

IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

CIVIL APPLICATION NO. 301/03 OF 2021

PATRICK YUNDE KIMU (as administrator of

The late YUNDE KIMU) APPLICANT

VERSUS

RAJAB MGHENYI RESPONDENT

**(Application for extension of time from the decision of the High Court of
Tanzania, at Dodoma)**

(Mansoor, J.)

Dated the 19th day of February, 2021

in

Land Appeal No. 02 of 2020

RULING

18th August & 19th 2021

MAIGE J.A.:

In this matter, the applicant is seeking for an extension of time to lodge a record of appeal. The application which is preferred under rule 10 of the Court of Appeal Rules, 2009 ("the Rules") is founded on the affidavit of the applicant, Patrick Yunde Kimu under his representative capacity as the administrator of the estate of the late Yunde Kimu.

The application traces its genesis from the decision of the District Land and Housing Tribunal for Singida ("the trial tribunal") in Application No. 80 of 2016. In the said application, the respondent came out victoriously in a suit for recovery of ten acres land at Unyankhanya village, Siuyu Ward within Ikungu District in Singida Region ("the disputed

property")- Notwithstanding the appellant's first appeal to the High Court of Tanzania at Dodoma vide Land Appeal No. 2 Of 2020, the decision of the **trial tribunal** remained undisturbed.

Being aggrieved by the concurrent decision of the two lower courts, the applicant lodged, on 26th day of February 2021, a notice of appeal and on 2nd day of March 2021, an application for leave to appeal to the Court of Appeal. On 3rd day of May 2021, leave to appeal was granted. In this application which was filed on 24th June 2021, the applicant claims that, he could not timely institute his appeal because he was prosecuting the above application.

Under rule 90 (1) of the Rules, an appeal has to be instituted within 60 days of the date when the notice of appeal was lodged. It is nonetheless the position of law under the respective provision read together with subrule 3 thereof that, provided the intended appellant requests, in writing, for a copy of the proceedings in the High Court within 30 days of the date of the decision and serve a copy of the request letter on the adverse party within the period of 14 days from the date thereof, the period in which the intended appellant was awaiting for the record shall, by way of a certificate of delay issued by the Registrar of the High Court, be excluded in computing the period of limitation.

In the affidavit, it is apparent, whether the applicant requested for a

copy of the proceedings of the High Court and whether he was supplied with the same, is not stated. For that reason, Mr. Leonard Mwanamonga, learned advocate for the respondent, submits that, since the appellant did not formally request for a copy of the proceedings, the delay to institute the appeal cannot be associated with the prosecution of the said application. In the alternative, it is the counsel's submission that, in the absence of the request letter, the grant of the application will be useless because as the position of law stands, the intended appeal is bound to be struck out for being time barred. The counsel submits further that; if, which he denied, the prosecution of the application for leave was a justifiable ground of delay in the circumstance, the applicant would still be condemned for failure to account for every day of delay. In his conclusion therefore, the application is without merit and ought to be dismissed.

On his part, the respondent who appears in person without legal representation, adopts the facts in the affidavit and submits that sufficient cause for extension of time has been demonstrated. On omission to request in writing for a copy of the proceeding, it is his submission that, the same was unnecessary in as long as he was timely supplied with a copy of the proceedings. He thus urges the Court to grant the application.

Having exposed the arguments for and against the motion, the question which I have to address is whether or not sufficient cause for

extension of time has been demonstrated. Parties appear not to be in dispute that, prosecution of another proceeding relevant to the appeal may amount to sufficient. See for instance, **Emmanuel Rurihafi and another v. Janas Mrema**, Civil Appeal No. 314 of 2019 (unreported). The debate, it would appear, is whether in the circumstance of this case where the applicant did not request for a copy of the proceedings, it can be said that, the delay was connected with prosecution of the said application.

Let me say right from the outset that, it is not a legal requirement that the institution of an appeal to the Court has to be preceded by the request letter envisaged in rule 90(3) of the Rules. It is however a condition *sine qua non* that, for the intended appellant to be entitled exclusion of the period he had been waiting for a copy of the record, he must have made such a request in writing and served the same on the adverse part within the prescribed period of time. Therefore, in **Victoria Mbowe vs. Christopher Shafurael Mbowe and another**, Civil Appeal No. 155 of 2012, it was held as follows: -

"/Is a matters stand, we are in agreement with Mr. Mganyizi that in the absence of a letter applying for the copy of the proceedings, the appellant was supposed to institute her appeal within sixty (60) days reckoned from 7/12/2010 when she lodged her notice of appeal. Thus, we are settled in our mind that the present purported appeal which was initiated on 11/12/2012 in violation of Rule 90(1) of the Rules is,

unarguably, time barred".

In this matter, the applicant, it would seem, wants the Court to take it that, the non-compliance of the respective provision is irrelevant because the record of appeal was supplied on him before the expiry of the statutory period. If everything remains constant, that will mean, in my view that, the applicant would but for the delay to procure a leave to appeal, instituted the appeal within the statutory period. I submit that, whether the record was supplied on the applicant within time or not is a question of fact which was to be stated in the affidavit. In the absence of that, the Court cannot have factual basis to decide when the record was served on the applicant and whether it was before or after the expiry of the statutory time limit.

I therefore, agree with Mr. Mwanamonga, learned advocate that, as the date on which the record was supplied to the applicant is not established, this Court is not in a position to determine to what extent the delay to procure a copy of the proceedings accounted for the lateness to institute the intended appeal. It would sound to me to be the law that, where the ground for extension of time to file an appeal is prosecution of an application for leave to appeal or certificate on point of law, as the case may be, the extension of time has to be counted from the date when the applicant was supplied with the record of appeal. The rationale behind being that, under the provision of rule 90 (1) of the Rules, the time limit for lodging an appeal does not run until the intended appellant is supplied

with a copy of the proceeding. Interpreting the provision otherwise, would, in my humble opinion, lead to confusion between the exclusion by the Registrar of the High Court under the respective provisions and the discretion of the Court under rule 10 of the Rules, to extend time within which to appeal.

That being the case and indeed it is, disclosure of whether the applicant formally requested for the record and when was he supplied with the same is the essential element of an application of this nature. In not clearly stating such an essential element in the affidavit, the applicant has not been able to establish causal connection between prosecution of the said application and delay to institute the intended appeal.

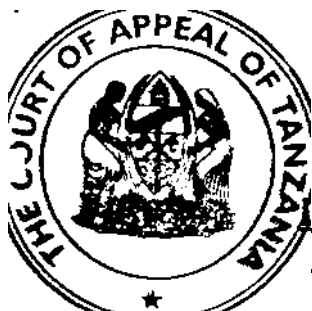
If, however, contrary to the opinion I have expressed, the prosecution of the application in question accounted for the delay, yet the application would not succeed for failure to account for every day of delay as required in among other authorities, **Zuberi Nassor Moh'd v. Mkurugenzi Mkuu Shirika la Bandari Zanzibar**, Civil Application No. 93/15 of 2018 (unreported). For, the facts in the affidavit indicate that though leave to appeal was granted on 3rd May 2021, this application was filed after lapse of more than 50 days. In the affidavit, such period has not been accounted for. It should have.

In my opinion therefore, the instant application is without merit. It is accordingly dismissed

DATED at DODOMA this 19th day of August, 2021

I. J. MAIGE
JUSTICE OF APPEAL

This Ruling delivered on 19th day of August, 2021 in the presence of the applicant in person and Mr. Leonard Mwanamonga, learned counsel for the respondent, is hereby certified as a true copy of the



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL