

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

CIVIL APPLICATION NO. 76/02 OF 2023

MELAU MAUNA.....1ST APPLICANT
JOEL METIVAN (Legal Representative
of MEITIVANI TENGESI).....2ND APPLICANT
FRANCIS MWOITA.....3RD APPLICANT
JOHN MWOITA.....4TH APPLICANT
RAYMOND PHILIPO (Legal Representative
of PHILIPO LENGUTUTI)5TH APPLICANT
EMMANUEL LENAKOONI.....6TH APPLICANT
LOGALAA MAUNA.....7TH APPLICANT
JACOB FRANCIS.....8TH APPLICANT
RAYMOND PHILIPO.....9TH APPLICANT
PAULO IKAYO.....10TH APPLICANT
LEAH DAUDI (Legal Representative
of DAUDI LOSUJAKI).....11TH APPLICANT
JULIUS MWOITA12TH APPLICANT
LONYAKWA MEALU.....13TH APPLICANT
LOVOYO MELAU.....14TH APPLICANT
CHRISTOPHER JOHN.....15TH APPLICANT
MERIMAN MWOITA.....16TH APPLICANT
KAKA FRANCIS.....17TH APPLICANT
LOREU LOPAKWANI.....18TH APPLICANT
SAMBOTI NGOSIO.....19TH APPLICANT
TUBALAI PHILIPO.....20TH APPLICANT

MAUNA LONGUTUTI.....21ST APPLICANT
TUKAI MAUNA.....22ND APPLICANT

VERSUS

THE REGISTERED TRUSTEES OF
EVANGELICAL LUTHERAN CHURCH..... 1ST RESPONDENT
ARUSHA DISTRICT COUNCIL.....2ND RESPONDENT

**(Application for extension of time to file an appeal against the judgment
and decree of the High Court of Tanzania, Land Division at Arusha)**

(Nchimbi, J.)

dated 5th day of September, 2012

in

Land Case No. 13 of 2004

.....

RULING

8th & 15th November, 2023

MGONYA. J.A.:

The applicants herein, preferred an application for extension of time within which to file an appeal to this Court against the decision of the High Court of Tanzania at Arusha. The application is made under rule 10 of the Tanzania Court of Appeal Rules, 2009 (hereinafter to be referred to as the Rules). The application is by way of notice of motion supported by an affidavit deponed to by the applicants. The respondents resist the application through an affidavit in reply deponed by Mr. John Sikay Umbulla, learned counsel for the 1st respondent and

Monica Augustine Mwilolo, Principal officer employed by the 2nd respondent.

The filing of the instant application has been prompted by the following facts: The applicants herein were the plaintiffs in Land Case No. 13 of 2004 at the High Court of Tanzania at Arusha (Land Division). Among other reliefs the Plaintiffs were claiming for a declaration that, they are the lawful owners of the suit land and an order for permanent injunction restraining the defendant, its agents, workmen, servants and whosoever from entering, constructing and/or in any manner deal with the suit land. After full trial, on 5th September, 2004 the court delivered a judgment which was in favour of the Defendants who were declared by the court as the lawful owner of the suit land. Aggrieved by the decision, the applicants intend to appeal to this Court. As it was the requirement of the law, they have to apply for leave from the High Court to appeal to this Court.

As the time to seek leave was expired, they applied for extension of time to file leave but the application was struck out for misjoinder. The applicants had to file another application which was later dismissed for lack of merits. Still daunted the applicants approached this Court

applying for an extension of time to file an application for leave, but the said application again was struck out for being omnibus. While they are still struggling for leave, there was changes in law where the requirement for leave to appeal was no longer the requirement. Therefore, the applicants were free to lodge their appeal without leave. Since the time to appeal was already lapsed, they filed this application for an enlargement of time to lodge an appeal to challenge the decision of the High Court in Land Case No. 13 of 2004. The reasons for the delay advanced in the Notice of Motion are:

- (a) That the delay in appealing was caused by protracted proceedings in the High Court of Tanzania for an order for leave to the Honourable Court and the changes in the law excluding appeals originating from High Court to apply for leave to appeal to the court, and
- (b) That, important points of law and fact are involved in decision and decree intended to be appealed against that require due consideration and determination by the Honourable Court of Appeal.

When this matter was called for hearing, Ms. Sara Lawena learned counsel representing the applicants, having fully adopted the affidavit and its annexures she went on to submit, the delay in appealing was due to protracted proceedings which were not supplied until 18/01/2014. Thus on 4/3/2014 they filed an application for extension of time to file an appeal. Unfortunately, the application was misplaced since the same was filed in this Court prior filing an application for leave to appeal. Therefore, they withdrew it. That on 6/05/2015 they filed another application which was Civil application No. 38/2015 for extension of time to apply for leave to appeal at the Court of Appeal. However, the said application faced a preliminary objection for suing a wrong party where they sued Arumeru District Council as the second respondent instead of Arusha District Council. Hence, the applicants had to file an application to join the Arusha District. The said prayer was granted then the hearing of the main application No. 38 of 2015 proceeded by Hon. Opiyo, J. After hearing of the said application, Hon. Opiyo, J. was of the view that the application has no merit hence, on 20/07/2016 dismissed it.

Still intending to challenge the impugned judgment, the applicant approached this Court to pursue the application for extension of time as a second bite vide an application No. 580/17 of 2018. Unfortunately, before hearing of the said application, on 27/7/2018 there was a change of law whereby Section 47 of Cap. 216 was amended to the effect that, land matters originating from the High Court in exercising its original jurisdiction need not to seek leave to appeal to the Court of Appeal. On that basis, the applicants had to withdraw application No. 580/17/2018 which was marked withdrawn on 23/3/2020.

Ms. Lawena went on to submit that, after the withdrawal of the application, some of the applicants died thus they had to make follow up of their administrators. That process took too long hence they had to seek for extension of time before the Court of Appeal vide Civil Application No. 89/02/2021. However, on 2/12/2022 the said application was struck out on the reason that, some of the applicants did not sign the affidavit. That on 12/12/ 2022 they were supplied with the copy of the ruling and order. Thereafter, on 23/12/2022 the applicants filed the instant application.

On the 2nd ground stated in the Notice of motion that, there are important points of law and facts that requires determination of this Court, by referring to the case of **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported). Ms. Lawena opted to abandon this point on the ground that there is no pure point of law to be determined by this Court. It was Ms. Lawena's stance that the applicants have stated enough reasons for the delay.

In reply Mr. Sikay Umbulla, learned counsel for the 1st respondent at the outset objected the application. He adopted the affidavit and went on to submit that, the applicants had all the time having services of the advocates with legal mind. In his stance, they were negligence in pursuing the matter. Mr. Umbulla submitted further that, the applicants delayed in filing an application for leave on the reasons that they were waiting for judgment and decree while those documents were not required for the purpose of leave. To bolster his stance, he referred the Court to the case of **Alex Maganga v. Director of Msimbazi Centre**, Civil Application No. 81 of 2001 (unreported).

Mr. Umbulla contended further that, the applicants in this application have not supplied any sufficient reasons for the Court to exercise its discretion. In his view one cannot stay for three years without filing an application for leave. He also submitted that the current application was filed on 23/12/2022 while the earlier application was struck out on 2/12/2022 and the ruling was delivered on 8/12/2022. So there are 15 days which were uncounted for from the date the ruling was delivered. That, even if the applicants' assertion that they were supplied with the order of the Court on 12/12/2022 will be considered, still there are 11 days which were not counted for and it's a long period as the law requires each single day must be accounted for. It was Mr. Umbulla's stance that, from Lyamuya's case the applicants have not fulfilled the conditions hence the application be dismissed with costs.

On his part Mr. Mkama Musalama learned State Attorney representing the 2nd respondent after adopting the affidavit in reply and their list of authorities he argued that, it is the requirement of rule 10 of the Rules that, an order for extension of time is granted upon good cause shown. To fortify his stance, he relied on the Court's previous

decisions cases of **Regional Manager Tanroads Kagera v Ruaha Concrete Co. Ltd**, Civil Application No. 96 of 2007 and **Zitto Zuberi Kabwe & 2 others v. AG**, Civil Application No. 365/01/2019.

Responding to the applicants' assertion that the delay was occasioned by protracted proceedings at the High Court and the change of the law, Mr. Musalama contended that, they are not disputing that the applicants filed different applications at the High Court. Their concern is on Civil Application No. 580/17 of 2018 which was marked withdrawn on 23/3/2020, the applicants did not take any immediate action to file Civil Application No. 89/2/2021. Reacting on the allegation that the delay was due to the facts that some of the applicants died, Mr. Musalama contended that, from the annexures the time when Civil Application No. 580/17/2018 was filed, the alleged deceased were already dead and their legal representatives were appointed. According to Mr. Musalama the delay was due to negligence on the part of the applicants to take actions.

Mr. Musalama went on to contend that, Civil application No. 89/2/2021 was struck out on 08/12/2022 and the copy of the said ruling was supplied to the parties on the same date. That counting from the

date the application was struck out to the date of filing the application which is on 23/12/22, it is about 15 days but there is no single paragraph in the applicants' affidavit accounting for the 14 days. In his view, failure to account on the delay for 15 days amounts to negligence to them. It was Mr. Musalama's stance that this application is devoid of merits and the same be dismissed with costs.

When it was her turn for a rejoinder, Ms. Lawena submitted that, the point that the leave to appeal did not need a copy of judgment and decree is a misconception. Also, on the point that the decision was delivered on 8/12/2022, they were not issued with the copies on that date, the same were supplied on 12/12/2022. Ms. Lawena, argued the Court to grant the application because the applicants accounted for all the days of delay.

I have keenly considered the engaging submissions by the learned counsel for and against the application. The main issue for consideration is whether the applicants have shown good cause to warrant the Court to exercise its discretion under rule 10 of the Rules which stipulates:

"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 reference to that time as so extended".

Also, I find it apt to echo what has been stipulated by this Court in the case of Benedict **Mumello v. Bank of Tanzania, E.A.I.R** [2006] Vol.1 that:

"It is trite law that an application for extension of time is entirely in the discretion of the Court to grant or refuse it, and that extension of time may only be granted where it has been sufficiently established that the delay was with sufficient cause".

From the excerpt above, the Court have the discretion to grant extension of time for filing an application if the party requesting the extension can demonstrate good cause for the delay. To add on that, the extension of time can be made if there are exceptional

circumstances that justify the extension. What amounts to good cause it has been stated by this Court in numerous decisions to mention few are; the case of **Tanga Cement Company Limited v. Jumanne D. Massanga and Amos A. Mwalwanda**, Civil Application No. 6 of 2001, **John David Kashekya v. The Attorney General**, Civil Application No. 1 of 2012 and **Emmanuel R. Maira v. The District Executive Director Bunda District Council**, Civil Application No. 66 of 2010 (all unreported). In **Tanga Cement Company Limited v. Jumanne D. Massanga and Amos A. Mwalwanda** (supra) this Court stated that:

"What amounts to sufficient cause has not been defined. From decided cases a number of factors have to be taken into account including whether or not the application has been promptly, the absence of any valid explanation for delay, lack of diligence on the part of the applicant".

In this application, it is from record that the matter subject to the intended appeal commenced on 2004 and impugned judgment was delivered on 5th September, 2012. It is almost 11 years since the

judgment was delivered. It is also undisputed that from 2012 the applicants are in Court's corridors making follow up for the record for appeal purpose and later on struggling to pursue different applications for leave to appeal which ended being struck out for being incompetent. In my view, that constitutes sufficient cause for delay as it was of the finding of this Court as the same falls under technical delay. See; the case of **Jimmy Anderson Mwampashi v. The Director of Public Prosecutions**, Criminal Application No. 43/06 of 2018 (unreported) where it was held that:

"The reason advanced by the applicant in the present matter that he has all through been trying to lodge the intended application but his efforts were thwarted because of certain mistakes he made during those previous applications preparations, leading to their being struck out for being incompetent, in my view constitutes sufficient cause for delay".

Also the case of **Hamis Mohamed (as Administrator of the Estates of the late RISASI NGAWA) v. Mtumwa Moshi (as Administratrix of the Estates of the late MOSHI ABDALLAH)**, Civil application No. 407/17 of 2019 where it was held that:

"As such the time taken by the applicant in seeking leave, that is, counting from the time the applicant's initial for leave was struck out to the time 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".

Being guided with the above position, I find it sensible to consider all the period from 5th September, 2012 up to 12th December, 2022 when the applicants were issued with the copies of an order to withdraw application No. 580/17 of 2018, which was the last application before filing this application to be accounted for. Therefore, the issue now is whether the applicants have to demonstrate the reason for delay from 12th December, 2022 to 23rd December, 2022 when they filed an application at hand.

It is an affidavit in support of the application sworn by the applicants within which I find to have relevant material as far as the above issue is concerned. I have taken enough time to go through the affidavit filed by the applicants on 23rd December, 2022 where it is deponed in paragraphs 29 and 30 of the affidavit that:

"29. That when the application came for hearing on 2nd December 2022 it was realized that some of the Applicants have not signed the affidavit and thus it was struck out on 8th December 2022. Copy of the Ruling and Order are hereto annexed marked MM22 to form part of this affidavit.

30. That from 12th December, 2022 when the copy of the ruling was made available to us to the date of filing this application, the applicants used the same to prepare this application".

From the above excerpt, it is evidenced that the application was struck out due to the missing signature of some of the applicants. Also, in paragraph 30 of the affidavit, it is deponed that the time between 12th December, 2022 to the date of filling this application was used to prepare the current application. Therefore, it is my firm view that the applicants accounted for the period between 12th to 23rd December, 2022. In the circumstances, I am pressed to hold that good cause for the delay has been shown warranting the Court to exercise its discretion.

That said, I grant the application and order the applicants to lodge their appeal to the Court within sixty (60) days from the date of the delivery of this ruling. Costs shall abide the result of the intended appeal.

Order accordingly.

DATED at **ARUSHA** this 14th day of November, 2023.

L. E. MGONYA
JUSTICE OF APPEAL

The Ruling delivered this 15th day of November, 2023 in the presence of Ms. Sara Severin Lawena, learned counsel for the applicants, Mr. Muhidini Jonas Lesirwa, learned State Attorney for the 2nd respondent who took brief for Mr. John Sikay Umbulla, learned counsel for the 1st respondent and the 1st, 3rd, 4th, 5th, 9th and 16th applicants in person, is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL