

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 347/17 OF 2022

ABUBAKAR RASHID ISMAIL APPLICANT

VERSUS

AHMED SALUM RASHID KATUNGUNYA 1ST RESPONDENT

ABDALLAH SALUM RASHID KATUNGUNYA 2ND RESPONDENT

**(Appeal from the judgment and decree of the High Court of Tanzania, Land
Division at Dar es Salaam)**

(Mkuye, J)

Dated the 31st day of March 2016

in

Land Case No. 182 of 2012

RULING OF THE COURT

22nd & 30th August, 2023

MGEYEKWA, J.A.

This is an application predicted upon rule 10 of the Court of Appeal Rules, 2009 (the Rules) wherein the applicant is seeking an extension of time within which to serve the respondents with copies of the Memorandum and record of appeal and additional record of appeal in Civil Appeal No. 365 of 2020. The notice of motion initiating this application is supported by two affidavits deponed by the applicant and Mr. Mpaya Kamara, learned counsel.

In opposing the application, the respondents filed a joint affidavit in reply deponed by Ahmed Salum Katungunya, the respondents.

To appreciate the nature and essence of the application the relevant background facts, albeit in brief, as discerned from the affidavits filed for and against the application together with the documents attached thereto, are as follows: Through Land Case No. 182 of 2012 in the High Court of Tanzania (Land Division) at Dar es Salaam, the applicant sued the respondents; for give vacant possession of the property on Plot No. 17, Block 58, Sikukuu Street at Kariakoo area, Ilala Municipality within Dar es Salaam, permanent injunction restraining the respondents, their workmen and/ or agents from interfering with the applicant's quiet enjoyment with suit premises, and for payment of TZS. 4,000,000/= (Tanzanian Shillings Four Million Only) per month being loss of income and damages suffered by the applicant.

The applicant narrated that on 30th January, 2009 one Ismail Rashidi Mkoko, now the deceased, purchased the suit property from the legal personal representative of Saium Seif Katuganya at a consideration of TZS.

620,000,000/= (Tanzanian Shillings Six Hundred Twenty Million Only) and the transfer of the right of occupancy was duly executed.

Subsequent to the said transfer, on 11th March, 2010, Ismail Rashid Mkojo, the purchaser, was granted a right of occupancy. Upon a full trial, the High Court found that the applicant had failed to prove his case on the balance of probabilities and thus dismissed it with costs. The decision by the High Court did not amuse the applicant who expressed his desire to challenge it by duly lodging a notice of appeal on 2nd May, 2012. In terms of rule 90 (91) of the Rules, the applicant was required to file a memorandum of appeal and record of appeal within sixty (60) days from the date the notice of appeal was lodged. Unfortunately, the applicant failed to file the same within the prescribed time hence, the instant application for an extension of time.

When the application came for hearing before me, the applicant enjoyed the legal service of Mr. Mpaya Kamara, learned counsel while the respondents appeared in person, unrepresented.

Submitting in support of the prayer for extension of time, Mr. Kamara adopted the two supporting affidavits as well as the notice of motion to form

part of his submissions. The gist of Kamara's averment is that they have raised sufficient and exceptional reasons in support of the application at hand. Mr. Kamara submitted that the Court in exercising its power of extension of time, requires the applicant to show good cause and it is the discretion of the Court to decide if there is a good cause.

Expounding, Mr. Kamara submitted that the applicant is required to show the reasons why he delayed filing the memorandum and record of appeal within time. To fortify his assertion, he referred me to the cases of **Rahid Abiki Nguwa v Ramadhan Hassan Kuteya & Another**, Civil Application No. 431 of 2021 and **The International Airline of the United Arab Emirates**, Civil Application No. 509 of 2019 (both unreported).

Mr. Kamara recalled the diligent step which the applicant took on 9th October, 2020 to file the Notice of Appeal and the same was served to the respondents. In paragraph 5 of his affidavit, Mr. Kamara's averred that on 14th October, 2020, he tried to serve the respondents through the Law Firm, Semgalawe Co. Advocates and realized that the Law Firm's office was no longer located at Co – Cabs Building as indicated in the notice of appeal. The office ceased to operate following the death of Mr. Charles Semgalawe,

learned counsel. In the same paragraph, Mr. Kamara avers that on the next day on 15th, October, 2020, he informed the applicant that he did not serve the respondents through their Advocate.

The applicant made several follow-ups till 11th June, 2022 when he was able to trace their physical address. After a lapse of nine (9) days, they lodged the instant application. Mr. Kamara was firm that the applicant has accounted for the days of delay from 15th October, 2020 when he communicated with the applicant to 11th June, 2022, when the applicant spotted the respondents. To support his submission, he referred the Court to paragraphs 6 and 8 of his affidavit and paragraph 4 of the applicant's affidavit.

Apart from the submission on the days of delay, Mr. Kamara prayed for the Court to disregard and expunge the respondents' attached annexures to the written submission for being evidence of facts. Supporting his averment, he referred the Court to the case of **Tanzania Union of Industrial and Commercial Workers (TUICO) at Mbeya Cement Company Ltd v Mbeya Cement Company Ltd and National Insurance Corporation (T) Ltd** [2005] TLR 42.

Further, the learned counsel urged the Court to exercise its discretion under Rule 10 of the Rules, and extend time to the applicant to serve the respondents the memorandum and record of appeal and additional record of appeal. He also urged the Court to find that the respondents would not be prejudiced in any way should an extension be granted.

In their reply submissions, the respondents attacked the averments that the applicant did not know their residential address. They challenged the applicant's affidavit for failing to account for the days of delay of days, claiming that the applicant is lying under Oath because he knows their residential address. To cement their submission, they drew my attention to paragraphs 3 and 4 of the applicant's affidavit.

The respondents submitted in length on the matter which was at the High Court, they argued that the applicant on 7th September, 2012 lodged a Land Case No. 182 of 2012 before the High Court of Tanzania (Land Division) at Dar es Salaam claiming for an order against them to vacate from suit premises described as Plot No.17, Block 58, House No. 65, Kariakoo area, Ilala, Dar es Salaam and the matter was decided in their favour. They claimed that the applicant did not take any legal steps to apply for extension

of time to lodge an application for leave to appeal. Therefore, they were certain that the applicant had failed to show good cause and account for each day of delay to enable the Court to extend time as required by the Rules.

Before embarking on the matter of the application, I feel appropriate to address the issue raised by the respondents in their written submission. In his submission, Mr. Kamara urged the Court not to consider the annexures to the respondent's submission as they raise matters of evidence. I am at one with him because at the stage of making submissions, parties are precluded from adducing or tendering evidence. Annexures intended to form part of evidence in the matter like the one at hand, have to be appended to the affidavit(s) deposed to support the Notice of Motion, otherwise it cannot be tendered or admitted and considered during submissions stage.

From the affidavits, written submission, and oral presentation by Mr. Kamara learned counsel, there is one issue that shall guide how I exercise the judicial discretion to extend time. That is whether the applicant has furnished good cause to warrant the grant of extension of time. I wish to take off by examining the provisions of Rule 10 of the Rules which states:

"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 expiration of that time and 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 so extended." [Emphasis added]

The emphasis in the above rule is for the applicant to show a good cause. This Court on several occasions has stated that, what constitutes good cause(s) cannot be laid down by any hard and fast rules. There is no exact definition as to what constitutes good cause but certain factors may be considered to assess whether the reasons given by the applicant are good cause for a party not being able to act within the prescribed time. This stance was followed in many decisions among them being the cases of **Geita Gold Mining Ltd v Twalib Ally**, Civil Application No. 14 of 2012, **Lyamuya Construction Company Ltd v Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No.2 of 2010, (unreported) and **Victoria Real Estate Development Ltd v**

Tanzania Investment Bank and 3 Others, Civil Application No. 225 of 2014 (all unreported).

In the case of **Lyamuya Construction** (supra), the Court set the following guidelines that may be considered in ascertaining whether there is a good cause:

- a) The applicant must account for all the period of 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; and*
- d) If the Court feels that there are other sufficient reasons, such as existence of a point of law for sufficient importance; such as the illegality of the decision sought to be challenged.*

Equally important is that an application for extension of time must be filed as soon as an applicant becomes aware of the need to do so and he is obliged to account for the delay for every day within the prescribed period. See **Bushfire Hassan v Latina Lucia Masanya**, Civil Application No.3 of 2007 (unreported).

Going by the above authorities, it stands to reason that in exercising its discretion whether or not to grant condonation, the court must be appraised of all the facts and circumstances relating to the delay. Condonation cannot be heard for the mere asking. An applicant is required to make out a case entitling him to the court's indulgence by showing good cause and giving a full, detailed, and accurate of the cause of the delay. In the end, the explanation must be reasonable enough to excuse the default. See the case of **Njoroge v Kimani** (Civil Application No. E049 OF 2022) [2022] KECA 1188 (KLR).

I have evaluated the reasons offered for the delay, I found that on 14th October, 2022, the applicant's counsel tried to serve the respondents with copies memorandum and record of appeal, only to find that the respondents' learned counsel had passed away. The last address for service of the respondents was in the care of Sengalawe & Co. Advocates and there was no any change of address for service. Thereafter, the applicant made several follow-ups till 11th June, 2022 when he was able to trace the respondents' physical address and the applicant lodged the instant application on 20th June, 2022.

From my examination of affidavits and having gone through the respondents' written submission, I find the delay in serving the respondents with copies of the memorandum and records of appeal cannot be linked with any negligence or inaction of the applicant. I say so because it is vivid that the applicant lodged the record of appeal and memorandum of appeal within time which shows that the applicants took further steps to serve respondents, unfortunately, they were nowhere to be found until 11th June, 2022 when the applicant spotted the respondents at House No. 57 on Plot 17, Block 58, Sikukuu Street, Kariakoo area, Ilala, Dar es Salaam. Thereafter, the applicant lodged the instant application on 20th June, 2022.

For the aforesaid reasons, I agree with Mr. Kamara that there is scant material in the affidavit linking the delay and hold that the delay is excusable and that it has been satisfactorily explained, the application meets the tests for the Court to exercise its discretion in the applicant's favour.

Having said so, I restrain myself from considering the respondents' argument that the applicant did not take any steps to file leave to appeal. As correctly pointed out by Mr. Kamara, the respondents' argument is misconceived, and therefore at this juncture, the court is only determining

the application for extension of time to serve the respondents with copies of the memorandum and record of appeal not otherwise.

Consequently, the applicant is granted an extension of time to serve the respondents with copies of the memorandum and record of appeal and additional record of appeal in Civil Appeal No. 365 of 2020. It ordered that the same be effected within thirty (30) days from the date of the delivery of the ruling.

Nevertheless, in the circumstances of this application, I order that parties shall bear their respective costs.

DATED at **DAR ES SALAAM** this 30th day of August, 2023.

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Ruling delivered this 30th day of August, 2023 in the presence of Mr. Mahmudu Mussa holding brief of Mpaya Kamara, learned counsel for the applicant, and the 1st respondent in person, is hereby certified as a true copy of the original.



R. W. Chaungu
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DEPUTY REGISTRAR
COURT OF APPEAL