

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
MISC. LAND APPLICATION NO. 43 OF 2019
(*Arising from Application No. 93 of 2013, the
District Land and Housing Tribunal for Mbeya*)**

SIJALI SIMON MWANGONELA

**(An administrator of the estate of the late Simon
Mwangonela).....**

APPLICANT

VERSUS

LUCY MPILUKA.....1st RESPONDENT

TELEZIA JULIUS MAKOMBE.....2nd RESPONDENT

ELIZABETH JULIUS MAKOMBE.....3rd RESPONDENT

MBEYA DISTRICT COUNCIL.....4th RESPONDENT

R U L I N G

Date of last Order: 15/07/2020

Date of Ruling: 21/09/2020

NDUNGURU, J.

The applicant in this application Sijali Simon Mwangonela being an administrator of the estate of the late Simon Mwangonela is seeking for the following orders:

- (i) That the leave be granted to the applicant to appeal out of time against the judgment and order of the District Land and Housing Tribunal dated 04/07/2018 in Land Application No. 93 of 2013.

- (ii) Costs be in the course.
- (iii) That the court be pleased to issue any other order it deems fit and proper.

This application is brought under Section 41 (2) of the Land Disputes Courts Act (Cap 216 Revised Edition 2002) as amended by the Written Laws (Misc. Amendment) Act No. 02 of 2016.

Further, the application is supported by the affidavit of the applicant. Upon reception of the Chamber Summons the respondents resisted the application by filing their counter affidavits.

The applicant's grounds for the delay to file an appeal in time are contained at paragraph 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 19, and 21 of the affidavit. In those paragraphs of the affidavit the applicant states that after the delivery of judgment on 04/07/2018, the applicant's advocate on 13/07/2018 wrote a letter to the tribunal applying to be supplied with the copies of judgment, decree and proceedings.

That despite of several reminders and constant visit on weekly basis from 27/08/2018 he was not supplied with those copies until 03/05/2019 when he was called by the tribunal clerk to pay fees for obtaining certified copies of the judgment, decree and the proceedings

which he later on 06/05/2019 he handled them to the office of his advocate through her secretary.

He further stated that on the mentioned date above he was informed that his advocate had travelled to Dar es Salaam for family matters until 12/05/2019, it was the said incident that delayed him from 13/05/2019, he stated that when he made an appointment with his advocate on 18/05/2019 he agreed to go through the documents for preparation of legal advice and was agreed to meet him again on 24/05/2019 when he told him that there were errors on fact and law on the judgment and the only way to challenge is by way of appeal but he have to apply for enlargement of time to appeal out of time and that he demanded a substantial amount of instruction fee to wit four million Tanzanian shillings for consultation fee to pursue application for extension of time and thereafter to file an appeal something that he could not afford to pay at that time as he was administrator of the estate of Simon Mwangonela hence on 26/05/2019 he successfully convened a clan meeting to raise that legal fees for advocacy for each member to contribute Tshs. 200,000/=. He also stated that on 31/05/2019 he made an appointment with his advocate to meet him on

Monday 03/06/2019 for a formal preparation of further professional service and proceed with the matter.

Lastly he stated that his delay occasioned was innocently made due to inadvertent, delay to be supplied with certified copies of judgment, decree and proceedings and economic motivated.

When the application was due for hearing Mr. Muya learned Counsel represented the applicant while Mr. Ngogo learned counsel represented the 1st, 2nd and 3rd respondents, the 4th respondent was represented by Wilson Saul Nyamunda (District Solicitor of Mbeya District Counsel).

By leave of the court it was agreed the application be disposed of by way of written submission.

In his written submission the counsel for the applicant prayed the affidavit of Sijali Simon Mwangonela (as administrator of the estate of the late Simon Mwangonela) be adopted to form part of their submission.

Submitting for the application, the applicant's counsel was of the argument that, the applicant sued for recovery of un surveyed land at Songwe Mbeya before the District Land and Housing Tribunal for Mbeya in Application No. 39 of 2013 and the said application was heard on

In the case of **Henry Mugasha vs. Tanzania Telecommunication Ltd BK**, Civil Application No. 08 of 2011, Court of Appeal of Tanzania (unreported) it was held that:

"the discretion of the court to extend time under rule 10 is unfettered, but has also been held that in considering an application under the rule, the court may take into consideration such factors as the length of delay, the chances of success of the intended appeal and the degree of prejudice that the respondent may suffer if the application is granted."

The duty of the applicant is to show sufficient cause which impeded him to appeal on time. There are abundance of decisions by supreme court of the land to that effect, In the case of **Laurent Simon Asenga vs. Joseph Magoso and 2 Others**, Civil Appl. No. 50 of 2016 Court of Appeal of Tanzania (unreported), the court stated:

"in determining an application under rule 10, the issue that has to be resolved is always whether the applicant has shown good cause for extension of time, what is good cause is a question of fact depending on facts of each case, for that reason many and varied circumstances could constitute a good cause in any particular case."

In the instant application, the applicant in his affidavit has raised several causes which impeded him to appeal on time. He stated that he delayed to be supplied with the necessary documents requisite for

appeal process, communication with an advocate for legal advice and representation and economic cause

Starting with the first reason which is the delay to be supplied with the copies decree and judgment. The law is clear that the time awaiting to be supplied with the decree must be excluded in computing for the period of limitation. The applicant in the present application was supposed to appeal within 45 days from the date of judgment. Section 19 (2) of the Law of Limitation Act (Cap 89 Revised Edition 2019) provides:

"(2) In computing the period of limitation prescribed for an appeal, an application for leave to appeal, or an application for review of judgment complained of was delivered, the period of time requisite for obtaining a copy of the decree or order appealed from or sought to be reviewed, shall be excluded."

In view of what I have endeavored to show above, and in the light of Section 19 (2) (supra), it follow that the period between 4th July, 2018 and 3rd may 2019 when the appellant eventually obtained a copy of decree and judgment is excluded in computing time or accounted for.

It is the submission of the applicant that having received a copy of decree and judgment on 3rd May, 2019, on 6th May, 2019 (two days later) he made copies and handled to the office of his advocate through

secretary where he was informed that his advocate had travelled to Dar es salaam for family matters until 12th May, 2019.

The reason of communication with his advocate has been stated in paragraphs 10, 11, 12, 13 and 14 of his affidavit where he stated that he tried to find another advocate to advice him but he did not get one and that was the incident which delayed him from 13th May, 2019 till 18th May, 2019 when he got an appointment and the advocate agreed to go through the said documents for legal advice and any necessary action if any on 24th May, 2019.

He stated that on 24th May, 2019 he received his response that there were errors on facts and law on the judgment of the tribunal and the only way to challenge it was by way of appeal thus on the same day his advocate proposed that he have to make an application for extension of time.

Economic reason has been stated in paragraphs 15, 16, 17, 18 and 19 where he stated that on 24th May, 2019 his advocate demanded four million Tanzanian shillings as consultation fee for extension of time and thereafter to file an appeal but as an administrator of the estate of the late Simon Mwangonela he had no any means to afford as he had no any other property to depend up on, hence on 26th May, 2019 he

decided to convene a clan meeting in order to raise the said amount from heirs of the deceased where he was able to raise that amount by 31st May, 2019, on Monday 3rd June, 2019 he successfully met with his advocate where a formal preparation of professional service to proceed with the matter was made and the application for extension of time was filed on 06/06/2019.

To my view the applicant was not negligent in per suing his case. There was no undue delay.

In the circumstances I am of the view that the applicant has carried his burden of showing sufficient reasons to move this court to exercise its legal and noble discretion.

I hold that the applicant has shown sufficient cause which impeded him to file the appeal. I hereby grant extension of time. The applicant to file his appeal within 45 (forty five) days from the date of this ruling. No order as to costs.

It is so ordered.

D. B. NDUNGURU
JUDGE
21/09/2020

Date: 21/09/2020

Coram: D. B. Ndunguru, Judge

Applicant: Present

For the Applicant: Ms. Matha Gwalema advocate holding brief of Mr. Muya advocate

1st Respondent: Present

2nd Respondent:

3rd Respondent:

4th Respondent:

For the 1st, 2nd and 3rd Respondent:

B/C: M. Mihayo

Court: Ruling delivered in the presence of Ms. Matha Gwalema advocate holding brief of Mr. Muya advocate for the applicant, applicant and the first respondent.

D. B. NDUNGURU
JUDGE
21/09/2020

merit and judgment was delivered on the 4th July, 2018 in favour of the respondents, following that judgment of the tribunal the applicant instructed our firm to write a letter to trial tribunal requesting for certified copies of judgment, decree and proceedings(through letter dated 13th July, 2018) for filling an appeal before this court.

It was his further submission that the applicant was not supplied with those copies despite of his several reminders from 27th August, 2018 until 3rd May, 2019 when he was called via mobile phone by the tribunal clerk to pay fees for obtaining certified copies of the judgment, decree and proceedings (a copy of payment receipt is attached for reference) where on 6th May, 2019 he was supplied with those copies of judgment ,decree and proceedings and without delay he handled those copies to the firm through secretary where he was informed that the advocate had travelled to Dar es Salaam, thus he will review them when is back and that was the incident that delayed the applicant from 6th May, 2019 until 18th May, 2019 when the firm agreed to go through those documents for advice, hence on 24th May, 2019 they advised the applicant to apply for extension of time so that an appeal can be filed.

The counsel proceed to submit that the applicant was instructed to pay four million for legal services and consultation fee to pursue

application for extension of time and thereafter an appeal unfortunately the applicant did not afford, thus on 26th May, 2019, the applicant convened the clan meeting to raise that fee where by each had to contribute Tshs. 200,000/=, fortunate on 31st May they raised that amount of money needed hence on 3rd June the applicant was able to contact with the firm and a formal preparation of legal service proceed and the application was filed on 4th May, 2019.

The counsel for the applicant was of further contention that time spent in prosecuting other cases in the court amounts to technical delay and must be excluded from counting each day of delay, he cited the case of **Elly Peter Sanya vs. Ester Nelson**, Civil Appeal No. 151 of 2018, thus he submitted that the delay was caused by good cause.

He also invited this court to make reference to whole judgment, that page 63 of the proceedings of the tribunal is tainted with serious irregularities and illegalities including failure to invite assessors to give out their opinions as required by Regulation 19 (2) of the lands disputes courts (The District Land and Housing Tribunal) Regulations, 2003 and Section 23 (2) of Cap 216.

He further submitted that the delay occasioned was innocently made due to an inadvertent, delay to be supplied with the certified

copies of the Judgment, decree and proceedings and economic motivated thus the necessity for application for extension of time, that if the application is not allowed, the applicant's right will be completely shut while the intended appeal has high prospects of success

To cement the facts deponed, the applicant cited several decisions such as **Mary Kimaro vs. Khalfan Mohamed T.L.R 1995**, **Jawambele Mtumwa Shashame vs. Mohamed Hamis**, Civil Reference No. 08 of 2016 (unreported), **Edna Adam Kibona vs. Absalom Swebe (Sheli)**, Civil Case No. 286 of 2017 Court of Appeal of Tanzania (unreported).

Resisting the application Mr. Ngogo learned counsel for the 1st, 2nd and 3rd respondents in his submission was of the argument that extension of time is the discretion of the court but the applicant must establish sufficient cause for the delay and the applicant is duty bound to account for each day of delay, he cited the case of **Dar Es Salaam City Council vs. S. Group Security Ltd.**, Civil Application No. 234 of 2015 Court of Appeal of Tanzania (unreported).

He submitted that the issue for determination in this application is whether the applicant has established sufficient cause for the delay by counting each day of delay, he argued that the main reasons for delay

advanced by the applicant are delay to be availed with copies of judgment and decree, communications with his lawyer and final constrains. The counsel had no dispute with the reasons of waiting for copies of judgment and decree as the same were beyond the applicant capacity.

The learned counsel further submitted that the copy of judgment and decree was certified ready for collection on 06/05/2019 while this application was filed on 06/06/2019 after the laps of more than 30 days, hence the applicant is duty bound to account for each day of delay for delayed 30 days, the duty which has not been discharged.

It was the counsel submission that the alleged internal communication between the client and an advocate as envisaged under paragraph 10 to 15 cannot amount to sufficient cause for delay and the same cannot be a reason to circumvent the clear mandatory limitation provided by law, the applicant has not accounted as to why the communication with his lawyer did not start immediately after delivery of judgment taking into consideration that the counsel for the applicant acted for him before the tribunal and both were present during delivery of judgment.

The counsel proceeded to submit that it is a day lies that the applicant failed to get another advocate while there are more than nine thousand registered advocates, the time alleged to be used for collection of legal service fees cannot in any way be termed as good cause for delay. There is no proof that the applicant is a poor unable to pay legal services otherwise he could have opted for legal aid service.

Lastly he submitted that the issue of illegalities was not pleaded in the affidavit and in the annexed memorandum of intended appeal and the same is the mere unfounded after thought which should not be considered by this court.

On the basis of the above submission and the counter affidavit they pray this application be dismissed with cost.

Thereza Linda Deus (District Solicitor, Mbeya District Council) for the 4th respondent, resisting the application, in her reply she prayed this court to adopt her counter affidavit as part of her submission.

She submitted that the applicant here in above was not interested to appeal against the decision of the trial tribunal delivered on 4th July, 2018 until he was served with summons to defend a bill of costs. Before that the applicant took no steps to make a follow up on the copies of judgment and proceedings, therefore the claims that he was delayed by

the tribunal lacks bases and is mere technique to avoid bill of cost which is still pending at the tribunal.

Also she submitted that the claims made by the applicant that he sued on un surveyed land at Songwe Mbeya is unfounded as the disputed premises are all surveyed ones with Plot No. 457, 458, 459 and 460 respectively with their certificates.

The delay in obtaining copies of judgments and proceedings was due to his own negligence as he took no efforts to get them immediately

Her submission was to the effect that, on the assertion that the applicant was required to pay four million as legal service lacks basis as is a private arrangement between them and cannot be proved in any way as there is no proof of minutes for the said family meeting for raising the legal service fee and if the applicant knew that, his relative could have raised the amount on the very first day

It was her further submission that the applicant cannot rely on the case of **Marry Kimaro vs. Khalfan Mohamed [1995] T.L.R** as the delay was caused by the applicant negligence as he failed to make follow up within a time, the said copies were available one month after the judgment that is why the first respondent was able to attach the same in her bill of cost filed before the tribunal on 31st August, 2020

Further she submitted that Economic reasons and other advocate undertakings are not sufficient reasons for extension of time, she cited the case of **Wambele Mtumwa Shahame vs. Mohamed Hamis**, Civil Reference No. 08 of 2016, Court of Appeal if Tanzania.

It was her argument that ,the claims that this honourable court has to exclude time spent in prosecuting other cases, they are of the opinion that he has misconstrued the decision of **Elly Peter Sanya vs. Ester Nelson**, Civil Appeal No. 151 of 2018 as this case the applicant was prosecuting the same case before different judges, that is why it was termed as technical delay but here in the applicant's counsel cannot take it as one of the reasons for delay just because he has other cases to attend that is not sufficient reasons, therefore attending to prosecute other cases is not a defence

On the issue of irregularities pointed out by the counsel for the applicant, she submitted that the same is not fatal to the applicant as he himself has failed to state as how he has been affected by the same as evidences presented by the respondents were strong persuasive that is why the tribunal entered verdict in favour of the respondents.

Lastly the counsel submitted that the applicant has failed to account for each day of delay and no sufficient reasons has been given

for his delay, if this court found that the same are fatal and therefore affecting the whole findings, they humbly submit that it be allowed without cost as the error complained has never been occasioned by the respondents at all.

In his rejoinder to the 1st, 2nd and 3rd respondents written submission, the counsel for the applicant was of the submission that the case of **Dar Es Salaam City Council** (supra) is distinguishable in the present case, in the case at hand the applicant has discharged his duty to account for delay, similarly the applicant acted reasonable and made constant visit until the judgment, decree and proceedings were delivered to him

It was his further submission that the delay has been accounted from the day the judgment was read on 4th July, 2018 up to the date when the application was filed on 4th June, 2019 and not on 06/06/2019 as submitted by counsel for the respondent .

Lastly he submitted that opinion of assessors is pure point of law unlike what the counsel for the respondents has submitted. Affidavit is confined to facts only but the opinion of assessors which have been raised is a typical point of law which cannot be pleaded in the affidavit and once pleaded will be liable for objection, it is regulated by

Regulation 19(2) of the Land Disputes Courts Act (The District Land and Housing Tribunal) Regulations, 2003 and Section 23 (2) of the Lands Disputes Courts Act[Cap 216 R:E 2019] to cement his submission he cited the case of **Edna Adam Kibona vs. Absolom Swebe (Sheli)** (supra).

In the circumstances he prayed this court to allow this application. In rejoinder to the 4th respondent written submission, the counsel submitted that the case of **Marry Kimaro** (supra) is a relevant case in the present situation to justify that the delay is attributed by good cause, it is their submission that the applicant was not negligent at any material time, he further argued that the delay which the counsel for the 4th respondent is inculcating in the minds of this court to be inordinate, the applicant raised legal service fees for only 6 days from 25th May, 2019 to 31st May, 2019, On 31st May, 2019 the applicant paid the fees thus the advocate prepared the application and filed it by 3rd June, 2019, the manner this fact of economic reason was submitted by the counsel for the 4th respondent implies that it was the only reason that caused the delay, the delay also attributed by the tribunal for almost a year in preparation of proceedings, judgment and decree, thus the applicant as administrator of the estate of the deceased had no means to finance the

legal service, the applicant was bound to consult other legal heirs of the deceased, hence the case of **Wambele Mtumwa** (supra), **Yusuph Same and Another** (supra) are distinguishable.

Lastly he submitted that the opinion of assessors is pure point of law and is regulated by Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 and Section 23(2) of the Land Disputes Courts Act [Cap 216 Revised Edition 2019], unlike what the counsel for respondent has submitted hence it cannot be in the affidavit as affidavit must be confined to facts only, to cement his argument he cited the case of **Edina Adam Kibona vs. Absolom Swebe (Sheli)** (supra). The appellant argued his application be allowed.

The point for determination is whether the applicant has shown sufficient cause to move this court to grant the application.

It be clearly noted that in this kind of applications the grant or refusal of the extension of time is the discretion of court. But such discretion must be exercised judiciously. This position has been articulated in a number of cases decided by the supreme court of land.

In the case of **Henry Mugasha vs. Tanzania Telecommunication Ltd BK**, Civil Application No. 08 of 2011, Court of Appeal of Tanzania (unreported) it was held that:

"the discretion of the court to extend time under rule 10 is unfettered, but has also been held that in considering an application under the rule, the court may take into consideration such factors as the length of delay, the chances of success of the intended appeal and the degree of prejudice that the respondent may suffer if the application is granted."

The duty of the applicant is to show sufficient cause which impeded him to appeal on time. There are abundance of decisions by supreme court of the land to that effect, In the case of **Laurent Simon Asenga vs. Joseph Magoso and 2 Others**, Civil Appl. No. 50 of 2016 Court of Appeal of Tanzania (unreported), the court stated:

"in determining an application under rule 10, the issue that has to be resolved is always whether the applicant has shown good cause for extension of time, what is good cause is a question of fact depending on facts of each case, for that reason many and varied circumstances could constitute a good cause in any particular case."

In the instant application, the applicant in his affidavit has raised several causes which impeded him to appeal on time. He stated that he delayed to be supplied with the necessary documents requisite for

appeal process, communication with an advocate for legal advice and representation and economic cause

Starting with the first reason which is the delay to be supplied with the copies decree and judgment. The law is clear that the time awaiting to be supplied with the decree must be excluded in computing for the period of limitation. The applicant in the present application was supposed to appeal within 45 days from the date of judgment. Section 19 (2) of the Law of Limitation Act (Cap 89 Revised Edition 2019) provides:

"(2) In computing the period of limitation prescribed for an appeal, an application for leave to appeal, or an application for review of judgment complained of was delivered, the period of time requisite for obtaining a copy of the decree or order appealed from or sought to be reviewed, shall be excluded."

In view of what I have endeavored to show above, and in the light of Section 19 (2) (supra), it follow that the period between 4th July, 2018 and 3rd May 2019 when the appellant eventually obtained a copy of decree and judgment is excluded in computing time or accounted for.

It is the submission of the applicant that having received a copy of decree and judgment on 3rd May, 2019, on 6th May, 2019 (two days later) he made copies and handed to the office of his advocate through

secretary where he was informed that his advocate had travelled to Dar es salaam for family matters until 12th May, 2019.

The reason of communication with his advocate has been stated in paragraphs 10, 11, 12, 13 and 14 of his affidavit where he stated that he tried to find another advocate to advice him but he did not get one and that was the incident which delayed him from 13th May, 2019 till 18th May, 2019 when he got an appointment and the advocate agreed to go through the said documents for legal advice and any necessary action if any on 24th May, 2019.

He stated that on 24th May, 2019 he received his response that there were errors on facts and law on the judgment of the tribunal and the only way to challenge it was by way of appeal thus on the same day his advocate proposed that he have to make an application for extension of time.

Economic reason has been stated in paragraphs 15, 16, 17, 18 and 19 where he stated that on 24th May, 2019 his advocate demanded four million Tanzanian shillings as consultation fee for extension of time and thereafter to file an appeal but as an administrator of the estate of the late Simon Mwangonela he had no any means to afford as he had no any other property to depend up on, hence on 26th May, 2019 he

decided to convene a clan meeting in order to raise the said amount from heirs of the deceased where he was able to raise that amount by 31st May, 2019, on Monday 3rd June, 2019 he successfully met with his advocate where a formal preparation of professional service to proceed with the matter was made and the application for extension of time was filed on 06/06/2019.

To my view the applicant was not negligent in per suing his case. There was no undue delay.

In the circumstances I am of the view that the applicant has carried his burden of showing sufficient reasons to move this court to exercise its legal and noble discretion.

I hold that the applicant has shown sufficient cause which impeded him to file the appeal. I hereby grant extension of time. The applicant to file his appeal within 45 (forty five) days from the date of this ruling. No order as to costs.

It is so ordered.




D. B. NDUNGURU
JUDGE

21/09/2020

Date: 21/09/2020

Coram: D. B. Ndunguru, Judge

Applicant: Present

For the Applicant: Ms. Matha Gwalema advocate holding brief of Mr.

Muya advocate

1st Respondent: Present

2nd Respondent:

3rd Respondent:

4th Respondent:

For the 1st, 2nd and 3rd Respondent:

B/C: M. Mihayo

Court: Ruling delivered in the presence of Ms. Matha Gwalema advocate holding brief of Mr. Muya advocate for the applicant, applicant and the first respondent.




D. B. NDUNGURU
JUDGE
21/09/2020