

IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA

CIVIL APPLICATION NO. 825/04 OF 2023

JOSEPHAT MWEMEZI BAKUZA APPLICANT

VERSUS

WINIFRIDA MUKONO1ST RESPONDENT

LEONARD MUJAKI.....2ND RESPONDENT

**[Application for Extension of time within which to lodge a notice of an
intention to appeal to Court against the judgment of the
High Court of Tanzania at Bukoba]**

(Khaday, J.)

dated 10th day November, 2015

in

Land Case Appeal No. 13 of 2013

.....

RULING

13th March & 9th April, 2024

KAIRO, J.A.:

The applicant, Josephat Mwemezi Bakuza has filed this application seeking an order for extension of time within which to lodge notice of appeal to the Court out of time so as to challenge the decision of the Court dated 10th November, 2015. The application is preferred under rules 10, 45 (1) (a) (3), (47) and (48) (a) and (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is supported by an affidavit of the applicant.

It all started when the applicant unsuccessfully instituted land Application No. 205 of 2008 before the District Land and Housing Tribunal

for Kagera (the Tribunal) against the respondents claiming land ownership of a piece of land located at Nshambya area in Kitubi village, within Bukoba Municipality. He was aggrieved, and decided to appeal to the High Court vide Land Appeal No 13 of 2013. However, in its decision delivered on 10th November, 2015, the High Court decided in the respondents' favour.

Still dissatisfied, the applicant lodged Civil Appeal No.17 of 2020 which was later struck out for being time barred. Determined to pursue what he believed to be his right, the applicant filed Misc. Land Application No. 2 of 2022 seeking for three orders to wit; extension of time within which to give a notice of appeal, extension of time to apply for leave and application for leave to the Court, but the application was struck out on 1st March, 2022 for being omnibus. Still adamant, the applicant filed Misc. Land Application No. 35 of 2022 praying for an extension of time within which to lodge a notice of appeal and leave to appeal. Again, the same was dismissed on 30th August, 2022 for lack of sufficient cause to enlarge time, as prayed. Following the said outcome, the applicant on 8th September, 2022, lodged a notice of appeal to challenge the dismissed application, but on 2nd February, 2023, the said notice of appeal was withdrawn. He finally filed this application on 25th May, 2023 for an extension of time as alluded above.

The respondents filed their joint affidavit in reply into which they contested the grant of the application asserting that the applicant failed to account for the days of delay, as such no good cause was advanced to warrant the grant of the extension of time sought.

When the application was called on for hearing, the applicant who was also present in Court, was represented by Mr. Gerase Reuben, learned counsel from Candid Attorneys. On the other hand, the respondents were represented by Ms. Gisela Maruka, learned counsel from Haki Attorneys. The 1st respondent was also present in Court.

Amplifying the reason for delay, Mr. Reuben submitted that, the applicant was required to apply for the extension of time to lodge the notice of appeal in Court, on a second bite basis after the refusal to grant the said application by the High Court on 30th August, 2022. However, he failed to do so because Ms. Kabunga Advocate and Associates who were representing him by then, decided to file a notice of appeal on 8th September, 2022 to challenge the dismissal order. He contended that, though the said move was incorrect as what was required to be filed was a second bite application, nevertheless, the notice was lodged within 14 days.

He went on to submit that, it was through the advice given by an advocate from Candid Attorneys that the applicant withdrew the wrongly

filed notice of appeal on 2nd February, 2023, that is after the lapse of more than eight months from the date of refusal order.

Mr. Reuben further submitted that, immediately thereafter, the applicant suffered diabetes which ailment forced him to go to the hospital now and then, the state which impaired close follow-up of the matter as a result, he filed this application on 25th May, 2023.

It was the argument of Mr. Reuben that, the delay was not caused by the applicant negligence, but that of his former advocate who opted for a wrong remedy. Further to that, the applicant also associated his delay with his sickness which according to him, impaired his ability to get funds to pay for advocate fees to pursue the application. He added that, the decision of the Tribunal which was upheld by the High Court is tainted with illegality which is sufficient cause to grant an extension of time. He cited the cases of **The Attorney General vs Raksha Gadhvi and 2 Others**, Civil Application No. 147/01 of 2022 and **Sabena Technics Dar Es Salaam Ltd vs Alfred Kirschten**, Civil Application No. 91/18 of 2022 (both unreported) to support his arguments. He insisted that, the noted illegality cannot be left uncorrected, otherwise it will create bad precedent. He thus prayed the application to be granted.

In her reply, Ms. Maruka prayed to adopt the affidavit in reply and urged the Court to dismiss this application for being without merit. She

contended that, the grounds stated in the affidavit were fabricated to suit this application. Elaborating, she submitted that the medical report attached to verify the applicant's sickness shows to have been written by the ELCT Health Centre (the Centre) in Bukoba on 22nd December, 2022. She clarified that, according to the said document, the applicant attended at the Centre on 24th September, 2022 and went again for treatment on 26th November, 2022 when he was given a bed rest of five days which lapsed on 30th November, 2022. The learned counsel went on to submit that, the law prescribes that, the application on a second bite basis is required to be filed within 14 days after the High Court refusal of the application. In the instant matter the refusal order was given on 30th August, 2022. It was her contention that, by the time the applicant fell sick and went to the Centre for treatment on 24th September, 2022, the 14 days had already lapsed on 13th September, 2022. As such, the sickness had no connection with his delay.

Responding to the contention that, the applicant through Kabunga advocate and associates filed the notice of appeal within 14 days, Ms. Maruka submitted that, the action taken was wrong as the refusal order is not appealable. She further contended that, it is on record that, it was Candid Attorneys who advised the applicant to withdraw the notice of appeal filed and even went ahead to prepare the withdrawal notice. Again,

it is the very law firm which is currently representing the applicant, but since they lodged the withdrawal notice on 2nd February, 2023, they did not take further steps until 25th May, 2023, that is 112 days after, when this application was filed. He argued that, the inaction signifies negligence on their part and thus, it is not correct to shift blame to the former advocate. She added that, the stance of the law is to the effect that, the advocate's negligence does not constitute sufficient cause to warrant the grant of an extension of time and cited the case of **Bahati M. Ngowi vs Paul Aidan Ulungi**, Misc. Civil Application No. 490/13 of 2020 (unreported) to fortify her argument. She further contended that, the applicant has not accounted for the 112 days lapse which again is contrary to the settled position that the applicant is required to account for each day of delay. She referred the Court to the case of **Uswege Webb Luhanga & Another vs Mussa Mohamed Mnasi & Another**, Civil Appeal No. 218 of 2021 (unreported) to back up her argument.

As regards the alleged illegality in the decision intended to be challenged, Ms. Maruka submitted that, the one pointed-out cannot move the Court to exercise its discretion to grant the extension of time as the same it is not apparent on the face of the record. According to her, the Tribunal was correct to order the survey of the land in dispute so as to determine the boundaries. It was her contention that, the alleged illegality

will attract a long-drawn argument for it to be established and referred me to the case of **Uswege Webb Luhanga** (supra) to back up her argument.

Distinguishing the cited cases by Mr. Reuben, Ms. Maruka contended that, the asserted illegality therein concerned the right to be heard which was apparent on the face of the record, while it is not the case in the matter at hand. She concluded by praying the Court to dismiss this application with costs, for lack of merit.

In his rejoinder, Mr. Reuben distinguished the cited case of **Uswege Webb Luhanga & Another** (supra) arguing that it concerned the presence of assessors at the District Land and Housing Tribunal wherein the Court found them to be present at the trial according to the record before the Court. However, the act of giving the order to survey the area in dispute, the Chairman of the Tribunal made himself a land officer which according to him was an illegality calling for attention by the Court.

As regards the wrongly filled notice of appeal which Ms. Maruka asserted it to be negligence baking up with the case of **Bahati M. Ngowi** (supra), Mr. Reuben argued that in the cited case, the applicant relaxed and left the matter to the advocate while in this case, the applicant did not. Instead, he made close follow-ups and discovered the discrepancy, thus the two cases are distinguishable. He also refuted the alleged

negligence on the part of Candid Attorneys as by the time the notice was withdrawn, the applicant was out of time already.

Reacting to the contended failure to account for each day of delay, Mr. Reuben submitted that, from 30th August, 2022 when the ruling to be challenged was delivered up to 25th May, 2023 when this application was filed, the applicant was busy in courts' corridors pursuing his right, thus, never rested. That aside, he contended, the applicant suffered diabetes in between, which according to him, is a disease which is an on and off type of sickness. Further to that, the applicant had to find some money to enable him hire another advocate. He thus prayed the Court to rule out that the applicant has exhibited good cause to warrant the grant of the extension of time sought.

In determining whether or not this application is meritorious, the Court will resolve two issues: **one;** whether or not sufficient reason has been demonstrated by the applicant, and **two;** whether or not there is an illegality in the decision sought to be challenged.

The powers pursuant to rule 10 of the Rules under which this application is predicated confers wide discretionary powers to the Court to grant extension of time where good cause has been exhibited. However, what amounts to good cause has not been defined and the Court has invariably considered various factors which include: to account

for all period for delay, the delay should not be inordinate, the applicant must show diligence and not apathy, negligence, or sloppiness in the prosecution of the action he intends to take and the existence of a point of law of sufficient importance such as illegality of the decision sought to be challenged [See: **Tanga Cement Company Limited vs Jumanne D. Masangwa and Another**, Civil Application No. 60 of 2001, **Ludger Bernard Nyoni vs National Housing Corporation**, Civil Application No. 372/01 of 2018 and **Zahara Kitindi and Another vs Juma Swalehe & Nine Others**, Civil Application no 4/05 of 2017 (all unreported)] to mention but a few.

There is no dispute that an application for extension of time was required to be filed in Court within 14 days of refusal of a similar application by the High Court, which in this matter was on 30th August, 2022. The applicant herein has associated his delay to apply for an extension of time from the Court on a second bite basis with the filing of a wrong remedy by his former advocate whereby a notice of appeal was lodged instead. It is my conviction that, the advocate is expected to be knowledgeable of the rules and procedures governing the conduct of the proceedings before the Court, as such, the stated wrong choice of the remedy by the former advocate in my conviction, did not demonstrate diligence on the part of the applicant's advocate, but apathy.

Mr. Reuben submitted that, it was through his firm's advice that the wrongly filed notice of appeal was eventually withdrawn on 2nd February, 2023. However, this application was filed on 25th August, 2022, that is more than eight months later, which time is unaccounted for and by all standards is inordinate and the Court cannot close its eye on the inaction. More so, it was the same law firm which is currently representing the applicant. Settled is the legal stance that, negligence and apathy on the part of the advocate cannot constitute sufficient cause for the purpose of extending time. There is a chain of authorities to that effect like in **Exim Bank (Tz) Ltd vs Jacquilene Kweka**, Civil Application No. 348 of 2020, **Jubilee Insurance (Tanzania Limited) vs Mohamed Sameer Khan**, Civil Application No. 439/01 of 2020 and **Wambura N.J. Waryuba vs The principal Secretary Ministry of Finance and Another**, Civil Application 320 of 2023, (all unreported).

The applicant has also linked the delay with his sickness and attached a medical report written on 22nd December, 2022 for verification. Going through the medical report, I have observed that, the applicant attended the Centre on 24th September, 2022 and admitted for two days and given a bed rest for 3 days thereafter which lapsed on 28th September, 2022.

He again went for check-up and treatment on 16th October, 2022 that is 17 days after the lapse of the bed rest given. The applicant went

again for check-up and treatment after a month on 26th November, 2022 when he was given a bed rest of 5 days; that is up to 30th November, 2022. It is noteworthy that, by the time applicant became sick, he was already time barred, as such the sickness had no connection with the delay as correctly argued by Ms. Maruka. Simple arithmetic reveals that, there are 17 days unaccounted for between 28th September to 16th October, 40 days unaccounted for between 16th October to 26th November, 2022. Furthermore, there is a lapse of more than eight months unaccounted for since the date of the withdrawal of the wrongly filed notice of appeal to the date when this application was filed. The law is now settled that, in an application for extension of time, the applicant has to account for each day of delay. Times without number the Court has consistently reiterated this position. For example, in **Dar es salaam City Council vs. Group Security Co. Ltd**, Civil Application No. 234 of 2015, **Hassan Bushiri vs Latifa Lukio Mashayo**, Civil Application No. 39 of 2007 and **Wambura N.J. Waryoba vs The PS Ministry of Finance & Another**, Civil Application No. 320/01/2020 (all unreported)]. In **Dar es salaam City Council** (supra) the Court observed as follows: -

"...the stance which this court has consistently taken is that an application for extension of time, the applicant has to account for every day of delay."

On the above stated circumstances therefore, the conclusion that the applicant has failed to account for all the period of delay is inescapable and the contention that the applicant has been in court corridors pursuing his right, does not hold water, with due respect.

I am aware that Mr. Reuben has stated that the applicant was searching for money to hire the advocate to pursue his case after the withdrawal of the notice of appeal. Suffice to state that economic hardship or financial constraint does not amount to good cause for the purpose of extending time. [See: **Yusuph Same & Another vs Hadija Yusufu**, Civil Application No. 1 of 2003 and **Constantine Victor John vs Muhimbili National Hospital**, Civil Application No. 214/18 of 2020 (both unreported).

The applicant has also pleaded illegality in the decision of the Tribunal subject of the intended appeal, which according to him was upheld by the High Court. Principally, the alleged illegality has to be apparent on the face of the record as rightly submitted by Ms. Maruka.

I have gone through the decision concerned. The applicant's complaint in this regard is the Chairman's order which I feel apposite to reproduce it hereunder for ease of reference:

"3) The area be surveyed within 90 days to ascertain and establish its dimension as was observed from the locus in quo and the sketch map prepared by this DLHT with dimension of 160x80 paces."

It was Mr. Reuben's argument that, by so ordering, the Chairman has converted himself to a land officer. In other words, the Chairman had no mandate to give the complained order according to Mr. Reuben. In my view, the determination of the said complaint would entail a long process of reasoning and probably each party would come up with a distinct opinion. This defeats the principle requiring the illegalities to be so overt that its determination would not require a long-drawn process of arguments. In **Chandrakant Joshubhai Patel vs Republic**, [2004] T.L.R. 218 the Court observed the following regarding the phrase "apparent on the face of record":

"... An error apparent on the face of record must be such that can be seen by one who writes and reading that is an obvious and patent mistake, and not something which can be established by long drawn process of reason on points on which there may conceivably be two opinions ..."

Applying the principle in the facts at hand, I join hands with Ms. Maruka that the long-drawn process of reasoning could not be avoided in the alleged illegality and there is no gain saying that, two distinct opinions

would be drawn by the rival parties. As such, conflicting the principles explained in **Chandrakant Joshubhai Patel** (supra) above explained.

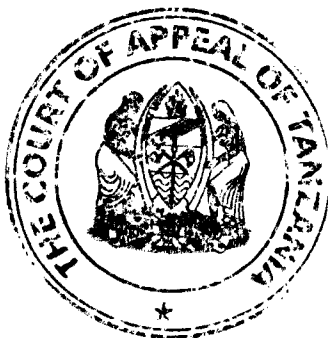
All said and done, I am with settled mind that the applicant has failed to advance good or sufficient cause upon which the Court can exercise its discretion to grant the extension of time sought. The application therefore fails and is accordingly dismissed with costs.

It is so ordered.

DATED at DAR ES SALAAM this 8th day of April, 2024.

L. G. KAIRO
JUSTICE OF APPEAL

This Ruling delivered on 9th day of April, 2024 in the presence of Ms. Gerase Reuben, learned Counsel for the Applicant - linked through video facility from Bukoba and Ms. Pilli Hassan, learned Counsel for the Respondents, is hereby certified as a true copy of original.




O. H. KINGWELE
DEPUTY REGISTRAR
COURT OF APPEAL