

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 148/17 OF 2017

EZROM MAGESA MARYOGO.....APPLICANT

VERSUS

1. KASIM MOHAMED SAID

2. IBRAHIM MWANKUSYERESPONDENTS

(Application for extension of time to serve Notice of Appeal and letter requesting Proceedings from the decision of the High Court of Tanzania at Dar es Salaam)

(Mgeta, J.)

dated the 7th day of February, 2014

in

Land Case No. 228 of 2005

RULING

18th & 30th August, 2017

MUGASHA, J.A.:

The second respondent successfully commenced against the applicant, Land Case No. 167 of 2004 in the High Court (Land Division) at Dar-es-salaam where the applicant was declared the rightful owner of the farm in dispute. Later, the first respondent successfully filed another Land Case No. 228 of 2005 against the applicant on the same piece of land. Demello, J. declared the applicant as the rightful owner of the land in dispute. Then, the first

respondent lodged notice of appeal to the Court and subsequently sought a review before Mgeta, J. who ruled in favour of the first respondent.

Aggrieved, the applicant through his former advocate Mr. Godfrey Taisamo filed a notice of appeal against the Ruling by Mgeta, J. He as well requested to be supplied with proceedings, Ruling and Drawn Order. However, the applicant fell sick having suffered a severe stroke which disabled him to communicate orally and as such, he could not instruct his advocate on further steps to pursue the appeal.

It is against the said backdrop, the applicant has brought the present motion on grounds that; **One**, the incapacity due to illness made him not to embark on further steps subsequent to the filing of the notice of appeal and seeking to be supplied with requisite proceedings for the prosecution of the appeal. **Two**, in the process of drawing an appeal, it was discovered that, the notice of appeal and applicant's letter to the Registrar seeking to be supplied with Ruling, Drawn Order and Proceedings were not served to the respondents as

required by the law. **Three**, the review of Mgetta, J. which reversed the decision of Demello, J. is against the Law. **Four**, the hearing of the appeal will not cause any injustice. The affidavit of **ESROM MAGESA MARYOGO**, the applicant is in support of the application. The application is not opposed by the respondents in the absence of any affidavit in reply.

At the hearing of the application, the applicant was represented by Mrs. Nakazaeli Tenga, learned counsel. The respondents were absent though served through their advocates namely, H.K. Law Chambers and R.B. Msirikale who declined service in terms of the affidavit sworn by one **SALIM EDWARD**, the process server. Therefore, with leave of the Court, the applicant was permitted to proceed in the absence of the respondents in terms of Rule 63 (2) of the Rules.

Mrs. Nakazaeli Tenga adopted the contents of the notice of motion, affidavit in support of the application and the written submissions. She then proceeded to pray for the grant of the application to enable the applicant to effect service of the notice of

appeal and the letter to be supplied with the proceedings, Ruling and Order.

The question for determination is whether good cause has been established as required by Rule 10 of the Rules which provides as follows:-

"The Court may, upon good cause shown, extend 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 expiration of that time and whether before or after the doing of the act, any reference in these Rules to any such time shall be construed as a reference to that time so extended".

In interpreting judicial discretion, apart from the same being unfettered, the courts may take into consideration, such factors as, the length of delay, the reason for the delay, the chance of success of the intended appeal, and the degree of prejudice that the respondent may suffer if the application is not granted. (**See HENRY MUYAGA vs. TTCL** Application No. 8 of 2011 (unreported)). What amounts to good

cause includes whether or not the application has been brought promptly, the absence of any valid explanation for delay, lack of diligence on the part of the applicant. (See **TANGA CEMENT COMPANY LIMITED v JUMANNE D. MASSANGA AND AMOS A. MWALWANDA CIVIL APPLICATION NO. 6 OF 2001**)

In the light of the said decisions, what steps did the applicant take since he became aware that the respondents were not served with the requisite documents and whether or not he respondents will be prejudiced if the application is granted, will guide my determination of existence or otherwise of good cause in the present application. It is trite law that, an applicant before the Court must satisfy the Court that since becoming aware of the fact that he is out of time, acted very expeditiously and that the application has been brought in good faith. (See **ROYAL INSURANCE TANZANIA LIMITED VS KIWENGWA STRAND HOTEL LIMITED**, Civil Application No. 116 of 2008 (unreported). Moreover, incapacitation on account of sickness, indeed provide good cause for delay entitling the applicant to the orders sought. (See **EMMANUEL MAIRA VS THE DISTRICT EXECUTIVE**

DIRECTOR, BUNDA DISTRICT COUNCIL, and Civil Application No. 66 of 2010 (unreported). The reason of sickness given by the applicant is sufficient reason for granting the application for extension of time.(See **JOHN DAVID KASHEKYA VS THE ATTORNEY GENERAL**, Civil Application No. 1 of 2012 (unreported).

It is worthwhile to point out that, Mrs. Tenga learned counsel was the applicant's subsequent advocate who took over the matter after the sick applicant had recovered. This was after the notice of appeal was filed and the applicant had applied to the Registrar to be supplied with the Ruling, Drawn Order and proceedings of the decision which is desired to be appealed against. In the course of processing the appeal it was unearthed that, the respondents were not served with the requisite documents and that is what prompted the present motion. In his affidavit, the applicant has deposed to the effect that, the delay was occasioned by illness but after he had recovered, instructed his subsequent advocate to pursue the appeal but time had already expired.

It is pertinent to note that, in the absence of an affidavit in reply in opposition of the application, the delay on account incapacity due to illness remains undisputed. Moreover, after becoming aware of the omission the applicant acted promptly having brought the motion at hand in order to remedy the defect. This will not prejudice the respondents and instead, it will pave way and hasten the hearing of the appeal where rights of the parties will be conclusively determined.

Mrs. Tenga also submitted on illegality surrounding the decision of Mgetta, J. in the review. This was featured in the notice of motion as well as the affidavit in support. She backed her proposition by citing the case of **VIP ENGINEERING AND MARKETING LIMITED & THREE OTHERS VS CITIBANK TANZANIA LIMITED**, Consolidated Civil References No. 6,7 and 8 of 2006 (Unreported). The Court categorically said that, illegality or otherwise of the decision being challenged, by itself constitutes sufficient reason for extending time.

In my considered view, Mrs. Tenga has demonstrated a probable case of illegality. However, I will not address the details in order to avoid going into the merits of the case. The position of the law is well

settled that, when there is allegation of illegality, it is important to give an opportunity to the party making such allegation to have the issue considered. (See **THE PRINCIPAL SECRETARY VS MINISTRY OF DEFENCE** and **NATIONAL SERVICE VS DEVRAM VALAMBHIA (1992) TLR 182.**)

In view of the aforesaid, on account of illness and probable case of illegality, the applicant has established good cause for the delay. I accordingly grant the application with no order as to costs. The notice of appeal and the applicant's letter to the Registrar to be supplied with the Ruling, Drawn Order and Proceedings of the High Court to be served to the respondents not later than twenty one (21) days from the date of the Ruling.

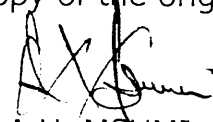
DATED at DAR ES SALAAM this 25th day of August, 2017.

S.E.A. MUGASHA

JUSTICE OF APPEAL

I certify that this is a true copy of the original.




A.H. MSUMI

DEPUTY REGISTRAR
COURT OF APPEAL