IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CIVIL APPLICATION NO. 45/08 OF 2018

ELISHA MANG'EHE.....APPLICANT

VERUS

NYANGI OGIGO.....RESPONDENT

(Application seeking an extension of time to lodge an appeal out of time from the Judgment and decree of The High Court of Tanzania at Mwanza)

(Mruma, J.)

dated 29th day of August, 2013

in

Land Appeal No. 71 of 2009

.....

RULING

11th & 15th February, 2022.

FIKIRINI, J.A.:

This application brought by the applicant, Elisha Mangéhe, is preferred under sections 5 (1) c, (2) b of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002(the AJA) and Rules 10, 48 (1), (2), (4) and 82 and 83 of the Tanzania Court of Appeal Rules, 2009 (the Rules). The application seeks an extension of time to lodge an appeal out of time after timely filing of a notice of appeal and grant of leave to appeal to the Court of Appeal (the CAT). The application is premised on the grounds in support of it, on the written submissions expounded by the applicant's counsel, and on the

affidavit sworn by Elisha Mang'ehe, the applicant. In the affidavit, in support, the applicant stated that unknown people attacked him and sustained injuries at the time when the Miscellaneous Civil Application No. 120 of 2013 was pending in Court. The applicant has also stated that the injuries held him back from following up on his application and, as a result, was not aware when the leave was granted to act promptly. He has further averred that by the time he came to learn of the court ruling in his favour, he was already out of time to lodge his appeal, hence the present application.

The application is not contested since the respondent has not filed an affidavit in reply nor any written submissions or entered appearance. The applicant stated that the respondent refused service when was duly served on 19th January, 2022, and threatened those trying to serve him when they called him through his mobile number.

In short, the genesis of the matter is the Land Application No. 162 of 2008 before the District Land and Housing Tribunal (DHTL) for Tarime at Tarime, which the applicant lost. He was aggrieved and appealed to the High Court of Tanzania at Mwanza in Land Appeal No. 71 of 2009. The appeal was dismissed on 29th August, 2013. Dissatisfied, he promptly

lodged a notice of appeal on 30th August, 2013, followed by an application for leave to appeal to the Court of Appeal. The leave was granted in the applicant's absence on 25th August, 2016. The appeal was not timely lodged. Consequently, the applicant had to apply for an extension of time.

At the hearing on 11th February, 2022, Mr. Musa Mhingo, learned counsel appeared representing the applicant, who was also present in person. Since the respondent was absent, Mr. Mhingo urged the Court to proceed in the absence of the respondent under Rule 63 (2) of the Rules, the application I granted. Submitting on the application, Mr. Mhingo furnished the reason for the delay; he submitted that while the application for leave was ongoing in court, the applicant was attacked on 19th July, 2016. Therefore when the application for leave was granted on 25th August, 2016, he was not present in court. The respondent was present and promised the court that he would inform the applicant, which he did not. In November, 2016, the applicant's son, while making follow up, was told that the ruling had already been delivered.

I inquired if the applicant knew the date of the ruling. Mr. Mhingo's submission was that the applicant was present at the hearing. The date of the ruling was not given. Parties were to be notified. I probed him if such

notice was ever issued and if he had a copy with him. The counsel admitted to have no notice of the ruling date issued to the applicant. Relying on that as good reason, Mr. Mhingo referred me to the case of **Cosmas Construction Co. Ltd v Arrow Garments Ltd** [1992] T. L. R. 127, that a party who fails to enter appearance has to be informed when the judgment is delivered so that he may if he wishes, attend and know the outcome for his further action. Thus, he nitpicked for the applicant's not being informed, as he would have attended had he been informed. Also, he would have been able to comply with the requirement under Rule 90 (1) of the Rules by lodging his intended appeal within sixty (60) days prescribed. However, by the time he received the information, two (2) years had already elapsed. He was obviously out of time and could not lodge his appeal unless granted an extension of time.

Emphatically urging me to grant the application, he contended that the delay was outside the applicant's control and not out of negligence. Court's failure to inform him resulted in all this, he underscored. Based on his submission, he found the applicant to have shown sufficient cause warranting the grant of the application.

Before what is for determination is whether the applicant in this application has advanced good cause for the Court to grant the applicant the extension of time sought. The present application is predicated on sections 5 (1) c, (2) b of the AJA and Rules 10, 48 (1), (2), (4), and 82 and 83 of the Rules. Rule 10 is the one explicitly catering for extension of time. The Rule provides as follows:

> *"The Court may; upon good cause shown, extend the time limited by these Rules or by any decision of the High Court or tribunal for the doing of any act authorized or required by these Rules, whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to that time as so extended."*

Reading from the above provision, it is crystal clear that with the use of the term "may," the Court has been conferred with discretion to either grant or deny the extension of time sought. The discretion of the Court has, however, to be exercised judiciously. So far, there is no exact definition of what amounts to a good cause, but this Court, over time, has, through decided cases, come up with guidelines that could assist in gauging what amounts to "good cause." In the case of **Lyamuya**

Construction Company Limited v Board of Registered Trustees of Young Women's Christians Association of Tanzania, Civil Application No. 02 of 2010 (unreported). Some of the guidelines set were:

a) The applicant must account for all days of the 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 there are other reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged.

Applying the above stated guidelines to the application at hand, whereas the notice of appeal and leave to appeal to the Court of Appeal were time filed, and leave granted, but no appeal was lodged within the prescribed time of sixty (60) days as per Rule 90 (1) of the Rules. The applicant has delayed lodging his appeal for almost two (2) years. In his affidavit in support of the application, particularly paragraphs 4 and 5, the applicant has stated the reasons for his delay.

To appreciate what is stated in paragraph 4 of the 'applicant's affidavit, let the paragraph speak for itself:

"That, while the application proceeded for hearing and before its final determination the applicant was attacked by unknown persons and got several injuries on different parties (sic !) of his body which incapacitated and render him fail to attend Court and to make follow up of his case."

Copies of PF 3 and hospital prescription and X-rays were annexed as annextures EM "2"

In paragraph 5, the following is depicted:

"That, on 25th August, 2016 ruling on the application for leave was pronounced in the absence of the applicant whereby leave was granted. And in the ruling, it has been written that the respondent promised to give information to the applicant, a thing which was not done. "

A copy of the said ruling was annexed as annexture EM "3." The reasons for the delay advanced by the applicant though sound plausible but cannot pass untested. Despite what has been averred in paragraph 4 on what occurred to the applicant, the applicant has not been able to give an account of what transpired from the time he claims he was attacked up to when this application was filed. One of the requirements in **Lyamuya Construction** (supra) was the applicant had to account for each of the

delayed days. He thus had an obligation of accounting for the delay from the 19th July, 2016, which he has not been able to do.

The applicant has annexed several documents collectively marked as annexture EM "3," but no explanation was given for supporting his application. I am saying so for the following reasons: the documents had various dates to compose a story to make sense of his delay. Among the documents is a PF 3, which was issued on 19th July, 2016, documents indicating he attended Bugando Medical Hospital on 2nd October, 2018, 7th October, 2018, 19th October, 2018, 20th March, 2019 and 4th January, 2019, prescription form dated 17thand 24th March, 2017 issued by Shirati Hospital, request for X-ray made on 23rd July, 2016 and another on 16th January, 2018 at Shirati KMT Council and some skull x-rays attached. Aside from the PF 3 issued on 19th July, 2016, presumably on the day he was attacked and an x-ray requested on 23rd July, 2016; all other documents were beyond 2016, which I find difficult to associate with his ill-fate, which occurred on 19th July, 2016. Lumping medical chits was on its own not sufficient without further explanation to elaborate on the treatment, especially in the absence of hospital admission or additional doctor's recommendation. From the information availed, I am inclined to conclude

the applicant was following his treatment as an outpatient who could still easily monitor his other obligations, including following up on his application, be it himself or through his son or other relatives of his.

Also, nowhere in his affidavit, the applicant has stated the exact date as to when he was made aware and by who. In the case of **Cosmas Construction Co. Ltd** (supra), the Court encountered the same challenge and had this to say:

> *"Without disclosing when the applicant got to know of the existence of the judgment, it is not possible to gauge the extent of the delay."*

I am facing the same predicament in the present application. By stating November, 2016, without an exact date or who informed him and an affidavit supporting the statement, it becomes hard to rely on the information, and it becomes impossible to compute the delay.

Another shortfall encountered is the applicant's name with annexture EM "3." In all the documents annexed as EM "3," the name featuring is Elisha Wangwe. Nowhere in the affidavit has it been reflected that Elisha Wangwe is the same person as Elisha Mang'ehe. Therefore, it has been tricky to assume that all the documents as filed related to the applicant.

On the issue that the applicant ought to have been notified of the date of the ruling, as illustrated in the case of **Cosmas Construction Co. Ltd** (supra), and relied on by Mr. Mhingo to fortify his position. At the same time, I agree entirely with the principle, but the information availed to me in the affidavit is sketchy to make up any meaningful interpretation. In both paragraphs 4 and 5, the applicant has not explained clearly what is meant by:

> *"That, while the application proceeded for hearing and before its final determination, the applicant was attacked ....."*

Going by Mr. Mhingo's submission, I understood him to mean parties were present after the hearing, only that the date of the ruling was not pronounced and that ruling would be on notice, meaning parties would be informed. According to Mr. Mhingo, no notice was issued to the applicant. When probed if the applicant had any order from the Court that the ruling would be on notice, he replied the applicant had no document in that regard, contending the order was made orally. I do not dispute that could have happened, but it should have been illustrated in the affidavit. Relying on Mr. Mhingo's statement only is akin to relying on testimony from the

bar, which is not credible, bearing in mind the practice is discouraged by the Court.

The applicant also blamed it on the respondent, as reflected in paragraph 5 of his affidavit. The respondent promised to do that, and the Court order shows that. In my view, the respondent's promise did not exonerate the applicant's obligation to follow up on his case. More so, the applicant when either him or his son was following up on the matter, he could as well find out as to why the applicant was not notified of the date of the ruling. If the respondent was present, it is possible he was notified, which I have no reason to believe the same was not afforded to the applicant, in the absence of explanation on this aspect.

I also find it strange and unconvinced that the applicant opted to wait indefinitely without following up until November, 2016 when he was informed by his son, whom he did not name nor state the precise date when his son told him. In the case of **Daudi Robert Mapunga & 417 Others v Tanzania Hotels Investment Ltd & 4 Others**, Civil Application No. 462/18 of 2018 (unreported), in which the Court observed:

> *It would be most illogical and injudicious, we think, to accept the 'respondents wait infinitely for a copy of the proceedings*

while they take no action on their part to follow up on their request to the Registrar. To say the least, this infinite inaction, in our respectful view, offends the ends of justice."

Even though the decision concerns the requested proceedings from the Registrar, the logic is still valid in the present scenario. The applicant is the one who sought leave to appeal to the Court of Appeal, and his inaction seems to me unexplainable despite what happened to him on the 19th July, 2019. I am saying so based on the information in the affidavit and written submissions that Mr. Mhingo later expounded at the hearing.

On the totality of the above assessment and the reasoning, I have failed to find any convincing reasons which hindered the applicant from following up on his matter. The ill-health reason information is so spread out to be relied on as good cause. And reliance placed on the respondent did not sound as good cause. If he had a son from whom he learnt of the status, he could have sent to follow up on the matter long ago. The period of two (2) years is an inordinate delay.

The applicant's failure to give compelling reasons as to why he failed to lodge his appeal after the leave has been granted, until after the elapse of two (2) years, there cannot be any other better language than holding

that, there has been gross sloppiness on the part of the applicant that disentitles him from benefitting the discretion of the Court contained in Rule 10 of the Rules being exercised in his favour.

The applicant's application lacks merit and has to fail and is hereby dismissed. Order accordingly.

DATED at **MWANZA** this 15th day of February, 2022.

P. S. FIKIRINI
JUSTICE OF APPEAL

The Ruling delivered this 15th day of February, 2022 in the presence of Ms. Lilian Lyimo holding brief for Mr. Mussa Mhingo, learned counsel for the Applicant and Respondent was Absent, is hereby certified as true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL