

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 514/17 OF 2022

ESTER BARUTI APPLICANT

VERSUS

SEITH SENYAEL AYO1ST RESPONDENT

MRISHO RAMADHANI2ND RESPONDENT

(Application for extension of time to lodge an appeal to the Court of Appeal of Tanzania against the decision of the High Court of Tanzania,

(Land Division) at Dar es Salaam)

(Maghimbi, J.)

Dated 12th day of May, 2020

in

Misc. Land Application No. 132 of 2019

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RULING

8th & 13th November, 2023

NGWEMBE, J. A.:

Before me is an application by way of a notice of motion taken under rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules) seeking extension of time within which to institute an appeal against the decision of the High Court of Tanzania, Land Division at Dar es Salaam (the High

Court), in Misc. Land Application No. 132 of 2019. The notice of motion is supported by an affidavit sworn by the applicant.

At the hearing of this application, Dr. Abdon Rwegasira, learned advocate appeared for the applicant, while Mr. Fredrick Mwakinga, also learned advocate appeared for the 1st respondent. The 2nd respondent did not appear in court. According to the affidavit of the Court Process Server, it is indicated that, the 2nd respondent is unavailable and his mobile phone could not be reached. Also, it was evident that none of the respondents filed an affidavit in reply, presumably they intended not to oppose the application. Thus, for the interest of justice and speedy disposal of the application, I invoked Rule 63 (2) of the Rules to proceed with hearing of the application.

To grasp the essence of this application for extension of time, I find essential to recap just briefly, the genesis of this application which traces its background to the land dispute arising from ownership of a piece of land at Vikawe Shule, way back in year 2004. The dispute arose between the disputants in year 2009, which landed in the District Land and Housing Tribunal for Kibaha as Land Application No. 98 of 2012. Upon

determination, the tribunal delivered its judgement on 02nd November, 2017 in favour of Sethi Senyael Ayo (1st respondent).

The decision of the tribunal engineered unsuccessful marathon of litigation in the corridors of the High Court and now in the Court. The applicant unsuccessfully instituted before the High Court, Misc. Land Application No. 132 of 2019, seeking extension of time to appeal against the decision of the tribunal delivered on 02nd November, 2017. The application was dismissed by Maghimbi, J: on 12th May, 2020. The reason for such dismissal was failure of the applicant to disclose good cause for delay. Again, the applicant was dissatisfied with the High Court's ruling, hence intended to appeal to this Court against it. However, she found herself also out of time to apply for leave of the High Court to Appeal to the Court. Hence, successfully applied for extension of time (Misc. Land Application No. 90 of 2022) to file an application for leave to appeal against the dismissal order of her application for extension of time. The High Court granted her an extension of time of thirty (30) days within which to file an application for leave. Such decision was delivered on 20th May, 2022 by Judge A. Z. Mgeyekwa (as she then was), which time elapsed on 19th June, 2022. Within that time, that is on 12th July, 2022, the applicant lodged

Misc. Land Application No. 289 of 2022 for leave. Leave was granted by the same judge of the High Court. However, instead of appealing to the Court within the extended time, the applicant again preferred this application for extension of time which application was lodged on 31st August, 2022. I can gather from the notice of motion and affidavit of the applicant, the purpose of this application is for extension of time to challenge the refusal of extension of time by Maghimbi, J.

Having such background, the reasons for delay are disclosed in the narrative affidavit of the applicant. I may conveniently summarize those reasons into; mental illness, thus, transferred to Kigoma and Bukoba for treatment; mishandling of her case by her former learned advocates namely, Frank Chundu and Mgaya; and illegality of the tribunal's decision.

At the outset, Mr. Rwegasira, learned advocate briefly submitted that, soon after the ruling of the High Court refusing her extension of time, the advocate of the applicant lodged notice of appeal and requested for certified copies of ruling and drawn order, but did not request for proceedings. Hence was advised to write another letter for copies of proceedings. After receipt of those proceedings, she proceeded to apply for

extension of time to apply for leave which was granted. Lastly the applicant was granted leave to appeal to this Court.

Arguing on illegalities of the High Court's ruling refusing extension of time, Mr. Rwegasira referred this Court to paragraph 25 of the affidavit which discloses illegalities of the ruling subject to appeal. He rested by a prayer that the application be granted with no order as to costs.

When Mr. Mwakinga was invited to respond to the applicant's submission, he conceded to the application and prayed for the same to be granted.

I have deeply considered the notice of motion and its supporting affidavit together with submission by Mr. Rwegasira, learned advocate for applicant. To the best, I may gather the issue for my determination is whether the applicant has disclosed sufficient cause for the delay to file an appeal to the Court. In our jurisdiction, the law is settled that, whoever seeks extension of time to do a particular action, has uncompromised duty to show good cause for failing to do what she should have done within the prescribed time limitation. This position of law is also statutory as well as

from countless precedents. Rule 10 of the Rules is relevant to be quoted hereunder:

"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"

Principally, the application for extension of time is purely in the discretionary powers of the Court to grant or otherwise. Such discretion, however, has to be exercised judicially, meaning the court has to have good reason to grant it contrary to arbitrary refusal or unreasonable granting extension of time. Therefore, the applicant's duty to account for every day she delayed is not lessened because the application is unopposed. See **Ngao Godwin Losero v. Julius Mwarabu, Civil Application No. 10 of 2015.**

Usually, the courts on application of similar nature, takes cognizance of promptness of the applicant in bringing the action in Court; the exercise of diligence on the part of the applicant; and any other sufficient reason according to a particular circumstance, which may convince the conscience of the presiding justice to exercise his/her discretion. See **Lyamuya Construction Company Ltd v. Board of Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010 (Unreported); Dominic Ishengoma v. Geita Gold Mining Ltd (Civil Application 146 of 2020) [2022] TZCA 803, Bushiri Hassan v. Latifa Lukio Mashayo, Civil Application No. 3 of 2007 and Praygod Mbagu v. Government of Kenya, Criminal Investigation Department & Another [2019] 1 TLR. 629 [CA].**

In respect to the applicant's affidavit, discloses vividly that, the original decision by the tribunal was delivered on 2nd November, 2017, however up to February, 2019 the appeal against it was yet to be processed, though the certified copies of the tribunal's judgement and decree were ready for collection since July, 2018. Moreover, the applicant kept changing advocates from one advocate to another. Even after dismissal of the application for extension of time, in Misc. Land Application

No. 132 of 2019, which ruling was delivered on 12th May, 2020, yet instead of appealing against it to this Court, she opted to change her advocate to the current one, hence this application for extension of time to lodge an appeal against the ruling delivered on 12th May, 2020.

To count from the date of the decision of the High Court subject to appeal, to the date of filing this application, that is on 31/08/2022, makes an aggregate of two years, three months and 19 days. Thus, the applicant has a duty to account for all those days of delay. Such inordinate delay contravened Rule 90 (1) of the Rules, which provide only 60 days from the date the notice of appeal was lodged. Under the circumstance, the applicant requires to lay strong reasons for such inordinate delay with a view to establish a sufficient cause for extension of time.

The law is clear on this point, that in an application for extension of time, the applicant must account for each day of the delay consistent with the decision of the Court in **Hassan Bushiri (Supra)**, where the Court held:

"Delay of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken"

Mr. Rwegasira tried to justify such delay by raising the issue of mental illness; technical delay and negligence of the previous advocates in pursuit of the applicant's appeal timeously. Unfortunate to the applicant, in her affidavit there is no evidence to support the allegations of sickness from either medical doctor who attended her and for how long or an affidavit to that effect. I think, medical report or an affidavit from whoever attended her were material facts to justify the allegations of mental illness.

Equally, is the allegation of technical delay, based on the information from other persons including the advocates mentioned in the affidavit. Prudently, those advocates were expected to append affidavits in support to what she averred. In the absence of it, this Court may treat the allegations as mere hearsay. In this application it seems the applicant attempts to throw the blames on other persons not present in court. But the law strongly discourages such trend and requires the persons so named to swear or affirm an affidavit. See for example in the case of **Mzee Mohammed Akida & Others v. Low Shek Kon & Others (Civil Application No. 481 of 2017) [2023] TZCA 36**, this court: -

"It is trite law that where an affidavit in support of a certain material fact mentions another person on

that point, that other person should also take an affidavit in support of that fact.”

Other relevant precedents include; **Franconia Investment Ltd v. TIB Development Bank Ltd (Civil Application 270 of 2020) [2021] TZCA 563; Jamillah Hassan Muyonga v. Almas Charles Muvungi (Civil Application No.199/17 of 2022) [2023] TZCA 17365 and Sabena Technics Dar Limited v. Michael J. Luwunzu (Civil Application 451 of 2020) [2021] TZCA 108.**

Many times, without number, it has been pronounced by the Court that, times spent in a court corridor by the applicant in further pursuit of her rights and resulting into delay, that delay is technical constituting good cause for extension of time. See **Omary Ally Nyamalege (as Administrator of the Estate of the late Seleman Ally Nyamalege) & 2 Others v. Mwanza Engineering Works, Civil Application No. 94/08 of 2017, (at Mwanza) and Hamisi Mohamed (as the administrator of the Estate of the late Risasi Ngawe) v. Mtumwa Moshi (as Administratrix of the Estate of the late Moshi Abdallah), Civil Application No. 407/17 of 2019, (at Dar es Salaam) both unreported).**

However, the rule built on those precedents, I think was not meant to be universally applicable even at the situation where the applicant approaches a wrong forum, or proper forum but for a wrong remedy, or apply the principle unreasonably. Even in a situation where the applicant is disinterested to the conclusion of the matter, thus, deliberately uses wrong forum to buy time. In such a situation, technical delay cannot help. See **Commissioner General of Tanzania Revenue Authority and Another vs. Urban J. Mtui, Civil Application No. 532/01 of 2021 (Unreported)**.

As discussed above, in respect of this application, the principle of technical delay does not feature. Therefore, she cannot seek amnesty of the purported technical delay as she acted negligently. In other words, her changes of advocates cannot amount into technical delay. The issue of technical delay therefore is neither here nor there. See **Dominic Ishengoma (Supra)**.

The issue of illegality as alleged in the affidavit of the applicant, in our jurisdiction is as well developed. However, granting extension of time based on illegality, the illegality must be apparent on the face of the record

with sufficient public importance. See **Lyamuya Construction Company Ltd (Supra)** and **Principal Secretary Ministry of Defence and National Service v. Devram Valambhia [1992] T.L.R 185**, where this court maintained that the illegality or such point of law, must be that of sufficient importance and must also be apparent on the face of the record.

In respect to this application, the applicant tried to disclose the alleged illegalities in paragraph 25 of the supporting affidavit. Yet I have read both, the ruling of the High Court and the judgement of the tribunal, frankly, there is no illegality apparent on the face of the record. I find that, the High Court judge exercised her discretionary powers correctly.

As was so decided by the Court in the case of the **Commissioner General of Tanzania Revenue Authority and Another (Supra)**, that extension of time is an equitable remedy. In deciding whether or not to grant it, the Court is expected as well to consider the reason for the delay and degree of prejudice that the respondent may suffer if the application is granted. See. **Henry Muyanga v. Tanzania Communication Company Ltd, Civil Application No. 8 of 2014 (unreported)**.

Despite the fact that, the 1st respondent did not oppose the application, yet justice demand that, enough water has passed under the tunnel from 2017 to date, deciding otherwise, will defeat the ends of justice. Therefore, this application must fail for lack of merits.

In the final result and for the foregoing reasons, the application fails and it is accordingly dismissed with no order as to costs for the respondent did not oppose the application.

DATED at DAR ES SALAAM this 13th day of November, 2023.

P. J. NGWEMBE
JUSTICE OF APPEAL

The Ruling delivered this 13th day of November, 2023 in the presence of Dr. Abdon Rwegasira, learned counsel for the Applicant, who is also holding brief for Mr. Frederick Mwakinga, learned counsel for the 1st Respondent and in absence of the 2nd Respondent is hereby certified as a true copy of the original.



S. J. Kainda
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REGISTRAR
COURT OF APPEAL