

IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

CIVIL APPLICATION NO. 27/03 OF 2021

HAWA ISSA NCHIRYA.....APPLICANT

VERSUS

RAMADHANI IDDI NCHIRYA.....1ST RESPONDENT

HASSAN IDDI NCHIRYA2ND RESPONDENT

HAMIS ADINANI3RD RESPONDENT

**(Application for extension of time to institute an appeal from the
decision of the High Court of Tanzania, at Dodoma**

(Mansoor, J.)

dated the 25th day of October, 2019

in

Land Appeal No. 12 of 2019

.....

RULING

10th & 18th August, 2021

MWANDAMBO, J.A.:

Hawa Issa Nchirya, the applicant was aggrieved by the decision of the High Court sitting at Dodoma delivered on 25/10/2019 quashing the judgment of the District Land and Housing Tribunal (DLHT) which was in her favour. She subsequently lodged a notice of appeal against that decision. As she was late in instituting her appeal, the applicant has now lodged an application by way of notice of motion predicated under rule 10

of the Court of Appeal Rules, 2009 (the Rules) seeking extension of time within which to do so. To her notice of motion, the applicant has annexed an affidavit in support of the application. The respondents resist the application through an affidavit in reply deposed to by Mr. Fred Peter Kalonga, learned advocate instructed to represent them.

The chronology of the events is well set out in the applicant's affidavit which is not disputed by the respondents except for the reason for the delay set out in para 8 of the founding affidavit. The applicant lost to the respondents before the High Court sustaining their appeal from the DLHT which had decreed the applicant as the lawful owner of a parcel of land the subject of the dispute in the trial tribunal. Afterwards, the applicant lodged her notice of appeal on 5/11/2019 simultaneous with a letter applying for copies of requisite documents for the purpose of the intended appeal. Subsequently, she successfully applied for leave to appeal. On 25/08/2020, the Deputy Registrar of the High Court notified the applicant to collect copies of the documents requested for which she did. Four days later, on 29/08/2020, to be precise, the Deputy Registrar issued a certificate of delay excluding 329 days from 5/11/2019 to 29/08/2020 from the computation of the limitation period for the purpose

of the appeal as necessary for the preparation and delivery of the copies of the documents to the applicant. Nevertheless, the applicant delayed in instituting her appeal within the prescribed period. Explaining away the delay, the applicant avers that the documents she collected for the purpose of the intended appeal were being processed in Dodoma; away from Kondoa where she resides. It was not until 7/10/2020, when she was informed by phone to travel to Dodoma to sign the documents at the time, she was already admitted at Kondoa District Hospital receiving treatment were discharged on 12/10/2020.

The applicant depones further that despite being discharged, she was still weak and feeble continuing with medication which made it difficult for her to be able to travel to Dodoma to sign the documents and have them lodged in Court within the prescribed time. In para 9 of the affidavit, the applicant avers that the delay was not due to negligence or intentional delay, rather sickness beyond her control and thus the Court should find it fit and just to extend the time sought.

For their part, the respondents have taken issues with the applicant's averments as they relate to sickness as a reason for the delay in instituting

the appeal the more so because the applicant has failed to account properly for the days of delay.

During the hearing, Mr. Godfrey Wasonga, learned advocate appeared to prosecute the application for the applicant. The learned advocate is reflected in the notice of motion as having been retained to draw the applicant's documents. Having adopted the averments in the founding affidavit, Mr. Wasonga impressed upon the Court that much as he had been retained to draw the documents in the intended appeal, he had no instructions to sign and lodge them in Court which explains why he had to call the applicant to travel from Kondoa to sign the documents in Dodoma. According to the learned advocate, the applicant's averments in para 8 of the affidavit have sufficiently explained the reason for the delay warranting the Court's exercise of its discretion to extend the time sought. Whilst conceding that the applicant had 17 days to institute her appeal after her discharge from the Hospital on 12/10/2020, the learned advocate contended that the applicant's state of health could not have allowed her to travel and sign documents in Dodoma.

In his reply, essentially, Mr. Kalonga submitted that the applicant has not accounted for each day of delay. He advanced two reasons to support his contention. **One**, the applicant has not said anything in relation to the period from 29/08/2020 when the Deputy Registrar of the High Court issued her a certificate of delay to 5/10/2020 when she was admitted in hospital and later from 12/10/2020 to 29/10/2020 when 60 days to institute the appeal elapsed. **Two**, her affidavit is silent in relation to the period after the expiry of the time for instituting the appeal to the date of filing the instant application which, according to him, was an inordinate delay. The learned advocate contended that much as the applicant is a lay person, she was at all material times being guided by an advocate who drew the documents on her behalf. He thus prayed that the application should be dismissed with costs.

In his brief in rejoinder, Mr. Wasonga contended that the applicant has explained away the delay in her affidavit which shows that she was weak and feeble after her discharge from hospital which impacted on her ability to travel to Dodoma to sign the documents. However, he had difficulties in relating that contention with any medical proof.

From the affidavit and the submissions for and against the application, most of the facts are not in dispute except the reason for the delay and the promptness in filing the instant application. The issues for my consideration revolves around whether the applicant's sickness contributed to the delay in instituting the appeal within the prescribed period and if so, whether she acted promptly in filing the application for extension of time.

For a start, rule 10 of the Rules vests in the Court power to extend time for doing any act authorised by the Rules or by any order of the Court either before or after the expiration of the period limited by the Rules. The instant application seeks an order extending time for instituting an appeal from the decision of the High Court delivered on 25/10/2019. It is common ground that the applicant complied with rule 90 (1) of the Rules by applying for requisite documents for the purpose of the intended appeal. Consequently, the time limit for instituting the appeal was 60 days from the date the Deputy Registrar of the High Court notified the applicant of the availability of the copies of documents required after excluding the days necessary for the preparation and delivery of such documents to the applicant. It is common ground too that in the certificate of delay, the

Deputy Registrar excluded 329 days as necessary for the preparation of the necessary documents which were ready for collection on 29/08/2020. That means, the period for instituting the appeal started running from 29/08/2020 and thus, the applicant had up to 29/10/2020 to institute her appeal. This the applicant failed to do attributing such failure to illness which resulted into her admission at Kondoa District Hospital from 5/10/2020 to 12/10/2020. At that time, the applicant had 17 days to the deadline.

Mr. Wasonga urged me to accept the applicant's averment in para 8 of her affidavit as sufficient explanation for the delay which Mr. Kalonga disagreed. Para 8 of the affidavit shows that after she was discharged from hospital, the applicant was still weak, feeble and on medication. In the same paragraph, the applicant avers that she was informed on 7/10/2020 that her documents were ready for signing in Dodoma at a time when she was unconscious and bed ridden. One may be prompted to ask, if the applicant was informed of the signing of documents while in a hospital bed unconscious on 7/10/2020, it is not clear how was it possible for an unconscious person to have been able to engage into a call with her caller in that state. Otherwise, if she was able to talk from a hospital bed, the

applicant has failed to explain why she could not instruct the person who was dealing with her documents instantly or, at the latest immediately after her discharge from hospital.

Admittedly, the medical report; annexure HAWA 7 to the affidavit shows that the applicant was to attend medical clinic at OPD on monthly basis and physiotherapy on daily basis. But that as it may, it is not indicated for how long was the applicant required to attend physiotherapy just as it is not clear from the affidavit when did the physiotherapy end. Under the circumstances, it cannot be said with any degree of certitude whether the delay in instituting the appeal was wholly attributable to the applicant's illness and her admission in a hospital for one week.

In **Juto Ally v. Lukas Komba & Another**, Civil Application No. 484/17 of 2017 (unreported), the applicant had delayed in serving copies of the notice of appeal on the respondents together with a letter to the Registrar to be supplied with requisite copies for the purpose of the intended appeal. Like in the instant application, the applicant attributed her delay to sickness. Rejecting that assertion, the Court stated that where the applicant's delay is due to illness, she must show how that illness

contributed to the delay as opposed to a general statement as it were. In a subsequent decision in **Sabena Technics Limited v. Michael J. Luwungu**, Civil Application No. 451/18 of 2020 citing **Juto Ally**, the Court reiterated its stance holding that to amount to a good cause for the delay, there must be evidence that sickness had a bearing on the delay. There is scant material in the affidavit linking the delay with the applicant's sickness which occurred more than a month after being supplied with requisite copies by the Deputy Registrar. Similarly, as submitted by Mr. Kalonga, there is not enough material to support a conclusion that the sickness continued as late as 29/10/2020, the date on which the time for instituting the appeal expired.

Mr. Wasonga's invitation notwithstanding, I find myself constrained to disagree with him guided by well established principles for the exercise of discretion particularly in applications for extensions of time such as this one. One of such well cherished principles is that the Court's discretion must be exercised judiciously as opposed to capriciousness. In **Daphne Parry v. Murray Alexander Carson** [1963] EA 546 cited with approval by the Court in **Daud s/o Haga v. Jenitha Abdon Mchafu**, Civil

Application No.19 of 2006 (unreported), Sir Ralph Windham, CJ referred to extracts in the works of *Rustomji, Law of Limitation* 5th edition thus:

"It does not seem just that an applicant who has no valid excuse for failure to utilize the prescribed time, but tardiness, negligence or ineptitude of counsel should be extended extra time merely out of sympathy for his cause."

See also: **Allison Xerox Sila v. Tanzania Harbours Authority**, Civil Reference No. 14 of 1998 (unreported).

I think it will be clear by now to Mr. Wasonga that sympathy is not one of the factors to be considered in by the courts in exercising discretion to extend the time as it were. On that score, and with unfeigned respect, I would reject the argument that the delay in instituting the appeal was solely due to the applicant's illness.

Next for my consideration is whether the applicant has accounted for each day of delay in relation to the filing the instant application. Mr. Wasonga would have me agree with him but with respect, I am unable to do so in the light of the submissions made by Mr. Kalonga. I have no doubt that Mr. Wasonga is aware that it is settled law that in considering

applications such as this one, the Court is guided by established principles to wit; reason or cause and length for the delay, whether the applicant has accounted for each day of delay etc. See for instance, the Court's decisions in **Lyamuya Construction Co. Ltd v. Board of Trustees of Young Women's Christian Association (YWCA)**, Civil Application No. 2 of 2010, **Elifazi Nyatega & 3 Others v. Caspian Mining Ltd**, Civil Application No. 44/08 of 2017 and **Moses Mchunguzi v. Tanzania Cigarette Co. Ltd**, Civil Application No. 531/4 of 2016 (all unreported).

As rightly submitted by Mr. Kalonga, if I was to accept that the appellant's illness as the reason behind the delay in lodging the appeal, I am unable to accept that the applicant was prompt in moving the Court for extension of time after the lapse of the time for instituting her appeal on 29/10/2010. This is so because the applicant has not accounted for 94 days between 29/10/2020 to 5/02/2021 when she filed the instant application. Guided by the decided cases in this regard, a delay of more than three unaccounted for months is, with respect, an inordinate delay under the circumstances.

In the upshot, as the applicant has not succeeded in persuading me to exercise my discretion extending the time under rule 10 of the Rules, I

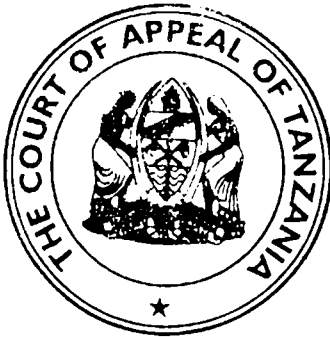
find no merit in the application and dismiss it. Considering the peculiar circumstances involving relatives, I make no order as to costs.


Order accordingly.

DATED at DODOMA this 16th day of August, 2021.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The ruling delivered this 18th day of August, 2021 in the presence of Mr. Godfrey Wasonga, learned counsel for the applicant and the respondents present in person too is hereby certified as a true copy of the original.




S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL