

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
CIVIL APPLICATION NO. 551/01 OF 2019**

**1. ANDREW ATHUMAN NTANDU }
2. MENGI ATHUMAN NTANDU } APPLICANTS**
VERSUS

**DUSTAN PETER RIMA (As an Administrator of
the estate of the late PETER JOSEPH RIMA) RESPONDENT**
**(Application for extension of time to serve notice of appeal and
a letter requesting for proceedings, judgment and decree of the
High Court of Tanzania (Land Division) at Dar es Salaam)**

(Khamis, J.)

Dated the 30th day of May, 2019

In

Land Case No. 44 of 2015

.....

RULING

8th & 21st May 2020.

LEVIRA, J.A.:

The applicants herein, Andrew Athuman Ntandu and Mengi Athuman Ntandu (the first and second applicants respectively) by way of Notice of Motion made under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules), seek extension of time within which to serve the respondent Notice of Appeal and a letter applying for copies of

proceedings, judgment and decree of the High Court (Khamis, J.) in Land Case No. 44 of 2015 dated 30th May, 2019. The Notice of Motion is supported by an affidavit deposed by the first applicant and on behalf of the second applicant. The grounds of the application are stated in the Notice of Motion and paragraphs 14 and 15 of the supporting affidavit to the effect that:

1. On 14th December, 2019 while a newly instructed advocate was reading thoroughly the record of the case he discovered that a Notice of Appeal, and the letter to the Registrar applying for the certified copies of Judgment and Decree dated 30th May, 2019 in Land Case No. 44 of 2015 were inadvertently not served to the respondent.
2. There are illegalities and incurable irregularities in the impugned decision and proceedings in Land Case No. 44 of 2015.

It is important to note that the respondent did not file affidavit in reply to oppose this application.

At the hearing of the application, the applicants were represented by Mr. Daimu Khalfani, learned advocate, whereas the respondent had the services of Mr. Felix Bruder also learned advocate.

Upon commencement of the hearing of the application, Mr. Khalfani adopted the Notice of Motion, supporting affidavit and the written submissions to form part of his submission in support of the application with no more.

It is noteworthy that, in essence the above adopted documents give series of events of what transpired before Mr. Khalfani was engaged to represent the applicants; and that, failure to serve the respondent was not a deliberate conduct. In their written submissions, the applicants state that initially they were assisted by Mr. Charles Mugila, learned advocate to draft the Notice of Appeal and letter applying for copies of proceedings, judgment and decree. They filed those documents in the High Court within time and they waited to be supplied with the requested documents. Thereafter, they decided to hire an advocate (Mr. Khalfani) to represent them in Court and in the process of perusing the record, he discovered that the respondent was not served. Mr. Khalfani informed the applicants on 14th December, 2019 about his discovery and on 16th December, 2019 they managed to lodge the current application. Therefore, they urged me to find that they acted promptly upon discovery of the error and that they had been diligently pursuing the case. In support of their prayer, they cited the case of **Michael Lessani Kweka v. John Eliafye** [1997] TLR 152; **Diamond**

Trust Bank Tanzania Ltd v. Idrisa Shehe Mohamed, Civil Application No. 89 of 2018 (unreported).

Regarding the second ground of the application on illegality of the impugned decision, the applicants stated in paragraphs 9, 10, 11, 12 and 17 of the supporting affidavit that the impugned decision of the High Court was tainted with illegalities and irregularities. They stated in their written submissions that the claim of illegality and irregularity which they have raised amounts to good cause justifying extension of time. In support of this position, they referred some decisions of the Court including, in **Johan Harald Christer Abrahsson v. Exim Bank & 3 Others**, Civil Application No. 224 of 2018 (unreported); and, **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** (1992) TLR 185.

Finally, the applicants prayed for this application to be granted for them to be able to serve the respondent with the Notice of Appeal and the letter requesting for proceedings, judgment and decree of the High Court as earlier on indicated.

In reply Mr. Bruder opposed the application as he argued that, the applicant has failed to show good cause to move the court to grant the application. He stated that the applicants have failed to account for a

delay of about 161 days from 19th June, 2019 when they filed the Notice of Appeal to 16th December, 2019 when this application was filed. According to him, the applicants were negligent by failing to serve the respondent because they filed the Notice of Appeal and applied for judgment, decree and proceedings in time as stated in paragraph 13 of the supporting affidavit. It was his argument that, negligence of the applicants cannot amount to good cause to justify extension of time sought.

Submitting on the second ground regarding the alleged illegality, Mr. Bruder contended that, there was no any illegality committed by the High Court in reaching its decision. According to him, the applicants were given an opportunity to defend their case during trial and therefore, their right to be heard was not violated. He concluded by stating that, if the application will be granted the respondent will suffer both socially and economically. Thus, he urged me to dismiss this application with costs.

Mr. Khalfan made a very brief rejoinder while insisting that, the supporting affidavit explains the reasons for the delay. He argued that Mr. Bruder has no right to challenge paragraphs 12, 13 and 14 of the supporting affidavit because the respondent ought to have filed affidavit

in reply had it been that he intended to challenge the contents of those paragraphs but he did not. In addition, he said, failure by the respondent to file affidavit in reply has also deprived his right to elaborate on the nature and extent of loss which Mr. Bruder was trying to state.

As regards the illegality, Mr. Khalfani stated that the applicants have been able to show that the decision of the High Court is tainted with apparent illegalities and irregularities. Thus, he prayed that this application be granted.

Having heard the parties and perused the record, the main issue calling for my determination is whether or not the applicants have shown good cause to justify their application in terms of Rule 10 of the Rules under which this application is brought. Rule 10 of the Rules provides:

*"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 to that time as so extended". [Emphasis added]

It has to be noted at the outset that in determining good cause, circumstances of each case have to be taken into consideration as there is no single definition of what amounts to good cause. 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 dependent upon the party seeking extension of time to provide the relevant material in order to move the court to exercise its discretion."*

The term 'good cause' may include but not limited to, whether the application has been brought promptly, absence of any invalid explanation for delay, diligence on the part of the applicant and claim of illegality of the impugned decision. In **Henry Leonard Maeda and Another vs Ms. John Anael Mongi**, Civil Application No. 31 of 2013 (unreported); the length of delay, the reasons for delay and the degree of prejudice that the respondent may suffer if the application is granted were considered as factors in determining good cause. While in

Principle Secretary Ministry of Defense and National Service v. Devran Valambia (supra); illegality of the impugned decision was considered as a good cause for extending time.

In the current application, the applicants lodged their Notice of Appeal on 19th June, 2019 and applied to the Registrar for copies of judgment, decree and proceedings in respect of Land Case No. 44 of 2015 on 17th June, 2019 as per Annexure AN-9. However, the said Notice of Appeal and the letter to the Registrar were not served on the respondent within 14 days as it is required under Rule 84 (1) of the Rules. For ease of reference this Rule reads:

*"84 (1) An intended appellant shall, before, or **within fourteen days after lodging a notice of appeal, serve copies of it on all persons who seem to him to be directly affected by the appeal**; but the Court may, on an **ex parte** application, direct that service need not be effected on any person who took no part in the proceedings in the High Court".*

[Emphasis added].

In paragraphs 13 and 14 of the supporting affidavit, the applicants have averred that the Notice of Appeal and the said letter were prepared

by their then advocate Mr. Charles Mugila who left the applicants to proceed with other steps of filing them in court. However, inadvertently, the applicants failed to serve the copies of the said documents on the respondent until when it was discovered by their newly engaged advocate, Mr. Daimu Khalfani on 14th December, 2019. Thereafter, on 16th December, 2019 the applicants lodged the current application. In paragraph 16 of the supporting affidavit they averred further that, they acted promptly to file this application upon discovery of the error and they have been diligently pursuing the case and appeal. On his part, Mr. Bruder argued that, the applicants were negligent until when they lodged the current application. According to him, if this application is granted, the respondent will suffer both economically and socially. As earlier on stated, the respondent did not file affidavit in reply, so the argument concerning suffering was just made casually by the advocate and nothing was put forth to substantiate it.

Regarding whether or not the applicants were negligent as argued by Mr. Bruder, we need to consider the sequence of events demonstrated above. It is clear that on 13th December, 2019 the applicants instructed a new advocate to represent them and it took the said advocate one day to discover the error. Immediately upon such discovery, he informed the applicants on 14th December, 2019 and on

16th December, 2019 they lodged the current application. Therefore, it means that, it took the applicants only two days to lodge the current application from the date when their advocate discovered that the respondent was not served. I agree with the applicants that the present application was filed promptly upon discovery of the error which I consider was not made deliberately. The applicants have stated in the supporting affidavit that they inadvertently failed to serve the respondent and they took actions immediately after discovering the error. They cited the decision of the Court which I subscribe, in **Michael Lessani Kweka v. John Eliafye** [1997] TLR 152; where the Court considered inadvertence and the conduct of the counsel for the applicant after discovering the omission as sufficient grounds for extending time.

Another ground raised by the applicants as indicated above is that, the judgment and proceedings of the High Court subject of this application are tainted with illegalities and irregularities. Mr. Bruder opposed this ground on account that there was no any illegality committed by the High Court. Suffices here to state that, when illegality is raised as a ground in an application of this nature, determination of its existence or otherwise is made by the full Court. In my view, the main ground of illegality complained of by the applicants is elaborated in

paragraph 12 of the supporting affidavit where they claim that, the High Court changed issues without affording parties the right to be heard and the issues concerned the legality of the sale of plot No. 343 Block "A" Mikocheni High Density from Rukia Athuman Mbelwa to Athuman Ntandu and Flora Ntandu who were not parties to the case and were not called to give evidence to defend the property.

The right to be heard is one of the fundamental rights of litigants in a trial and therefore, failure by the trial court to give the parties the right to be heard is an illegality. Moreover, it is settled law that a claim of illegality of the impugned decision constitutes good cause for extension of time regardless of whether or not reasonable explanation has been given by the applicant to account for the delay. (See **Republic v. Yona Kaponda and 9 Others** [1985] T.L.R 84; **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** (supra); **Victoria Real Estate Development Limited v. Tanzania Investment Bank and Others**, Civil Application No. 225 of 2014, CAT- Dar es Salaam (unreported)). In **Republic v. Yona Kaponda and 9 Others** (supra) case, the Court stated at page 86 that:

"In deciding whether or not to extend time I have to consider whether or not there are "sufficient reasons." As I

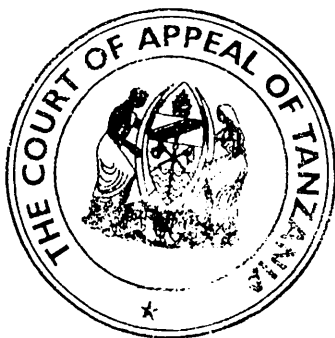
understand it, "sufficient reasons" here does not refer only, and is not confined, to the delay. Rather it is "sufficient reason" for extending time, and for this I have to take into account also the decision intended to be appealed against, the surrounding circumstances, and the weight and implications of the issue or issues involved."


Being guided by the above discussed principle of the law and having considered circumstances of this matter, I am satisfied that the applicants have been able to show good cause in terms of Rule 10 of the Rules. Consequently, I hereby grant the application with no order as to costs. The applicants are given 14 days from the date of this Ruling to serve the respondent with the copies of the Notice of Appeal and the letter to the Registrar applying for copies of judgment, decree and proceedings.

DATED at DAR ES SALAAM this 18th day of May, 2020.

M.C. LEVIRA
JUSTICE OF APPEAL

The Ruling delivered this 21st day of May, 2020 in the presence of Mr. Daimu Khalfan, counsel for the Applicants and Mr. Felix Bruda, learned counsel for the Respondent is hereby certified as a true copy of the original.




A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL