IN THE HIGH COURT OF TANZANIA

AT ARUSHA

MISCL CIVIL APPLICATION NO.287 OF 2014

(Originating from High Court Land Case No.270 of 2014)

PROFESSOR SENDUI OLE NGUYAINE
(As Administrator of the Estate of the late
MZEE NGUYANINE MEIJO MOLLEL) ..... APPLICANT

VERSUS

THE ARUSHA CITY COUNCIL ..... RESPONDENT

RULING

MAGHIMBI, J

This is a ruling upon an application made under the provisions of Section 11(1) of the Appellant Jurisdiction Act, Cap 141 R.E 2002. The applicant sought to move the court to grant an extension of time to apply for leave to appeal to the Court of Appeal against the High Court judgment and Decree in High Court Land Case No. 13/2006 dated 22/10/2014 and for any other orders that the Court may deem fit and just to grant.

The application was supported by an affidavit of the Elvais Erasmo Maro learned counsel for the applicant dated 10th December, 2014. The brief background of the application as set out in the affidavit is that the applicant timely preferred Misc. Civil Application No.259/214 on the 05/11/2014 seeking for leave to appeal to the Court of Appeal against the

Land Case No. 13/2006. On the 08/12/2014 the said application was withdrawn by the applicants with a leave to refile and since the fourteen days within which to apply for leave had lapsed the applicant had to first file this application for extension of time.

On the day of the hearing, the Mr. Maro, learned counsel for the applicant submitted that in terms of the amended chamber summons filed on 19/05/2015, the applicant is seeking for two substantive orders which are the extension of time for leave to appeal to the Court of Appeal of Tanzania against the judgment of this court in Land Case No 13/2006 and two is the order for extension of time within which to file the notice of appeal to appeal against the said decision. Mr. Maro submitted that the judgmen and decree that extension of time is sought for was rendered on the 22/10/2014. Seven days thereafter that is on 30/10/2014 a notice of appeal was filed in court and an application for leave was filed on 05/11/2014 as Misc Civil Appln No. 259/2014. That when the application was called before judge on 08/11/2014 the same was withdrawn with a leave to refile for reasons that first it was not accompanied by a High Court Order and secondly and by non-citation of enabling provision of the law. Mr. Maro submitted further that by then, in terms of Rule 45 of Court of Appeal Rules, 2009 time within which an application for leave to appeal to the Court of Appeal had lapsed. Mr. Maro argued that despite the lapse, initially the application was filed on time. He further argued that the intended appeal raises contentious matters one of which is the 1st ground of the intended appeal that the trial court ought to have tried the case with

the aid of assessors. He therefore prayed that the application be granted and that he will not press for costs.

In his reply, Mr. Chonya, learned City Solicitor representing the respondent begun his submissions in the application for extension of time to file leave. He submitted that the record of the case show that the 1st application for leave was made within time, the only problem of that application is that it was defective that it was incompetent on the ground that it didn't move the court accordingly. That this caused the applicant to apply to withdraw his application with leave to refile whereby the court granted his application. Mr. Chonya contended that it was the duty of the applicant to make sure that he moves the court properly. He argued that in exercising discretionary power to grant leave, the High Court has to act judiciously. To support his argument, Mr. Chonya cited the case of **Kalunga & Co Advocates Vs NBC, 2006 TLR 235**when the same issue was discussed at pg 288:

> *"This discretion however wide it may be is a discretion to be exercised judiciously having regard to the circumstances of each case"*

Further that His Lordship Justice Nsekela (as he then was) went far quoting the Ruling, the judgment and decision on appeal on **Ratinum Cumarasamy of the Supreme Court of Malaya** on how the court should be guided on exercising its discretion that:

> *"The rules of the court must prima facie, be obeyed and in order to justify a court in extending the time during which some step in*

procedure requires to be taken, there must be some material on which the Court can exercise its discretion. If the law were otherwise a party in breach have unqualified right to an extension of time which would defeat the purpose of the Rules which is to provide a time table for the conduct of litigation".

and the case of **Savill Vs. Southern Health Authority of Judge Mann LJ** at pg 259:

"The Rules of Supreme Court are the rules for the conduct of litigation. There are therefore benefits of plaintiffs and the protection of the defendants. Here the rule was not complied with, we are asked to exercise our discretion to waive application of the rules. There is no material put before us on which we should grant waiver. I do not see how one can exercise discretion without material upon which to consider it"

Mr. Chonya then submitted that the point that the counsel for the applicant was misdirected by the Land Courts Disputes Act is no leg to stand and is not a material fact which can make this Court to use its discretion as the matter before the Court was handled by an advocate, who knows the rules and procedure. Mr. Chonya submitted further that most of the submissions by Mr. Maro were based on influence of certain decision which he did not cite, that on those decision that on the 2nd appeal or application decree should be attached. He argued that since that was a first application attachment of a decree or order was immaterial.

Arguing on the notice of appeal, Mr. Chonya submitted that it is true the 1st notice of appeal was filed within time, however under Rule 90(1) the notice will be deemed withdrawn if the appeal is not filed within 60 days. He argued that the circumstance in this case is quite different as the notice of appeal filed by the applicant was not withdrawn by virtue of Rule 90(1) it was withdrawn by the applicant by filing his application in the court of appeal withdrawing his notice of appeal u/Rule 89(1) of the Court of Appeal Rules and that the application was done by the applicant without seeking the leave to come again. He submitted further that the Court granted the order as prayed; he argued that Rule 90(1) and Rule 89(1) are used in quite different circumstances. Rule 89(1) is used when the applicant does not show interest to continue with the appeal at any time. Rule 90(1) on the other hand goes without saying that if 60 days passes the notice deem to be withdrawn that is the operation of the Rules.

Mr. Chonya argued that if at all it would happen that the leave was not granted after 60 days while the matter is still pending in the Court, it would have been easier for the applicant to lodge another notice of appeal without even seeking extension of time. That the applicant is seeking extension of time because he is the one who caused those delays. That since the withdrawal was intentional the applicant cannot again seek extension while he was the one who sought to withdraw. He hence prayed that this application should not be granted.

In his rejoinder, Mr. Maro counter arguing the fact the respondent argument that the applicant was not diligent in preparing the previous application which was found to have some defects, cited the case of **Royal**

Insurance Tz Ltd Vs Kiwangwa Strand Hotel Ltd Court of Appeal of Tanzania Civil Application No. 11/2009 (unreported) when the Court was dealing with the previous Rule 8 which is now Rule 10 of the Court of Appeal Rules, 2009 the court stated:

> *"We shall state by saying that it is a fallacy to add that diligence could only be shown before instituting the record. We have two reasons, first under Rule 8 an application for extension of time may be brought before or after the expiration of time limited for doing anything under the rules. It cannot be read into the rules that sufficient reasons must have something to do with actions taken before the expiry of time although those will certainly weigh heavily in such consideration. But second if the law had demanded so, there will be no need for extension of time as everybody will be diligent before filing an action and make provisions for extension of time such as Rule 8 redundant, and so we cannot accept that line of argument"*

Mr. Maro argued that there could be some lapse on the part of the applicant's counsel, but the court has to measure and weigh the extent of the omission and whether in the circumstance the applicant can be allowed to exercise his constitutional rights. The various provisions for extension of time recognizes that occasion may happen that a party can assign reason and resurrect his right of appeal or otherwise as the case may be. He submitted that there were reasons for the omitting to cite the Appellant Jurisdiction Act and not to attach the High Court Order, and that there was no objection from the respondent but instead the matter was picked by the

Court hence even the respondent would appear to have been sailing on the same boat with the applicant. Secondly that matters of decree or order are immaterial in a first application for leave, is also the opinion the applicants.

Mr. Maro submitted further that the requirement for leave to appeal against the judgment of the High Court in its original jurisdiction is not provided for under the Appellate Jurisdiction Act, neither the Rules, it is provided in a different piece of legislation that is Section 47(1) of the Land Courts Disputes Act. That Section 5(1) (c) deals with other orders and not decree.

On the notice of appeal, Mr. Maro submitted that under the two provisions that is Rule 89 and 91; Rule 91(a) the notice is deemed withdrawn but is not in fact withdrawn, hence once the 60 days have expired that notice cannot be used to sustain an appeal hence one has to withdraw that notice which has expired and pave way for a filing of a fresh competent notice of appeal. Arguing on the argument raised by the respondent that no leave was applied by the applicant while withdrawing the notice, Mr. Maro referred to Section 11 of the Appellate Jurisdiction Act which confers powers to the High Court to extend time and that there is no provision in the Rules to the effect that it should be withdrawn with a notice to refile.

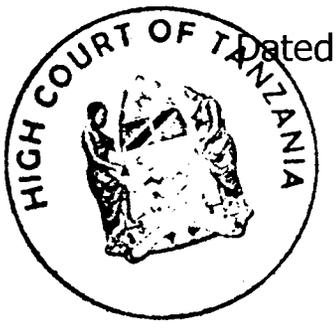
Mr. Maro concluded that the respondent has not suggested how he will be prejudiced if the application is granted and have not countered the argument that the applicant has constitutional rights to appeal against the original decision of the High Court and lastly they have not discounted that

the intended appeal has chances to succeed. He therefore prayed that the application be allowed.

Having gone through the records and the submissions of the parties, I am satisfied with the reason for the delay as advanced by the applicant. Having withdrawn the initial application, the applicant promptly lodged this application in hand. Therefore the applicant was at all times diligent in following up on his right to appeal and it was only a matter of technicalities that made his efforts futile. Indeed as per the case **of Royal Insurance Tz Ltd** (Supra) cited above, there is a reason why the legislature made a law allowing a party to apply for extension of time. What is required of the court is to exercise the discretionary powers judiciously, upon being satisfied of the reasons advanced for the delay, in granting the application. As for the reasons advanced herein, this Court is satisfied that the delay caused was beyond the applicants control and that at all times he acted promptly in pursuing his right. Under the circumstances therefore, I see no reason not to allow this application.

The applicant is hereby granted extension of time to file notice of appeal and further extension to the period for filing an application for leave to appeal from the Judgment of the High Court Land Case No. 13/2006 dated 22/10/2014. The notice of appeal as well as application for leave to appeal against the aforementioned judgment should be lodged within fourteen days from the date of this decision.

Application allowed



Dated at Arusha this 13th day of July, 2015

SGD
S.M MAGHIMBI
JUDGE

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

Deputy Registrar
High Court
Arusha
15/10/15