

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT SONGEA

MISCELLANEOUS LAND APPLICATION NO. 45 OF 2019

CHRISTIAN HAULE APPLICANT

VERSUS

MARIANUS MSELEWARESPONDENT

RULING

Date of Last Order: 28/05/2020

Date of Ruling: 11/08/2020.

BEFORE: S.C. MOSHI, J.

The applicant Christian Haule is seeking extension of time to file notice of appeal to the court of Appeal out of time under section 11(1) of the Appellate Jurisdiction Act Cap. 141 R.E 2002. His application is supported by the affidavit of CHRISTIAN HAULE. The application is strongly opposed by the respondent through a counter affidavit which was sworn by the respondent, MARIANUS MSELEWA.

While the applicant was represented by Mr. Edson Mbogoro, learned Advocate, the respondent appeared in person. The court ordered the parties to argue the application by way of written submissions.

The counsel for the applicant argued among other things that, the applicant lodged all requisite documents for processing appeal to the court of Appeal which include notice of Appeal, a letter requesting for record of appeal, application for leave to appeal to the court of Appeal was duly filed within the time prescribed by the law and even leave to appeal to the court of appeal was duly granted. However, when the applicant was waiting to be supplied with the record of appeal which was unduly taking long time he was notified by the Registrar that the record of appeal cannot be availed to him as the letter by which he applied for the same could not be traced. Time lapsed before an idea was floated to the applicant that the starting point of getting out of the deadlock was to get an affidavit of the Registry officer who received the applicant appeal documents at the material time that is 2008. He succeeded to locate the whereabouts of the said Registry Officer as being at Mbeya Resident Magistrate's court. The long delay in locating the said Registry Officer was aggravated by the physical disability of the applicant who is blind hence whatever he does must be through the agency of an able bodied person.

He further said that, after obtaining the affidavit of the said Registry Officer whose copy is appended in the application the applicant lodged an omnibus application for filling a notice of appeal out of time, leave to serve the respondent, copy of a letter applying for the record of appeal out of

time and leave to appeal out of time. Right from Kilagano Ward Tribunal where the matter originated the applicant was in contest with one OCTAVIAN MSELEWA who had passed away. However when filing the said application the applicant inadvertently named OCTAVIAN MSELEWA as his respondent instead of the administrator of his estate. On 28/2/2019 when the application came for mention the applicant reminded this anomaly and hence he was compelled to withdraw the application with the view of rectifying the anomaly and refile the application. After rectifying it he again filed another application with omnibus prayers an application whose competence was challenged for being an omnibus. The objection was sustained by this court as a result the applicant has filed this application after rectifying the irregularity. He said that the delay in filing this application is on account of the above background.

He persuaded the court to allow the application despite the fact that the delay may seem inordinate bearing in mind the glaring illegality which the applicant is craving to have it cured. He submitted that, in the judgment against which the applicant intends to appeal the court misapplied the law instead of applying the local customary law Declaration No. 4 GN 279 of 1963, it applied the Ngoni Customary law, a nonexistent law, the same having been subsumed since 1963 forming a constituent part of the said declaration pursuant to the Judicature and application of Laws Act Cap. 358

R.E 2019. He argued that, misapplication of the law is an illegality and it was this reasons which prompted this court to grant leave to the applicant to appeal to the court of appeal.

He said that, this court as well as the Court of Appeal has repeatedly held that when the point at issue is one alleging illegality of the decision intended to be challenged the court may extend the time with the object of rectifying such illegality. He made reference to the case of **Kalunga and Company Advocates Versus National Bank of Commerce Ltd**, (2006) TLR 235 and the case of **The Principal Secretary Ministry of Defence and National Service Versus Devram Valambhia** (1993) TLR 91.

He stated that, on first impression it may seem that the delay is inordinate, however it should be borne in mind that the matter in dispute is land which is still there, hence granting this application. He argued that its grants will not occasion miscarriage of justice to any party.

In reply the respondent submitted that, it is the discretion of the court to extend time for giving notice of intention of appeal from the judgment of the High Court upon finding that the case is fit for appeal. But with this application there is gross negligence on the part of the applicant and the whole submission does not hold water as the ruling at issue was delivered on 3/10/2019 that means it is about 32 days from the date when

it was delivered. He said that the application is inordinate since the applicant had enough time to make his application on time, the reason that he was on safari on the date which the ruling was delivered does not stand as the applicant personally was present at the time the ruling was delivered and another advocate held brief for him. The advocate could have taken action immediately after the pronouncement of the said ruling.

He stated that it is the applicant's habit not to take things seriously, hence making the respondent annoyed and unsettled at his property causing pain and unpeaceful enjoyment to his property. He said that as the dispute originated far back in 2007 at Kilagano Ward Tribunal where it was decided in favor of the respondent. The applicant appealed in the District and Land Tribunal where the judgment was delivered on 6th October 2008 in favor of the respondent. 10 years have passed since the judgment was delivered until 2018 when the applicant filed an appeal in this court without having any justifiable cause as to why he failed to appeal on time.

He contended that the case of **Kalunga and Company Advocates Versus National Bank of Commerce Ltd (2006)** TLR 235 cited by Mr.Mbogoro is irrelevant in this scenario as there is no any irregularity in this case which need to be challenged or cured by the court of Appeal. The reason explained by the applicant that he intends to cure the illegality that the court misapplied the law is irrelevant with this case at hand as the

question was ruled and determined by this court in Miscellaneous Land Application No 5/2008 before Hon. Fikirini, J and was granted leave to appeal to the court of Appeal, the right which the applicant has failed to exercise it on time and hence this application. He said that the applicant has enough time to proceed with his appeal but because of his negligence has failed to appeal to the court of Appeal.

In his rejoinder the counsel for applicant stated that the respondent has not filed a reply to a written submission as ordered by the court rather the reply has been filed by a person who is not a party in this application. He said that the respondent in this application is MARIANUS MSELEWA as the administrator of the estate of OCTAVIAN MSELEWA. However, the reply in this application has been filed by MARIANUS MSELEWA as the legal representative of LAURENT SINDA MOYO and MAKARIUS SINDA MOYO a party unknown in this application. He said that the effect of this irregularity is as if the respondent has not filed any reply in court and the purported reply be disregarded by the court.

He argued that without prejudice to the above submission, the respondent is contending negligence, but every case must be looked at and determined according to its own specific facts. The applicant engaged his current advocate after he had filed the initial appeal documents e.g. notice of appeal, letter requesting for the record of appeal etc. He started

representing the applicant in preparing and arguing the first application for leave to appeal to the Court of Appeal upon assumption that everything which was done prior to his engagement was in order.

He said that even if this court will concur with the respondent contention on negligence, this court held that Advocate's negligence if any should not be used to punish clients, he buttressed this argument with the case of **Judith Emmanuel Lushoka Versus Pastory Binyura Mlekule and 2 others**, Miscellaneous Land Application NO 74 of 2018 High court of Tanzania Tabora Registry (unreported). He also said that the delay between 3rd October and 5th November 2019 has been reasonably accounted for as per the sequence of events as deposed in the affidavit accompanying the application.

I would like at the outset to address the applicant's advocates concern regarding the error in citing the parties. It seems to be an oversight as reading the reply submission as a whole shows that the respondent was referring to this case. I therefore find that the error doesn't occasion any miscarriage of justice.

In determining this application, I find it imperative to reiterate the guidelines to be followed by courts in exercising its discretion in deciding to grant or refuse an application for extension of time. The same were aptly

stated by the court in the case of **Lyamuya Construction Company Ltd Vs Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No 2 of 2010 (Unreported) as follows

"(a) the applicant must account for all the period of delay

(b) the delay must not be inordinate

(c) the applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intended to take.

(d) If the court feels that there are 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 immediate issue for determination is whether the applicant has accounted for all the period of delay. I agree with the respondent that indeed the applicant did not say anything as regards the period between 3/11/2019 to 5/11/2019 when the application was struck out. The requirement of accounting for every day of delay has been emphasized in the case of **Bushiri Hassan Vs. Latifa Lukiko, Mashayo**, Civil Application No. 3/2007 (Unreported), the court stated as follows:-

"Delay, of even a single day, has to be accounted for otherwise there would be no proof of having rules prescribing periods within which certain steps have to be taken".


It is also evident that there was gross negligence on the part of the applicant as he filed two applications which were withdrawn and the other one was struck out. The applicant is represented by Mr. Mbogoro, he was duty bound to file applicant's applications in accordance with the law as he has a duty to his client; by filing the application which is against the non existing party and the one which had omnibus prayers I find that he failed to perform his duty to his client. However I have decided to grant the application because it was advocate's negligence as it was held in the case of **Judith Emmanuel Lusohoka Vs Pastory Binyura Mlekule and two others**, Misceleneous Land Application No. 74/2018 High court at Tabora (Unreported) that advocate's negligence should not be used to punish his client, I quote:-

"i have formed an opinion that the applicant has shown good cause because she entrusted her advocate and therefore was not to blame for negligence acts or incompetence of those lawyers whom she believed to be legal practioners."

The decision is not binding on me but in the circumstances of this case it is very persuasive. Besides, there is no evidence showing that the applicant contributed to advocate's lack of diligency. It is for those premises that I find the applicant has shown sufficient reasons for the delay; thus the application has merit and it is hereby granted. The applicant has to file his notice of appeal to the court of appeal within 14 days from the date of this ruling.

Each party to bear its own costs

It is so ordered.



S. C. MOSHI

JUDGE

11/8/2020