

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 456/17 OF 2022

AMANDUS KATO APPLICANT

VERSUS

MASEKE KANYOROZENGO 1ST RESPONDENT

MPOY TRADERS & AUCTION MART 2ND RESPONDENT

**(Application for extension of time within which to apply for leave to appeal
to the Court of Appeal Tanzania against the decision of the High Court in
Land Appeal No. 367 of 2019)**

(Mango, J)

**Dated the 22nd October, 2022
in**

Labour Revision No. 267 of 2020

RULING OF THE COURT

25th & 30th August, 2023

MGEYEKWA, J.A;

This is an application for extension of time within which to apply for leave to appeal to the Court. The Notice of Motion is made under Rules 10 and 45 (b) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules) and it is supported by an affidavit sworn by Amandus Kato, the applicant. In opposing the application, the respondent filed an affidavit in reply sworn by one Godwin Muganyizi, his learned advocate.

At the hearing of the application, the applicant enlisted the noble legal services of Mr. Silvester Shayo, learned counsel whereas the respondent had the legal services of Mr. Godwin Muganyizi, learned counsel.

The brief facts giving rise to the present motion are pegged in the affidavit in support of the application which states that: On 22nd October, 2020, the High Court (Mango, J) dismissed the appeal in Land Appeal No. 267 of 2019. Undeterred, on 4th November, 2020, the applicant lodged his notice of appeal followed by Misc. Land Application No. 677 of 2020 on leave to appeal to the Court which was struck out on 11th October, 2021 for being incompetent. The matter in controversy is on ownership of Plot No. 461, Block "AA", Makurumla area at Dar es Salaam with a Certificate of Title No. 53916. The applicant alleged that, the lower courts ignored his testimony that, the signature of Prosista Kimario, his late mother was forged. He further alleges that he made several follow-ups to the police to obtain forensic evidence regarding the sale agreement (Exh.D1) and finally, the Forensic Bureau Report was issued on 1st July, 2022.

In the present application, the applicant indicated that he intends to challenge the decision of the High Court (Land Division) in Land Appeal No.

267 of 2019. The grounds under which this application is brought are as follows:-

- 1. The judgment and decree in Land Appeal No. 267 of 2019 are tainted with illegality in that they are based on a forged document, and the expert opinion on the forgery was obtained by the applicant on 29th July, 2022.*
- 2. The applicant has an appeal that stands an overwhelming chances of success.*
- 3. The applicant has taken essential steps to prosecute his appeal in the Court of Appeal.*
- 4. The applicant applied for leave to appeal, but the High Court (Land Division) at Dar es Salaam refused to grant leave.*

Submitting in support of the application, Mr. Shayo commenced his submission by fully adopting the contents of the notice of motion and the affidavit in support of the application. He started by stating that the applicant has accounted for the days of delay; particularly, from the time when the appeal was dismissed to the time of lodging this application. He asserted that after the dismissal of the appeal, the applicant made several follow-ups

to the police to obtain relevant documents related to the alleged forgery, and soon after receiving the same, he filed the instant application.

The applicant's counsel further contended that the issue of illegality concerning the sale agreement was the main dispute before Chanye, Chairperson. He added that the sale agreement (exhibit D1) was wrongly admitted in evidence at the District Land and Housing Tribunal (the DLHT), which noted the defects but did not consider them in its decision. Mr. Shayo elaborated that, it was wrong for the learned Judge to hold that exhibit D1 was wrongly admitted in evidence by the DLHT, yet the learned High Court Judge confirmed the decision of the DLHT. He further blamed the learned High Court Judge for failure to analyze the forensic evidence. He urged me to find that the applicant has good cause for the delay and grant the application.

In reply, the learned counsel for the respondent also prayed to adopt his affidavit in reply to form part of his oral submission. Mr. Muganyizi, attacked the averments that the applicant has accounted for the days of delay. According to him, this application is unmerited and deserves to be dismissed. It was his submission that, in the application of this nature, the applicant is required to show sufficient cause and account for the days of

delay. He contended that the Court at this stage is not supposed to look at the raised issues of illegality. The counsel went on to submit that in accounting for the days of delay from 11th October, 2021 when the impugned ruling was issued to 19th January, 2022 when he lodged a complaint at the Police, the days are unaccounted.

He strongly argued that a follow-up of the forensic report cannot be a sufficient reason for the delay in filing this application and the same is an afterthought. Mr. Muganyizi submitted that the court has the discretion to extend time, however, the same has to be exercised judiciously. Mr. Muganyizi further contended that, the applicant is trying to fill the gaps in his evidence which is not justified in law. He forcefully argued that the Court at this juncture is not supposed to look at the forged documents which were obtained after the decision of the High Court. He concluded his submission by imploring the Court to hold that the applicants had failed to account for the delay.

In a brief rejoinder, Mr. Shayo reiterated what he submitted in chief and maintained that the applicant has availed good cause for extension of time. He clarified that the applicant has accounted for the days of delay from 11th October, 2021 when he received the forensic evidence report to 4th

August, 2022 when he lodged the instant application. He stressed that there is an issue of illegality that drew the attention of this Court. He stressed that the applicants acted diligently, as he lodged the instant application within ten (10) days.

I have dispassionately considered and weighed the submissions from both counsel as presented before me for and against the application. The present application is preferred under Rule 10 of the Rules which requires good cause to be shown for the Court to exercise its discretionary powers to extend time. The relevant Rule 10 states:

"10. 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 as so extended."

Under the above-cited provision of the law, the requirement which the applicant has to satisfy is to show good cause for the delay in filling the

application. The term “good cause” having not been defined by the Rules, cannot be laid by any hard and fast rules but is dependent upon the facts obtained in each particular case. This stance has been taken by the Court of Appeal in a number of its decisions, In **Ngao Godwin Losero v Julius Mwarabu**, Civil Application No. 10 of 2015 (unreported), the Court quoted with approval the decision of the defunct Court of Appeal of Eastern Africa in **Mbogo v Shah** [1968] EA where it was held that:

"All relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reason for the delay, whether there is an arguable case on the appeal and the degree of prejudice."

Having carefully gone through the notice of motion, supporting affidavit, and oral presentations by the two learned advocates. Mr. Shayo has shown the path navigated by the applicant and the backing he has encountered in trying to reverse the decision of the High Court. The applicant's Advocate has raised two main limbs for his delay, accounting for days of delay, and illegality.

On the first limb, the first reason for the delay submitted by Mr. Shayo is delay in obtaining the forensic report from the police. It is on record that,

the ruling of the High Court was delivered on 11th October, 2021. According to rule 45 (b) of the Rules, the second bite leave, the applicant was required to file his application within fourteen (14) days from the date of delivery of the said ruling. It ought to have been filed lately on 25th October, 2021. Nonetheless, the application before me was lodged on 4th August, 2022, which is, after lapse of approximately 282 days.

The reason that has been advanced by the learned counsel for the applicant and also found in paragraphs 2, 5 and 6 of the affidavit is that, the applicant was waiting for the forensic report which was vailed to him on 1st July, 2022. He indeed tried to account for that delay by stating that, he approached the police station at Magomeni on 11th October, 2021. Subsequently, the police started to investigate on the matter from 5th April, 2022 to 1st July, 2022 when the forensic bureau informed him that exhibit D1 was a forged document. In my considered view, I find and hold that the police investigation did not hinder the applicant to commence his appeal process within time.

Even if I were to agree with Mr. Shayo that the applicant has accounted for the period when he was waiting for the forensic report. He has failed to account for each day of delay from 11th October, 2021 when the impugned

ruling was delivered to 4th August, 2022 when he lodged the instant application. The applicant was expected to account for such delay and give reasons in the supporting affidavit explaining why he stayed mute for almost 282) days. Unfortunately, that was not done.

It is settled position that, any applicant seeking for extension of time under Rule 10 of the Rules is required to account for the delay of each day. This point was underscored in the case of **Bushiri Hassan v Latifa Lukio Mashayo**, Civil Application No. 03 of 2007, (unreported) and the Court took a similar position in **Bariki Israel v R**, Criminal Application No. 4 of 2011 (unreported) where we held: -

"...in an application for extension of time, the applicant has to account for every day of the delay..."

I fully subscribe to the above authority, and I am thus constrained to consider the submission by Mr. Shayo on the first point, in that, the applicant unexplained delay of more than 282 days is inordinate.

Regarding the alleged illegality, the focus is on whether or not the applicant deposited sufficient amount as subsistence allowance. Just like in the first ground, this ground also requires proof through long process. Much

as it can be appreciated that illegality is one of factors to be considered as good cause, the same is not an automatic right. For illegality to be considered as a good cause for extension of time, it must be apparent on the face of record. (See **The Principal Secretary, Ministry of Defence and National Service v Devram Valambhia** [1992] TLR 185 and **Arunaben Chaggan Mistry v Naushad Mohamed Hussein & 3 Others**, Civil Application No. 6 of 2016. In **Lyamuya Construction** (supra), the scope of illegality was taken a top-notch when this Court propounded as follows:-

*"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in Vaambia's case, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one. **The Court there emphasized that such point of law must be that of sufficient importance** and, I would add that it must also be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by a long-drawn argument or process." [Emphasis added].*

In the application at hand, the illegality is alleged to reside in the powers exercised by the High Court (Land Division) in hearing the appeal originating from the DLHT. The applicant in paragraphs 3 and 4 of the affidavit in support of the application, has raised two points that hinge on illegality. First, the High Court relied upon the sale agreement which was wrongly admitted in evidence by the DLHT; and second, he is certain that his mother's signature on exhibit D1 was forged.

Having considered the basis of the pointed illegality, I am not persuaded that the same deserve to be termed so, because it is not that of sufficient importance. I will explain. The applicant in his affidavit has deposed that the report which he wants to rely upon in his appeal before the Court, on that point of illegality, was obtained on 1st July, 2022 after the DLHT and the High Court had already heard his case and handed down their decisions. That means, the said lower courts, in determination of the applicant's case, did not have the benefit and opportunity of considering the said report, which the applicant is now relying upon to raise issues of illegality in the impugned decision. It is my respectful opinion that, in the circumstances, the raised issue is wanting, as the said courts cannot be blamed on matters which were not before them.

I am therefore in agreement with the submission advanced by Mr. Muganyizi that the applicant's alleged illegality do not qualify to be termed so, and it is nothing, but an afterthought. The same does not fall within the meaning of good cause in terms of Rule 10 of the Rules.

In the premises, I find and hold that, the applicant has failed to account for the delay and establish the alleged illegality as a good cause for extending time for him to file an application for leave.

In the upshot, I hereby dismiss this application with costs.

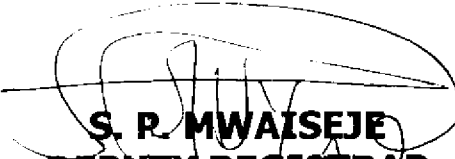
Order accordingly.

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 the applicant in person and 1st respondent and in the absence of the 2nd respondent is hereby certified as a true copy of the original.




S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL