

**IN THE COURT OF APPEAL OF TANZANIA**

**AT KIGOMA**

**CIVIL APPLICATION NO. 681/11 OF 2021**

**WILSON S/O SIMON.....APPLICANT**

**VERSUS**

**ABOGAST S/O KIBOBELA.....RESPONDENT**

**(An Application for extension of time within which to lodge an appeal out  
of the prescribed limitation period from the decision/decreed of the High**

**Court of Tanzania at Kigoma)**

**(MUGETA, J.)**

**dated the 29<sup>th</sup> day of October, 2019**

**in**

**Misc. Land Application No. 4 of 2019**

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**RULING**

**14<sup>th</sup> & 16<sup>th</sup> June, 2022**

**KITUSI, J.A.:**

The Applicant Wilson Simon has moved me under rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules), to grant him extension of time within which he can appeal against the High Court decision in Misc. Land Application No. 4 of 2019 dated 29/10/2019. The application is by notice of motion supported by an affidavit taken by Mr. Masendeka Anania Ndayanse, learned advocate.

Briefly, the Applicant was aggrieved by the decision of the District Land and Housing Tribunal (DLHT) in Land Appeal No. 10 of 2015. He

wished to appeal to the High Court but could not act in time, thus he prayed in the High Court for an extension of time to appeal out of time. His application, Misc. Land Application No. 4 of 2019, was disallowed by the High Court, (I. C. Mugeta, J), on 29/10/2019, for want of sufficient or good cause.

Intending to appeal against the said denial for extension of time, the applicant lodged his notice of appeal and applied for certified copies of the relevant documents for that purpose. He was supplied with the documents together with the certificate of delay excluding days up to 30/7/2021, however, he did not timely lodge the intended appeal. He has thus preferred this application so that time may be extended for him to lodge the appeal. The reason cited in the notice of motion for his failure to appeal in time is that he he was waiting for the outcome of Misc. Land Application No. 93 of 2020 in the DLHT of Kigoma seeking to stay execution of the decree in Land Appeal No. 10 of 2015. The ruling in Misc. Land Application No. 93 of 2020 for stay of execution was delivered on 10/11/2021 and its copy was availed to the applicant on 19/11/2021. By that time the applicant was out of time within which he could have filed his appeal as per the certificate of delay.

At the hearing before me, the applicant was represented by Mr. Masendeka Anania Ndayanse, learned advocate, while the respondent enjoyed the service of Mr. Silvester Damas Sagomba, also learned advocate. After adopting his affidavit, Mr. Ndayanse submitted that, as the certificate of delay excluded days up to 30/7/2021 the appeal ought to have been lodged latest by 30/9/2021. However, they could not appeal as they had to apply for stay of execution at the DLHT and had to wait for the results, which results were given on 10/11/2021 as stated above. I have to note that these facts were not stated in the supporting affidavit.

Upon being probed, Mr. Ndayanse submitted that he could not seek for stay of execution at the Court of Appeal because the DLHT might have proceeded with execution. On further probing, Mr. Ndayanse submitted that, he spent the days between 19/11/2021, when he was supplied with the copy of the ruling of the DLHT in Misc Land Application No. 93 of 2020, to 6/12/2021 preparing the present application and filed it on 7/12/2021. The receipt for lodging the notice of motion is dated 14/12/2021.

Mr. Sagomba briefly responded to the application by showing that, his client was served with the notice of motion and its supporting documents on 30/3/2022, outside the 14 days prescribed under rule 55(1)

of the Rules. That is why, he argued, he could not file an affidavit in reply. In addition, he pointed out that, an important document, the chamber summons before the High Court, is not attached in the present application. Mr. Sagomba thus submitted that the application is incompetent and denied the respondent the right to be heard. The learned advocate further submitted that as the reasons for the delay are not raised in the supporting affidavit, I should not consider the arguments from the bar made by counsel for the applicant. He asked that I dismiss the application with cost.

In a short rejoinder, Mr. Ndayanse admitted that they did not serve the respondent in time for the reason that he was not available at his residence at Urambo and that they managed to serve him later while at Kasulu where he was found. Apart from admitting that the above facts were not stated in his affidavit, Mr. Ndayanse did not have any proof as to his attempts to serve the respondent in compliance with rule 55(1) of the Rules.

The first thing for me to consider is the competency of the application. Rule 55(1) of the Rules provides as follows;

*"55 -(1) The notice of motion, affidavit and all supporting documents shall, within fourteen (14)*

*days from the date of filing, be served upon the party or parties affected”.*

The provision is couched in mandatory terms and there is no dispute that the applicant did not comply with it. In **Rashid Twalib Makonyora & Others vs Salim Twalib Makonyora & Another**, Civil Appl. No.21 of 2015) [2015] TZCA 132 (unreported), the Court declared the application incompetent for the reason that service of the notice of motion and its supporting documents had not been effected on the respondent. It emphasized that the applicant did not comply with rule 48(4) (now rule 55(1)) of the Court of Appeal Rules, as amended by G.N. No. 362 of 2017.

Well before that, in **Ludovick K Mbona v. National Bank of Commerce** [1997] T.L.R 26 in an akin situation, the Court insisted on the compliance of the rules that regulate the conduct of its business, in the following statement;

*"For similar reasons, it is my view that the instant case is such that it should strictly comply with the requirements of **the Appellate Jurisdiction Act, 1979 and the Court's rules...** Consequently, in the circumstances of the case, I am increasingly convinced that the mandatory provisions of Rule 52(1) not having been complied*

*with, the application was incompetent which in effect amounts to no application at all."*

Since this application was filed on 7/12/2021, the notice of motion and its supporting documents ought to have been served on the respondent by 21/12/2021. However, Mr. Sagomba, counsel for the respondent submitted and Mr. Ndayanse counsel for the applicant conceded, that the same were served on the respondent on 30/3/2022, which was by far beyond the 14 days prescribed under rule 55(1) of the Rules.

Mr. Ndayanse's argument that he took time to trace the respondent is attractive but untenable for two reasons. One it is an argument from the bar as it is not reflected in his affidavit. Two, that argument would be relevant in an application for extension of time to serve the respondent. I go along with Mr. Sagomba, that I should not consider such arguments from the bar. In **Richard Mchau vs Shabir Abdulhussein** [2017] T.L.R 491, we held that the Court will treat as afterthought facts not stated by a party in the affidavit.

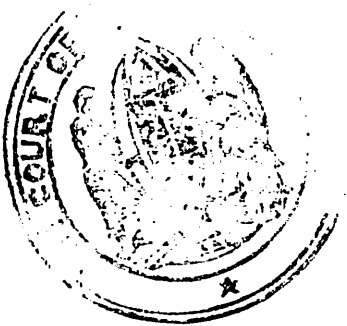
In the instant application, the applicant is in a worse scenario because even the reason for the delay is not reflected in the affidavit. However, since the application is incompetent, I need not venture into

that. Suffice to conclude that the application is incompetent for contravening the mandatory provisions of rule 55 (1) of the Rules and it is struck out with costs.

**DATED at KIGOMA** this 15<sup>th</sup> day of June, 2022.

I. P. KITUSI  
**JUSTICE OF APPEAL**

The Ruling delivered on this 16<sup>th</sup> day of June, 2022 in the presence of the Mr. Daniel Rumenyela holding brief Mr. Masendeka Ndayanse counsel for the appellant and Mr. Silvester Damas Sagomba counsel for the respondent is hereby certified as a true copy of the original.



  
G. H. HERBERT  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**

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of Tanzania at Kigoma)**

**(MUGETA, J.)**

**dated the 29<sup>th</sup> day of October, 2019**

**in**

**Misc. Land Application No. 4 of 2019**

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**ORDER**

**In court this 16<sup>th</sup> day of June, 2020**

**Before:   The Honourable Mr. Justice F.L.K. Wambali, Justice of Appeal**  
**The Honourable Mr. Justice I.P. Kitusi, Justice of Appeal**  
**And,       The Honourable Mr. Justice P.M. Kitusi, Justice of Appeal**

**THIS APPLICATION** coming on for hearing this 14<sup>th</sup> day of June, 2022 in the presence of Mr. Masendeka Anania Ndayanse counsel for the applicant and Mr. Silvester Damas Sogomba, counsel for the respondent. **AND UPON HEARING** the parties, when the Application stood over for Ruling and this Application coming for Ruling this day;

**IT IS ORDERED that,** Application struck out with costs.

**DATED at KIGOMA** this 16<sup>th</sup> day of June, 2022.



**G. H. HERBERT**  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**

**Extracted** on 16<sup>th</sup> day of June, 2022.