

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 432/17 OF 2017

1. NATIONAL HOUSING CORPORATION
2. ATTORNEY GENERAL
3. LARS ERIC HULSTROM
4. MANYONI AUCTIONEERS } **APPLICANTS**

VERSUS

JING LANG LI RESPONDENT

**[Application for Extension of Time to file a Notice of Appeal from the
Judgment and Order of the High Court (Land Division) at Dar es Salaam]**

(Ngwala, J.)

Dated the 27th day of April, 2012

in

Land Case No. 129 of 2006

RULING

9th February & 12th March, 2021

MWAMBEGELE, J.A.:

Initially, there were only three applicants in this application. However, the Attorney General sought and obtained leave to be joined as an applicant. By an order of the Court dated 11.11.2019, the Attorney General was granted leave to join the proceedings at this stage as one of the applicants. For convenience, heeding to an eminent proposal by Mr. Paschal Malata, Solicitor General, I have made the Honourable the Attorney

General the second applicant and renumbered the second and third applicants as third and fourth.

By a Notice of Motion taken under the provisions of rules 10 and 48 of the Tanzania Court of Appeal Rules, 2009 – GN No. 368 of 2009 (henceforth the Rules), the applicant moves the Court to extend time within which to file a notice of appeal against the decision of the Land Division of the High Court (Ngwala, J.) dated 27.04.2012 in Land Case No. 129 of 2006. The application is supported by an affidavit deposed by Masumbuko Roman Mahunga Lamwai. It was lodged after the High Court (Mzuna, J.) refused to extend time on 15.09.2017 in Miscellaneous Land Application No. 454 of 2017.

At this juncture, I find it apt to narrate the background to this application before me, albeit briefly. It is this: the dispute between the first applicant and the respondent in relation to the property the subject of this application dates back to the year 2003 in Land Case No. 1 of 2003. The respondent was a tenant of the first applicant in Apartment No. 103 situated at Plots No. 3, 5, 7 and 9 along Haile Selassie Road, Oysterbay area, Kinondoni District in the City of Dar es Salaam. She had been issued with an eviction notice whereas in challenging the validity of the notice, she instituted Land Case No. 1 of 2003 whose end result was an amicable

settlement on the ground, among many, that the first respondent would withdraw the notice of termination of the tenancy agreement.

At a later stage; on 30.09.2003, the first applicant issued another notice of termination of the tenancy agreement and appointed the fourth applicant to carry out the eviction. The eviction was carried out on 09.05.2006 in the absence of the respondent. Not amused, the respondent filed in the High Court Land Case No. 129 of 2006 suing the first, third and fourth applicants for unlawful eviction. The High Court (Ngwala, J.) decided in favour of the respondent on 27.04.2012. Dissatisfied, the first, third and fourth applicants lodged a Notice of Appeal, requested for copies of the proceedings, judgment and decree and finally lodged Civil Appeals No. 47 and 45 of 2013 which were consolidated but to their dismay, the consolidated appeal ended up being struck out on 12.09.2014 for want of competency. The Court (Msoffe, Bwana and Massati, JJ.A) observed that leave to appeal was not included in the record of appeal thus making it incomplete and finally rendering the appeal incompetent.

Still eager to pursue an appeal to the Court, the first, third and fourth applicants made an application before the High Court for extension of time to file a fresh Notice of Appeal as well as requested for leave to appeal to the Court vide Miscellaneous Land Application No. 102 of 2014. Both

applications were granted on 31.10.2014. This enabled the first, third and fourth applicants to set foot again into the Court through Civil Appeal No. 52 of 2016 which again ended up being struck out on 31.05.2017 for want of competency since one page of the Amended Written Statement of Defence was missing in the record of appeal.

The applicants did not despair. They went back to the High Court (Land Division) and filed yet another application for extension of time to lodge a Notice of Appeal through Miscellaneous Land Application No. 454 of 2017. However, as already stated above, the High Court (Mzuna, J.), dismissed it on 15.09.2017 under on the ground that there was no illegality in the High Court's decision and that litigations should come to an end. Undeterred, the applicants have come to the Court seeking the same extension of time sought in the High Court on what is commonly known in this jurisdiction as a second bite.

At the hearing of the application before me on 09.02.2021, Mr. Gabriel Malata, learned Solicitor General, Ms. Anjela Lushagara, learned Principal State Attorney and Mr. Aloyce Sekule, also learned State Attorney joined forces to represent the first and second applicants. Mr. Jebra Kambole, learned advocate, held brief for Mr. Chance Luoga, learned advocate for the third applicant and Mr. Alex Mushumbusi, learned

advocate, appeared for the fourth applicant. The respondent had the services of Dr. Rugemeleza Nshala, learned advocate.

It should be noted that the supporting affidavit was sworn for and on behalf of all the applicants. As deposed at para 2, that course of action was taken "in order to avoid the multiplication of several affidavits stating the same facts." That fact was confirmed by all the applicants at the oral hearing of the application.

At the hearing, Mr. Malata, having adopted the notice of motion and the supporting affidavit as part of the applicants' oral submissions, clarified that the applicants' quest to come to this Court to assail the decisions has all along been frustrated by technicalities. He added that in addition to the good cause for the delay, the impugned decision is marred with illegalities which this Court must address. These illegalities have been pointed out in paragraphs 9 – 12 of the supporting affidavit, he submitted. He contended that where there is an illegality in the decision sought to be challenged, that by itself constitutes good cause for extending time under Rule 10 of the Rules. To buttress this proposition, Mr. Malata referred me to the decisions of the Court in **Amour Habib Salim v. Hussein Bafagi**, Civii Application No. 52 of 2009, **VIP Engineering and Marketing Ltd and Three Others v. Citibank Tanzania Limited**, Consolidated Civil

Reference No. 6, 7 and 8 of 2006, **Zahara Kitindi and Another v. Juma Swalehe and 9 Others**, Civil Application No. 4/05 of 2017, **KABDECO v. WETCU Limited**, Civil Application No. 526/11 of 2017, **Kashinde Machiba v. Hafidhi Said**, Civil Application No. 48 of 2009 and **Yazidi Kassim Mbakileki v. CRDB (1996) Ltd and Another**, Civil Application No. 14/04 of 2018 (all unreported).

Mr. Malata thus submitted that the applicants have demonstrated good cause for the delay and implored the Court to allow the application.

Mr. Sekule, joining hands with Mr. Malata's submissions, reminded the Court that this was a second bite following the decision of Mzuna, J. refusing applicants' application for extension of time. Mr. Kambole and Mr. Mushumbusi subscribed to the submissions by Mr. Malata. Mr. Kambole added that the present application was filed promptly in that Mzuna, J. dismissed the application on 15.09.2017, the present application was lodged on 22.09.2017. That was quite promptly done to trigger the Court to exercise its discretion to grant the prayer for extension of time.

The application faced a strenuous resistance from Dr. Nshala, learned counsel for the respondent. Dr. Nshala first adopted the affidavit in reply and thereafter started his onslaught by branding the application as an

effort to thwart delivery of justice to the respondent by delaying her enjoy the fruit of litigation. He argued that the application does not meet the threshold for extension of time, for it has not accounted for every day of the delay. The learned counsel charged that the extensions of time have been given thrice to the applicants but they squandered it on account of negligence. He added that the Court struck out the appeal twice on negligence of the applicants in preparation of the record of appeal and indolence cannot justify extension of time.

With regard to the claim that there are illegalities in the impugned decision, Dr. Nshala submitted that in order to extend time on account of illegality, the illegality must be apparent on the face of record. He submitted further that the applicants have miserably failed to show the apparentness of the illegality. He added that it will take a long drawn process and arguments to depict the illegalities, if any.

Dr. Nshala submitted further that it is in the interest of the Republic that litigation must come to an end. The dispute between the first applicant and the respondent commenced in 2003 vide Land Case No. 1 of 2003; some eighteen years down the lane. There is need to have an end to this litigation, he submitted. The learned counsel also reminded the Court that the present application was lodged on 26.09.2017 and not

22.09.2017 as submitted by Mr. Kambole. He thus prayed for the dismissal of the application with costs.

In a short rejoinder, Mr. Malata submitted that the application was lodged within fourteen days of the refusal by the High Court as prescribed by the provisions of rule 45A of the Rules. He added that every day of the delay has been accounted for as deposed at para 13 of the supporting affidavit. He also submitted that the illegalities in the impugned judgment are apparent; no long drawn process is required to depict them.

With regard to the contention that the dispute between the second applicant and the respondent dates back to the year 2003, Mr. Sekule submitted that Land Case No. 1 of 2003 was settled out of court and is not subject of the present application.

Before dealing with the substance of this application in the light of the rival submissions by the learned counsel for the parties, I find it apt to restate the settled law that the power of the Court to extend time in terms of rule 10 of the Rules is both broad and discretionary. However, the Court will extend time only upon the applicant showing good cause for the delay. Admittedly, what amounts to "good cause" has not been defined by the Rules. In **Regional Manager, TANROADS Kagera v. Ruaha**

Concrete Company Limited, Civil Application No. 96 of 2007 (unreported), the Court had an occasion to substantiate why. It observed that extension of time being a matter within the discretion of the Court, cannot be laid down by any hard and fast rules but will be determined by reference to all the circumstances of each particular case.

Applications of this nature, as rightly submitted by Mr. Malata and conceded by Dr. Nshala, will also succeed upon an applicant showing an illegality in the impugned decision. Authorities on the point are innumerable and include the ones cited by the applicants. Others are: **The Principal Secretary, Ministry of Defence and National Service v. D P Valambhia** [1992] T.L.R. 185, **Abubakar Ali Himid v. Edward Nyelusye**, Civil Application No. 51 of 2007 (unreported), **Kalunga and Company Advocates v. National Bank of Commerce** [2006] T.L.R. 235 and **VIP Engineering and Marketing Ltd and Three Others v. Citibank Tanzania Limited v. Citibank Tanzania Limited** (supra). In **VIP Engineering and Marketing Limited** (supra), for instance, it was observed that where a point of law at issue is the illegality of the decision, that is of sufficient importance it constitutes sufficient reason for extending time under rule 8 (now rule 10) of the Rules. Likewise, the same observation was echoed in **Edward Nyelusye** (supra) that where a point

of law at issue is the question of illegality, time will always be extended and leave to appeal to the Court of Appeal must be granted even where there is an inordinate delay.

Adverting to the matter at hand, have the applicants shown good cause by accounting for each every day the delay? Or if not, is there any illegality in the decision to constitute good cause for extending time? I find it irresistible to interpose and observe here that what befell the applicants, as can be gleaned in the depositions of the supporting affidavit and the entire record is, in my view, very unfortunate. The applicants wished to challenge the decision of the High Court but could not get that opportunity. Technicalities reigned the day. — To appreciate this, I wish to recite the depositions. The first and third applicants timely lodged their respective Notices of Appeal, timely requested for copies of the proceedings, judgment and decree and timely lodged Civil Appeals No. 45 and 47 of 2013 which were consolidated. Civil Appeal No. 45 of 2013 was by the third applicant against the respondent, the third applicant and the fourth applicant. Civil Appeal No. 47 of 2013 by the second applicant against the respondent. The consolidated appeal was struck out on 12.09.2014 for being incompetent. Undaunted the first, third and fourth applicants went back to restart the process afresh which process was successful.

Eventually, they resurfaced to the Court vide Civil Appeal No. 52 of 2016 which was struck out on 31.05.2017 for, again, being incompetent.

There are two categories of periods of delay in this matter. The first is the period between the time of delivery of the impugned judgment and the second one is the time after application for leave was delivered and dismissed and the time of filing of the present application.

The first period is explicable and excusable for it is a technical delay (as opposed to real or actual delay) and considered as good cause upon which to extend time under rule 10 of the Rules. There are innumerable decisions of the Court that so hold – see: **Fortunatus Masha v. William Shija and Another** [1997] T.L.R. 154 and **Salvand K. A. Rwegasira v. China Henan International Group Co. Ltd.**, Civil Reference No. 18 of 2006, **Zahara Kitindi** (supra), **Yara Tanzania Limited v. DB Shapriya and Co. Limited**, Civil Application No. 498/16 of 2016, **Vodacom Foundation v. Commissioner General (TRA)**, Civil Application No. 107/20 of 2017 and **Samwel Kobelo Muhulo v. National Housing Corporation**, Civil Application No. 302/17 of 2017 (all unreported), to mention but a few. In **Salvand Rwegasira** (supra), for instance, the full Court quoted the holding and subscribed to the position taken by a single

Justice of the Court in **Fortunatus Masha** (supra). The Full Court observed:

"A distinction had to be drawn between cases involving real or actual delays and those such as the present one which clearly only involved technical delays in the sense that the original appeal was lodged in time but had been found to be incompetent for one or another reason and a fresh appeal had to be instituted. In the present case the applicant had acted immediately after the pronouncement of the ruling of the Court striking out the first appeal. In these circumstances an extension of time ought to be granted."

In **Fortunatus Masha** (supra), in allowing an extension, the single Justice of the Court, had observed:

"... a distinction should be made between cases involving real or actual delays and those like the present one which only involve what can be called technical delays in the sense that the original appeal was lodged in time but the present situation arose only because the original appeal for one reason or another has been found to be incompetent and a fresh appeal has to be instituted. In the circumstances, the negligence

*if any really refers to the filing of an incompetent appeal not the delay in filing it. **The filing of an incompetent appeal having been duly penalized by striking it out, the same cannot be used yet again to determine the timeousness of applying for filing the fresh appeal.** In fact in the present case, the applicant acted immediately after the pronouncement of the ruling of this Court striking out the first appeal.”*
[Emphasis supplied].

I am guided by the stance taken by the Court in the above cases. In the present application, the first and third applicants, having been duly penalized by striking out Consolidated Civil Appeals No. 45 and 47 of 2013 and the first, third and fourth having been duly penalized by striking out Civil Appeal No. 52 of 2016 and the High Court dismissing the application for extension of time in Miscellaneous Land Application No. 454 of 2017, the same cannot be used yet again to determine the timeousness of applying for filing the fresh notice of appeal in a bid to file a fresh appeal. That was a technical delay on the part of the applicants which constitutes good cause under rule 10 of the Rules. The applicants have therefore sufficiently explained the delay between 27.04.2012 when the impugned

judgement was pronounced and 15.09.2017 when the High Court refused the application for extension.

The second period is between 15.09.2017 when the application for extension of time was refused and 26.09.2017 when the present application was lodged. That period has been accounted for well at para 13 of the affidavit and captured well by Mr. Malata during the hearing. At para 13, it is deposed:

"This application has been brought within a reasonably short time from the date of the High Court ruling on 15th day of September 2017 and the days between the filing of the application and the ruling were taken to secure copies of the ruling and order the subject matter of this Application and securing the admission of the Notice of Motion by the Registry."

Mr. Malata expounded well at the hearing that the application was timely lodged within fourteen days of the refusal by the High Court in terms of the provisions of rule 45A of the Rules.

In the premises, it behooves me to find and hold that the applicants have brought good cause for the delay to warrant the Court exercise its discretion to enlarge the time sought. This suffices to dispose of this

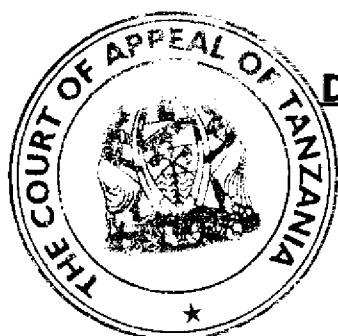
application. I do not see any point of considering the question of illegality, for, its determination will not change the outcome of this application.

This application is meritorious. I allow it and order that the applicants should file the Notice of Appeal within thirty (30) days of pronouncement of this ruling. Costs of and incidental to this application shall abide the outcome of the intended appeal.

DATED at DAR ES SALAAM this 3rd day of March, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

The ruling delivered this 12th day of March, 2021 in the presence of Mr. Lubelo Samwel, learned Principal State Attorney for the Applicant and Ms. Ndigwallo Joel, learned State Attorney for the 1st Respondent, Ms. Lucy Nangoo, learned counsel for the 2nd Respondent. 3rd and 4th Respondent are absent though dully served is hereby certified as a true copy of the original.



S. J. Kainda
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DEPUTY REGISTRAR
COURT OF APPEAL