

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CIVIL APPLICATION NO. 462/17 OF 2020

ABRAHAM ABRAHAM SIMAMA APPLICANT

VERSUS

BAHATI SANGA FIRST RESPONDENT

NIXON MWAKIBETE SECOND RESPONDENT

NOLIC CO. LIMITED & COURT BROKER THIRD RESPONDENT

**(Application for extension of time to institute appeal from the ruling of the
High Court of Tanzania, Land Division at Dar es Salaam)
(Mzuna, J.)**

dated the 4th day of August, 2017

in

Land Case No. 313 of 2016

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RULING

23rd March & 14th April, 2021

NDIKA, J.A.:

This matter presents the sole question whether time should be enlarged for the applicant, Abraham Abraham Simama, to institute an appeal against the ruling of the High Court of Tanzania, Land Division (Mzuna, J.) dated 4th August, 2017. The application is by a notice of motion made under Rule 10 of the Tanzania Court of Appeal Rules (“the Rules”) supported by an affidavit sworn by Mr. Frank Chacha, an advocate having the conduct of the matter on behalf of the applicant. On behalf of Bahati Sanga and Nolic Co. Limited & Court Broker, the first and third respondents respectively, Mr. Amon Ndunguru,

learned advocate, swore an affidavit in reply strongly opposing the application. On his part, the second respondent, Nixon Mwakibete, did not file any affidavit in reply nor did he resist the application at the hearing.

As can be gathered from the accompanying affidavit, the applicant was the losing party in Land Case No. 313 of 2016 before the High Court of Tanzania, Land Division (Mzuna, J.), which he instituted against the respondents. Mzuna, J. struck out the suit with costs on 4th August, 2017 upon sustaining a point of preliminary objection that the action was *res judicata*. Resenting that outcome, the applicant duly lodged a notice of appeal on 7th August, 2017 manifesting his intention to appeal to this Court. It is noteworthy that in terms of Rule 90 of the Rules, the intended appeal was to be instituted within sixty days of the filing of the notice of appeal subject to exclusion of the period required for the preparation and delivery of the requested copy of the proceedings as certified by the Registrar of the High Court.

It is averred that having received a copy of the proceedings, the applicant presented the Memorandum and Record of Appeal to this Court's Registry on Monday 5th October, 2020 so as to institute his appeal but the Memorandum and Record of Appeal was rejected by the Registrar on the ground that, based

on the certificate of delay issued to the applicant, the appeal was time-barred as the sixty days limitation period had expired on Friday 2nd October, 2020.

According to the applicant, when the intended appeal was presented for lodgment on Monday 5th October, 2020, it was the last day of the prescribed limitation period but the appeal was mistakenly rejected because, acting on the certificate of delay, the limitation period must have expired on Friday 2nd October, 2020. To the contrary, it is deposed that the said certificate incorrectly excluded the limitation period up to 4th August, 2020 as being the date on which the applicant was notified of the requested copy of the proceedings being ready for collection instead of 5th August, 2020. As proof of the date of notification, a certified extract from the High Court's dispatch book is annexed to the founding affidavit. The appeal would have been in time had the notification date been correctly stated because the sixty days limitation, which would have expired on Saturday 3rd October, 2020, apparently a court vacation, would have been deemed to have elapsed on Monday 5th October, 2020, which was the next working day.

In the affidavit in reply, it is disputed that the copy of the proceedings was ready for collection on 5th August, 2020. It is maintained that on the basis of the certificate of delay relied upon by the applicant to lodge his intended

appeal the excluded period of a total of 1,092 days ended on 4th August, 2020 from 8th August, 2020, meaning that the limitation period for lodging the appeal ended on Friday 2nd October, 2020. This implies that when the appeal was presented for filing, it was about three days late.

At the hearing of the application, Mr. Chacha, learned counsel, stood for the applicant whereas Mr. Ndunguru represented the first and third respondents. The second respondent appeared in person, self-represented.

In his oral argument, Mr. Chacha essentially characterized the delay involved in lodging the intended appeal as nominal, arising from the error in the certificate of delay. To appreciate the essence of his submission, I find it necessary to extract the relevant part of the Deputy Registrar's certification of the excluded period thus:

*"This is to certify that the period from **8th August, 2017** when the Plaintiff requested for copies of the ruling, proceedings and drawn order in this matter up to **4th August, 2020** when the Plaintiff was notified that the documents were ready for collection, a total number of **1,092** days should be excluded in computing the time for instituting the appeal in the Court of Appeal."*

It was Mr. Chacha's contention that if the said certificate had correctly excluded the period for preparation and delivery of a copy of the trial

proceedings up to 5th August, 2020 instead of 4th August, 2020, the appeal presented for filing on Monday 5th October, 2020 would have been in time because the last day of the sixty days limitation reckoned from 5th August, 2020 would have been Saturday 3rd August, 2020. Since Saturday 3rd August, 2020 was a court vacation, the last day would have been Monday 5th October, 2020 on the reason that it was the next working day.

On the other hand, Mr. Ndunguru fervently opposed the application. While acknowledging that the applicant duly lodged his notice of appeal on 7th August, 2017 and that the intended appeal was due within sixty days thereafter, he submitted that as per the certificate of delay the applicant lodged his request for a copy of the proceedings on 8th August, 2017. On that basis, one day of the limitation period between 7th and 8th August, 2017 had already been spent and that the applicant was left with fifty-nine days to lodge the appeal after being supplied with the copy of the proceedings. According to his computation of the limitation period based on the certificate of delay, the remaining fifty-nine days expired on Friday 2nd October, 2020. He thus disagreed that the delay involved in the instant matter originated from the defect in the certificate of delay and urged me to dismiss the matter with costs.

When I queried if it was proper for the exclusion to be reckoned from 8th August, 2017, which was supposedly a public holiday, Mr. Ndunguru still stuck to his guns and added that the certificate of delay, if anything, was fatally defective. If I understood him correctly, it was his contention that the applicant should not have relied on that certificate to lodge his appeal.

As already stated, the second respondent did not oppose the application.

In a brief rejoinder, Mr. Chacha maintained that the certificate of delay was erroneous in stating the notification date as 4th August, 2020 instead of 5th August, 2020.

I have keenly examined the notice of motion, the supporting affidavit and the affidavit in reply in the light of the contending submissions of the learned counsel for the parties. The sticking question is whether there is a good cause warranting enlargement of time prayed for.

At first, I should state that the discretion of a single Judge of the Court for extending time under Rule 10 of the Rules is wide-ranging. It is exercisable judiciously upon reason rather than arbitrarily, capriciously, on whim or sentiment. Some considerations that have been consistently taken into account by the Court in determining if "good cause" has been disclosed include the

4th August, 2020 as being the date on which the applicant was notified of the requested copy of the proceedings being ready for collection while the actual date was 5th August, 2020.

Based on the above observations, I find that the certificate of delay incorrectly excluded a total of 1,092 days from 8th August, 2017 to 4th August, 2020 instead of a total of 1,094 days from 7th August, 2017 to 5th August, 2020. If reckoned from 5th August, 2020, the sixty days limitation period in terms of Rule 90 (1) of the Rules for instituting the appeal elapsed on Sunday 4th October, 2020, apparently a court vacation, hence the last day became Monday 5th October, 2020, as it was the next working day. Since it was not disputed the applicant actually presented his Memorandum and Record of Appeal to the Registrar on 5th October, 2020 but that it was rejected based on the manifestly imperfect certificate of delay that the appeal was time-barred, I am persuaded by Mr. Chacha that the applicant is plainly blameless. The delay involved in instituting the intended appeal arose from the apparent errors in the certificate of delay.

In sum, I find merit in the application. In consequence, I grant the applicant sixty days from the date of the delivery of this ruling to lodge the

appeal ought to have been filed within sixty days of the filing of the notice subject to the exclusion of the period of time required for preparation and delivery of the copy of the proceedings as certified by the Registrar of the High Court. While the applicant blamed his travails on the error on the certificate of delay, the respondent's counsel disagreed. In order to resolve this disparity, I carefully examined the aforesaid certificate and would now observe as follows. First, the statement on the certificate of delay reckoning the excluded period from 8th August, 2017 as the date on which the applicant lodged his request to the Registrar of the High Court for the copy of the trial proceedings is manifestly erroneously once judicial notice is taken of the fact that the aforesaid day was a public holiday, hence no such request could have been received by the registry of that court. Although it is unfortunate that the material before me does not disclose the exact date on which the said request was made, it is preponderant that the said request was made earlier than 8th August, 2017. It was most probably made along with the lodging of the notice on 7th August, 2017.

Secondly, having scrutinized the certificate of delay as against the certified extract from the High Court's dispatch book, I am persuaded by Mr. Chacha that the said certificate incorrectly excluded the limitation period up to

cause for the delay involved; the length of the delay; the conduct of the parties; the degree of prejudice, if any, that each party stands to suffer depending on how the Court exercises its discretion; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; whether there is a point of law of sufficient importance such as the illegality of the decision sought to be challenged: see, for instance, this Court's unreported decisions in **Dar es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987; **Tanga Cement Company Limited v. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001; **Eliya Anderson v. Republic**, Criminal Application No. 2 of 2013; and **William Ndingu @ Ngoso v. Republic**, Criminal Appeal No. 3 of 2014. See also **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] TLR 185; and **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

It is common ground that the applicant duly lodged his notice of appeal on 7th August, 2017 and that, in terms of Rule 90 (1) of the Rules, the intended

The delay involved in instituting the intended appeal arose from the apparent errors in the certificate of delay.

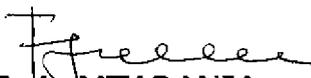
In sum, I find merit in the application. In consequence, I grant the applicant sixty days from the date of the delivery of this ruling to lodge the Memorandum and Record of Appeal so as to institute his intended appeal. Costs shall be in the cause.

DATED at **DAR ES SALAAM** this 29th day of March, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

The ruling delivered on this 14th day of April, 2021 in the presence of Mr. Frank Chacha learned Counsel for the applicant who is also holding brief for Mr. Amon Ndunguru, learned counsel for the respondents, is hereby certified as a true copy of original.




F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL