

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

CIVIL APPLICATION NO. 562/17 OF 2017

**1. FINN VON WURDEN PETERSEN }
2. MILIMANI FARMERS LIMITED } APPLICANTS**

VERSUS

ARUSHA DISTRICT COUNCIL RESPONDENT

**(Application for extension of time to lodge an appeal from the Judgment
and Decree of the High Court of Tanzania at Arusha)**

(Masengi, J.)

Dated the 21st day of November, 2016

in

Land Case No. 7 of 2016

RULING

27th March & 2nd April, 2020

WAMBALI, J.A.:

Finn Von Wurden Petersen and Milimani Farmers Limited the applicants have lodged an application for extension of time within which to lodge an appeal from the decision of the High Court of Tanzania at Arusha in Land Case No. 7 of 2016. The application which has been preferred under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules) is through a notice of motion. It is not out of context to state that although the notice of motion does not show that the application is supported by the affidavit as required by Form A in the first schedule to the Rules, the record of the application contains an affidavit deposed by Mr. Colman Mark Ngalo, learned advocate on behalf of the applicants.

On the other hand, it is acknowledged that Arusha District Council, the respondent did not lodge an affidavit in reply as required in terms of Rule 56 (1) of the Rules, despite being served with the application pursuant to Rule 55 (1) of the Rules. Nonetheless, the respondent's counsel lodged a reply written submission in response to the applicants' counsel written submission.

At the hearing of the application, the applicants were represented by Mr. Colman Mark Ngalo, whereas the respondent had the services of Mr. Hangi Chang'a, learned Senior State Attorney assisted by Mr. Stanley Kalokola, learned State Attorney.

Apparently, whereas the counsel for the applicants adopted the notice of motion, his affidavit and the written submission in support of the application, the counsel for the respondent adopted the reply written submission as a basis for opposing the application.

To this end, during the hearing of the application counsel for the parties submitted briefly to emphasize their respective positions contained in the written submissions lodged earlier on in Court.

From the foregoing, I wish to preface my deliberation by stating that it is settled that where the respondent does not lodge an affidavit in reply despite being served, it is taken that he does not dispute the

contents of the applicant's affidavit [see **Yokobeti Simon Sanga v. Yohana Sanga**, Civil Application No. 1 of 2011 (unreported)].

Therefore, the respondent who appears at the hearing without having lodged an affidavit in reply is precluded from challenging matters of fact, but he can challenge the application on matters of law.

In this regard, in the present application, it is noted that through a reply written submission the respondent has raised a point of law to the effect that, the application was lodged out of time. It was contended for the respondent that the application was lodged after the expiry of fourteen days contrary to the provisions of Rule 45(b) of the Rules. However, the respondent's counsel contention was not sustained as after a dialogue with the Court concerning the response of the counsel for the applicants on this point of law, Mr. Kalokola conceded that Rule 45(b) of the Rules was referred out of context. It was thus conclusively determined that Rule 45(b) of the Rules is not applicable in the circumstances of the present application. In the event, the learned State Attorney prayed and was granted leave to withdraw his submission in respect this point of law. This being the case, the respondent who had not duly lodged an affidavit in reply, had nothing remaining in the record to oppose the application on matters of fact.

In the circumstances, Mr. Kalokola courteously, urged me to determine the application based on a judicious discretion in terms of Rule 10 of the Rules. The respondent's counsel also prayed that costs be determined in the intended appeal if the application is granted.

As intimated earlier on, having adopted his written submission, Mr. Ngalo did not have much to elaborate in support of the application. In short, he requested me to consider the notice of motion, his affidavit and the written submission to determine the application. He however, emphasized that the applicants have demonstrated that good cause exists to warrant the Court to grant extension of time. Finally, to support his submission he implored me to consider the decision of the defunct East Africa Court of Appeal in **Shanti v. Hindocha and Others** [1973] E.A. 207 and the decision of the Court in **Guardian Limited and Printa Afrique Limited v. Justine Nyari**, Civil Application No. 2 of 2015 (unreported) as a basis for granting the applicants extension of time. It is acknowledged that copies of the said decisions were attached to the applicants' counsel written submission in support of the application. Mr. Ngalo also joined hands with the counsel for the respondent to pray that costs be determined in the intended appeal.

At this juncture, the pertinent issue for determination is whether the applicants have demonstrated good cause to support the application for extension of time.

It is not disputed that the decision against which an intended appeal is sought to be lodged was delivered on 21st November, 2016. Moreover, it is not in dispute that on 2nd December, 2016 the applicants applied to the Registrar of the High Court to be supplied with certified copies of proceedings, judgment and decree.

On the other hand, it is noted that the applicants acknowledged to have been supplied with the said requisite copies of documents on 13th December, 2016. Time to institute the appeal, therefore, started to run after the date the applicants were supplied with the documents in respect of Land Case No. 7 of 2016.

However, I note from the affidavit of Mr. Ngalo in support of the application, particularly paragraphs 5, 8, 9 and 10 that the cause of the delay by the applicants to lodge the appeal within time is attributed by the fact that an application for leave to appeal to this Court which was made before the High Court on 29th November, 2016 was not disposed until 30th March, 2017. That notwithstanding, the applicants were supplied with the requisite copies of the proceedings, ruling and drawn

order on 22nd May, 2017 despite several reminders to the Registrar of the High Court.

It was thus submitted for the applicants that the major reason for the delay in lodging the appeal is due to the delay of the High Court in granting the application for leave to appeal despite that the same was lodged within a reasonable time after the delivery of the judgment sought to be challenged on appeal.

In the result, the learned counsel for the applicants contended that the present application which was lodged on 25th May, 2017, which was the same day after the applicants were supplied with the certified copies of the proceedings, ruling and drawn order; demonstrated the applicants' diligence and promptness in ensuring that the intended appeal is lodged within reasonable time.

It is appreciated that Rule 10 of the Rules requires that for the applicant to be granted extension of time he must show good cause for the delay. Apparently, the provision of Rule 10 does not define what constitutes good cause. It follows that good cause, therefore, depends on the explanation of the applicant as to why he has failed to do what he ought to have done within the prescribed time. To this end, in

Osward Masatu Mwizarubi v. Tanzania Fish Processing Ltd, Civil

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

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

On the other hand, in **Shanti v. Hindocha and Others** (supra) the defunct East Africa Court of Appeal stated at page 209 as follows:

"The position of an applicant for an extension of time is entirely different from that of an applicant for leave to appeal. He is concerned with showing "sufficient reason" why he should be given more time and the more persuasive reason that he can show ... is that the delay has not been caused or contributed by dilatory conduct on his part. But there may be other reasons and these are matters of degree. He does not necessarily have to show that his appeal has a reasonable prospect of success or even that he has arguable case... and if he fails to comply with the requirement set out above he does so at his peril."

It is thus the duty of the Court to consider an application of this nature based on not only whether or not there is sufficient cause for the delay, but also the reason for extending the time to take the intended

action (See **Republic v. Yona Kaponda and 9 Others** [1985] TLR 84).

Admittedly, in the present application the reason for the delay advanced by the applicants is that the delay by the High Court to grant them leave to appeal cannot be said to have been caused by the dilatory conduct on their part. It is apparent, from the record of the application that the applicants made efforts to have the application heard and determined early, but it was until 3rd March, 2013 when the High Court delivered the ruling granting them leave to appeal. Notwithstanding the delay in determination of the application for leave, the applicants encountered yet another obstacle as they had to wait until 25th May, 2017 when they were supplied with the certified copies of proceedings, ruling and drawn order. Admittedly, by 25th May, 2017 time to lodge an appeal had expired. Therefore, the applicants demonstrated diligence and promptness after they lodged the present application seeking extension of time on the same date.

In the circumstances, considering the applicants' diligence and promptness in pursuing the application for leave at the High Court, which is one among the essential steps towards lodging an appeal, I am

satisfied that the delay in lodging the appeal was not caused by negligence on their part. The delay was beyond their control.

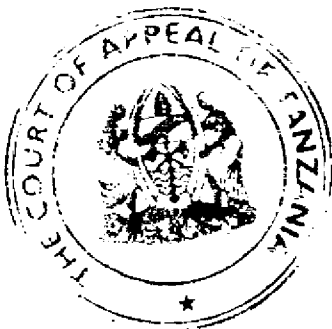
In the event, I am satisfied that the applicants have sufficiently accounted for the delay to deserve extension of time. I, therefore, hold that the application has merit.

Consequently, I grant the applicants extension of time within which to lodge an appeal against the decision of the High Court in Land Case No. 7 of 2016. The intended appeal should be lodged within sixty (60) days from the date of this ruling. I make no orders as to costs.

DATED at **ARUSHA** this 1st day of April, 2020.

F.L.K. WAMBALI
JUSTICE OF APPEAL

This Ruling delivered on 2nd day of April, 2020 in the presence of Mr. Colman Ngalo, learned counsel for the Applicant and Mr. Hangi Chang'a, learned Senior State Attorney for the respondent, is hereby certified as a true copy of the original.




B.A. Mpepo
DEPUTY REGISTRAR
COURT OF APPEAL