

**IN THE COURT OF APPEAL OF TANZANIA**

**AT TANGA**

**CIVIL APPLICATION NO. 311/12 OF 2020**

**ZUBERI ATHUMANI MBUGUNI..... APPLICANT**

**VERSUS**

**NATIONAL BANK OF COMMERCE LIMITED .....RESPONDENT**

**(Appeal from the judgment and decree of the High Court of Tanzania  
at Tanga)**

**(Mruma, J:)**

**Dated the 26<sup>th</sup> day of February, 2019**

**In**

**Land Case No. 24 of 2016**

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**RULING**

*8<sup>th</sup> & May, 1<sup>st</sup> June, 2023*

**LILA, J.A.:**

The applicant, Zuberi Athumani Mbuguni, was aggrieved by the judgment and decree in Land Case No. 24 of 2016 which was delivered on 26/2/2019 but was late in lodging an appeal. He is now seeking for enlargement of time within which to appeal. The application which has been preferred under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (henceforth the Rules) is supported by an affidavit sworn by Philemon Raulencio, the applicant's advocate and is resisted by the respondent in the reply affidavit sworn by Mr. Desmond Malyi, a Principal Officer of the respondent.

According to the affidavit and reply affidavit, it is not disputed that the applicant was a defendant in Land Case No. 24 of 2016 (annexture ZA-1) which was determined in the respondent's favour on 26/2/2019. A notice of appeal was duly lodged by the applicant showing his dissatisfaction with the decision on 15/3/2019 well within time followed by a request to be supplied with requisite documents for appeal purposes (annexture ZA-2) and the same were availed to him on 12/4/2019. The applicant then applied for extension of time to apply for leave as well as be granted leave to appeal (annexture ZA-3) which application was struck out on 6/5/2020 because, by then, it was not a requirement and the proceedings thereof were supplied on the applicant on 15/5/2020 upon his request.

The contest between the parties as reflected in the affidavit and reply affidavit and the learned counsel arguments before me, centred on whether the delay occasioned by the applicant preferring the application for extension of time to apply for leave and be granted leave amounts to sufficient cause for the Court to exercise its discretionary power and grant extension of time to lodge an appeal.

Before me to argue, respectively, for and against the application were Mr. Alex Balomi who was assisted by Mr. Charles Shipate, both

learned advocates representing the applicant and Mr. Sabato Ngogo, also learned advocate representing the respondent.

To be frank, a substantial part of Mr. Balomi's arguments constituted the narration of the background of the application as amply demonstrated above which, he argued, presented a chronology of steps duly taken by the applicant and without delay. He added that the applicant had been diligently pursuing his course to have the appeal lodged despite his delay and that the delay was a result of an amendment of law vide written Laws (Miscellaneous Amendments) Act No. 8 of 2018 which dispensed with the requirement of leave on land matters emanating from the High Court exercising its original jurisdiction before lodging an appeal which the applicant was not aware of. He insisted that the delay was a technical one. He, further, argued that prosecuting a wrong cause has been held to be good cause for delay by the Court citing **Fortunatus Masha V. William Shija and Another** [1997] TLR 154 and **Bharya Engineering & Contracting Co. Ltd V. Hamoud Ahmed Nassor**, Civil Application No. 342/01 of 2017 as authorities.

In the written submission, Mr. Balomi began by acknowledging the position of law that grant of extension of time to appeal is not automatic but subject to the applicant showing good cause for each day of delay which position was promulgated by the Court in a number of decisions

and, to bolster his assertion, he singled out the Court's decisions in **The Principal Secretary, Ministry of Defence and National service V. Devram P. Valambhia** [1992] TLR 387 and **Tumsifu Kimaro (administrator of the Estate of late Eliamini Kimaro) V. Mohamed Mshindo**, Civil Application No. 28/17 of 2017 and **Hamisi Mohamed (as administrator of the estate of the late Risasi Ngawe) V. Mtumwa Moshi (as administrator of the estate of the late Moshi Abdallah)**, Civil Application No. 407/17 of 2019 (both unreported). He also argued that the above conditions notwithstanding, each case has to be decided according to its facts citing the case of **Bank M (Tanzania) Limited V. Enock Mwakyusa**, Civil Application No. 28/17 of 2017 (unreported). The applicant contended that from 6/5/2020 when Misc. Civil Application No. 19 of 2019 was struck out to 27/5/2020 when this application was lodged, only 12 days lapsed which, considering that the proceedings thereof were supplied to the applicant on 15/5/2020, the applicant should be taken to have acted promptly justifying grant of extension of time.

I also take note that Mr. Balomi raised before me and orally as a reason for granting extension of time, that the decision sought to be impugned is tainted with illegalities pointing out that the court lacked pecuniary jurisdiction to adjudicate on the land case.

There was no written submission from the respondent on the record and Mr. Ngogo argued against the application orally having adopted the contents of the reply affidavit as part of his submission. He was brief and focused advancing, both in his reply affidavit and oral submission, three reasons for resisting the application. One, he argued that the applicant cannot rely on technical delay for a reason that when Misc. Civil Application No. 19 of 2019 was lodged, the law abolishing requirement of leave to appeal had long been enacted. He was opposed to taking ignorance of law at the time of lodging the application for extension of time to apply and be granted leave of to appeal as good cause for granting extension of time.

Two, Mr. Ngogo submitted that that a claim by Mr. Balomi that the decision sought to be appealed against is tainted with illegality was an argument not averred in the affidavit in support of the application hence an argument from the bar which should not be considered.

Lastly, Mr. Ngogo raised a concern as to how the applicant rushed to the Court to apply for extension of time before obtaining a certificate of delay from the Registrar in terms of Rule 90(1) of the Rules which could have excluded the period spent by the Registrar in preparation of vital documents for appealing. Relying on those arguments, Mr. Ngogo

concluded that the applicant had failed to demonstrate good cause for delay and beseeched the Court to dismiss the application with costs.

In his brief rejoinder, Mr. Balomi reiterated what he had told the Court and added that Mr. Ngogo's argument would be valid had he told the operational date of the Government Notice of the amending law and as for the absence of a certificate of delay, he discounted the argument for being premature as that is a matter to be argued once the appeal is lodged.

Grant of extension of time as appreciated by both counsel is a matter of Court's discretion the exercise of which is governed by law (Rule 10 of the Rules) that good cause must be shown depending on the circumstances of each particular case. That said, without hesitation, I associate myself with the positions set by the cited cases above. As stated above, the parties agree that the applicant lodged a notice of appeal timeously on 15/3/2019. Rule 90(1) of the Rules enjoins the applicant to lodge an appeal within sixty (60) days of the lodging of the notice appeal which means the applicant ought to have done so latest on 15/5/2019 unless a certificate of delay is issued by the Registrar of the Court excluding days spent in preparing the documents requested for appeal purposes. In the present case, there was no certificate to that effect. Here I should pause and provide an answer to the issue of absence of a

certificate of delay. I have read no Rule in the Rules putting it as a mandatory requirement before one applies for extension of time. All that is required is that the applicant should account for the delay. Days excluded in the certificate of delay is just one way of accounting some days delayed as it reduces the number of days an applicant has to account for. Where a party does not obtain a certificate of delay, he denies himself of the advantage of exclusion and therefore the burden lies on him to account for each day of delay for the whole period he was late in lodging the appeal. Mr. Ngogo's argument is therefore without basis and it fails.

Coming now to the issue of the alleged illegality of the decision desired to be impugned, I entirely agree with Mr. Balomi that existence of an illegality constitutes good reason for grant of extension of time to appeal. The rationale is that it allows an opportunity to the appellate court to correct the illegality. That was, with sufficient lucidity, stated by the Court in **The Principal Secretary Ministry of Defence and Notional Service Vs. Devram Valambia** (supra) where it was held thus: -

*"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 straight"*

But it is noteworthy that for the Court to act on any argument in an application, the same should have been reflected in the affidavit supporting the application otherwise, as was rightly argued by Mr. Ngogo, the allegation of illegality, in the instant application, came from Mr. Balomi's oral submission hence it was an argument from the bar not deserving any consideration. **In: Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman, Bunju Village Government & 11 Others**, Civil Appeal No. 147 of 2006, the Court insisted that: -

*"To start with, it is not in dispute that no reasons for the failure to appeal in time were given in the affidavit in support of the application before the High Court. Since, as correctly submitted by Mr. Mhango, **an affidavit is evidence we think it was expected that reasons for the delay would be reflected in the affidavit.** In the absence of reasons, it occurs to us that there was no material evidence upon which the judge could determine on merit the application before him..."*

(Emphasis added)

Given the stance of the law, an allegation of illegality as raised by Mr. Balomi, it not having featured in the affidavit, cannot be entertained.

Last to be considered is whether the applicant has assigned good reason(s) for delay. The remaining sole reason the application hinges on



is that the applicant was late to lodge an appeal because he was prosecuting an application for extension of time to apply for leave and be granted the same which was dispensed with following the amendment of law for which the applicant's lawyer was not aware of. The argument is stoutly resisted as being ignorance of law which does not constitute good cause of delay. I think, I should not be detained on this argument for the Court had occasions to consider and make a finding on it that the circumstances of this case amounts to a technical delay. Relevant here is the case of **Hamisi Mohamed (as administrator of the estate of the late Risasi Ngawe) V. Mtumwa Moshi (as administrator of the estate of the late Moshi Abdallah)** (supra) where the Court categorically stated that: -

*"As such, the time taken by the applicant in seeking leave, that is, counting from the time the applicant's initial application for leave was struck out to the time when the application for leave was found to be overtaken by operation of the law is in fact, a technical delay which is explicable and excusable..."*

In the instant case, as rightly submitted by Mr. Balomi, the applicant's application for extension of time to apply for leave was struck out on 6/5/2020 and when the present application was lodge only twelve (12) days lapsed. I have examined the record and satisfied myself that

the applicant has shown the steps he had been taking and days spent all along until the application was struck out and I have not noted any laxity on his part. He diligently prosecuted the cases in court and the twelve days which lapsed before lodging this application is too short a time to condemn the applicant that he did not act promptly to lodge the present application. Mr. Ngogo's assertion, therefore misses legs to stand on and it falls apart.

All said, I hold that the applicant has shown good cause and exercising the discretional powers under Rule 10 of the Rules, time to lodge an appeal is hereby extended. The applicant to lodge an appeal within sixty (60) days from the date of the delivery of this ruling. Each party shall bear own costs in this application.

**DATED at DAR ES SALAAM this 25<sup>th</sup> day of May, 2023.**

S. A. LILA  
**JUSTICE OF APPEAL**

The Ruling is delivered this 1<sup>st</sup> day of June, 2023 in the presence of the Alex Balomi, learned counsel for the Applicant also holding brief for Mr. Sabato Ngogo, learned counsel for the respondent is hereby certified as a true ~~copy~~ of the original.



  
R. W. CHAUNGU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**