THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

DISTRICT REGISTRY OF MBEYA

AT MBEYA

MISC. LAND APPLICATION NO. 41 OF 2020.

(Arising from Application No. 75 of 2012, in the District Land and Housing Tribunal of Mbeya, at Mbeya).

1. USWEGE WEBB LUHANGA.....1ST APPLICANT

2. TUMAINI JOSEPH LUHANGA.....2ND APPLICANT

VERSUS

1. MUSSA MOHAMED MNASI.....1ST RESPONDENT

2. BENARD MWOMBEKI MUKASA.....2ND RESPONDENT

RULING

11/11/2020 & 10/02/2021.

UTAMWA, J:

The two applicants in this matter, USWEGE WEBB LUHANGA and TUMAINI JOSEPH LUHANGA (the first and second applicant respectively), moved this court for the following orders:

i. That, this court be pleased to grant extension of time to enable the applicants lodge an appeal against the judgment (impugned

judgment) of the District Land and Housing Tribunal of Mbeya, at Mbeya, henceforth the DLHT (in Application No. 75 of 2012).

ii. Any other reliefs the court may deem fit to grant.

iii. Costs to abide the course.

The application was made by a chamber summons under sections 41 (2), of the Land Disputes Courts Act, Cap. 216 R. E. 2019 (the LADCA). It was supported by a joint affidavit of the applicants.

The respondents in this application are MUSSA MOHAMED MNASI and BENARD MWOMBEKI MUKASA (first and second respondent correspondingly). The first respondent objected the application by filing a counter affidavit. The second respondent however, neither lodged a counter affidavit nor appeared in court despite due service upon him by way of publication of the summons through the Uhuru Newspaper dated 24th August, 2020 (at page 20). The court thus, ordered the matter to proceed *experte* against the second respondent, at the instance of the applicants.

In this application, the applicants represented themselves while the first respondent was represented by Mr. Baraka Mbwilo, learned counsel. The application was argued by way of written submissions.

In their joint affidavit supporting the application the applicants deponed basically that, having been aggrieved by the impugned judgement of the DLHT (dated the 5th May, 2013), they lodged the Appeal No. 15 of 2013 before this court. Owing to some technical defects, the appeal was withdrawn (on the 18th February, 2015) with leave to refile it. They thus,

lodged another appeal that was registered before this court as Appeal No. 16 of 2015. This other appeal was struck out by this court on the 21st November, 2016 on technical issues. For purposes of convenience and differentiating these appeals during the discussions in this ruling, the Appeals No. 15 of 2013 and No. 16 of 2015 will hereinafter be called the first and the second appeal respectively.

The affidavit further stated that, upon the second appeal being struck out by this court, the applicants lodged an application for extension of time to file a proper appeal. Nonetheless, the application was also struck out on the 6th September, 2018 on technical reasons. They yet filed another application for the extension of time on the 5th October, 2018. Nevertheless, the same was, likewise, struck out on the 22nd April, 2020.

The applicants further deponed into their joint affidavit that, they are still interested to challenge the impugned judgment of the DLHT on the grounds of appeal appended to the affidavit. This is because, their properties are under jeopardy, hence the present application.

Now, for purposes of convenience and for making clear the distinction between the applications mentioned above, the one that was struck out on the 6th September, 2018 will hereinafter be called the first application. As to the one which struck out on the 22nd April, 2020, it will be referred to as the second application.

Furthermore, for the same purposes of convenience in discussions, the first appeal, the second appeal, the first application and the second

application will hereinafter be branded the previous proceedings cumulatively.

In their joint written submissions in-chief which seems to have been drafted by a legally skilled mind, the applicants reiterated the contents of their joint affidavit. They also essentially argued that, in law an extension of time is granted at the discretion of the court upon an applicant adducing sufficient reasons. They supported the argument by the decision of the Court of Appeal of Tanzania (the CAT) in the case of **Benedict Mumello v. Bank of Tanzania, Civil Appeal No. 12 of 2002, CAT at Dar es Salaam** (unreported).

The applicants further submitted that, though their previous proceedings were terminated on technical errors, they showed that they were diligent in pursuing their rights. The trend thus, constituted what is known in law as technical delay. This kind of delay is excusable and forms a sufficient reason for granting the prayed extension of time. They supported the contention by citing the following precedents: **Abdallah Hamis Abdallah v. Zagaluu Rajabu Misc. Civil Appeal No. 168 of 2018 High Court of Tanzania** (HCT), at Mwanza (unreported), **Victor Rweyemamu Binamungu v. George Kabaka and another, Civil Application No. 602 of 2008, CAT at Mwanza** (unreported), **Amani Girls Home v. Isack Charles Kenela, Civil application No. 325/8 of 2019, CAT** (unreported), **Fortunatus Masha v. William Shija and another [1997] TLR. 154** and **Jamal Msitiri @ Chaijaba v. Republic, Criminal Application No. 52/12 of 2017, CAT at Tanga** (unreported).

According to the reaction by the first respondent in his counter affidavit, he did not dispute the existence of the previous proceedings mentioned above. He however, deponed that, the second application was struck out (on the 22nd April, 2020) for incompetence following the negligence of the applicants and their counsel. The second appeal was filed in this court in disregard to the order of this court which withdrew the first appeal with leave to refile another appeal subject to time limitation. Again, it was the applicants' duty to appeal against the order of this court regarding the second appeal. The option to apply for extension of time was not available to them. The first application was also filed with negligence by the applicants, hence struck out. The applicants thus, did not give any sufficient reasons for extension of time in their affidavit. They only narrated what had happened before filing the present application. They have not also accounted for each day of delay from when the impugned judgment of the DLHT was made.

In his written replying submissions, the learned counsel for the first respondent reiterated the contents of the counter affidavit. He further argued that, the law requires an applicant for extension of time to account for each date of delay. He cited the following precedents to support the contention: **Ludger Benard Nyoni v. National Housing Corporation, Civil Application No. 372/01 of 2018, CAT at Dar es Salaam** (unreported), **Wembele Mtumwa Shahame v. Mohamed Hamis, Civil Reference No. 8 of 2016, CAT at Dar es Salaam** (unreported), **Severini Lusiji v. The Republic, Criminal Application No. 101/01 of 2019, CAT at Dar es Salaam** (unreported), **Miraji v. KCB Bank**

Tanzania Limited, Civil Application No. 118/16 of 2018, CAT at Dar es Salaam (unreported), **John Dongo and 3 others v. Lepasi Mbokoso, Civil Application No. 14/01 of 2018, CAT at Dar es Salaam** (unreported) and **CRDB Bank PLC v. Victoria General Supply Co. Ltd, Civil Application No. 319/08 of 2019, CAT at Mwanza** (unreported).

It was also the contention by the learned counsel that, the ground of technical delay was not stated into the affidavit, but in the written submissions. However, submissions are not evidence in law. He nevertheless, agreed that, in law a technical delay is excusable in opportune circumstances and constitutes a sufficient reason for granting the prayed extension of time. However, there are some exceptions for applying this doctrine. The exception include where the applicant commits repeated mistakes in pursuing his rights the way the applicants in the matter at hand did. He thus, distinguished the **Fortunatus Masha case** (supra) from the present application on the ground that, in the said case there was no repeated mistakes like in the case at hand and as demonstrated above. He further argued that, the principle of technical delay applies where the previously struck out matter had been filed timely. However, in the matter at hand, the second appeal was filed out of time and without any prior leave for extending the time to do so.

The learned counsel for the first respondent added that, in law errors committed by an advocate do not constitute any sufficient reason for enlargement of time. He cemented this particular stance of the law by the case of **Prof. Aron Massawe and another v. Thomas Gerald**

Mwendanunu (Tanzania Cutleries Ltd), Misc. Land Case Application No. 271 of 2019, HCT at Dar es Salaam (unreported) which followed the case of **VIP Engineering and Marketing Limited v. Said Salim Bakharesa Ltd, Civil Application No. 52 of 1998, CAT, at Dar es Salaam** (unreported).

The learned counsel also argued that, the second application (which was also the applicants' last application before the present application was filed in this court), was struck out on the 22nd April, 2020. However, the application at hand was lodged on 13th May, 2020. The present application was thus, instituted after the lapse of 24 days from when the second application was struck out. The applicants nonetheless, did not explain on what they were doing during all these days. They did not thus, account for each date of the delay regarding this particular portion of the period of the delay.

Owing to the reasons shown above, the learned counsel for the first respondent urged this court to dismiss the application at hand with costs. The applicants did not bother to file any rejoinder submissions, hence this ruling.

I have considered the arguments by both sides, the affidavit, the counter affidavit, the record and the relevant law. In fact, it is not disputed that the impugned judgement of the DLHT was made on the 5th May, 2013. The existence of all the previous proceedings and the manners in which they were terminated demonstrated above are also not at issue. The parties are further at one regarding the law on extension of time as

highlighted earlier by the applicants. They thus, agree that extension of time is granted at the discretion of the court and upon the applicant adducing sufficient reasons.

The parties are also in consensus that, where the doctrine of technical delay is applicable, such delay is excusable and constitutes a sufficient reason for granting the prayed extension of time. Again, it is clear from the arguments of the parties and the record that, the applicants solely pegged the present application on the doctrine of technical delay. Indeed, I agree with the parties on the stance of the law just highlighted since that is the true position of the law in our law. I also agree with them on the other undisputed facts listed above since they are supported by the record.

Owing to the above listed undisputed matters, I am of the settled view that, the contention between the parties is centred on the applicability of the doctrine of technical delay. While the applicants argued that it operates in their favour, the learned counsel for the first respondent refutes that contention. The major issue has therefore, been narrowed to *whether or not the doctrine of technical delay is applicable in favour of the applicants according to the circumstance of the application at hand.*

In my further opinion, the circumstances of the case do not favour answering the issue posed above affirmatively. This particular view is based on the following grounds; in the first place, according to the applicants' affidavit and their arguments, the applicants want to hide faces under the doctrine of technical delay merely because the previous proceedings were terminated on technical grounds and they were diligent

in pursuing their rights. On his part, the learned counsel for the first respondent objected the contention on the following three major reasons: **One**, that, the aspect of technical delay was not embodied into the applicants' affidavit. **Two**, that, the applicants did not account for each day of the delay from when the impugned judgement was delivered by the DLHT. **Three**, that, the applicants did not also account for each day of the delay from the date when the last proceedings (regarding the second application) were dismissed to when the present application was filed.

Before I go further in examining the issue posed above, I feel it incumbent to make a brief overview on the doctrine of technical delay. In our jurisdiction this doctrine took root in the **Fortunatus Masha Case** (supra). In underlining the doctrine through that precedent, the CAT (speaking through a single Justice of Appeal) made remarks in relation to an application for extension of time to file an appeal to it out of time. However, the doctrine was latter taken as applicable to other matters. In its remarks, the CAT used the following words, and I quote the pertinent paragraph (at page 155) for the sake of a readymade reference;

> "...a distinction should be made between cases involving real or actual delays and those like the present one which only involve what can be called technical delays in the sense that the original appeal was lodged in time, but the present situation arose only because the original appeal for one reason or another has been found to be incompetent and a fresh appeal has to be instituted. In the circumstances, the negligence if any really refers to the filing of an incompetent appeal not the delay in filing it. The filing of an incompetent appeal having been duly penalised by striking it out, the same cannot be used yet again to determine the timeousness of applying for filing the fresh appeal. In fact in the present case, the applicant acted immediately after the pronouncement of the ruling of this Court striking out the first appeal."

It must be noted however, that, the **Fortunatus Masha Case** (supra) was decided by a single Justice of Appeal of the CAT. It later reached the panel of three Justices of Appeal by way of reference. This was in the case of **William Shija v. Fortunatus Masha [1997] TLR 213**, henceforth the **William Shija Case** to differentiate it from the **Fortunatus Masha Case** (supra) in discussions under this ruling. The panel ultimately nullified the proceedings before the single Justice of Appeal and set aside his order extending the time for appealing out of time. However, the decision by the panel was mainly based on the ground that, under the circumstances of the case, what was before the single Justice of Appeal was a wrong application for extension of time to appeal to the CAT. It held further that, the proper application by the applicant would have been firstly for extension of time to file a notice of intention to appeal before the High Court. This followed the fact that, the applicant's previous appeal against the same decision of the High Court had been struck out by the CAT for incompetence. In its decision therefore, the panel did not discard the concept of technical delay that had been highlighted by the single Judge in the **Fortunatus Masha Case** (supra).

The principle of technical delay has thus, been applied in various precedents of the CAT and this court despite the decision in the **William Shija Case** (supra). Indeed, apart from the precedents cited by the applicants in support of the doctrine of technical delay, the following precedents by the CAT also underlined it: **Salvand K. A. Rwegasira v. China Henan International Group Co. Ltd, Civil Reference No. 18 of 2006, CAT at Dar ss Salaam** (Unreported), **Yara Tanzania Limited**

v. DB Sharpriya and Co. Limited, Civil Application No. 498 of 2016, CAT at Dar es Salaam (unreported), **Zahara Kitindi and another v. Juma Swalehe and 9 others, Civil Application No. 4 of 2005** (unreported) and **Bharya Engineering and Contracting Co. Ltd v. Hamoud Ahmad @ Nassor, Civil Application No. 342/01 of 2017, CAT, at Tabora** (unreported).

Now, since the panel of the CAT in the **William Shija Case** (supra) did not discard the concept of technical delay, and since the concept was underscored by the same CAT in the precedents cited above which were decided after the **William Shija Case**, it is clear that, the concept of technical delay is among the proper laws applicable in our land. It is more so considering the fact that, I know no any other decision by the CAT, as the highest court of this land, which discarded the concept of technical delay in any way. I also underscored the doctrine in my various decisions including in **Mohamed Enterprises (T) Ltd v. Mussa Shabani Chekechea, Misc. Civil Application No. 81 of 2017, High Court of Tanzania, at Tabora** (unreported ruling).

In my concerted view therefore, and according to the precedents cited earlier, the principle of technical delay essentially guides that; where a party timely files an appeal or any other matter in court, but the court strikes it out for incompetence, then there will be a sufficient ground for granting the prayed extension of time to file a competent matter for the same orders or remedies that had been sought in the struck out matter. This guidance, nonetheless, is subject to the fact that, the affected

party/applicant promptly moves the court upon the striking out order being made.

It follows thus, that, the most relevant period of delay in considering the applicability of the doctrine of technical delay is **not** between the dates when the impugned decision to be challenged was made and when the application for extension of time was lodged. Rather, it is the period between the date when the previous matter had been struck out and the date when the application for extension of time (being under consideration by the court) was instituted in court. The applicant must thus, be diligent in pursuing his rights during this particular period. Additionally, he/she is duty bound to account for each and every day of the delay covered under this period with a view to demonstrating his/her diligence. In the case at hand, the relevant period of delay is thus, between when the second application was struck out (on 22nd April, 2020) and when this application at hand was filed (on 13th May, 2020).

It follows further that, the argument by the learned counsel for the first respondent that the aspect of technical delay was not embodied into the applicants' affidavit supporting the application is irrelevant. It is more so since the facts alleging that there was such a delay are embodied into the affidavit as I demonstrated above. Whether such facts meet all the conditions for applying the doctrine of technical delay in favour of the applicant is another issue to be resolved below. Again, the contention by the first respondent's counsel that the applicants did not account for each date of delay from when the impugned judgement was delivered by the

DLHT is also weightless. This is so because, that period is irrelevant as far as the doctrine of technical delay is concerned and as observed earlier.

Now, the sub-issue at this juncture is *whether or not the applicants acted promptly in filing the present application upon the second application (which was the last proceedings) being struck out by this court*. In my view, the answer to this sub-issue is not in favour of the applicants for the following grounds: in fact, as shown above, it is not disputed that the second application was struck out on 22nd April, 2020. The application under consideration was lodged in this court on 13th May, 2020. The record of this court also supports this fact. By simple arithmetic, this application was filed upon the expiry of 21 days (not 24 as contended by the counsel for the first respondent) from the date when the second application (as the lastly previous proceedings) was struck out. Nonetheless, there is no any explanation by the applicants regarding this particular delay of 21 days as rightly argued by the counsel for the first respondent. They did so neither in their affidavit nor in their written submissions. The applicants did not thus, as rightly contended by the counsel for the first respondent, account for each day of delay regarding that pertinent period so as to demonstrate their diligence and promptness in filing the present application.

Owing to the reasons adduced herein above, I hereby answer the sub-issue negatively that, *the applicants did not act promptly in filing the present application upon the second application (which was the last proceedings) being struck out by this court.* This finding attracts a negative answer to the major issue. I therefore, answer it negatively that, the

doctrine of technical delay is not applicable in favour of the applicants according to the circumstance of the application at hand.

Now, since the applicants had based their present application entirely on the doctrine of technical delay purporting to show that it constituted a sufficient ground for the prayed extension of time, and since the major issue has been answered negatively as shown above, then it is conclusive that, the applicants have failed to adduce any sufficient reason for the prayed extension of time. I consequently dismiss the application with costs. it is so ordered.

JHK. UTAMWA.

JUDGE

10/02/2021.

10/02/2021.
CORAM; JHK. Utamwa, J.
Applicants: both absent.
Respondent: Mr. Steward Ngwale, advocate for the first respondent.
BC; Mr. Patrick, RMA.

Court: ruling delivered in the presence of Mr. Steward Ngwale, learned advocate for the first respondent, in court, this 10th February, 2021.

JHK. UTAMWA.
JUDGE.
10/02/2021.