

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**AT DODOMA**

**MISC. LAND APPLICATION NO. 40 OF 2020**

*(Originating from the High Court of Tanzania at Dodoma Land Appeal No. 38 of 2018, Original District Land and Housing Tribunal of Singida in Land Application No. 3 of 2016)*

**EMMANUEL KALEBI** (*Adm. of the Estate of the late Kalebi Mpuku*) **& ANOTHER..... APPLICANTS**

**VERSUS**

**1. ISSA OMARY SOMBI**  
**2. MTINKO VILLAGE COUNCIL ..... RESPONDENTS**

**RULING**

*14/9/2021 & 15/11/2021*

**KAGOMBA, J**

EMMANUEL KALEBI, being the Administrator of the estate of the late Kalebi Mpuku, and KIJOSI FURAHE, being the Administrator of the estate of the late Mwangi Mudi ("the applicants") have filed this Application seeking for orders of this Court to enlarge time for the applicants to file an application for leave to appeal to the Court of Appeal against the judgment of this Court in Land Appeal No. 38 of 2018 by Hon. L. M. Mlacha, J. out of time. They also apply for costs and any other relief this Court may deem fit and just to grant.

As required by law, the Application is supported by affidavit, jointly sworn by the applicants. The supporting affidavit, apart from showing the ground upon which the applicants intend to rely to convince the Court in granting the orders sought, provides a brief background on the nature of this Application.

The applicants aver in their joint affidavit that they were the applicants in the District Land and Housing Tribunal for Singida at Singida ("the Singida DLHT") in the Land Application No. 3 of 2016 which was decided in favour of the respondents. The respondents then, and even in this application, are ISSA OMARY and MTINKO VILLAGE COUNCIL.

The applicants further aver that after being aggrieved by the decision of Singida DLHT, they appealed to this Court vide Land Appeal No. 38 of 2018 whereby this Court presided over by Hon L. M. Mlacha, J. dismissed the appeal for lack of merit. The applicants are still aggrieved, this time around they intend to go to the Court of Appeal to challenge the decision of this Court as aforesaid, which was made since 12/11/2019.

The appellants aver that they have chances of succeeding in their appeal as the impugned judgment of this Court raise points of law to be determined by the Court of Appeal of Tanzania. They say, the Court erred in law and fact by disregarding the documentary evidence brought by the applicants in Court; by deciding the appeal while the issue of boundaries between Minyenye and Mtinko had not been resolved, and by giving weight to the evidence of District Court (sic) which was not critically dealt with.

The applicants further averred that upon being dissatisfied by the said judgment of this Court, they filed a notice of appeal. A copy of the same was attached to this application and forms part thereof.

Regarding the reason for delay to file the application for leave to appeal, paragraph 7 of the joint affidavit provides;

*"7 that, after lodging notice of appeal, we filed an application for leave which was lodged at the registry whereas we made follow up for the long time up to 15<sup>th</sup> June, 2020 when we were told by the Registry personnel that it was admitted but not paid hence I have to make this Application. Copy of the returned form is annexed as P2".*

Finally, the applicants averred that it was for the interest of justice for this Court to grant the prayers sought in the chamber application and if the application is not allowed the applicants shall be denied their right to appeal.

The respondents strongly disputed the contents of the applicants' affidavit with respect to the chances of success of the intended appeal. They averred that in reaching the decision, the High Court regarded each evidence produced but still the respondent's evidence were proved to be stronger than those of the applicants; the issue of boundaries was resolved by District Council through its Land Officers, Minyenye and Mtinko Village councils; and thus they put the applicants to strict proof of their allegations.

The respondents noted the contents of paragraph 6 of the applicants' affidavit, where it was stated that the applicants had already filed a notice of Appeal. The respondents strongly disputed the reason for delay by the applicants to file application for leave to appeal to the Court of Appeal.

During the hearing of the Application in this Court, the applicants were represented by Mr. Fredy Kalonga, learned advocate, while the 1<sup>st</sup> respondent appeared in person without legal representation and the 2<sup>nd</sup> respondent was represented by Ms. Leila Salum, learned State Attorney.

Mr. Kalonga, gave a brief background of the application in the same line as captured in the applicant's joint affidavit. He submitted that after the judgment of the Court which was delivered by Hon. Mlacha, J. on 12/11/2019, the applicants lodged a Notice of Appeal to the Court of Appeal and also filed, on the same date, an application for leave to this Court as per annexure P2 to the joint affidavit of the applicants.

He further submitted that, after long follow up, on 15/6/2020 they were told that their application for leave was pending because it was not paid for. That, for that reason the same was received by the Court but was not given a registration number. He further submitted that upon being so told, on 19/6/2020 they brought this application for extension of times, so as to file their application for leave to appeal to the Court of Appeal. The learned advocate spoke of the chance to succeed in the intended appeal, that the applicants delay is not a result of negligence but was due to reasons explained in para 7 of the applicants affidavit.

Replying to the above submission, Mr. Issa Omary Sombi the 1<sup>st</sup> respondent, objected to the application for a reason that he had not heard a special reason for the delay. He submitted that there were 14 appellants before Hon. Mlacha, J. 12 of whom withdrew from the case but only the

applicants have remained. He said the applicants are applying lately after being defeated in Singida DLHT where the matter was duly determined.

Mr. Sombi, further submitted that this was the third time the case was being heard in this Court between the same parties, and that the dispute has turned eleven years old, which is a wastage of time. He emphatically prayed the application to be dismissed with cost.

For the 2<sup>nd</sup> respondent, Ms. Leila Salum submitted that the applicants, having filed a Notice of Appeal on 12/12/2019, opted to do nothing further. That from the date of the judgment of this Court on 12/11/2019 to the date they filed this Application for extension of time it was over 270 days, which she said it is too long a period to be justified by the Registry not admitting the Application. She said, the applicants needed to make follow up with the Registry, and by not doing so they were negligent.

Ms. Salum further argued that the applicants are required to justify each day of delay as per Court of Appeal decision in the **REGIONAL MANAGER TANROADS LINDI VS. D. B. SHAPRIYA, & CO. LTD**, Civil Application No. 29 of 2012, at Dar es Salaam where Hon. Bwana, J. A stated that it is mandatory for an applicant of extension of time to show good cause in the affidavit to justify delay so as to make the Court invoke the provision of Rule 10 of the Court of Appeal Rules.

Ms. Salum argued that the cause of delay stated in the affidavit is not sufficient. She further referred to the case of **TANZANIA COFFEE BOARD VS. ROMBO MILLERS LTD**, Civil Application No. 13 of 2015, Court of Appeal, Arusha, where Juma, J.A (as he then was) stated on page 11 of the typed Ruling of the Court that, the applicant has to account for each day of delay after receiving a signed notice of appeal. Based on the cited authorities, she prayed for dismissal of the application with costs. She added that the main reason for the applicants to file this application is to dodge paying costs of previous suit which they lost.

In his rejoinder, Mr. Kalonga for the applicants submitted that there is no dispute that the applicants filed a notice of appeal on 12/12/2019 and that they submitted application for leave on the same day, a reason why the respondents have noted the facts stated under paragraph 5 of the counter affidavit.

He despised the allegation that the applicants have filed their application after the respondents had filed a bill of costs. He added that, once one files a notice of intention to appeal it is like the appeal is pending in Court of Appeal. He further argued that the matter before the Court is not an appeal but an application for extension of time. He further argued that the allegations that the blame is unfairly taken to the Registry are mere statements as they are not in the respondents' counter affidavit.



Mr. Kalonga further distinguished the case cited by the State Attorney for the 2<sup>nd</sup> respondent. He argued that in this matter, all the pleadings (ie Notice) were actually filed in Court and were stamped. He said, the application has been in Court since 12/12/2019 and as such the issue of counting each day of delay does not arise.

Mr. Kalonga further argued that since the respondents noted in paragraph 5 of their counter affidavit that a notice of appeal has been lodged by the applicants, there was no reason for them to proceed filing bill of costs. He further argued that the issue of there being 14 appellants will be determined by the Court of Appeal. He said such issues are invalid to be raised at this stage. He therefore prayed the Court to grant the application.

This application for extension of time, has been preferred under section 11(1) of the Appellate Jurisdiction Act, [Cap 141 R.E 2019] (AJA) which empowers this Court to exercise discretion of extending the time for making an application like the one before the Court out of time. It is trite law that the exercise of this discretion has to be done judiciously by gauging whether sufficient or good cause exists for granting the orders sought by the applicants.

In the Case of **LYAMUYA CONSTRUCTION CO. LTD VS. BOARD OF REGISTERED TRUTEES OF YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF TANZANIA**, Civil Application No. 2 of 2010, Court of Appeal, the following criteria were set to guide determination of applications of this nature. The criteria are;-

- (i) The degree of lateness;
- (ii) The reasons for lateness
- (iii) The prospect of succeeding in the intended appeal and obtaining the relief sought against the other party.
- (iv) Whether there will be prejudice to the other party.

Applying the above criteria, one by one, it will be found that the application was presented for filing on 19/6/2020 while the judgment of this Court, which is the subject of the intended appeal, was delivered by Hon. Mlacha, J. on 12/11/2019. We shall examine the reason for the application to be filed late next. Suffice it to say on this first criteria that the application was filed seven (7) months plus five (5) days after the judgment was delivered. However, deducting one month (30 days) within which the applicants were allowed to file their application for leave to appeal to the Court of Appeal in time, the degree of lateness is six (6) months plus five (5) days. By any yardstick, this is too long a period of time for one to successfully lodge an application of this nature. It requires very convincing reason to justify this half – a – year – delay, which now leads me to consider the reason for such a delay.

Turning to the second criteria, the reasons for the lateness have been adduced in paragraph 7 of the applicants' affidavit. The content of the said paragraph has been reproduced above in this Ruling. The applicants simply state that they filed the application for leave on the same day they lodged the notice of appeal. The applicants were shy to mention the date of lodging the notice of appeal in the main text of their affidavit. They, however, attached a copy of the said notice of appeal showing that the same was filed



on 12/12/2019. They further state that they made follow up for long time up to 15/6/2020 when they were told by the Registry personnel that the application was admitted but not paid for. That is all what the applicants say in respect of reasons for the late filing.

Ms. Salum termed the applicants' act of delay as negligence. I cannot agree more with that description. With due respect to the counsel for the applicants, the act of filing an application without paying necessary court fees and sitting back or alleging to make follow up without substantiating such follow up with any evidence, such as reminder letter to the Registrar, for half a year, if not negligence then that word would have no better usage. The delay was sheer negligence.

On the third criteria, the applicants have said that the intended appeal has chances of success because the said judgment raises points of law to be determined by the Court of Appeal. Other things being equal, this Court would have given due weight to this reason in light of the decision of the Court of Appeal in the case of **PRINCIPAL SECRETARY MINISTRY OF DEFENCE AND NATIONAL SERVICE VS. DP VALAMBHIA [1992] TLR 185**. In this case where it was held that where there are issues of illegality to be determined, the court has a duty to extend time for the purpose of ascertaining the point of law raised and to take appropriate measures to put the matter and records right. The Court held further that where the point of law at issue is the illegality or otherwise of decision being challenged, that is sufficient reason.

I have, however, looked at the cited points of law stated in paragraph 5 (1), (ii), (iii) of the affidavit, but I am not convinced that they are pure points of law. I would think, since at this stage the Court is not called upon to determine the legality involved in the intended appeal rather to consider reasons adduced for granting extension of time, the alleged points of law are supposed to be pure points of law such as issues of jurisdiction or limitation of time. The points of law should be in a form such that the issues of legality being questioned are conspicuously shown on the face of record. The issues mentioned in the affidavit are not that pure. As such, I would not apply the decision of the Court of Appeal made in the above cited case to cover the situation in this application. Therefore, the third criteria are not met too.

As to whether there will be prejudice to the respondents, the answer is obviously in the affirmative. The 1<sup>st</sup> respondent, Issa Omary Sombi, has submitted to this Court that the matter has been in court for long enough. He said it has reached eleven (11) years. The respondents won the case at Singida DLHT, a decision which was upheld by this Court, on appeal. It is obvious that the respondents will be further prejudiced if the extension of time is granted. They will be delayed access to the fruits of the decision made in their favour. There is a question of costs for this prolonged litigation too.


The above said, the Court would however grant the application if there were sufficient cause shown for delay to file the application for leave. The blame has been thrown to the Registry of this Court, in a very unfair manner.

The Application was not paid for by the applicants and the alleged follow up has not been proved at all.

For these reasons the applicants have failed to show sufficient cause for granting the orders sought in the chamber application. I therefore find no other option but to dismiss the application with costs.

It is so ordered.



  
**ABDI S. KAGOMBA**  
**JUDGE**  
**15/11/20210**