

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

CIVIL APPLICATION NO. 97/17 OF 2020

BADRU ISSA BADRU.....APPLICANT

VERSUS

1. OMARY KILENDU

2. HASHIMU RUNGWE t/a H. RUNGWE LTD }RESPONDENTS

**(Application for extension of time from the Decision of the High Court of
Tanzania, (Land Division) at Dar es Salaam)**

(De-Mello, J.)

Dated the 28th Day of September, 2012

in

Land Appeal No. 93 of 2009

RULING

19th & 31st March, 2021

KEREFU, J.A.:

The applicant, BADRU ISSA BADRU, has lodged this application seeking an order for extension of time within which to lodge an appeal against the decision of the High Court of Tanzania (Land Division), at Dar es Salaam, (De-Mello, J.) dated 28th September, 2012 in Land Appeal No. 93 of 2009. The application is brought by way of notice of motion lodged under Rule 10 of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules). The grounds canvassed in the notice of motion are as follows, that: -

- (a) The applicant had initially lodged appeal within time but his appeal was struck out for incompetence on the ground that leave to appeal was not properly obtained;*
- (b) Following the striking out of the earlier appeal the applicant was engaged in seeking extension of time to lodge afresh a notice of appeal, applying for extension of time to apply for leave to appeal*

and ultimately applying for and obtaining leave to appeal to the Court of Appeal;

- (c) The decision of the High Court sought to be appealed against had left undetermined important matters that were raised in the first appeal;*
- (d) The decision of the High Court sought to be appealed against contains illegalities for reasons of leaving key-points undetermined hence failure to make consequential orders as regards second sale and possession of the disputed property;*
- (e) The decision of the High Court sought to be appealed against contains illegalities for mixing up application of principles of double allocation of a right of occupancy of land and the effect or status of one piece of land being sold to two different buyers.*

The application is supported by two affidavits. The first affidavit was affirmed by the applicant on 23rd March, 2020 and the second affidavit was dully sworn on 25th March, 2020 by Mr. Denis Michael Msafiri, the learned counsel for the applicant, respectively.

On the other hand, the first respondent has filed an affidavit in reply opposing the application. However, the second respondent did not file any affidavit in reply an indication that he is not opposing the application.

For a better appreciation of the issues raised herein, it is important to explore the background of the matter and the factual setting giving rise to this application. According to the affidavit in support of the application, the applicant was the second respondent in Land Application No. 19 of 2006

instituted by the first respondent at the District Land and Housing Tribunal for Kinondoni (DLHT) claiming to be declared the lawful owner of the house located at Manzese Sisi kwa Sisi in Dar es Salaam (disputed property). After hearing the parties, the DLHT dismissed the suit with costs and declared the applicant lawful owner of the disputed property. Aggrieved, the first respondent successfully appealed to the High Court of Tanzania (Land Division) at Dar es Salaam (De-Mello, J.) vide Land Appeal No. 93 of 2009.

Aggrieved by that decision, the applicant lodged a notice of appeal on 12th October, 2012 and on 9th November, 2012 he applied for leave to appeal which was granted on 21st May, 2014. Subsequently, on 24th July, 2014, the applicant instituted the appeal in this Court vide Civil Appeal No. 59 of 2014. However, the said appeal was struck out on account of being incompetent. Upon receipt of the ruling of the Court he discovered that the Court inadvertently indicated that the judgement of the High Court was issued on 2nd October, 2012 instead of 28th November, 2012. He thus instructed his advocate to make a follow-up to have the noted error rectified. On 8th December, 2015 and upon rectifying the said error and obtaining the missing documents, the applicant unsuccessfully lodged Misc. Land Application No. 780 of 2015 in the High Court for extension of time to lodge notice of appeal.

Still being desirous to pursue the intended appeal, the applicant rebooted its quest by approaching this Court vide Civil Application No. 164 of 2016, as a second bite, seeking extension of time to file notice of appeal. On

28th November, 2016, the Court (Oriyo, J.A.) granted the said application hence on 5th December, 2016 the applicant, again, lodged the notice of appeal and Misc. Land Application No. 1038 of 2016 in the High Court for extension of time to apply for leave to appeal to this Court. The said leave was granted on 13th July, 2018.

Then, on 16th July, 2018 the applicant requested for copies of proceedings, ruling, and drawn order of the High Court in Misc. Land Application No. 1038 of 2016 which were availed by the Registrar on 30th July, 2018. Subsequently, on 3rd August, 2018 the applicant lodged Misc. Land Application No. 484 of 2018 seeking leave to appeal to this Court. The said application was granted on 26th February, 2020 and the applicant was dully supplied with the certified copies of the ruling on 19th March, 2020, hence this current application which was lodged on 26th March, 2020. It is the applicant averments that all that time he was in courts corridors pursuing the matter diligently and in good faith.

The applicant also contends that the impugned decision of the High Court contains illegalities as the High Court omitted to consider and determine key issues identified for determination hence not making consequential orders on his rights and the status of the disputed property which was sold to two different buyers.

In his affidavit in reply, the first respondent opposed the application by stating that the delay was due to the negligence of the applicant and his counsel which, he said, do not constitute sufficient reason to warrant the Court to grant extension of time. On the alleged illegalities, the first respondent stated that there is no any illegality as all issues raised during the appeal were properly determined by the High Court.

At the hearing of the application, the applicant was represented by Mr. Dennis Msafiri, learned counsel whereas the first respondent was represented by Mr. Silvanus Mayenga, learned counsel. The second respondent, though dully served on 17th February, 2021 did not enter appearance thus, the hearing of the application proceeded in his absence under Rule 63 (2) of the Rules.

Submitting in support of the application, Mr. Msafiri commenced his submission by fully adopting the contents of the notice of motion, the supporting affidavits and his written submission. In his written submission, Mr. Msafiri narrated the historical background to this application as indicated above, he then argued that, the applicant has taken various steps to challenge the impugned decision including lodging the notice of appeal timely and instituting the appeal. However, the said appeal was struck out on technical grounds.

He submitted further that the applicant made further attempts to pursue the intended appeal before the High Court, but his applications were not successfully hence he successfully resorted to a second bite application in this Court. He said that, having been granted a second leave to appeal to this Court on 25th February, 2020 and availed with certified copies of the said application on 19th March, 2020, he learnt that he was not eligible to be issued with a second certificate of delay, thus he decided to lodge this application. As such, Mr. Msafiri, urged me to find out that the delay was due to the time spent in pursuing different applications in the High Court and in this Court. Reinforcing his argument, Mr. Msafiri invited me to consider the decision of the Court in **Osward Masatu Mwinzarubi v. Tanzania Fish Processing Limited**, Civil Application No. 13 of 2010 and **Republic v. Yona Kaponda & 9 Others** [1985] TLR 84.

On the illegalities, Mr. Msafiri argued that, the impugned decision is tainted with illegalities as the High Court Judge omitted to determine key issues identified for the determination of the appeal. He clarified that, the appeal before the High Court raised seven (7) grounds of appeal which were condensed by the High Court Judge into three main issues, namely **first**, party to suit, interpleader and counter claim by the second respondent, **second**, the sale agreement, parties to it and the validity of the sale transaction, and **third**, the evaluation of evidence on record in arriving and

granting of prayers not sought while disregarding the reality of facts on record.

He argued that, in its judgement, the High Court did not decide on the first issue and did not also make any order as to the fate of purchase price paid by the applicant and the long possession the applicant had on the disputed property. He argued that the said issue was crucial as the DLHT made a finding that the first respondent is the rightful purchaser and lawful owner of the disputed property. It was his argument that, in reversing the decision of the LDHT, the High Court was supposed to determine the fate of purchase price that was paid by the applicant to the second respondent and the long occupation he had in the disputed property. He added that, since those matters were left unresolved, the appeal was not finally determined which he termed it as an illegality and a good cause for extension of time. To bolster his proposition, he referred to **Principal Secretary Ministry of Defence and National Service Vs Divram P. Valambhia** (1992) TLR 385 and **Victoria Real Estate Development Limited v. Tanzania Investment Bank and 3 Others**, Civil Application No. 225 of 2014 (unreported). He then submitted that the reasons advanced by the applicant constitute good cause within the purview of Rule 10 of the Rules. He finally urged me to grant the application.

In response, Mr. Mayenga strenuously opposed the application by arguing that the applicant has failed to show good cause for extension of

time. Relying on the affidavit in reply and written submission earlier on lodged, Mr. Mayenga argued that the reason for the delay is due to the negligence of the applicant and his counsel for lodging incompetent applications before the High Court. He said that negligence cannot constitute a good reason for extension of time. To bolster his proposition, he cited **Royal Insurance (T) Ltd v. Kiwengwa Strand Hotel Ltd**, Civil Application No. 111 of 2009 (unreported) and **Benedict Mumello v. Bank of Tanzania E.A.I.R** [2006] Vol. 1 which cited the case of **Alliance Insurance Corporation Ltd v. Arusha Art. Limited**, Civil Application No. 33 of 2015 (unreported).

He challenged the submission made by Mr. Msafiri that the applicant was not eligible to be issued with a second certificate of delay by arguing that, upon being availed with the certified copies of the proceedings and the ruling of the High Court Registrar on 5th March, 2020, the applicant was supposed to request for a certificate of delay where the Registrar could excluded all time spent by the applicant in pursuing the intended appeal.

On the alleged illegalities, Mr. Mayenga argued that there is no any illegality as all issues raised were properly determined by the High Court. He added that, even if those matters were not considered by the High Court the first respondent is the lawful owner of the disputed property as there is an oral agreement between the first and the second respondent for the purchase of the disputed property. Based on his argument, Mr. Mayenga

urged me to find that the alleged illegality is unjustified and thus dismiss the application with costs.

Having heard the counsel for the parties, the main issue for my consideration is whether the applicant has submitted good cause for the delay to warrant grant of this application. It is essential to reiterate that the Court's power of extending time under Rule 10 of the Rules is both wide-ranging and discretionary but the same is exercisable judiciously upon good cause being shown. It may not be possible to lay down an invariable or constant definition of the phrase "good cause", but the Court consistently considers such factors like, the length of delay involved, the reasons for the delay; the degree of prejudice, if any, that each party stands to suffer depending on how the Court exercises its discretion; the conduct of the parties, and 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. There are numerous authorities to this effect and some of them have been cited by the counsel for the parties, but I wish to add on the list to include, **Dar es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987; **Kalunga & Company Advocates Ltd v. National Bank of Commerce Ltd** (2006) TLR 235, **Elia Anderson v. Republic**, Criminal Application No. 2 of 2013 and **Attorney General v. Tanzania Ports Authority & Another**, Civil Application No. 87 of 2016 to mention but a few.

Another factor to be considered is whether there is a point of law of sufficient importance such as illegality of the decision sought to be challenged. Among the decisions on this point include, **Principal Secretary Ministry of Defence and National Service** (supra), **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 and **Arunaben Chaggan Mistry v. Naushad Mohamed Hussein & 3 Others**, Civil Application No. 6 of 2016, (both unreported).

Now, in the application at hand, it is common ground that the impugned decision subject matter of the intended appeal was handed down on 28th September, 2012. The applicant manifested his intention to appeal against that decision by lodging a notice of appeal on 12th October, 2012 and initiated his appeal well within the prescribed time, but the said appeal was struck out on technical reasons. The applicant re-initiated the process by lodging an application for extension of time before the High Court which was refused. He then approached this Court on the same application, which was granted on 28th November, 2016 thus he lodged the second notice of appeal on 5th December, 2016 and he also applied for leave to appeal which was granted on 25th February, 2020 and on 19th March, 2020 he was availed with the certified copies of the proceedings, ruling and the drawn order therein.

As submitted by Mr. Msafiri, after being availed with those documents, the applicant could not have managed to obtain a second certificate of delay

from the Registrar of the High Court, as the Registrar has no powers to exclude the time used by the applicant before this Court as under Rule 90 (1) of the Rules. Pursuant to that Rule, the Registrar is empowered to only exclude the time used to prepare the requested documents before the High Court. I find support in our recent decision in the case of **Hamisi Mdida & Saidi Mbogo v. The Registered Trustees of Islamic Foundation**, Civil Appeal No. 59 of 2020 (unreported) where, among others, we considered the powers of the Registrar to issue certificate of delay under Rule 90 (1) of the Rules and we observed that: -

*"it must be pointed out that **the Registrar of the High Court has no mandate, in terms of Rule 90 (1) of the Rules, to exclude the total number of days concerning the proceedings in the Court of Appeal.** In the appeal before us, the Registrar of the High Court was only mandated to exclude the period in which the appellant was involved in the proceedings in the High Court...". [Emphasis added].*

Being guided by the above authority and also taking into account that the applicant has spent considerable amount of time in this Court when pursuing an application for extension of time to lodge notice of appeal and also this application, I find this to be a proper avenue for the applicant to seek for extension of time. I am therefore in agreement with Mr. Msafiri on

this point. With respect, I find the argument of Mr. Mayanga on this matter to have no legal basis.

On the issue of illegality contained in the impugned decision, it was the submission of Mr. Msafiri that the appeal before the High Court raised seven (7) grounds of appeal which were condensed by the High Court Judge into three main issues, but the first issue on parties to suit, interpleader and counter claim by the second respondent was not considered. Mr. Msafiri also lamented that the learned High Court Judge did not make any order as to the fate of the purchase price paid by the applicant and the long possession he had on the disputed property. It is on record that Mr. Mayenga disputed this claim by stating that all issues raised were properly determined by the High Court.

I am mindful of the fact that, as a single Justice, I am not supposed to dig much on the alleged illegality but only to consider as to whether the same constitute good cause to warrant grant of this application. However, in deciding as to whether the pointed illegality in this application amount to an illegality envisaged under Rule 10 of the Rules, I wish to refer to the decision of this Court in the case of **Principal Secretary Ministry of Defence**, (supra) where the Court stated that: -

"In our view when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty even if it

means extending the time for the purpose to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record right". [Emphasis added].

See also the cases of **Lyamuya Construction Company Limited** (supra) and **Hamida Hamisi v. the Principal Magistrate Mbagala Primary Court and 2 Others**, Civil Application No. 118 of 2015 (Unreported). Specifically, in the latter case, the single Justice of Appeal, when dealing with an application for extension of time based on allegation of illegality, cited the case of **Patrobert D. Ishengoma v Kahama Mining Corporation Ltd, (Barrick Tanzania Bulankulu) and 2 Others**, Civil Application No. 2 of 2013 where it was stated that: -

*"...I am of the considered view that even though there is a considerable delay in the application, pertinent issues have been raised. Firstly, ..., **there is an allegation of illegality, irregularities and impropriety...**, which cannot be brushed aside" [Emphasis added].*

Now, since in the matter at hand, the applicant is claiming that some of the issues were left undetermined and by mere looking into a four-page judgement of the High Court, it is clear that, though at page 1, the learned High Court Judge summarized the seven (7) grounds of appeal into three

issues for determination, as indicated above, those issues were not reflected therein. I am therefore in agreement with the submission of the applicant that the allegation of an illegality of the decision sought to be challenged amount to good cause, hence warrant grant of extension of time. It is my respectful opinion that granting such an extension will avail an opportunity to the applicant to institute his appeal and address the alleged illegality in the impugned decision. I am therefore satisfied that the alleged illegality falls squarely within the meaning of good cause in terms of Rule 10 of the Rules.

In the premises, I find merit in the application and it is hereby granted. The applicant should lodge the intended appeal within sixty (60) days, from the date of delivery of this ruling. Costs to be in the cause.

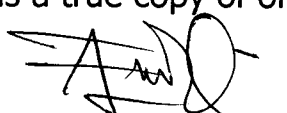
It is so ordered.

DATED at DAR ES SALAAM this 30th day of March, 2021.

R. J. KEREFU
JUSTICE OF APPEAL

The Ruling delivered this 31st day of March, 2021. In the presence of Mr. Mashaka Mfala, learned counsel for 1st Respondent, who also holding brief for Mr. Denis Msafiri, learned counsel for Applicant and in absence of 2nd Respondent, is hereby certified as a true copy of original.




E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL