

IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

CIVIL APPLICATION NO. 514/04 OF 2021

THEROD FREDRICK..... APPLICANT

VERSUS

ABDU SAMADU SALIMU..... RESPONDENT

**(Application to lodge a Notice of Appeal out of time from the Judgment
and Decree of the High Court of Tanzania, at Bukoba)**

(Kibela, J.)

Dated the 4th day of June, 2012

in

Miscellaneous Land Case Appeal No. 2 of 2008

.....

RULING

6th & 11th December, 2023.

FIKIRINI, J.A.:

By way of notice of motion predicated under rules 45A (1) (a),(c), (2), (3), 48 (1) (2) and 60 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicant seeks for extension of time to lodge a notice of appeal out of time. An affidavit sworn by the applicant, Therod Fredrick supports the application. The respondent, Abdu Samadu Salimu, contested the application by filing an affidavit in reply and lodging a notice of preliminary objection. Both parties filed written submissions for and against the application pursuant to rule 106 (1) and (7) of the Rules.

The application was called for hearing on 6th December, 2023. Mr. Mathias Rweyemamu, learned advocate, appeared to represent the applicant who was also present in Court, while the respondent appeared in person unrepresented and hence fended for himself. After a brief dialogue with me, the respondent abandoned his notice of preliminary objection lodged and a hearing of the application on merit followed.

In his submission supporting the application, Mr. Rweyemamu recounted the historical background leading to the present application after the High Court Judge dismissed Miscellaneous Land Case Application No. 97 of 2019. The reasons advanced by the Judge declining the grant of extension of time sought was that no sufficient reasons were advanced to warrant the grant.

Initially, Mr. Rweyemamu vehemently contended that there were sufficient reasons advanced. However, when probed by me to specifically account for the delay between 24th October, 2016 up to 1st March, 2017 when the application for extension of time, subject to the present application was lodged. He contended that during that time, he was engaged in the Court of Appeal and High Court sessions and the Law Day activities. His assertion was bare as he had no proof in that regard and, on

reflection, admitted that there was no accounting of each day of the delay made.

Persistent that this application for extension of time termed as a second bite should be granted, Mr. Rweyemamu implored the Court to consider that there were illegalities in the impugned decision which deserve the attention of this Court. He based his submission on the fact that the High Court had already certified points of law for this Court's consideration in Miscellaneous Land Case Application No. 47 of 2012. The learned advocate, thus, urged me to grant the application and extend the time within which the applicant can lodge his notice of appeal out of time. Fortifying his submission that illegality in the decision can be a reasonable cause meriting the grant of extension of time, he cited the cases of **Laurent Simon Assenga v. Joseph Magoso & 2 Others**, Civil Application No. 50 of 2016 and **Rose Irene Mbwete (*Administrator of the Estate of the Late Mary Dotnata Watondoha*) v. Phoebe Martin Kyomo**, Civil Application No. 70/17 of 2019. He, thus beseeched me to grant the application on the strength of his submission.

On his part, the respondent vehemently opposed the grant of the application, contending that no sufficient reasons were stated. Specifically on accounting for each day of the delay, the respondent claimed that the

applicant has completely failed to account for each day of the delay from 24th October, 2016 to 1st March, 2017. He maintained that, the claim that the learned advocate was engaged in the Court of Appeal and High Court sessions were unsupported. Moreover, the learned advocate has admitted that he could not account for those days. The respondent further argued that even if the applicant's counsel was involved as alleged, that did not mean he was so engaged on every day of those four (4) months he could not account. He also wondered about the applicant's whereabouts in following up on his case. While the respondent diligently kept himself abreast of what was going on in the case. He thus pressed me not to grant the application for extension of time sought.

The powers of extending time under rule 45A (1) (a) and (c) of the Rules are undoubtedly broad and discretionary and should be flexibly applied, considering the relevant facts of each case before the Court, based on good or sufficient cause advanced by the applicant, for those discretionary powers to be exercised, albeit judiciously.

Several decisions have shed light and illustrated how to exercise those powers, although most of them are in reference to extension of time under rule 10 of the Rules, the situations pertaining to both situations are the same. The decisions are therefore relevant in applications under rule

45A(1) of the Rules. For instance, in the case **Gibb Eastern Africa Ltd v. Syscon Builders Ltd & 2 Others**, Civil Application No. 5 of 2005 (unreported), in which the case of **Costellow v. Somerset County Council** (1993) 1 WLR 256, 263, was referred to, the Court had this to say:

“The first principle is that the rules of Court and associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met. The second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate.”

Along the same line in **Mbogo v. Shah** [1968] E.A., the defunct Court of Appeal for Eastern Africa, it was held:-

“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, and the degree of prejudice to the respondent or defendant if time is extended.” [Emphasis added]

Several significant decisions on the subject have followed after the cases above, such as **Wambele Mtumwa Shabaan v. Mohamed Hamis**, Civil Reference No. 8 of 2016, **Glory Shifwaya Samson v. Raphael James Mwinuka**, Civil Application No. 506/17 of 2019, **Lyamuya Construction Company Ltd v. Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (all unreported). In all those decisions, while admitting that the court has unfettered broad discretion to grant or not to grant the application for extension of time, the emphasis has all along been that the applicant has to show sufficient or good cause.

While there is no exact definition of what amounts to a sufficient or good cause, however, as elaborated in the case of **Mic Tanzania Limited & 3 Others v. Golden Globe International Services Limited**, Civil Application No. 1/16 of 2017, the term could mean:-

"....adequate or substantial grounds or reasons to take action, or to fail to take action prescribed by due process."

Though not exhaustive, case law development and guidelines of what amounts to a reasonable or good cause have been spelt out in our various decisions. A good example is the case of **Lyamuya Construction Company Ltd** (supra), in which we illustrated what should be taken into

account. There are about four (4) grounds: that there must be an account for all delayed days, the delay should not be inordinate, and the applicant has to exhibit diligence and not negligence, apathy, or sloppiness. We also considered a point of law of sufficient importance, such as illegality, to constitute a sufficient or good cause.

Against the above stated principles, I shall thus determine the application before me and see if the applicant has been able to show sufficient cause. Having heard parties, I should outrightly express that by failing to account for each day of the delay from 24th October, 2016 up to 1st March, 2017, the fact admitted by Mr. Rweyemamu upon reflection, the applicant has failed to advance reasonable or good cause to permit grant of the application for extension of time. Although the case of **Laurent Simon Assenga** (supra) on extension of time is relevant, could not salvage the ill-fated situation in the present application. In that case, the applicant was delayed because he was pursuing matters in court, which is not the case in the present application. I thus join hands with the respondent that no reasonable cause was shown. This ground fails.

Despite the above conclusion, the applicant has alluded existence of illegalities. I shall now look at that.

It is a settled position in our jurisdiction that an alleged illegality, if established, is sufficient to move the Court to extend time. The Court clearly stated this in the cases of **Principal Secretary, Ministry of Defence and National Services v. Devram Valambhia** [1992] T. L. R. 387 and **VIP Engineering and Marketing Limited & 3 Others v. Citibank Tanzania Limited**, Consolidated Civil Reference Nos. 6, 7 and 8 of 2006 (unreported). In the **Rose Irene Mbwete** (supra), the Court referred and relied on the case of **Devram Valambhia** (supra), in which the Court held that: -

"We think that where, as here, the point of law at issue is the illegality or otherwise of the decision being challenged, that is sufficient importance to constitute sufficient reason within the meaning of rule 8 [now rule 10] of the Rules for extending time. To hold otherwise would amount to permitting a decision, which in law might not exist, to stand."

The Court went on to state that:-

"In our view, when the point at issue is one alleging the illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and, if the alleged

illegality be established, to take appropriate measures to put the matter and the record right."

[Emphasis mine]

As far as the present application is concerned, a brief background culminating in the present application shall be worthwhile. The summary runs as follows: the respondent unsuccessfully sued the applicant before Magete/Karutanga Ward Tribunal in Muleba District, claiming a piece of land in Civil Case No. 8 of 2005. Aggrieved, he successfully appealed to the District Land & Housing Tribunal of Bukoba at Bukoba in Land Appeal Case No. 222 of 2006. Disgruntled with the outcome, the applicant preferred an appeal to the High Court in Miscellaneous Land Appeal No. 2 of 2008. He lost. Undeterred, he approached this Court after securing the certificate on points of law worth consideration by the Court vide Miscellaneous Land Case Application No. 47 of 2012. The applicant lodged his appeal, registered as Civil Appeal No. 145 of 2015.

On the hearing date before the Court, the Court raised an issue *suo motu* that the record did not contain the views of the assessors who sat in the DLHT. Due to that omission, the appeal was struck out.

The applicant had to return to the DLHT to procure the missing documents. Upon securing the stated missing documents, the applicant was bound to start the process of appeal all over. He thus lodged

Miscellaneous Land Case Application No. 97 of 2019 seeking extension of time to lodge a notice of appeal to the Court of Appeal in Miscellaneous Land Case Appeal No. 2 of 2008 and a certificate of points of law. The High Court dismissed the application for failure to advance sufficient reasons, hence the present application.

It is evident that the applicant was initially timely in processing his appeal. Had it not been for the missing documents, he would not have been in such a predicament. This Court has come across issues of that nature in many occasions and it is now settled principle that the delay in taking action within the time specified by law caused by time spent in prosecuting a matter in court constitutes good cause of delay. This is what is now known in legal arena as technical delay. See the case of **Fortanatus Masha vs. William Shija and Another** [1997] T. L. R. 154.

In **Salvand K. A. Rwegasira v. China Henan International Group Co. Ltd.**, Civil Reference No. 18 of 2006 wherein we observed that:-

“Distinction had to be drawn between cases involving real or actual delays and those such as the present one which clearly only involved technical delays in the sense that the original appeal was lodged in time but had been found to be incompetent for one or another reason and a

fresh appeal had to be instituted. In the present case the applicant had acted immediately after the pronouncement of the ruling of the Court striking out the first appeal. In these circumstances an extension of time ought to be granted."

It is thus, my view that since the High Court had already issued a certificate on the points of law, even though the applicant is of the view that it is out of time the fact which I am not in support, simply because the application for certification on point of law was granted on a separate application so it is still valid, see the case of **Mohamed Suleiman Mohamed v. Amne Salum Mohamed & Others** (Civil Appeal 87 of 2019) [2019] TZCA 439 (4 December 2019). That said, declining to grant extension of time for failure to put forward reasonable and sufficient cause for the delay should not be the only issue for examination.

The Judge should have considered the illegalities claimed, which resulted in the issuance of the certificate on points of law in the first place. This would have been in line with the decision in **Valambhia** (supra) that illegality, once established, can pass to be sufficient cause. In the application before me, even though in the notice of motion and affidavit in support of the application, the issue has not been visibly averred, the claim of illegalities featured in paragraphs (ix) of the notice of motion and 18 and

19 of the affidavit, in support of the application, suffices to grant the application.

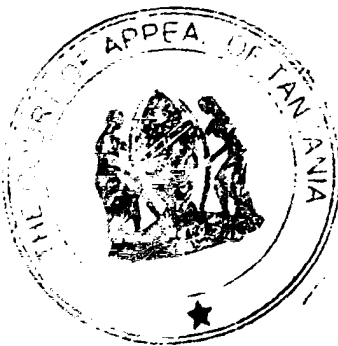
In light of the above discussion, I find the application is meritorious and proceed to grant it by permitting the applicant to lodge the notice of appeal out of time within thirty (30) days from the date of this order.

It is so ordered.

DATED at BUKOBA this 8th day of December, 2023.

P. S. FIKIRINI.
JUSTICE OF APPEAL

The Ruling delivered this 11th day of December, 2023 in the presence of Mr. Mathias Rweyemamu, learned counsel for the applicant and the respondent in person unrepresented, is hereby certified as a true copy of the original.




A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL