

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

MISC. CIVIL APPLICATION NO. 40 OF 2019

(Originating from HC Ruling in Misc. Civil Application No. 14 of 2015 and the Judgement and Decree of High Court Land Appeal No. 72/2010)

PRUKERIA P. BALILEMWAAPPELLANT

VERSUS

RISIKI MBISERESPONDENT

RULING

20th February & 06th May, 2020.

TIGANGA, J.

The applicant in this application Prukeria P. Balilelwa filed this application under section 11(1) of the Appellate Jurisdiction Act [Cap 141 RE 2002], section 14 of the Law of Limitations Act [Cap 89 RE 2002], Rule 47 of the Court of Appeal Rules 2009, Section 95 and Order XLIII Rule 2 of the Civil Procedure Code [Cap 33 RE 2002]. The orders sought in this application are;

- (i) The extension of time to file notice of intention to appeal to the Court of Appeal.
- (ii) Extension of time to file an application for leave to appeal to the Court of Appeal of Tanzania out of time.
- (iii) The costs of the application to follow event and
- (iv) Any other alternative relief as the court may think fit to be granted to the applicant.

The application was supported by an affidavit of the applicant which not only deposes of the grounds for application but also gives a brief historical background of the case.

In that affidavit, the applicant deposed that, she has been in dispute with the respondent since 2009. According to her, she filed Land Appeal No. 72/2010 which was stayed by the order of this court pending determination of other proceedings which were pending before the Court of Appeal. That was on 28/08/2012.

That despite the presence of the existence of the order for stay of the proceedings, the court proceeded to hear the appeal on 11/10/2015, without first vacating the stay of the proceedings order. That on 17/02/2015, the court Hon. Bukuku, J, dismissed the appeal while there was still a stay of the proceedings order.

Aggrieved by the decision of Hon. Bukuku, J, the applicant filed a Notice of Appeal on 19/02/2015 and served it to the respondent on that very date. As the requirement of the law, the applicant also filed an application for leave to appeal to the Court of Appeal on 02/03/2015 (within time) but

the same was struck out for being incompetent for citing the wrong provision of the law. The dismissal order was made on 05/02/2016. That the applicant was by then represented by Dotto Poncian Balilemwa, her lay daughter (now the late) under the power of attorney. She deposed further that, at that time, the said daughter was also attending studies, the facts which left the applicant without help of representation. That was before her such daughter got married and joined her husband away from the applicant's place.

That the applicant fall seriously sick and on 01/10/2018 was admitted to hospital, as a result she was amputated her big toe and the left leg at Bugando Medical Centre. Following such state of affairs, the respondent and his advocate took advantage of her sickness and asked the Court of Appeal to strike out her Notice of Appeal, which prayer was granted and on 18/07/2018, her Notice of Appeal was struck out. She further deposed that, from then she had nothing to do, as she was still sick, up to when she was visited by a good Samaritan one Marwa Chacha Kisyeri, the former teacher of her daughter who after being informed, volunteered to represent her.

She deposed that, under the above elaborated circumstances, and the illegality tainting the impugned judgement of Land Appeal No. 72/2010, she pray the application to be allowed as she came to realise in March 2019 that she was required to initiate these proceedings. She in the end deposed that, the reasons she gave suffices to be good and sufficient cause for extension of time.

The respondent was represented by Mr. Malongo, learned advocate who also sworn and filed a counter affidavit which narrated the chronological

of events which happened from the commencement of these proceedings. He deposed that, the matter started at the District Land and Housing Tribunal, where an *ex parte* judgment was granted against the applicant. Following that findings, the applicant appealed in Land Appeal No. 72/2010 which was determined on 17/02/2015.

Following that decision, the applicant lodged a Notice of Appeal to appeal against the judgement of the High Court in Land Appeal No. 72/2010 together with an Application for leave, which was struck out in the presence of the applicant's attorney Dotto Balilemwa on 05/02/2016.

However the applicant did not take necessary steps in prosecuting the Appeal, therefore the respondent filed an application in the Court of Appeal to strike out the Notice of Appeal, which application was granted.

He submitted that, the attending of training at Nyakahoja Mwanza did not essentially prevent the Attorney to come to court and make follow up, as the said Nyakahoja is in Mwanza city. He in the end submitted that, the applicant and her attorneys negligently handled the matter, as the power of attorney granted to the current Attorney was granted to him on 06/07/2018. However the Attorney did not take action up to when he filed this application at hand. He deposed that the judgment of the tribunal was not tainted with illegality as alleged.

By leave of the court, the application was argued by way of written submissions. Parties filed their respective submissions as ordered. However, before going to the merits of the submissions, I should first and foremost say this. The Attorney of the applicant, filed a 33 pages submission in chief

which with greatest respect to him, was actually arguing the appeal instead of the application for extension of time. In this application, what was expected of him, was to tell the court what prevented the applicant or himself to take the legal required steps within the time fixed by the law, and to give the justification as to why should the time be extended for him to take such step now.

As he also alleged the point of illegality in the judgement intended to be impugned, he was supposed to indicate what such illegalities are in that decision which he want the higher court to rectify.

However, in some few pages at the end of his submissions, he tried to tell the court about the sickness as one of the good or sufficient cause for which to extend time. Generally, he relied on the reason of the long illness of the applicant and the death of the applicant's daughter i.e Dotto Balilemwa who was representing the applicant under the umbrella of attorney. In his opinion, that counts away the delayed period. He cited and relied on the case of **Leonard Magesa Vs. M/S OLAM (T)**, Civil Application No. 11/2015 **CAT at Mwanza** (unreported) which considered illness as good and sufficient cause for extension on of time.

He also cited the cases of **Kapapa Kumpindi Vs The Manager Tanzania Breweries Limited**, CAT at Mwanza (unreported), **Omary Ally Nyamalege & 2 others Vs Nyanza Engineering Works**, Civil Application No. 94/08 of 2017 CAT Mwanza (unreported) in which sickness was taken as one of the good cause for extension of time. He submitted that, beside the misfortune of sickness, the applicant has been busy in court corridors

from when she filed Land Appeal No. 72/2010, application for leave No. 14/2014, the notice of appeal and the request letter as well as this application.

In the reply submission filed by Mr. Malongo, it was submitted that, the applicant has never been acting diligently and in good faith. He submitted that, the applicant has not been acting promptly, as the application for leave was struck out on 05/02/2016, no any other action was taken up to 21/11/2016, about 9 months when the respondent filed an application to strike out the Notice of Appeal.

He cited the case of **Allison Xerox Sila vs. Tanzania Harbour Authority**, Civil Reference No. 14/1998 CAT - DSM (unreported), which held to the effect that parties should strive to file the documents within time, it should be only to those with concrete reason who can be allowed to file out of time.

Further to that, Mr. Malongo submitted that, after the application for leave was struck out on 05/02/2016 followed by struck out of the Notice of Appeal on 21/11/2016, no action was taken to restore the application for leave or ask for extension of time so that the applicant could apply for leave to appeal. Also that, as the present Attorney was appointed on 06/07/2018, he did not immediately take any action, he filed the application on 22/03/2019 about 8 months later, that fact according to Mr. Malongo is also a sign of in action on the part of the applicant. He in the end submitted that the point of illegality has no merits. Mr. Malongo consequently submitted that the application be dismissed with costs.

The rejoinder by the Attorney for the applicant was filed in 24 typed pages, mostly reiterating the contents of the submission in chief, most of them not related with the matter before the court i.e an application for extension of time. The relevant part of the rejoinder gave just an insistence that the application has managed to show sufficient or good cause for extension of time. He in the end asked the application to be allowed as prayed.

As earlier on pointed out, the application has been preferred under a number of provisions, some relevant while others irrelevant, in this Ruling I will deal with the relevant provisions only. To start with section 11 (1) of the Appellate Jurisdiction Act (Cap 141 now RE 2019), empowers this court to extend time for giving notice of intention to appeal from the judgment of the High Court and for making an application for leave to appeal or for certification that a case is fit case for appeal.

As the provision stands, it does not provide for the criteria or factors to consider in allowing or refusing the application for extension of time. As a matter of general principle, it is always the discretion of the court to grant or refuse extension of time. However, that discretion needs to be judiciously exercised. These criteria which are in the decision of the Court of Appeal creates the general principle that the applicant must, as a matter of law, show good or sufficient cause for his/her delay to take action within the prescribed time. The principle is in the case of **Allison Xerox Sila Vs Tanzania Harbours Authority** Civil Reference No. 14 of 1998 CAT (unreported), in which it was held that, where the time limited by the rules

has expired, sufficient reasons must be shown to entitle the defaulting party for extension of time.

It is on record that, when Land Appeal No 72/2010 was decided, the applicant acted promptly and filed the Notice of appeal as well as the application for leave to appeal that was on 02/03/2015. However, on 05/02/2016 the application for leave was struck out for citing the wrong provision of the law. From then, no action was taken by the applicant, and following such inaction, the respondent moved the Court of Appeal, which prayers was granted on 18/07/2018, when the court struck out the Notice of Appeal for the applicant's failure to take necessary step.

From then, no action was taken, up to 22/03/2019, when this application was filed. Counting from when the application for leave was struck out that is on 05/02/2016 up to when this application was filed on 22/03/2019, it is more than three years. While counting from when the Notice of Appeal was struck out, that is on 18/07/2018 up to when this application was filed on 22/03/2019, it is about eight months of inaction.

It is true that the applicant was sick, but she was aware that she had the proceedings in court and had the duty to find another person to represent her especially when the first attorney, could not, by the act of God continue representing her. Further to that there is a proof that the current holder of the power of attorney was so granted the said power on 06/07/2018 and it was registered on 09/07/2018 and had its stamp duty paid on 11/07/2018. Counting from the date when the stamp duty was paid in respect of that power of attorney, to when the application at hand was

filed, it is also equally eight months and fortunately the power was specifically issued for prosecuting all matter arising from the case at hand including filing this application.

In the case of **Omary Makunja Vs Republic**, Criminal Application No. 88/2018. CAT – DSM, (unreported) it was held that, for the applicant in the application for extension of time to be entitled to the order for extension of time, he/she is required to show good cause for the delay.

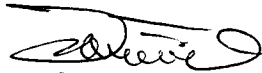
In **Hassan Bushiri vs Latifa Lukio Mashayo**, Civil Application No. 3 of 2007, **Lyamuya Construction Company Limited vs Board of Trustee of Young Women's Christia Association of Tanzania**, Civil Application No. 2 of 2010 and **Bariki Israel Vs Republic** Criminal Application No. 4 of 2011, the principle of showing good cause was even expanded further that in showing good cause for delay, even a single day delay must be accounted, as hereunder held *inter alia* that;

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

That being the position of the law, then the applicant was duty bound to show good cause by accounting for eight months of delay to take action from when the notice of appeal was struck out by the Court of Appeal. I thus dismiss the application for want of good cause, the respondent be paid costs.

It is accordingly ordered

DATED at MWANZA on 6th day of May 2020



J. C. Tiganga

Judge

06/05/2020

Ruling delivered in open chambers, in the absence of the parties but with the directives that the results be communicated to them by court clerk through their mobile phones.



J. C. Tiganga

Judge

06/05/2020