

**IN THE COURT OF APPEAL OF TANZANIA**

**AT IRINGA**

**CIVIL APPLICATION NO. 393/13 OF 2023**

**HAWA MASHAKA** (as administratrix

of the estate of the late **MASHAKA MAFTAH MWINYIHAMI**) ..... **APPLICANT**

**VERSUS**

**MTAMI MAFTAH**..... **1<sup>ST</sup> RESPONDENT**

**FADHILI MFILINGE** (administrator of the

estate of the late **MODESTUS MFILINGE**) ..... **2<sup>ND</sup> RESPONDENT**

**(Application for extension of time to lodge a second bite application for leave to appeal against the ruling of the High Court of Tanzania at Iringa)**

**(Shangali, J.)**

**Dated the 10<sup>th</sup> day of October, 2014**

**In**

**(DC) Civil Appeal No. 5 of 2008**

.....

**RULING**

08 & 12<sup>th</sup> December, 2023

**NGWEMBE, J.A.:**

The applicant seeks for extension of time to lodge an application for leave to appeal by way of a second bite after having been refused by the High Court of Tanzania. The application is preferred under rule 10 and Rule 45A of The Tanzania Court of Appeal Rules, 2009 (the Rules).

The genesis of this application traces some decades ago. It is prefaced by many applications with the sole purpose of challenging the decision of the District Court of Iringa in Civil Case No. 22 of 1998, which was delivered on 23/01/2001. The dispute arose over the ownership of a suit land in Plot No. 9 Block "K" Miyomboni area. Such a suit land seems to have been involved in exchange of Plot No. 210 Block "Q" Mwembetogwa area which had a house therein. It is in the record that the original parties had agreed to exchange the properties following the applicant's incapacity to erect a store building at Miyomboni area, which was a condition of occupation imposed in Miyomboni area by Iringa Municipal.

It was claimed by the respondent that, the applicant had required a person who is capable of fulfilling the municipal order and would be interested in that plot, so that he would take that plot in exchange of a house elsewhere where there would not be such a condition. That is how they exchanged their plots, but later on, the applicant claimed that, the exchange was not consented by other beneficiaries, so they wanted their plot at Miyomboni back to the original owner. The applicant maintained the occupation despite the transfers, which were conducted and completed.

It is on record that, the agreement was executed by the administrator, having agreed with his family. The respective house originally, belonged to their late father who passed away on 1985. One Zuberi Mashaka Maftah, being an administrator of the estate of Mashaka Maftah Mwinyihami instituted a suit against Mtami Mashaka Maftaha and Modestus Mfilinge. The record shows that, the said Zuberi Mashaka Maftah instituted the case in his name. The respondents (by then) filed a counter claim against the applicant. Before hearing of the main case, there was an internal dispute among the beneficiaries of the late Mwinyihami and two administrators were appointed by two different courts on different times over the same estate. It is for that reason the applicant (Zuberi Mashaka Maftah) withdrew his plaint, while the defendant's counterclaim remained in court.

In turn the district court proceeded to determine the counterclaim and concluded that, the disposition of Plot No. 9 Block "K" to the Plaintiff in counter Claim (herein the second respondent) was valid and that a good title had passed to him as a *bonafide* purchaser. The court ordered vacant possession in favour of the second respondent.

The applicant being dissatisfied and through the then administrator one Zuberi Mashaka, endeavored to challenge the decision at the High Court at Mbeya in DC Civil Appeal No. 08 of 2001. Unfortunately before the appeal is heard and concluded, Zuberi Mashaka passed away in year 2004. Upon death of Mr. Zuberi Mashaka, no steps were taken to secure another administrator to continue prosecuting the appeal. Several adjournments of the appeal were made to avail the beneficiaries to appear in court or appoint another administrator, but in vain. At the end the High Court dismissed the appeal on 18/07/2006 for want of prosecution.

Tireless as they are, the applicant through the current administrator lodged an application in the same High Court on 18/07/2007 seeking restoration of the appeal out of time. Again the application was erroneously admitted as DC Civil Appeal No. 05 of 2008. It was heard and determined on 10/10/2014, but the High Court dismissed it. In dismissing the application, the High Court Judge opined that, the applicant failed to adduce good cause for restoration of the appeal and that, the application was vexatious, frivolous and abuse of court process.

The thirst to challenge that ruling of the High Court never stopped, thus, the applicant filed notice of appeal and later lodged an appeal

registered as Civil Appeal No. 11 of 2017. Moreover, that appeal on 30/05/2018 was struck out for being accompanied by a defective notice of appeal. The applicant being fully determined, sought and secured extension of time to file notice of appeal through Misc. Civil Application No. 33 of 2018 and was granted 10 days to lodge proper notice of appeal. Consequently, on 04/09/2020 the notice of intention to appeal was filed, followed with Misc. Civil Application No. 40 of 2020 seeking leave to appeal against the decision of the High Court. The second respondent herein successfully, raised a preliminary objection against the application which objection was sustained and the application was dismissed on 26/08/2021.

In the same year 2021, the applicant filed Misc. Land Application No. 25 of 2021 seeking extension of time to file an application for leave to appeal to this Court. Such application was again dismissed by the High Court on 29/07/2022.

On 23/09/2022 the applicant by way of second bite, filed this application for extension of time to file an application for leave to appeal to this Court.

The instant application is preferred under Rules 45A and 10 of the Rules, supported by an affidavit affirmed by the applicant Hawa Mashaka. In her affidavit, apart from the background given herein above, in paragraphs 15, 16 and 17 brought forward mainly two reasons for extension of time that is; sickness of the applicant and illegality of the decision she seeks to challenge. Mr. Edmund Mkwata, learned counsel for the second respondent filed an affidavit in reply. He discredited the contents of paragraph 15 as deceptive and misleading, while paragraphs 16 and 17 were treated as irrelevant.

At the hearing of this application, Messrs Jassey Samwel Mwamgiga and Lazaro Joseph Hukumu represented the applicant whereas Mr. Mkwata appeared for the second respondent and the first respondent did not appear. In support to the application Mr. Mwamgiga addressed the Court on illegality of the decision of the District Court. That such decision had illegality on transfer of the property. He attacked Mr. Mkwata that, he was part of that forgery, hence acted with conflict of interest. Went further that the High Court in year 2007 failed to adjourn the appeal *sine die* in accordance with Order XVII Rule 2 of the Civil Procedure Code Cap 33 R.E. 2022, when it was informed that, the appellant had died.

Addressing on the second ground for extension of time, Mr. Mwamgiga referred back to paragraph 15 of the applicant's affidavit. He stated that, the applicant failed to file a second bite of the application timely because she was sick. Also, that the applicant was represented by advocate Kingwe who in the process he passed away prior to the final decision of the application for extension of time. Thus, constituted her failure to lodge the application in time.

In response Mr. Mkwata maintained his opposition to the application together with the facts relied upon by the applicant as irrelevant. He observed that, the applicant has failed to give reasons for delay. He elaborated that, the last decision of the High Court which refused extension of time, immediate thereafter the applicant ought to lodge her second bite application within fourteen days which ended on 12/08/2022. For such delay, the applicant is required to disclose good cause.

Mr. Mkwata proceeded to challenge the contents of paragraph 15 of the applicant's affidavit, which avers that, the applicant was sick as irrelevant. Since the attached medical chits are just laboratory results which were dated 09/05/2022 and 05/09/2022, while the court decision was delivered on 29/07/2022.

Responding on illegality, Mr. Mkwata maintained that, the allegation of fraud by the advocate would be relevant in the appeal and not as a ground for extension of time. Added that, litigation must come to an end, the current application is frivolous and is progress of endless litigation, thus prayed it be strike out with costs.

In rejoinder, Mr. Mwamgiga, reiterated his submission in chief and maintained that, his fellow advocate Mkwata had conflict of interest on this matter. Tried to substantiate on the sickness of the applicant from May 2022 before the ruling was delivered. He reiterated the prayer for extension of time.

Having addressed the background of the application and the parties' submission herein, the decisive question is whether the application has merit. The application for extension of time as a second bite is grantable by this Court under rule 45A (1) whose wording is reproduced that: -

***"Rule 45A.-(1) Where an application for extension of time to: -***

***(a) lodge a notice of appeal;***

***(b) apply for leave to appeal; or***

***(c) apply for a certificate on a point of law,***



***is refused by the High Court, the applicant may within fourteen days of such decision apply to the Court for extension of time."***

The time provided for filing a second bite application under rule 45A (1)(b) is only 14 days from the date of the decision of the first bite. The applicant in this case has come to this Court when fourteen days had expired. She now seeks extension of time to exercise her right of second bite. More than a month elapsed from when the decision of the first bite was delivered.

As I pointed earlier this Court can still grant extension of time even for such a long delay upon disclosure of good cause. Rule 10 of the Rules states *inter alia* that: -

***"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."***

The wording of the statute is clear, that this court despite its powers to extend time for doing an act authorized by the rules, it may not exercise

such powers when the prerequisite is not met. The only prerequisite for extension of time is for the applicant to show good cause for delay. The main consideration in this application is whether the applicant has shown a good cause for extension of time.

In countless occasions, this court and the courts below have maintained that there is no strict interpretation of the concept of *good cause*. See **Osward Masatu Mwizarubi vs. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010, (unreported), **Lyamuya Construction vs. The Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported). It is rather a subjective and usually depend on the circumstance of each case. In this application good cause will be taken as to have been established if after the whole consideration, the Court is satisfied that, the applicant has managed to establish that her failure to pursue the intended cause was not occasioned by his negligence or inaction. In testing such reasons, the Court will consider a number of relevant factors as was so decided in the case of **Lyamuya Construction (Supra)**, which is among the cases where this Court addressed the matter

in detail. It ruled that, the Court in exercising its discretionary powers, will abide by the rules of reason and justice. Among the guidelines are:

- (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.*
- (d) If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged.*

The list is never meant to be exhaustive, at least, the duty to account for all the period of delay and consideration of the length of delay are relevant and diligence must be demonstrated by the applicant.

At the hearing of this application, Mr. Mwangiga, learned advocate argued that the applicant was prevented to act promptly due to sickness and that there was illegality in the decision of the district court, which now he claims bred other illegalities by the High Court for dismissing the appeal for want of prosecution instead of adjourning the appeal *sine die*.

Notwithstanding the above arguments, the question is, whether the applicant has shown good cause for such long delay. The ruling sought to

be challenged was delivered on 10/10/2014 and the applicant filed a defective notice of appeal on 17/10/2014 which resulted into her appeal being struck out.

According to rule 45A (1)(b) of the Rules, she was obliged to seek for this second bite application within 14 days. But she filed this application on 23/09/2022 more than 56 days from the ruling of the High Court. I think Mr. Mkwata was correct that under the circumstance the applicant is duty bound to account for the days she delayed.

Regarding the duty to account for the days she delayed, the applicant is obliged to account for each day of delay. In the cases of **John Dongo and 3 others vs. Lepasi Mbokoso**, Civil Application No. 14/01 of 2018, **Elius Mwakalinga vs. Domina Kagaruki and 5 Others**, Civil Application No. 120/17 of 2018 (unreported) and **Frady Tajiri Chawe (As Administrator of the Estate of the Late Donatus Chawe Sanga) and 443 Others vs. TANESCO**, Civil Application No. 505/18 of 2019 (unreported) are among the precedents where the position was maintained.

In this case, 56 days elapsed from the day of the last decision of the High Court. The applicant has never stated how those days were used. I have put weight considered on the applicant's allegations of sickness as the reason for delay. That sickness can be a reason for delay, however, it must be established that, the applicant was prevented by such sickness from performing an action for which she seeks extension of time. See, **Emmanuel R. Maira vs. The District Executive Director Bunda District Council**, Civil Application No. 66 of 2010 (unreported) and **Shembilu Shefaya vs. Omary Ally** [1992] T.L.R. 245.

What the applicant annexed in the affidavit is laboratory diagnosis result dated 05/09/2022 indicating that she was tested blood sugar and urine analysis. There is no explanation of whether the applicant was hospitalized or was prevented by a certain sickness from acting what she ought to do timely. The nature, extent, duration and effect of her illness is not disclosed. Above all, the attached laboratory test of 05/09/2022 had no relevance in this application because the High Court ruling was delivered on 29/07/2022 and the time for filing her second bite application expired on 12/08/2022. Failure to give clear explanation for delay on the relevant

period cannot constitute good cause. For the reason so stated, I find the first ground on sickness is unmerited.

Regarding the allegation of illegality, I find the applicant's submission on this point is haphazardly crafted. Mr. Mwamgiga was definite in the beginning that, the illegality he complained of was in the district court's decision entered in 2001. And in pointing such illegality, he went into facts which in my position did not constitute illegality properly so called. The mere allegations of transfer of the suit properties that was fraudulent and that his fellow counsel Mr. Mkwata took part in the transaction cannot in itself constitute illegality capable to extend time. I tend to agree with Mr. Mkwata learned advocate that, the alleged fraud fit on the appeal and not in this application for extension of time. In essence the allegation does not constitute illegality for the purpose of extension of time. It is thus important to restate the law regarding illegality.

Generally, illegality can constitute a good cause for extension of time as was held in many cases. However, for such illegality to constitute good cause, it must be apparent on the face of the record; be of public significance and there is injustice calling for the superior Court to cure. In **Lyamuya's** case, the Court ruled *inter alia* :-

*"In VALAMBIA's case (supra) this Court held that a point of law of importance such as the legality of the decision sought to be challenged could constitute a sufficient reason for extension of time. But in that case, the errors of law, were clear on the face of the record... Since every party intending to appeal seeks to challenge a decision either on points of law or fact, it cannot in my view, be said that in VALAMBIA's case, the Court meant to draw a general rule that every applicant who demonstrate 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".*

In **Ngao Godwin Losero vs. Julius Mwarabu**, Civil Application No. 10 of 2015 (unreported), the Court was not persuaded by the point of illegality because it was not clearly apparent on the face of the impugned decision. But to find that illegality, required long-drawn process to establish if there was an error. Apart from the allegation in the district court's decision, the applicant was arguing that the High Court ought to have adjourned the case *sine die* instead of dismissing it. I cannot find any legal authority supporting such argument, the advocate supplied none. But from

the record, it is undisputed that the appeal remained pending and being adjourned for years from 2004 to 2006, when it was dismissed. Even the cited provision of Order XVII Rule 2 of the CPC does not serve any purpose. That provision simply provides that a court can grant adjournment of hearing. There is nothing in that provision which requires the High Court to adjourn the case *sine die*. To the contrary the CPC provides for application of a legal representative be made a party under Order XXII, Rule 3(1). Time limitation of 90 days is provided for under part III item 16 of the schedule to the **Law of Limitation Act**, Cap 89, RE 2022. Under Order XXII, Rule 3 (2) of the CPC, the suit would abate if no application was made within 90 days. See **Simon Nchangwa vs Majaliwa Mbande & Another** (Civil Appeal 293 of 2017) [2018] TZCA 287.

Again, the complaint on the decision which dismissed the application for restoration of the dismissed appeal was based on the duty of the applicant to adduce reasons as to why the appeal should be restored, or at least good cause as to why she failed to prosecute her appeal. Mr. Mwamgiga must have missed some points regarding the background of this matter. In the circumstance, the issue of illegality is devoid of merit.



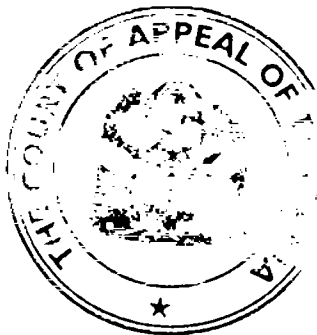
Having so reasoned, I find the observation made by the High Court that the applicant attempts to abuse the court process and defeat the execution process of Civil Case No. 22 of 1998 is apparent. Since no good cause is adduced for this Court to exercise its discretionary powers to enlarge time limitation, I proceed to dismiss this application with costs.

Order accordingly.

**DATED** at **IRINGA** this 12<sup>th</sup> day of December, 2023.

P. J. NGWEMBE  
**JUSTICE OF APPEAL**

The Ruling delivered this 12<sup>th</sup> day of December, 2023 in the presence of Messrs. Jassey Samuel Mwamgiga and Lazaro Joseph Hukumu, learned counsels for the Applicant and Mr. Edmund Bado Mkwata, learned counsel for the 2<sup>nd</sup> Respondent and in the absence of the 1<sup>st</sup> Respondent, is hereby certified as a true copy of the original.



  
R. W. CHAUNGU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**