

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MUSOMA

AT MUSOMA

MISC. LAND APPLICATION NO. 25 OF 2021

MARO WAMBURA APPLICANT

VERSUS

CHACHA NYAMAHEMBA RESPONDENT

***(Application for extension of time to file Notice of Appeal out of time from
the decision of this Court in Land Appeal No. 100 of 2020)***

RULING

14th September and 12th November, 2021

KISANYA, J.:

This is an application for extension of time within which a Notice of Appeal to the Court of Appeal may be lodged. It is made by way of Chambers Summons preferred under section 11 of the Appellate Jurisdiction Act [Cap. 141 R.E 2019] (the AJA) and supported by the sworn affidavit of Maro Wambura, the applicant. Upon being served with the Chamber Summons and affidavit, the respondent, Chacha Nyamahemba, filed a counter-affidavit to contest the application.

Briefly, the fact leading to the present application are that, the applicant instituted a land complaint before Majimoto Ward Tribunal. His complaint was to the effect that the respondent had trespassed into his land. The Ward Tribunal decided in favour of the respondent. Aggrieved, the applicant unsuccessfully appealed to the District Land and Housing Tribunal for Mara at

Musoma in Land Appeal No. 139 of 2019. The applicant's second appeal to this Court in Land Appeal No. 100 of 2010 was dismissed in a judgment delivered on 20th November, 2020. The applicant delayed to lodge the Notice of Appeal to the Court of Appeal within thirty (30) days specified by rule 83(2) of the Court of Appeal Rules, R.E. 2019. He was therefore, inclined to lodge the present application.

The affidavit in support of the application cite two major grounds for the delay. The cited main reasons are applicant's sickness and negligence of the advocate instructed to lodge the notice of appeal on behalf of the applicant.

At the hearing of this application, the applicant was represented by Ms. Mary Joachim, learned advocate, while the respondent appeared in person, unrepresented.

Submitting in support of the first ground for the delay, Ms. Joachim contended that the applicant was sick after the delivery of judgment and that he attended medical clinic at KCMC Hospital, Moshi from 8th December 2020 to 23rd April, 2021. Referring to the cases of **Kapapa Kumpimbi vs Plant Manager Tanzania Brewers Ltd**, Civil Application No. 6 of 2010 CAT at Mwanza and **Julius Wilfred Mungule (Administrator of Estate of the Late Wilfred Ndetaulwa Mungule) vs Mwarabu Kitisha**, Misc. Land Application No. 61 of 2021 HCT at Arusha (unreported), the learned counsel argued that sickness is a sufficient cause for extension of time. She was of the

view that the document (out-patient card) appended to the affidavit are sufficient to prove that the applicant was sick.

With regard to the second ground for the delay, Ms. Joachim submitted that the applicant had instructed advocate Daud Mahemba to lodge the Notice of Appeal. She went on to blame the former counsel for failing to lodge the notice of appeal. That said, Ms Joachim prayed that the prayers sought be granted.

In reply, the respondent prayed to adopt his counter-affidavit to form part of his submission. He argued further that the applicant had not proved that he was sick and that he instructed Mr. Mahemba to lodge the Notice of Appeal.

When Joachim rose to rejoin, she urged the Court to consider the affidavit in support of the application.

In view of the above, the pertinent question for consideration is whether the applicant has assigned good cause for this Court to exercise its discretionary power of extending time under section 11 of the AJA.

The provisions of section 11 of AJA do not specify the factors to be considered by the Court in determining whether or not to extend the time. However, from decided cases, some factors provide guidance on whether or not good cause has been established by the applicant. See for instance the case of **Lyamuya Construction Company Limited vs. Board of**

Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No.2 of 2010 (Unreported) in which the Court of Appeal set out the following factors:

- (a) The applicant must account for all the period for delay;*
- (b) The delay should not be Inordinate;*
- (c) The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take; and*
- (d) If the court feels that there are other 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 above factors were also stated in the case of **Damas Assesy and Another vs Raymond Mgonda Paula** and 8 Others, Civil Application No. 232/17 of 2018, CAT at Dar es Salaam (unreported).

Reverting to the case at hand, the applicant has advanced sickness as one of the grounds for the delay. I agree with Ms. Joachim that sickness is a good cause for the delay. This position was held in the case of **Kapapa Kumpimbi vs Plant Manager Tanzania Brewers Ltd (supra)** and **Emanuel R. Maira vs The District Executive Director of Bunda**, Civil Application No. 66 of 2010 (unreported). However, apart from proving sickness by medical evidence or document, the applicant must also show how the sickness prevented him from taking the required action within time. This stance was taken in **Pastory J. Bunonga v Pius Tofiri**, Miscellaneous Land

Application No. 12 of 2019 (unreported), when this Court (Rumanyika, J. held as follows:-

"Where it was on the balance of probabilities proved, sickness has been good and sufficient ground for extension of time yes. But with all fairness the fact cannot be founded on mere allegations. There always must be proof by the applicant that he fell sick and for the reason of sickness he was reasonably prevented from taking the necessary step within the prescribed time."

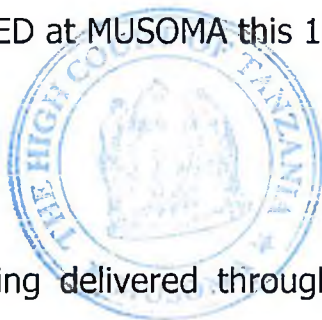
In the present case, the affidavit in support of the application does not state the dates on which the applicant fell sick and the date of recovering. It was during her oral submission when Ms. Joachim stated that, the applicant attended medical clinic at KCMC Hospital in Moshi from 8th December, 2020 to 23rd April, 2021. However, no medical document (s) was tendered to support the applicant's affidavit and learned counsel's submission. The outpatient card appended to the affidavit is by itself not sufficient to prove that the applicant went to KCMC Hospital. That document ought to have been supported by the medical document from the doctor or hospital. In the absence of the medical document, I am of the view that the applicant has failed to prove that he was sick during the period of delay. Even if I was to consider the outpatient card appended to the affidavit, the applicant did not account for 24 days of delay from 24th April, 2021 when he was discharged to 18th May 2021 when he lodged the present applicant.

Another ground for the delay is to the effect that, the applicant's previous counsel failed to lodge the Notice of Appeal after being so instructed. I agree with the respondent that the applicant has failed to prove that he instructed advocate Mahemba to lodge the notice of appeal on his behalf. This is so because the applicant did not produce the instruction note or receipt of instruction fee to support his contention.

From the foregoing, I am of the view that the applicant had failed to account for the delay of almost five months, from 20th December, 2020 when time to lodge the notice of appeal lapsed to 18th May, 2021 when the application at hand was lodged in this Court.


So, for all the above reasons, the application fails and is dismissed with costs.

DATED at MUSOMA this 12th day of November, 2021.





E.S Kisanya
JUDGE

Court: Ruling delivered through teleconference this 12th day of November, 2021 in the appearance of the respondent and in the absence of the applicant. B/C Jovian Katundu present.


E. S. Kisanya
JUDGE
12/11/2021

Court: Parties are informed that, in terms of the rule 45A of the Court of Appeal Rules R. E. 2019, the applicant is informed that he has the right to apply to the Court of Appeal for extension of time.


E. S. Kisanya
JUDGE
12/11/2021