

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(IRINGA DISTRICT REGISTRY)

(LAND DIVISION)

AT IRINGA

MISCELLANEOUS LAND APPLICATION NO.39 OF 2020

(From the decision of the District Land and Housing

Tribunal for Iringa in Application No.39 of 2019)

YONAH AKAN MBADIME APPLICANT

VERSUS

NATIONAL MICROFINANCE BANK PLC 1ST RESPONDENT

IMAN GREVAS MDEMU 2ND RESPONDENT

EDGAR MBADIME 3RD RESPONDENT

02/11 & 02/12/2021

RULING.

MATOGOLO, J.

This is an application by the applicant one Yonah Akan Mbadime for an order that the court be pleased to enlarge time to allow the applicant to file an appeal out of time. He also prays for costs and any other order as the court deems fit and just to grant.

The application is by chamber summons made under Section 41 (2) of the Land Disputes Courts Act, as amended by the Written Laws (Miscellaneous Amendment) (Act No. 2 of 2016). The same is supported by an affidavit sworn by Yonah Akan Mbadime the applicant.

At the hearing of this application parties were represented. Mr. Jonas Burton Kajiba learned Advocate represented the applicant while the respondents were represented by Mr. Steward Ngwale learned Advocate.

The application was argued by way of written submissions.

Mr. Kajiba in support of his application submitted that, the exparte judgment that the applicant intends to appeal against was delivered on 1st April 2020 thus the period of 45 days expired on 16th May 2020 and this application has been brought nearly after expiration of 179 days.

He submitted further that, it is well settled that this Court has discretional powers to extend time upon the applicant adducing sufficient reasons. To support his argument, he cited the case of ***Godwin Ndewezi and Karol Ishengoma vs. Tanzania Audit Corporation [1995] TLR 200***, the court among another thing held that:-

"Factors to be considered are such as, the applicant to account for all period of delay, the delay should not be inordinate, the applicant must show diligence"

He submitted that, from the forgoing position of the law, the pertinent issue in this instant application is whether the Applicant has demonstrated sufficient reasons to warrant this Court to extend time. He said in their considered opinion the issue is answered in the affirmative.

Mr. Kajiba submitted that, the applicant has adduced sickness and illegality as grounds warranting this Court to extend time to appeal out of time. He contended that, the applicant following the pronouncement of judgment on 01.04.2020, on 08.04.2020 he escorted his wife who was sick and from 09.05.2020 to 28.07.2020 he was hospitalized as per medical chit and a letter from Doctor incharge of the Hospital where the applicant was hospitalized which was attached in the affidavit thus failed to file his appeal on time and when he was supplied with the copy of judgment which was certified by the trial tribunal on 16.06.2020 time to appeal had already lapsed.

He submitted further that, sickness is one of sufficient cause for extension of time as has been emphasized in plethora authorities. To bolster his argument, he referred this court to the case of ***Bakari Seif Msongoro vs. Mwajuma Sultan Mtiege***, Misc. Land Application No. 526 of 2019 (unreported) in which it was held that illness constitute sufficient reasons.

Mr. Kajiba submitted further that, the applicant being hospitalized and escorted his wife to attend medical treatment are sufficient enough for this court to enlarge time to appeal.

Mr. Kajiba submitted that, it is well settled that in application of this nature accounting for each day of delay is mandatory requirement, to support his argument he referred this court to the case of ***Mary Mbwambo and Another vs. Mbeya Cement Company Limited [2017] TLS LR 277.***

He said the delays are accounted for pursuant to the direction of the above cited Court of Appeal of Tanzania decision. It is crystal clear that immediately after the judgment was pronounced on 01.04.2020, the applicant on 08.04.2020 escorted his wife to attend medical treatment and subsequently the applicant on 09.05.2020 he was hospitalized due to heart problem and seriously nauseating until 28.07.2020. Thus the period from 01.04.2020 to 16.05.2020 when time to appeal lapsed have been accounted for as the applicant escorted his wife for medical treatment and he was sick hence failed to file an appeal within time.

Mr. Kajiba submitted further that, since the applicant has adduced sufficient reason, in their considered view this Court should enlarge time to appeal because the respondents will not suffer any prejudice if the extension is granted. And often this stance that the Court should also take into consideration the degree of prejudice that the other party will suffer if the extension is granted. To support his argument, he cited the case of ***Mabroma Gold Corporation Ltd vs Minister for Energy and Others [1998] TLR 425*** where the court held:-

*"It is generally inappropriate to deny a party
an extension of time where such denial will*

stifle his case, as the applicants delay does not constitute a case of procedural abuse or contemptuous default and because the respondent will not suffer any prejudice, extension should be granted”

Mr. Kajiba concluded by praying to this Court to exercise its discretionary powers, invoke the precedent and authorities cited, and uphold the prayers sought by the applicant with costs and grant a leave to file his appeal out of time as it is vividly clear that, the reasons advanced are sufficient.

In reply Mr. Ngwale prayed for the contents of the counter affidavit of the 1st respondent sworn by Emmanuel Mwambona who is the principal officer of the 1st respondent to be adopted and form part of their submission.

He submitted that, it is well principle of the law in our jurisdiction that an applicant who applies for extension of time to make an appeal must account for every single day of delay by demonstrating sufficient reason(s) so as to enable the court exercise its discretion of extending time within which appeal may be filed. To support his argument, he cited the case ***of Dar es Salaam City Council vs S. Group Security Co. Ltd,*** Civil Application No. 234 of 2015 (unreported), where Kaijage JA among other things held that:-

“But the stance which this court has consistently taken is that in an application for extension of time, the applicant has to account for every day of the delay”.

He contended further that the requirement to account for each day of delay was enshrined in the case of ***Interchick Company Limited v. Mwaitende Ahobokile***, Civil Application No. 218 of 2016 (unreported) as cited in the case of ***Markarash Makwaya Shaban v Nyanza Co-Operation union (1984) Ltd***, Misc. Land Application No. 131 where it was held 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”.

He went on submitting that, it is clear that extension of time to appeal out of time is not automatic remedy instead, is subject to a well-reasoned established ground(s) reason (s) so as to convince the court to exercise its discretion. He contended that, the applicant in his affidavit has failed to adduce any reason (s), let alone sufficient reasons, that prevented them to file an application for extension of time from the date when the applicant recovered his normal condition as per alleged medical report attached to his affidavit (28/07/2020) to the date of filling this application (30/09/2020) that is about 62 days.

He contended further that, this issue does not need hard and fast rule because the law is very clear on this point that the court cannot exercise its discretion unless there are established material circumstances necessary to enable it to exercise discretion otherwise the court cannot assume the role of any party to the case or use any sympathy, to bolster his argument he referred this court to the case of ***John Cornel vs A.Grevo (T) Ltd***, Civil case No. 70 of 1998, where it was stated that:-

"However unfortunate it may be for plaintiff the Law of Limitation of action however knows nor sympathies or equity. It is a merciless sword that cut across and deep in all those who debt caught in its web".

Mr. Ngwale submitted that, failure to adduce any reason (s), to account what he was doing about 62 days prior to the filing this application amount to serious irregularity and its consequences is nothing but dismissal of the application, to support his argument he referred this court to the case of ***Vodacom Foundation vs Commissioner General (TRA)***, Civil Application No. 107 of 207 (unreported), whereby the court dismissed the application for failure to account only nine (9) days of delay, the court among other things held that:-

"After the withdraw, it took the applicant nine clear days to lodge the present application 02/03/2017. These nine days have also not been accounted for... the applicant, through

her advocates has just made a general statement to the effect that she was busy seeking the certification in the Tribunal. With due respect to the Learned Counsel for the applicant, I see no sufficient explanation regarding delay in this period”

He also cited the case of **Shabir Moledina@ Shabir Abbas Ghulam Hussein v. Sajida Kassim Karim** Misc. Civil Application No. 155 of 2018 the court referred the case of **Vodacom** (supra) in which it was held that:-

“The Applicant must account for all the period of delay, the delay should not be inordinate and the Applicant must show diligence and not apathy, negligence or sloppiness in prosecuting the action he intends to take”.

He said, the counsel for the applicant it seems he failed to understand what days need to be accounted for, to him it seems once the applicant account for only first 45 days of limitation to file an appeal is enough, because in his submission at page 03 paragraph 03 he is saying 45 days elapsed once the applicant escorted his wife and he was sick so failed to appeal within time and failed to account for the left days until the filing of this application.

He contended that, due to the fact that the applicant has failed to account for what he was doing in about 62 days contrary to the law, he invited this court to take precedent and dismiss this application.

With regard to the first reason of sickness, Mr. Ngwale submitted that, the applicant alleged in his affidavit that on 08/04/2020 he escorted his wife who was sick, unfortunately has failed to attach proof of tickets to confirm that he real travel to Dar es Salaam to escort his wife even an affidavit of his wife to confirm the alleged facts so as to enable this court to draw an inference that the applicant real escorted his wife to hospital. For him he was of the considered opinion that without proof of tickets or affidavit of his wife is afterthought and cooked story.

He submitted further that, in paragraph 5 of an affidavit the applicant underpins the ***annexure YAM2*** which is a medical sheet to form part of the affidavit, it is with no dispute that his wife on 18th August 1999 while at age of 40 years went to Ocean Road Cancer Institute and diagnosed Ectopic Right Kidney as shown in the ***annexure YAM 2***, he contended that, it has nothing to help this application and make the applicant not to observe time to file his appeal on time from 16th June 2020 the applicant try to hide himself in his wife's diseases without attaching a very current document that will help the court to see in the face of record they were true hospitalized in Dar es Salaam, the said ***annexure YAM 2*** is not a good document this court to rely upon condoning this application.

He went on submitting that, the applicant is alleging that he was also hospitalized from 09/05/2020 to 28/07/2020 but he failed to attach the

proof of an affidavit or the officer who attended him so as to confirm the alleged fact as per the law, he attached the **annexure YAM 3**, of which it has a clause that didn't show the patient will be fit to continue with his normal business there is no further document that signify the applicant started his business that bring him to the court to file this application, he argued that, this reason is misconceived and he prayed for this court not to consider it.

With regard to the second ground of illegality, Mr. Ngwale submitted that, the applicant failed to point out such alleged illegality, this is contrary to the standard set in **Valambhia's case** that in order for illegality to be considered as good reason for extension of time, the alleged illegality must be of sufficient importance and must be seen on the face of record without requiring long perusal of the case file, the similar view was take in the case of **Lyamuya Construction Company Limited versus Board of Trustees of Young Christian Women Association of Tanzania**, Civil Application No. 02 of 2010 (unreported)

"In Valambhia's case... this court (The Court of Appeal) held that... since every party intending to appeal seeks to challenge a decision on points of law or facts, it cannot in my view, be said that in Valambhia's case, the court meant to draw a general rule that every applicant who demonstrate that his intended appeal raises points of law should

as of right, be granted extension of time if he applies for one. The Court there emphasized that such point of law, must be that of "sufficient importance" and I would add that it must also be apparent on the face of the record, such as question of jurisdiction, not one that would be discovered by a long draw argument or process".

He went on submitting that, once the alleged illegality is not apparent on the face of record as in this case where the applicant failed to demonstrate the alleged illegality, the court will dismiss the application, to bolster his argument he cited the case of ***Phinias Manyama Musiba v. Bulyanhulu Gold Mine Ltd*** Misc. Labour Application No. 36 of 2020 Hc at Shinyanga (unreported) when this court enriched that:-

"At this point, with the presence of all those questions, can anyone say that the illegality as raised by the applicant, is apparent on the face of record? The answer is not at all. Illegality as ground for extension of time as raised by Applicant is not apparent on the face of record.... on that account, I am of the firm view that, the raised illegality does not meet the test set in the case of Samwel Monsilo supra)".

He submitted that, apart from those misconceived reasons, the applicant was negligent to make follow up of his case as he never bothers himself to apply for copy of judgment and proceeding to show that he intended to pursue this appeal as the law directs. He bolstered his argument by citing the case of ***Lyamuya Construction Company Ltd*** (supra) in which it was held:-

“(a)The applicant must account for all the period of 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”.

He contended further that, once the applicant was negligence to make follow up of their case the court will not entertain any application later on because it will be an afterthought, he cemented his argument by citing the case of ***Abel Pea v. Athumani Yusuf Kione***, Misc. Land application No. 1046 of 2016 HC at DSM (unreported) pp. 04 and 05 where the court stressed that;

*“According to the facts stated in the affidavit both the applicant and his Counsel were negligent to make follow up of his case. I say so because after they were informed by the tribunal that the judgment will be delivered on notice, **they could make a follow up and even take further steps by writing a letter requesting for the***

date of the delivery of the judgment. It seems that the applicant and his counsel were relaxing instead of making a follow up of their case while it was their duty to do so. If the notice for the date of the delivery of judgment was not issued at all, how could the respondents know of the date and appear on the date of the delivery of the judgment".

The court continued at page 05 to rule that:-

"The term sufficient cause has not been defined. However, in the case of **Yusuph Same and Hawa Dada vs Hadija Yusuf**, Civil Appeal No. 1 of 2002, the Court of Appeal elaborated on the term of sufficient cause "that it should be given a wide interpretation to encompass all reasons or causes which are outside the applicant's power to control or influence resulting in delay in taking necessary steps".

Mr. Ngwale submitted that, basing on the fact that the applicant never made follow up of his case it clearly shows that the applicant had no intention to appeal against the decision of the trial Tribunal so the alleged reason of sickness was afterthought and fraudulent for the detriment of the 1st respondent. He concluded by submitting that as the applicant left 62

days without accounting for delay, they prayed that this application should be dismissed for want of merit.

Having read the submissions by the parties and having carefully gone through the court records, the crucial issue to be determined by this court is whether the applicant has demonstrated or advanced any sufficient and good cause to warrant an extension of time.

It is trite law that an application for extension of time is within the discretion of the court to grant it or refuse to grant. However such discretion must be exercised judiciously. The Court of Appeal of Tanzania, Msofe J.A (as he then was), ***in Martha Iswalile Vincent Kahabi versus Marieth Salahe and 3 others***, Civil Application No.5 of 2012 at Mwanza (unreported) religiously held that:-

"It is a common ground that an application of this nature is at the discretion of the Court. In exercising the discretion the court must be satisfied that there are good grounds to decide in favour of an application".

Before the court decides to grant or not to grant an extension of time to appeal out of time, there are factors to be considered by the court, as it was held in the case ***of Lyamuya Construction Company Ltd versus Board of Registered Trustee of Young Women Christian Association of Tanzania***, Civil Application No.2 of 2010 (unreported), Massati, JA as he then was formulated the following factors:-

- (i) The applicant must account for all the period of delay.*
- (ii) The delay should not be inordinate.*
- (iii) The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.*
- (iv) If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance such as illegality of the decision sought to be challenged.*

In the instant application the reasons for the delay adduced by the applicant are two; the first one is sickness and the second one is illegality.

It is quite clear from the Tribunal records that the Judgment was delivered on 1st day of April 2020 and the present application was filed on 12th day of October 2020, the applicant filed this application almost 179 days have elapsed from the date when the judgment was delivered.

The present application is filed under section 41(2) of the Land Dispute Court Act (cap 216 R. E2002), which provides for forty-five days time Limitation to appeal after the day of the decision or order.

With regard to the first reason of sickness the applicant alleged that , the applicant following the pronouncement of judgment on 01.04.2020, on 08.04.2020 he escorted his wife who was sick and from 09.05.2020 to 28.07.2020 he was hospitalized as per medical chit and a letter from

Doctor incharge of the Hospital where the applicant was hospitalized was attached in the affidavit thus failed to file his appeal on time and when he was supplied with the copy of judgment which was certified by the trial Tribunal on 16.06.2020 time to appeal already had lapsed. The argument that he escorted his wife at Dar es Salaam for medical treatment in my opinion has no merit due to the fact that, in his affidavit in support of this application the applicant did not attach even a ticket showing that he travelled to the Dar es Salaam escorting his wife on that material date. But also I expected the applicant to attach even the affidavit of his wife to prove that, her husband escorted her to Dar es Salaam for treatment. Bad enough the applicant has failed to state in his affidavit in support of this application as to when his wife fell sick and when she was discharged from the hospital he was admitted to enable this court to make an assessment as to whether there are sufficient causes for extension of time. It is my considered opinion that, the reason that he escorted his wife for treatment at Dar es Salaam does not hold water the same is dismissed.

As to the reason that, from 09.05.2020 to 28.07.2020 he was hospitalized as per letter from Doctor in charge of the Hospital where the applicant was hospitalized attached in the affidavit thus failed to file his appeal on time and when he was supplied with the copy of judgment which was certified by the trial Tribunal on 16.06.2020 time to appeal had already lapsed. Despite the fact that, the applicant attached the letter from the Medical doctor in charge showing that he was hospitalized from 09.05.2020 to 28.07.2020, there is no explanation provided by the applicant as to what

transpired in the days between 28.07.2020 until when he filed the present application on 30.09.2020. It is my considered opinion that if the reasons raised in the affidavit were, applicant was required to account for each day of delay for 179 days of delay. The requirement to account for every day of the delay is important as it gives this court an opportunity to see whether the reasons advanced for delay constitute sufficient cause. I agree with Mr. Ngwale that the reasons advanced by the applicant as cause of delay are an afterthought.

In the case of ***Shembilu Shefaya vs. Omary Ally [1992] TLR 36***, whereby Moshi, J held that:-

"Ill health without elaboration cannot amount to a good reason for extending the time to file notice of appeal after a delay of about five months".

The above position applies to our instant case as the applicant failed to give explanation about his ill condition that, after fell sick when he recovered, this cannot amount to the sufficient cause.

Also let us assume the applicant real fell sick from 09.05.2020 to 28.07.2020 but there is no explanation provided by the applicant as to what he was doing from 28.07.2020 until when on 30.09.2020 when he filed this application.

It is a requirement of the law that, in any application for extension of time the applicant is legally bound to account for every day of delay, the

same as it was held in the case of ***Wambura N. J Waryuba vs The Principal Secretary Ministry of Finance and Another***, Civil Application No. 320/01 of 2020 (unreported) at page 8 it was held that:-

"Furthermore it is a trite law that, in application for extension of time, the applicant should account for each day of delay, and failure to do so would result into the dismissal of the application".

The applicant has failed to account for every day of delay, because even a single day of delay has to be accounted for, the same as it was held in the case of ***Bushiri Hassan versus Latifa Lutiko, Mashayo***, Civil Appeal No.3 of 2007 (unreported) the court stated;

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

The second reason for delay advanced by the applicant is the issue of illegality also is baseless, and it should not detain me here taking into consideration that, the applicant left it unattended he never pointed out before this court the alleged illegality.

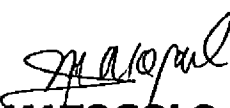
Due to the reasons advanced above it is my considered opinion that the applicant has failed to advance sufficient reason for his delay to appeal

within time. I do not see any reason for enlarging time. Thus, this application lacks merit, the same is dismissed with costs.

It is so ordered.

DATED at IRINGA this 2nd day of December, 2021.




F.N. MATOGOLO
JUDGE.
02/12/2021

Date: 02/12/2021
Coram: Hon. F. N. Matogolo – Judge
Applicant: Absent
1st Respondent: Absent
2nd Respondent: Cosmas Charles Advocate holding brief
3rd Respondent:
C/C: Grace

Mr. Cosmas Charles – Advocate:

My Lord I am holding brief for Mr. Steward Ngwale advocate for the Respondent, the matter is for ruling on part of the Respondent we are ready.

COURT:

Ruling delivered this 2nd day of December, 2021 in the absence of the applicant but in the present of Mr. Cosmas Charles learned advocate holding brief for Mr. Steward Ngwale advocate for the Respondent.




F. N. MATOGOLO

JUDGE

02/12/2021