

IN THE HIGH COURT OF TANZANIA

AT ARUSHA

MISC. LAND APPL. NO.216 OF 2014

JONATHAN SIKAY APPLICANT

VERSUS

DAMIANO RICHARD RESPONDENT

RULING OF THE COURT

S.M. MAGHIMBI, J

The applicant herein lodged this application under the provisions of Section 11(1) of the Appellant Jurisdiction Act, Cap. 141 RE 2002 seeking for an order for extension of time to apply for leave to appeal to the Court of Appeal against the decision of this Court in Land Appeal No. 42/2011. The application was supported by an affidavit of the applicant dated 24th day of September, 2014.

The background of the matter as per the deposed affidavit is that the applicant herein was the respondent in the said Land Appeal No. 42/2011 decision of which was determined on 29/01/2014 and delivered on 11/03/2014 in favour of the current respondent. The appellant deposed that on the date the judgment was delivered, his son aged 2years met with a fire accident and was burnt on his left hand and he was to attend him until he recovered. Further that by the time he recovered the 14 days from date of decision had expired and hence this application.

On the day of the hearing, Mr. Lundu, learned counsel for the appellant prayed that the supporting affidavit of the applicant Jonathan Sikay be adopted as part of this application. In addition to the reason of delay as deposed in the affidavit, Mr. Lundu submitted that if this application is allowed the intended appeal has overwhelming chances of success as the decision of Mad Judge Mansour on the preliminary objection that the appeal was time barred dismissed that contention only on one para saying that the application was lodged within 90 days and within time. He argued that the Honorable Judge misdirected herself as the appeal for the District Tribunal to the High Court is not 90 days.

Mr. Lundu further submitted that having gone through the counter affidavit of the respondent Damiano Richard and in principle he is challenging that the applicant is not a doctor hence taking care of the sick child is not his primary duty. Mr. Lundu submitted that the applicant was providing parental care to the child until recovery. Further that contrary to the contention of the respondent that the applicant has not filed a notice of appeal, the notice is there and the respondent was served on 26/03/2014 by Mwenyekiti wa Kitongoji and they have also applied for a copy of proceedings and filed in court on 24/03/2014. Mr. Lundu prayed that this application be allowed and the costs to be in the course.

In his reply, the respondent submitted that the reasons for the delay submitted are not valid as the fact deposed by the respondent that his child was sick as she was burnt is not true as they are neighbors and that is not so. He argued further that the appellant is represented by Mr. Lundu, hence he did not need to come in person to court to file the application, he

could have done so through his advocate. Further that even if we are to say that the child was sick, yet he did not have to be there for 24 hours, he could as well further just give a call to Mr. Lundu to proceed with filing of the application. The respondent submitted that for that reason, the reasons advanced lack merits and prayed that the matter be executed as ordered by judge in Land Appeal No. 42/2011 to go and be heard de novo and not to have to go to the Court of Appeal. He further prayed that this application be dismissed with costs.

In his rejoinder, Mr. Lundu submitted that the main contention by respondent is on the sick child and this depends on the kind of bonding that is there between the child and his father. That the advocate could not proceed without instructions from the clients. Mr. Lundu prayed that the court take it as a valid ground.

Having gone through the records of application and the parties' submissions thereto, having been guided by the decision in the case of Samson Kishosha Gabba Vs. Charles Kingongo Gabba 1990 TLR 133 where the Court held that:

*"In determining whether or not to allow an application for leave to appeal out of time the court has to consider the reasons for the delay **as well as the likelihood of success of the intended appeal.**"*

I will discuss the reason of delay as well as the likely hood of success of the appeal together. However, I will further be guided by the case of

Bushiri Hassan Vs Latifa Lukiyo Mashayo in Civil Appln. No 3 of 2007(unreported) where the Court of Appeal of Tanzania held that

“delay even of a single day has to be accounted otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken.”

In this case the applicant has failed to convince this court of its delay not only of a single day as held in the cited case above, but of more than five good months. The applicant only relied on the argument about having a sick child to attend and the chances of the success of his appeal. However the appellant has failed to prove having the sick child. He did not provide any evidence even a hospital prescription to show that the child was severely burnt on her hand. Therefore to me this reason has failed to convince the court as to the delay.

I have also considered the holding in the Samson Kishosha Gabba (Supra) case on the likelihood of success of the appeal and as correctly argued by the respondent, the order of the Hon. Judge Mansour is yet to be executed. Having gone through the said decision of the Land case No. 42/2011, the Hon Judge concluded that:

“Without going to the merits of the appeal, since the first two grounds are enough to dispose of the appeal, this appeal is allowed, the decision of the District Land and Housing Tribunal is hereby quashed and set aside, and either party to the dispute is at liberty to file a fresh claim before the proper authority for determination of the ownership of the land in dispute”

Without prejudice to the applicant's right to appeal, the matter has not been finally disposed. Instead parties are at liberty to file a fresh case. Therefore the likelihood of the success of the intended appeal is also not certain. I have not seen any matter of substantial miscarriage of justice that can warrant the discretion of the court in extending time to apply for leave to appeal taking into consideration the length of time lapsed.


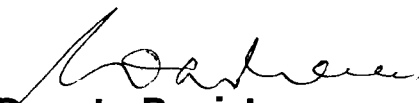
In conclusion, the applicant herein has not given justifiable reasons to warrant grant of prayer for order of extension of time and consequently this application is hereby dismissed with costs.

Application dismissed

Dated at Arusha this 11th day of September, 2015

**SGD
S.M MAGHIMBI
JUDGE**

I hereby certify this to be a true copy of the original.

 
**Deputy Registrar
High Court
Arusha**
29/10/15