

IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

CIVIL APPLICATION NO. 125/03 OF 2020

OMARY SHABAN S. NYAMBU (as the APPLICANT
Administrator of the late IDDI MOHA (Deceased)

VERSUS

DODOMA MUNICIPAL COUNCIL (FORMERLY
CAPITAL DEVELOPMENT AUTHORITY1ST RESPONDENT

THE REGISTERED TRUSTEES OF THE DAR ES SALAAM
YEMEN COMMUNITY FOR CHARITY & CULTURE (DYCCC)2ND RESPONDENT

BAHAJ CONSTRUCTION WORKS LIMITED3RD RESPONDENT

**(Application for extension of time to lodge a Notice of Appeal
to Appeal to Court of Appeal of Tanzania against the Ruling and Order of
High Court of Tanzania at Dodoma)**

(Sehel, J)

dated 24th day of May, 2016

In

Land Case No. 12 of 2015

.....

RULING

17th & 26th August, 2021

KOROSSO, J.A

By a Notice of Motion made under Rule 10 and 45A (a) and (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules), Omari Shaban S. Nyambu, the applicant herein in his capacity as the administrator of the estate of the late Idd Moha, seeks the following reliefs; one, extension of time within which to lodge a Notice of Appeal; and Two, application for extension of time for leave to appeal to this Court against the decision of the High Court dated 24/5/ 2016, Land Case No. 12 of 2015.

The application is supported by an affidavit deposed by the applicant. Contesting the application, all the respondents filed affidavits in reply. The 1st respondent affidavit in reply is affirmed by Msekeni Ally. Mkufya, a principal officer of the 1st respondent and the 2nd and 3rd respondents' affidavit in reply is sworn by Deus Juma Nyabiri, learned Advocate.

The reasons advance for the application are found in the notice of motion and in summary they are: **One**, that the applicant was an applicant in Land Case No. 12 of 2015 delivered on 24/5/2016 (impugned decision) which ended in favour of respondents after the trial court sustained a preliminary objection; **Two**, that the applicant was aggrieved by the impugned decision and thereafter lodged a notice of appeal filed an appeal to the Court marked as Civil Appeal No. 256 of 2017; **Three**, that Civil Appeal No. 256 of 2017 was struck out by the Court on ground of incompetent certificate of delay; **Four**, that the applicant intends to pursue an appeal to the Court arising from the impugned decision; **Five**, that extension of time to lodge a fresh notice of appeal was sought in the High Court and dismissed (1st bite) and **Six**, the delay in lodging the notice of appeal within time has been caused by the technical defects relating to the certificate of delay issued by the Registrar of the Court without withdrawing the previous one.

To appreciate the issues involved in this application, it is pertinent to bring forth albeit briefly the background to the matter at hand. The applicant, who is the administrator of the estate of the late Iddi Moha instituted a suit in the High Court of Tanzania, sitting at Dodoma in Land Case No. 12 of 2015 claiming against the respondents; Capital Development Authority, the Registered Trustees of the Dar es Salaam Yemen Community for Culture (COYCCC) and Bahaj Construction Works Limited, seeking to be declared the lawful owner of a piece of land, plot No. 26 (suit property) (also alleged to have formally been as No. 21, situated on Block 16 within Dodoma City). The 2nd and 3rd respondents raised a preliminary objection which was sustained by the High Court (Sehel, J) holding that there existed in the same court, another suit, Land Case No. 4 of 2015 which involves the same subject matter, that is the suit property and the same parties except for the 1st respondent. The matter was declared to be *res-subjudice*. Dissatisfied, the applicant appealed to the Court, in Civil Appeal No. 256 of 2017 which was struck out for having two certificates of delay. Undaunted, the applicant lodged an application in the High Court, in Misc. Land Application No. 66 of 2018 seeking extension of time to lodge notice of appeal and to file an application for leave to appeal to the Court against Land Case No. 12 of 2015.

When the application came for hearing, the applicant was represented by Mr. Mohamed Tibanyendera, learned counsel. The 1st respondent was represented by Mr. Camilius Ruhinda and Ms. Jennifer Kahaya both learned Senior State Attorneys, assisted by Mr. Thomas Mahushi, learned State Attorney. On the part of the 2nd and 3rd respondents, they enjoyed the services of Mr. Deus Nyabiri, learned Counsel.

Mr. Tibanyendera at the outset prayed to withdraw one of the prayers, that is, for extension of time to lodge an application for leave to appeal to the Court. The prayer was granted being uncontested and the prayer for extension of time to file an application for leave to appeal to the Court was marked withdrawn.

Mr. Tibanyendera, submitted that the reasons for the application were found in the notice of motion. He alluded the fact that the applicant had filed an appeal to this Court, No. 256 of 2017 which was struck out because the certificate of delay was found to be defective. He stated that after the appeal was struck out, he had to restart the process with filing a notice of appeal hence the current application. He prayed to adopt the applicant's affidavit and prayed it be considered as part of the applicant's overall submissions.

Mr. Tibanyendera argued further that what is averred in the applicant's affidavit shows that there were two cases which did not involve all the parties and that the dismissal of Land Case No. 12 of 2015 did not interfere with the pendency of Land Case No. 4 of 2015 since, the latter had earlier been filed by the applicant against the 2nd applicant. According to him, Land Case No. 12 was filed against the 1st respondent and in the impugned decision it was ordered that the 2nd and 3rd respondent be joined in Land Case No. 12 despite the Court having been informed of the pending case and it led to amending the plaint to comply with the court order.

The learned counsel submitted that upon the Court's decision to dismiss Land Case No. 12 of 2015 as averred in paragraph 10 of the applicant's affidavit, Land Case no. 4 of 2015 was also dismissed on a similar ground. He argued that the two cases did not end the dispute amongst the parties and in essence it created an unfair advantage to the respondents who had entered the suit property and took over.

The learned counsel concluded by praying for extension of time to file notice of appeal so that the process of appeal which had been stopped by legal process moves on and if the application is not granted, the applicant will suffer grave loss, that will arise from the illegalities

that led to acquisition of the disputed property. The learned counsel urged the Court to grant the relief sought pursuant to Rule 45A of the Rules.

Mr. Ruhinda contested the application and adopted the affidavit in reply. He contended that the High Court (Hon. Sehel, J. as she then was) held *suo motu* that the matter before the court was *subjudice* for reasons found in the said decision. With regard to the instant application, the learned Senior State Attorney argued that the applicant has not fully explained in his affidavit the reasons for delay to file the appeal on time so as to seek the current application especially when paragraph 9 of the applicant's affidavit is scrutinized.

The learned Senior State Attorney also challenged the argument that the delay to file the appeal on time was occasioned by a technical delay. He argued that the said term is used to disguise that the applicant was negligent since from the start he was supposed to know what to do in view of having a learned counsel representing from an early stage. Mr. Ruhinda referred me the case of **Lyamuya Construction Company Ltd. vs Board of Registered Trustee of Young Women and Another**, Civil Application No. 2 of 2010 (unreported) to reinforce his stance.

Ms. Kaaya took over and expounded the import of **Lyamuya's case** (supra), which she argued established four guidelines when illegalities of a decision is advanced as a ground to seek extension of time. She contended that the position of the law is clear that the illegality in decision claimed must be apparent on the face of the record. She argued that having gone through the impugned decision there is no visible illegality as claimed and that similarly, the alleged illegality was not claimed in the applicant's affidavit and thus should not be considered in the light of the case of **The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government and 11 others**, Civil Appeal No. 147 of 2006. Ms. Kaaya argued further that the import of the cited decision is that the contention presented by oral submission is not evidence and therefore the Court can not consider mere assertions without evidence. She then implored me to hold that there is no good reason advanced for the prayer sought and the application be dismissed with costs.

Mr. Nyabiri, commenced by adopting the affidavit in reply filed contesting the application. He alluded the fact that the provision grounding the application that is Rule 10 of the Rules that predicates the instant application requires that extension of time applied for should be based on showing good cause for the delay so as to move the Court to

exercise discretion to grant the prayer sought. He argued that in the applicant's notice of motion it is only paragraph (g) which alludes anything within the requirements of Rule 10 of the applicant's affidavit. The counsel contended that a number of paragraphs in the affidavit aver on matters related to seeking certificate of delay which is not an essential process is seeking extension of time to file notice of appeal for the intended appeal.

Mr. Nyabiri argued further that at page 10 of the judgment of the court in **Omari Nyumbu** Civil Appeal No. 256 of 2017, it was observed that the applicant requested for a certificate of delay twice and therefore he cannot blame the court for issuing two certificates of delay, which led to the appeal to be struck out for incompetence. Additionally, the learned counsel for 3rd and 4th appellant controverted the applicant's assertion that the impugned decision was dismissed, contending that it was held to be *subjudice*.

Additionally, the counsel stated that by the time the impugned decision was pronounced the first case had already been determined. He argued that in his scrutiny of the notice of motion and the applicant's affidavit there is nothing averring on condonation of delay so as to file the notice of appeal on time. He asserted that even claims that the

impugned decision is endowed in illegalities is not expounded in the affidavit and such claims cannot be grounded by oral submission to substantiate the said claims. He prayed for the application to be dismissed with costs.

The rejoinder was a reiteration of the submission in chief. The applicant's counsel contended that the impugned decision came after the decision in the second case was delivered. He urged the Court to refer to the cases in the list of authorities filed by the applicant because they address condonation of delay and factors to be considered to lead it to exercise its discretion to grant the prayers sought.

I have carefully considered the affidavits, notice of motion, submissions and the cited authorities to support the cases for the parties. The grounds for the application are as expounded herein above as found in the notice of motion. What is averred in the applicant's affidavit regarding reasons for delay are found in paragraph 13, 14, 16 and 19. Perusing through the affidavit, it is clear that the applicant concentrated on averring on the reason related to the dismissal of Land Case no. 12 of 2015 and land Case 4 of 2015 and the intended appeal, (see paragraphs 4, 5, 6, 7, 8, 9, 10, 11 and 12) and not the substance of the instant application.

It is a settled position that extension of time is discretionary on the part of the Court. Discretion which must be exercised judiciously and to a large extent confined to the facts of a particular case. Rule 10 of the Rules guides that when exercising the said discretion, the applicant must establish a good cause for the delay. However, there is no clear definition of good cause which can fit all possibilities. The Court has provided guidance on factors to consider when determining what can be considered to be good cause. These include, reasons for the delay, the length of the delay, whether the applicant was diligent, the degree of prejudice to the respondent if time is extended. See, **John Lazaro vs Republic**, Criminal Application No. 34/4 of 2017 and **Tanga Cement Company Limited vs Jumanne D. Masangwa and Another**, Civil Application No. 6 of 2001 (all unreported).

Evidently, the first application for extension of time to file notice of appeal in the High Court, Misc. Land Application No. 66 of 2018 (HCT Unreported) was dismissed, the learned Judge finding that the applicant failed to adduce sufficient reasons for the delay. In the instant application, it is important to note that in considering the reasons to condone the delay to file the notice of appeal on time, I have to take into consideration all the processes undertaken by the applicant in pursuant of justice after the pronouncement of the impugned decision,

regard shall be on how the applicant has accounted for the time from the time the appeal to the Court, that is, Civil Appeal No. 256 of 2017 was struck out. In my scrutiny of documents before me, starting with what is averred in the applicant's affidavit it is clear that there is limited information on action taken by the applicant to pursue the intended appeal.

Suffice to say, the decision of the Court striking out the appeal was pronounced on the 17/7/2018. Paragraph 15 of the supporting affidavit avers that upon receiving the Court of Appeal Ruling, the applicant applied to the Registrar requesting him to withdraw the certificates of delay and for a new certificate of delay in a letter dated 27/7/2018. This was 9 days after the delivery of the Ruling. However, I agree with the counsel for the 2nd and 3rd applicant in that at this juncture, I find no link between the certificate of delay sought and process to initiate appeal which means filing a notice of appeal on time.

Having carefully revisited the applicant's affidavit, I find no averment that shows the initiative done by the applicant related to *filing* a notice of appeal or the current application after the decision of the Court of Appeal. The only other initiative that can be linked to this application is averred in paragraph 19 of the applicant's affidavit related

to the filing of the application for extension of time to file notice of appeal, in Land Application No. 66 of 2018, whose decision was delivered on 16/8/2019.

The present application was filed on 4/11/2019, which is more than two months after the said application was dismissed. Essentially, an applicant is expected to account for each day of delay and to act promptly in filing the requisite documents in processing intended appeal. (See, **Isawakwe iduwandum Ng'unda vs Jennifer Danister and Another**, Civil Application No 339/02/2017; **Eliya Anderson vs Republic**, Criminal Application No. 2 of 2013 (both unreported)). With the averments in the applicant's affidavit can it be said that the applicant has accounted for each day of delay? Can it be said that he has shown diligence in pursuit of justice? I am inclined to agree with the learned counsel for the respondents that this was not the case. The applicant has failed to account for the delay to enable me to condone the delay to file the notice of appeal out of time.

I am alive to the principles for grant of extension of time pronounced in **Lyamuya's case** (supra) that:

"(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 their other sufficient reasons, such as the existence of a point of Law of sufficient importance; such as the illegality of the decision sought to be challenged."*

Allegations of illegality on the decision is one of the factors which courts are expected to consider. I am alive to the fact that in his oral submissions the applicant's counsel has claimed illegalities patent in the impugned decision. The applicant has not averred any illegality in the applicant's affidavit nor expounded any areas of concern to expound the claimed illegality in the impugned decision. Suffice to say, in **Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government and 11 Others**, (supra) it was held that:

"...it was expected that reasons for the delay would be reflected in the affidavit. In the absence of reasons, it occurs to us that there was no material evidence upon which the judge could determine on merit the application before him..."

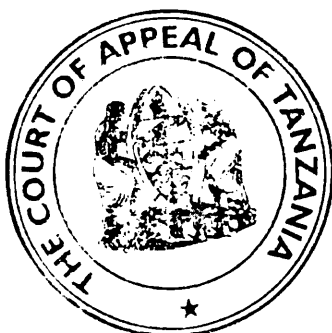
The averments in paragraph 7 of the applicant's affidavit do not aver apparent illegalities in the impugned decision. I am thus of the opinion that the applicant has failed to show illegalities which are apparent and thus will require taking a long-drawn process to decipher the alleged illegalities from the impugned decision. (See, **Lyamuya's case** (supra) **and Ngao Godwin Losero vs Julius Mwarabu**, Civil Application No 10 of 2015 (unreported).

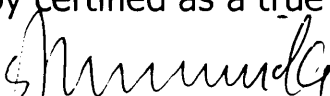
Therefore, I am satisfied that the applicant has not demonstrated any good cause to entitle him to be granted the prayer sought. In the final analysis, the application fails and is accordingly dismissed with costs.

DATED at **DODOMA** this 27th day of August, 2021.

W.B. KOROSSO
JUSTICE OF APPEAL

This Ruling delivered on 27th day of August, 2021 in the presence of Ms. Nyanjiga Nyabukika learned counsel for the 2nd and 3rd respondents who is also holding brief for Mr. Mohamed Tibanyendera for the applicant, and Mr. Camilius Ruhinda learned Senior State Attorney for the 1st respondent, is hereby certified as a true copy of original.




S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL