

IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

MISC. LAND APPLICATION NO. 13 OF 2021

(Arising from Land Appeal No.79 of 2018 dated 04th September, 2019
before Hon. M.M.Siyani, J)

NDOLE BUPILIPILI APPLICANT

VERSUS

**SHIJA JAMES IHUYA (Administrator of the Estate
of the late Jacob Ihuya) RESPONDENT**

RULING

Date of last order: 04.03.2021

Date of Ruling: 04.03.2021

A.Z.MGEYEKWA, J

The applicant application is brought by a chamber summons under the provisions of section 14 (1) of the Law of Limitation Act, Cap. 89 [R.E 2019] and section 95 of the Civil Procedure Code Cap.33 [R.E 2019]. The application is supported by an affidavit deposed by Ndole Bupilipili; the

applicant and resisted by an affidavit in reply deposed by Shija James Ihuya, the respondent. I am being asked to enlarge time within which to file an application for the setting aside an *ex parte* judgment of Hon. Siyani, J pronounced on 4th September, 2019 in Land Appeal No. 79 of 2018.

When the application was placed before me for hearing on 04th March, 2021, both parties were represented. The applicant enjoyed the legal service of Mr. Ng'wanzalima Mponeja, learned while the respondent enjoyed the service of Mr. Malik Hamza, learned counsel.

It was Mr. Mponeja who kicked the ball rolling in support of the application. The learned counsel for the applicant urged this court to adopt the affidavit supporting the application and form part of his submission. He stated that in the application for extension of time the law requires the applicant to account for the days of delay. He went on to submit that in paragraph 6 of the applicant's affidavit the applicant was informed that the judgment was delivered on 20th July, 2020. He added that the applicant after being aware of the existence of the *ex parte* judgment, promptly on 21st July, 2020 started to apply for extension of time to file an appeal out of time. Mr. Mponeja further stated the applicant was looking for an Advocate who could prepare his application whereby on 28th July, 2020 he got an Advocate

who prepared his document, and on 03rd August, 2020 the application were read.

Mr. Mponeja continued to submit that on 03rd August, 2020 the applicant filed an application and on 16th November, 2020 the application was struck out with a leave to file. He went on to submit that the applicant filed another application on 02nd December, 2020 then on 03rd December, 2020 the applicant was in process of registering his application online, unfortunately, the application was not registered. To support his submission he referred this court to a notification message NDB -4. He went on to state that from 15th January 2021 to 14th January, 2021 the applicant was waiting for a response without any fruitful answer then he decided to file the instant application.

On the strength of the above submission, Mr. Mponeja beckoned upon this court to find that the applicant has adduced sufficient reasons for his delay. He urged this court to grant the applicant's application.

In reply, Mr. Malik strongly opposed the application. He prays for this court to adopt the respondent's counter affidavit and form part of this submission. Mr. Malik stated that in application for extension of time one must state whether there is an issue of illegality, show good cause, and

account for each day of delay. Mr. Malik argued that the applicant has not submitted on illegality. He went on to argue that the applicant was aware that there was a Land Appeal No. 79 of 2018 before this court. He added that the applicant was summoned to appear in court but refused to show appearance. Mr. Malik went on to argue that this court ordered for substitution of service that means he was properly been served. The learned counsel further contended that the applicant has not shown good cause since he did not convince this court that he acted diligently and reasonably.

Mr. Malik did not end there, he argued that the applicant has not accounted for each day of delay. He added that in paragraphs 13 and 14 of the applicant's affidavit he stated that he was looking for an Advocate and money but he did not append any document to support his submission. He added that the applicant has failed to account for his delay starting from 04th October, 2019 to 20th July, 2021.

On the strength of the above submission, Mr. Malik beckoned upon this court to dismiss the application.

In a short rejoinder, the applicant's Advocate reiterated that the applicant has accounted for each day of delay. He insisted that the applicant

was not served to appear before this court. He added that this is a ground for setting apart judgment.

Having heard the contending submissions of the parties, it now behooves the Court to determine whether this is a fitting occasion to condone the delay involved and proceed to enlarge time to lodge an appeal to this Court. The central issue for consideration and determination is whether or not the applicant has shown good cause to justify her application.

To begin with, I wish to restate that the court's power for extending time is both wide-ranging and discretionary but it is exercisable judiciously upon sufficient reasons being shown. It may not be possible to lay down an invariable or constant definition of the phrase 'sufficient reason' but the court consistently considers factors such as the delay were with sufficient cause, the degree of prejudice, if any, that each party stands to suffer depending on how the court exercise its discretion; the conduct of the parties, the need to balance the interest of a party who has a constitutionally underpinned right of appeal.

There are a plethora of legal authorities in this respect. As it was decided in numerous decisions of the Court of Appeal of Tanzania, in the case of **Benedict Mumello v Bank of Tanzania**, Civil Appeal No. 12 of 2002

(unreported), **Republic v Yona Kaponda and 9 others** [1985] TLR 84 and in the case of **Lesero v Mwarabu** Civil application No. 10 of 2015 (2016) TZCA 10 the Court held that:-

" Granting application for extension is a discretionary power. This discretionary power, however, is judicial in nature and must be confined to the rules of the reason and justice..."

Additionally, it is settled law that in an application for extension of time, the applicant must not only demonstrate reasons for the delay but also he must account for each day of delay in taking a particular step in the proceedings. As it was held in the case of **FINCA (T) Ltd and another v Boniface Mwalukisa**, Civil Application No. 589/12 of 2018 Court of Appeal Iringa, (unreported) which was delivered in May, 2019 and the case of **Bushiri Hassan v Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported) which had held that:-

" Dismissal of an application is the consequence befalling an applicant seeking an extension of time who fails to account for every day of delay."

Guided by the above authority, the applicant was required to account for each day of delay. In the instant application, the applicant in his affidavit

has narrated and accounted for days of delay. Reading the applicant's affidavit specifically paragraphs 4 to 19 the same contains a series of steps taken by the applicant. The reasons for his delay are well articulated starting from 22nd July, 2020, when he became aware that the judgment was delivered in his absence. He continued to narrate that in all days of delay he was looking for an Advocate to assist him to file his application. From 05th to 14th January, 2021 the applicant was trying to file his application online without success thus he decided to file the instant application on 15th January, 2021.

I have considered the circumstances of the case, the fact that the requisite time of filing the application for extension of time expired while Ndole Bupilipili was in court corridors pursuing his appeal and trying to find justice that alone in my view is reasonable and sufficient cause for extending time of filing the application for extension to set aside *ex parte* judgment. Thus, I am satisfied that the applicant has advanced sufficient reasons to warrant this court to grant his application. I have also considered the fact that the right of appeal is not only a statutory one but also a constitutional right, of which a person cannot be lightly denied when the Highest Court of the Country is there to determine the applicant's rights.

For the above reasons, I hereby in terms of section 14 (1) of the Law of Limitation Act, Cap. 89. 141 [R.E 2019] exercise the Court discretion and extend the applicant time of filing a notice of appeal within a period of twenty-one (21) days from today.

Order accordingly.

DATED at Mwanza this 04th March, 2021.




A.Z.MGEYEKWA

JUDGE

04.03.2021

Ruling delivered on 04th March, 2021 via audio teleconference whereby Mr. Mponeja, learned counsel for the applicant, and Mr. Malik, learned counsel for the respondent were remotely present.


A.Z.MGEYEKWA

JUDGE

04.03.2021

Right to appeal fully explained.