness and lack of diligence on the part of the applicants. From written and oral submissions, the learned counsel argued that taking in consideration the sequence of events in this application, the applicant cannot rely on failing to get endorsed exhibits as a reason for delay since the said judgment was delivered on the 4th April 2016 and they had enough time to follow-up on the said documents and exhibits. He urged that the applicant filed Civil Appeal No. 178 of 2016 which was struck out on the 12th July 2017 and one of the reason was that the endorsed exhibits were not included in the record of appeal. That the applicant sought for records and copies of exhibits on the 25th June 2018, ten months after lodging the

appeal and argued further that the documents for which the applicant counsel contends were delayed, while true, but it was due to the fact that the applicant requested for the said documents very late.

The Counsel contended further that negligence on the part of the counsel for the applicant can be imputed from the fact that while the notice of appeal was filed on 19th September, 2017, a letter to Deputy Registrar was filed on 25th June 2018 to request for endorsed exhibits. That this does not show any diligence on the part of the applicant in pursuant of the appeal.

Mr. Philemon Raulencio also revealed that the applicant did also delay in requesting copies of the Ruling delivered on 19th September 2017 doing it on the 26th July 2018, which was ten months after the Ruling was delivered. He challenged the argument of there being any illegalities in the impugned judgment and decree, arguing that the anomalies revealed by the learned counsel for the applicant even if were true, the counsel for applicant failed to show how the said defects have prejudiced the applicant. The counsel argued that the applicant has not shown any good cause for the

delay to file the appeal on time to warrant the Court to grant the prayers sought. To cement his arguments, the counsel cited the case of **William Shija vs Fortunatus Masha** (supra) where it was stated that the negligence of an advocate in follow-up of a case is not good cause and **Sebastian Ndaula vs Grace Rwamafa**, Civil Application no. 4 of 2014 (unreported), which reiterated the need for the applicant to account for each day of delay, and urged that irregularities must be apparent on the face of record to constitute good cause and one need not look for the error or irregularity. The counsel was of the view that the applicants have brought unsubstantiated arguments to support the application which they want the Court to consider.

The learned counsel also beseeched the Court to find the cases cited by the applicant counsel distinguishable because in all those cases the circumstances were different from the present case. He also prayed for the application to be dismissed with costs.

The respondent counsel rejoinder was basically to reiterate submissions in chief, dispute allegations of negligence and lack of diligence

in pursuit of the intended appeal as argued by the learned counsel for the respondent and to state that the extension of time sought is from the time the applicant was granted leave to file notice of appeal and leave to appeal and not date of impugned judgment. Also restating the argument that the applicant has not been negligence but has exercised diligence throughout.

Having heard rival submissions, and considered all the cited cases, notice of motion and supporting affidavit and affidavit in reply, what will guide me when determining this application is the provision of Rule 10 of the Rules states:

"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 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 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."

From the submissions made by the learned counsel for the parties, the issue for determination is, whether the applicant has shown good cause to warrant grant of extension of time as prayed. Supplementary to this, is determining whether or not the applicant's delay to lodge and appeal in time was due to the delay by the court in supplying the relevant documents that is, leave to appeal, relevant Rulings, orders and endorsed exhibits.

It is important to note that when the counsel for the applicant was queried on whether or not the reasons that have been presented in the notice of motion and supporting affidavit to have caused the delay in filing the appeal, are still pending, the learned counsel for the applicant contended that they now have copies of the leave to file appeal and also the endorsed exhibits and the relevant rulings which are essential in any intended appeal.

There is also another fact important to state at this juncture, the fact that despite the fact that the learned counsel for the applicant in his oral submissions argued that there were irregularities and apparent errors in the impugned judgment and decree and proceedings of the decisions intended

to be appealed against, there are no such claims or averments in the notice of motion or affidavit supporting the notice of motion. Therefore the Court finds that this was an afterthought, and thus will not consider related submissions on there being irregularities and errors in the impugned decision.

There are a number of decisions which have expounded on what a court should consider when determining extension of time. In **Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), the Court reiterated the following guidelines for the grant of extension of time:-

- "(a) The applicant must account for all the period of delay.*
- (b) The delay should not be inordinate.*
- (c) The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.*
- (d) If the court feels that there other sufficient reasons, such as the existence o f a point of law of sufficient*

importance; such as the illegality of the decision sought to be challenged."

I have perused through the affidavit supporting the notice of motion, and of interest in this application is narration what of what transpired in pursuit of intended appeal. It is revealed that the appeal filed against the impugned judgment, that is, Civil Appeal No. 178 of 2016 and was struck out on the 12th July, 2017. According to paragraphs 4, 5, 6, 7 of the affidavit supporting the notice of motion, upon the appeal being struck out, the applicant applied for extension of time to file notice of appeal and application for leave to file appeal, essential requirements for intended appeal originating from the impugned decision. That on the 19th September 2017, the prayers were granted allowing the applicant to file a notice of appeal and application for leave to file an appeal which was a requirement of the law at that time. The order was for the notice of appeal and leave to file an appeal to be filed before 29th September 2017. The notice of appeal was filed on the 28th September 2017 while the leave was filed on the 29th September 2017, within the prescribed time. That the application for leave

to file appeal was disposed of by way of written submissions and Ruling was delivered on the 8th of June 2018 granting the application.

Noteworthy is the fact that from the date of filing the notice of appeal, the applicant had sixty (60) days to file an appeal by virtue of Rule 90(1) of the Rules. The said Rule also requires the appeal to be filed with a memorandum of appeal, record of appeal and security for the costs of appeal save where a process to initiate a certificate of delay is in progress. That is, where an application for a copy of proceedings in the High Court has been made within thirty days of the date of the decision upon which it is desired to appeal. In the present case, apart from mentions in Annexure PKZ8 in the 3rd paragraph alluding to there being a letter that had earlier requested for proceedings, there is nothing in the affidavit to show the said letter of request. From the Ruling of the Court in Civil Appeal No. 178 of 2016 delivered on the 12th July 2017, that struck out the said appeal and is annexure supporting the affidavit supporting the notice of motion, at line 5, it states:

“Secondly, the letter applying for the copy of proceedings from the High Court was not served upon the respondent within prescribed period contrary to rule 90(2) of the Rules. Thirdly, no certificate of delay is on the record of appeal, implying that the appeal ought to have been lodged within sixty days of the judgment of the notice of appeal, as the appellant must be deemed to have not been entitled to exception under rule 90(1) of the Rules of time required for collection of the requested copy of proceedings from the High Court”

From this it is clear that, the applicant did not seek for proceedings and relevant documents within a reasonable time as prescribed. In the above Ruling the Court goes on to say that the record of appeal is incomplete in that exhibits admitted at the trial were omitted.

The requirement of accounting for every day of delay has been emphasized by the Court in numerous decisions, such as **Bushiri Hassan**

v. Latifa Lukio, Mashayo, Civil Application No. 3 of 2007 and **Karibu Textile Mills v. Commissioner General (TRA)**, Civil Application No. 192/20 of 2016 (both unreported). In the **Bushiri Hassan case**, the Court stated:

"Delay, of even a single day, has to be accounted for otherwise there would be no proof of having rules prescribing periods within which certain steps have to be taken."

Importing this decision to the current matter, as argued by the counsel for the respondent, it is difficult to see the diligence exercised by the applicant when you take all the above factors into consideration. The Ruling of the Court when striking out the appeal filed by the appellant, was clear that the appeal was struck out for lack of proper records in the appeal. This Ruling is dated 12th July 2017, what has perplexed me is the applicant, knowing he intended to appeal, and the fact that leave is required, why did he not first, request for proceedings and documents on time? Which will have facilitated a process of getting a Certificate of Delay. But also why wait for more than a year after the said Ruling to file a letter requesting for

exhibits which you were made aware are not part of the original appeal record? Records reveal that the letter of request for the exhibits was received by the High Court on the 25th June 2018.

In Osward Masatu- Mwizarubi vs. Tanzania Fish Processing Ltd,

Civil Application No. 13 of 2010 (unreported) the Court held that:-

"What constitutes good cause cannot be laid down by any hard and fast rules. The term is a relative one and is dependent upon the party seeking extension of time to provide the relevant material in order to move the Court to exercise its discretion".

From all the above, I am constrained to find that the applicant has managed to explain the delay and show good cause for the delay to warrant this Court to exercise its discretion and grant extension of time. As alluded to earlier, the assertion of alleged irregularities in the impugned judgment and decree and related proceedings are not enough without any averments in the affidavit on this and revealing the said irregularities or apparent errors.

I find therefore, that under the circumstances pertaining to this case, the applicant has failed to illustrate good cause that would entitle him extension of time. In the result, this application is dismissed and under the circumstances each party to pay own costs. Order Accordingly.

DATED at TANGA this 4th day of October, 2019.

W. B. Korosso
JUSTICE OF APPEAL

The ruling delivered this 4th day of October, 2019 in the presence of the Mr. Ramadhani Lutengwe, holding brief for Mr. Nehemia Nkoko for the Applicant and Mr. Philemon Lawrence, counsel for the Respondent is hereby certified as a true copy of the original.




A.H. Msumi
DEPUTY REGISTRAR
COURT OF APPEAL