

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CIVIL APPLICATION NO. 259/08 OF 2021

LUDOVICK MICHAEL MASAWE.....APPLICANT

VERUS

SAMSON HERMAN.....RESPONDENT

(Application for extension of time to file Notice of appeal and leave out of time to the Court of Appeal against the ruling of High Court of Tanzania at Mwanza)

(Mashauri, J.)

dated 27th day of April, 2021

in

Miscellaneous Land Application No. 99 of 2020

.....

RULING

15th & 21st February, 2022.

FIKIRINI, J.A.:

By notice of motion under Rule 10 of the Tanzania Court of Appeal, Rules 2009 (the Rules), the applicant, Ludovick Michael Masawe is seeking an extension of time to file a notice of appeal out of time. Supporting the application, the applicant swore an affidavit stating that his application for extension of time to file a notice of appeal and leave to the Court of Appeal of Tanzania, out of time, was dismissed on 27th April, 2021. In its ruling, the Judge stated to have dismissed the application for want of points of law,

while the provision of section 47 (1) of the Land Disputes Courts Act, R. E. 2019 (the Act), does not require for that.

The application is uncontested as Mr. Samson Herman, the respondent did not file an affidavit in reply, despite acknowledging receipt of service.

I find it apt to narrate the background to this application before me, albeit briefly. Before the District Land and Housing Tribunal (Tribunal), the applicant alleged to have bought the disputed plot in 1978 from Mr. Kasonso, a District Magistrate. The plot boarded plot no. 1373, the property of Bashiru Mushi. The respondent contested this account, claiming to have bought the plot in dispute, referring it as plot no. 73/3/A/II situated in Nyakato area, from Mr. Katundu Mtondo on 18th March, 1996. To the applicant's surprise, Mr. Katundu sued him before the DL & HT for trespass. The applicant lost both at the Tribunal and later in the High Court at Mwanza. Aggrieved by the decision, and since he was late in lodging his notice of appeal and leave, he applied for an extension of time in Miscellaneous Land Application No. 99 of 2020. The application was dismissed on 27th April, 2021, for want of point of law, hence the present application.

At the hearing, both parties appeared in person unrepresented. Stating the reasons for his delay in filing the notice of appeal timely, the applicant stated that in November, 2021, he travelled to Moshi to attend to his sick child, leaving behind a letter requesting a copy of proceedings. However, no copy of such letter was annexed to his affidavit, and neither was his travel to Moshi reflected in his affidavit.

Before I proceed to determine the application, I wish to address two things: one, on why the respondent was not allowed to address the Court though he was present. It is trite law that a party who has not filed an affidavit in reply to contest what has been deposed in an affidavit supporting an application may be entitled to an oral reply but only on matters of law; not on matters of fact. The respondent is thus taken not to have contested the application. See: **Fransisca Mbakileki v. Tanzania Harbours Corporation, Civil Application No. 71 of 2002** and **Yokobeti Sanga v. Yohana Sanga**, Civil Application No. 1 of 2011 (both unreported). In the latter case the Court stated:

"... it is settled that where the respondent does not lodge an affidavit in reply despite being served, it is taken that he does not dispute the contents of the applicant's affidavit..... Therefore, the respondent who appears at the hearing without

having lodged an affidavit in reply is precluded from challenging matters of fact, but he can challenge the application on matters of law."

In the present application, the respondent admitted having received service of summons but did not file an affidavit in reply. By his inaction he has thus relinquished his right to address the Court on matters of fact. In contrast, he could have addressed the Court on the point of law, if any, but being a lay person had nothing to say.

Two, this application is essentially a second bite, which ought to have been filed as per the prescription under Rule 45 (1) (a), which requires the present application to be filed within fourteen (14) days from the date of the decision dismissing the application for leave to appeal to the Court of Appeal. The applicant's notice of motion does not indicate so, and I do not find the omission fatal, so long as Rule 10, which deals explicitly with extension of time, has been cited. Indeed, this application is appropriately before the Court by citing Rule 10 of the Rules, which governs extension of time on a second bite. See: **Mic Tanzania Limited & 3 Others v. Golden Globe International Services Limited**, Civil Application No. 1/16 of 2017 (unreported).

Now turning to the application, the only issue for determination is whether the application deserves granting. Under Rule 10, this Court has been vested with unfettered discretionary power to extend time sought upon showing good cause for the delay. What amounts to "good cause" is not defined in the Rules. However, over time, the Court has come up with guidelines assisting in determining what could be considered as good cause, the paramount focus being each case should be considered on its own peculiar facts. Illustrating on the point, in **Regional Manager, TAN ROADS Kagera v. Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007 (unreported), the Court observed that extension of time being a matter within the discretion of the Court, cannot be laid down by hard and fast rules but will be determined by reference to all the circumstances of each particular case. Amongst the condition which can be relied upon are as stated 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, are:

- 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.

See: **Principal Secretary, Ministry of Defence and National Service v. D P Valambhia** [1992] T.L.R, 185, **Kalunga and Company Advocates v. National Bank of Commerce** [2006] T.L.R. 235, and **Abubakar Ali Himid v. Edward Nyelusye**, Civil Application No. 51 of 2007 (unreported). In **Edward Nyelusye** (supra), the Court concluded that time and leave will always be extended once there is illegality, regardless as to whether there is an inordinate delay.

Applying the principles to the application before me, it is apparent that in his four (4) paragraphed, affidavit, the applicant has not accounted for each day of the delay. After his application for an extension of time to file a notice of appeal and leave was dismissed on 27th April, 2021, the applicant lied low until 27th May, 2021, when this application was filed. Under normal circumstances, I would have outrightly dismissed this application for the applicant's failure to account for each day of the delay,

from 27th April, 2021 to 27th May, 2021, had I not read paragraphs 3 and 4 of the applicant's affidavit. In paragraph 3 the applicant states as follows:

"That on 27-4-2021 the honourable High Court Judge, dismissed the application for want of points of law."

While the contents of paragraph 4 reads:

"That the honourable appellate Judge, erred in law to dismiss this Land Application for want of points of law, when it only needed leave of the Court to appeal to the Court of Appeal of Tanzania, as it originated from the District Land and Housing Tribunal and not from the Ward Tribunal."

From the two paragraphs, it is obvious that even though the applicant failed to account for each delayed day, there is a point of law worth consideration by this Court. The point of law involved germinates from the High Court decision refusing granting leave on the point of law. The provision of section 47 (1) of the Act, Cap. 216 R.E. 2019 clearly provides that the High Court, sitting in its original jurisdiction, revisional and appellate is vested with exclusive powers to grant leave to appeal to this Court in land matter originating from the Tribunal. The provision provides:

"Any person who is aggrieved by the decision of the High Court (Land Division) in the exercise of its original, revisional

or appellate jurisdiction, may with the leave from the High Court (Land Division) appeal to the Court of Appeal in accordance with the Appellate Jurisdiction Act.”

And that position has been restated in the case of **Nuru Omary Ligalwike v.Kipwele Ndunguru**, Civil Application No. 42 of 2015 (unreported), the Court stated:

“...inter alia that leave to appeal can only be granted by the High Court under s. 47 (1) of the Act and that it is that court which is vested with exclusive jurisdiction to do so. It means therefore, that the requisite leave can only be granted under s. 47 (1) of the Act.”

See: **Elizabeth Lusojaki v. Agness Lusojaki and Another**, Civil Appeal No.99 of 2016, **Tumsifu Anasi Mares v. Luhende Jumanne**, Civil Application No. 184/11/2017 and **Idd Miraji Mrisho (Administrator of the estate of Mwanahamisi Ramadhani Abdallah, deceased) and Another v. Godfrey Bagenda**, Civil Application No. 17 of 2015 (all unreported). In all the above cited cases, the Court categorically stated that where the High Court denies leave, the remedy is to appeal to the Court against that decision. Raising a point of law has never been a

determinant factor under section 47 (1) of the Land Disputes Courts Act to grant leave to appeal to the Court of Appeal.

In the premises, I find the illegality pointed out in paragraphs 3 and 4, a "good cause" warrants exercise of the discretionary powers vested upon the Court.

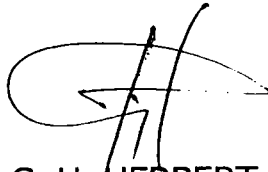
I allow the application and order that the applicant files the notice of appeal within thirty (30) days of pronouncement of this ruling. Costs of and incidental to this application shall abide by the outcome of the intended appeal.

DATED at MWANZA this 21st day of February, 2021.

P. S. FIKIRINI
JUSTICE OF APPEAL

The Ruling delivered this 21st day of February, 2022 in the presence of applicant and respondent in person is hereby certified as true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL