

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA**

MISC. LAND APPLICATION NO 93 OF 2020

*(Arising from the ruling in Land Case No. 38 of 2015 in the High Court of Tanzania
Land Division at Arusha)*

**INSTITUTE FOR ORKONEREI
PASTORALIST ADVANCEMENT LTD APPLICANT**

VERSUS

**DUTCH ORKONEREI
SOCIAL INVESTMENT LTD.....1ST RESPONDENT
STICHTING HET GROENE WOUDT.....2ND RESPONDENT
ROTIANA SOCIAL INVESTMENT LTD.....3RD RESPONDENT**

RULING

02/05/2022 & 06/06/2022

KAMUZORA, J.

The Applicant herein is seeking for extension of time to file an application for restoration of Land Case No. 38/2015 which was dismissed by this court before Hon. Dr. M Opiyo, J. on 29/03/2017. The application was brought under the provision of section 14 (1) of the Law of Limitation Act, Cap 89 R.E 2002, Section 68(e), section 95 and Order XLII Rule 2 of the Civil Procedure Code Cap 33 R.E 2002. The application is well supported by an affidavit. Only the 3rd Respondent opposed the application through a counter affidavit deponed Mr. William Mang'ena, learned advocate for the Respondent. Hearing of the application was conducted in the absence of the 1st and 2nd Respondents

after effort to procure their attendance proved futile. When the matter was called for hearing the Applicant was represented by Mr. George Stephen Njooka, learned advocate and the 3rd Respondent was represented by Mr. Asubuhi John Yoyo advocate. Counsel for the parties opted to argue the application by way of written submissions and they all complied to the submission schedule.

The brief background story is that, the Applicant instituted before this court a Land Case No. 38 of 2015 against all the Respondents herein praying for judgment and decree that the sale of plots Number 256 and 257 Block FF with Certificate of Title No. 17297 and No. 17298 located at Sakina Area Arusha City from 1st Respondent to 3rd Respondent is illegal and thus null and void. The suit was dismissed for want of prosecution on 29th March 2017. As the time to file an application for restoration had lapsed, the Applicant then preferred this application seeking for time enlargement. The main issue calling for the determination by this court is whether the Applicant has demonstrated sufficient reasons for the delay.

In support of the application, Mr. Njooka sought for leave to adopt the affidavit in support of the application to form part of his submission. He then submitted that, on the dates scheduled for hearing of Land case

No. 38 of 2015 from 28th to 29th March 2017 the director of the Applicant one Martin Kariongi Ole Sanago appeared before the court and informed the court that the key witness was abroad taking care of his sick wife and prayed for adjournment of the case. That, he also prayed for time to engage another advocate as his advocate withdrew himself from the case. That, the court found that the reasons advanced were insufficient hence proceeded to dismiss the suit for want of prosecution.

Mr. Njooka went on and submitted that, after the dismissal of the application, the Applicant's director engaged another advocate by the name of Nicodemu Mbugha who filed a fresh suit with Land Case No. 59/2017 which was found to be res judicata and on 12/12/2018 it was dismissed before this court. That, the Applicant filed a notice of appeal to the Court of Appeal on 8/01/2019 and around April 2019 the Applicant had to look for another advocate that is Advocate George Stephen Njooka from Fortis Attorney since the former had less than 5 years in practice hence could not appear before the Court of Appeal of Tanzania. That, after the engagement of new advocate the Applicant was advised to withdraw the notice of appeal and on 16/4/2019 the Applicant filed a notice to withdraw the notice of appeal. That, it was until 16/10/2020 when the counsel for the Applicant was informed that

the notice has been issued by the Deputy Registrar of the Court of Appeal of Tanzania on 23/3/2020 and the same was issued to the counsel for the Applicant on 16/10/2020. That, immediately after receiving the dispatch from the Deputy Registrar, the Applicant's advocate prepared this application and lodged it on 14/11/2020 through the Judiciary System JSDS and waited for admission until 7/12/2020 when he decided to make a follow up at the Deputy Registrar who informed the counsel that he does not see the application and advised him to see the information technology IT team.

The counsel for the Applicant further submitted that, he went to the IT team and met one Mr. Mrutu whom upon checking he realised that the application has been filed in the Land Registry instead of the Main registry and the same was then refiled on 7/12/2020 through the JSDS and the hard copy were admitted on 11/12/2020 by the court.

The counsel for the Applicant acknowledged the settled principle that a party applying for extension of time should have sufficient reasons to account for each day of the delay. He was of the view that, the Applicant has accounted for each day of delay from the date of the judgment to the date of filing the application for extension of time. That, the Applicant delayed while he was in court corridors pursuing his justice

between 29/3/2017 to 23/3/2020 when the order for withdraw was issued by the Deputy Registrar of the Court of Appeal.

That the same is termed as a technical delay which is a ground of extension of time. In support of that argument he cited the case of **Elly Peter Sanya V Ester Nelson**, Civil Appeal No 151/2018 CAT at Mbeya (Unreported).

The counsel for the Applicant further submitted that, one of the grounds for extension of time is that there was a considerable amount of time to follow up for the notice to withdraw the appeal from the Court of Appeal as explained under paragraph 10 to 12 of the Affidavit and evidenced by letters one being of 4/10/2020 as attached to the Applicant's affidavit. That, on 16/10/2020 the Applicant was informed that the order was ready to be collected and that after they collected the same, they found that it was delivered on 23/3/1010.

The counsel was of the view that, the time spent in making follow up of the relevant documents constitutes a good ground for extension of time. To buttress his submission, he cited the case of **Asha Juma Mansoor & 9 Others V John Ashery**, Civil Application No 192/3 of 2020 CAT and insisted on the existence of a good cause and relevant materials to move the court in exercising its discretion. That the

Applicant's delay is reasonable as he was in court corridors pursuing for justice since his case was dismissed on 29/3/2017. Basing on the reasons advanced above and the authorities cited the Applicant prays for this court to grant extension of time for the interest of justice to prevail.

Contesting the application, Mr. Yoyo counsel for the 3rd Respondent submitted that, the application at hand is hopelessly unfounded from the onset and devoid of merit to warrant the condonation of more than 1000 days delay. That, it is the trite law and indeed common knowledge to all members of the noble profession that, the court is bound to act judiciously whenever invited to condone lateness and for the court to be able to act judiciously it is always incumbent upon the Applicant to supply the court sufficient explanation and sufficient material to which the court can cling upon to act judiciously. To cement on this argument he cited the case of **Regional Manager Tanroads Kagera V. Ruaha Concrete Company Ltd**, Civil Application No 96/2007 CAT.

Mr. Yoyo went further and submitted that, there are two pertinent questions; whether the explanation for delay advanced in the sworn affidavit really meets the threshold required by the law? and whether

the material evidence attached to the said affidavit are sufficient enough to warrant a condonation of more than 1000 days?

The counsel for the Respondent contended that, both the explanation advanced and the material evidence supplied to support the same are totally insufficient to warrant the condonation of more than 1000 days. That, regarding the explanation under paragraph 5 and 6 of the Applicants' affidavit, two years period lapse from April 2017 to April 2019 where a junior advocate was engaged who in ignorance of the law opted to institute a fresh suit that is Land Case No. 59/2017 instead of lodging an application for restoration of the dismissed case. He was of the view that, ignorance of the law on the side of the counsel is a serious act of laxity and the same cannot constitute sufficient ground for condoning lateness and the same cannot be taken as a technical delay by the Applicant's counsel.

On the cited case of **Elly Peter Sanya** (Supra) the Respondent's counsel submitted that, the same to be distinguishable and cannot apply to this case as it involved wastage of two years period out of laxity of the counsel for the Respondent who did not know proper position of law. To cement on the argument of ignorance of law the counsel

referred the case of **Ngao Godwin Losero V Julius Mwarabu**, Civil Application No. 10/2015 CAT.

The counsel for the Respondent also submitted that, the provision of section 21(1) of the Law of Limitation Act Cap 89 R.E 2019 does not apply in this matter due to the fact that, even after the matter was declared res judicata still the Applicant's counsel opted to appeal to the court of appeal an act that prompted wastage of time for another one-year period. To him, there was no good faith coached under section 21 of the Law of Limitation.

The counsel further submitted that, on the second explanation of the delay as covered under item 7,8,9,10,11,12 and 13 of the Applicant's affidavit, the Applicant's counsel has endeavours to account for the remaining period of one year from the withdraw of notice to appeal to the court of appeal on 8th January 2019 to the actual date of filing this application. The counsel for the Respondents admits that such explanation is somewhat valid in the sense that it was wanting for the pending notice of appeal to be withdrawn before lodging the present application. What the Respondent disputes is the candidness of the side of the Applicant counsel in following up the said order from the registrar

of the Court of Appeal whether they have accounted for each day of delay from when they were engaged.

Mr. Yoyo went on and stated that, all the material supplied by the Applicant's counsel have fallen short of accounting for each day of delay hence the Applicant was zealous and consistent in following up for said withdraw order from Court of Appeal. He insisted that, as it is the requirement that Applicant seeking extension of time must account for each day of delay, the Applicant does not deserve the condonation of the lateness of more than 1000 days. To support this he cited the case of **Tanzania Fish Processors Vs Christopher Luhangula**, Civil Application No 1616/1994 CAT, **Daudi Hanga Vs Jenitha Abdan Machanju**, Civil reference No. 1/ 2000 CAT, **Mbogo Vs Shah (1968)** E.A 93

The counsel for the Respondent finalised by submitting that, in the application at hand the delay involved is inordinate delay of more than 1000 days which is fatal and worse enough the explanation for almost half of that period is ignorance of the law which is not acceptable. That, there is nothing that has been demonstrated as a point of law that would have constituted independent ground for extension of time. he thus prays that the application be dismissed.

Upon a rejoinder Mr. Njooka, the counsel for the Applicant reiterated the submission in chief and the prayers and added that, the counsel for the Respondent has misled himself by failing to understand that what amounts to sufficient reason for the court to grant an extension of time. He was of the view that, technical delay has been considered as sufficient reasons for extension of time as advanced in this application. That case of **Ngao Godwin Losero(Supra)** cited by the counsel for the Respondent differs from the matter at hand as the same was dismissed on the ground of ignorance of the law and illegality. That, in the present matter the Applicant had been diligent pursuing this matter step by step within time. That, after the matter was struck out the Applicant lodged the notice of appeal which later was withdrawn. That, the Applicant in this matter has been in court corridors since his matter was dismissed way back in 29/2/2017. He insisted that, the Applicant was not ignorant nor his advocate rather he was looking for the right remedy for his matter. That, there is clear substantiation of the evidence that the delay was technical thus justified.

I have considered the application and the submissions by the counsel for the parties. I understand that the grant or refusal to grant extension of time is within discretion of the court, the discretion which

however must be exercised judiciously. In **Mbogo Vs. Shah** [1968] EA 93, (Supra) certain factors were highlighted to assist the court in deciding to either grant or refuse to grant extension of time. It was held: -

"All relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reason for the delay/ whether there is an arguable case on the appeal and the degree of prejudice to the defendant if time is extended".

The Court of Appeal of Tanzania also formulated the guidelines to be considered in granting the extension of time in the case of **Lyamuya Construction Company Limited V Board of Registered Trustees of Young women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (Unreported). The court held that: -

"On the authorities however, the following guidelines may be formulated:

- a) The Applicant must account for all the period of delay;*
 - b) The delay should not be inordinate*
 - c) The Applicant must show diligence, 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 reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged."

In the case at hand, reading the affidavit filed in support of the application and the submission by the counsel for the Applicant, technical delay is relied upon as ground for the grant of extension of time. It must also be noted that, where the issue of technical delay is brought to the attention of the court, the Applicant needs to show to the court that he acted diligently in pursuing his rights during this particular period. That is, 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 prosecuting and or defending the matter before him or her. It was held in the case of **Fortunatus Masha V William Shija and Another** [1997] TLR 154 that: -

"A distinction had been drawn between cases involving real or actual delays and those such as the present one which clearly only involved technical delay in the sense that the original appeal was lodged in time but had been found to be incompetent for one or other reason and a fresh appeal had to be instituted. In the present case the Applicant had acted immediately after the pronouncement of the ruling of the Court sticking out the first appeal. In this circumstance an extension of time ought to be granted."

It is in record that Land Case No. 38 of 2015 was dismissed on 29/03/2017 for want of prosecution as depicted under annexure IOPA-1 of the Applicants' affidavit. The Applicant under paragraphs 5,6,7,8,9,10 and 11 of affidavit in support of application stated that, after the dismissal order a fresh suit that is Land Case No. 59 of 2017 was filed but the same was dismissed for being res judicata. A notice to appeal was lodged to the Court of Appeal of Tanzania but withdrawn with intention to file a proper application to set aside the dismissal order, Annexure IOPA-2, IOPA-3, IOPA-4 and IOPA-5.

The Respondent contended that, the whole process of filing a fresh suit and an appeal to the court of appeal was due to the ignorance of the counsel for the Applicant which cannot stand as an excuse warranting the grant of extension of time. I understand that to rely on technical delay one must show that the delay was beyond his control or that it was inevitable. While the counsel for the Respondent agree that the delay was inevitable when waiting for an order to withdraw the notice of appeal from the court of appeal, he questioned on the reasonableness in making the follow up to obtain the copy of the order from the registrar of the court of appeal.

It is in record that the order of the registrar of the court of appeal was issued on 23rd March 2020 but served to the Applicant on 22nd October after the Applicant had made follow of the same through a letter dated 11th October 2020, annexure IOPA-5. In that regard it cannot be said that the Applicant was reluctant in making follow up of the case.


It is also in record that after the order to withdraw the notice of appeal was served to the Applicant, immediate action was taken by the Applicant by filing the present application, the attempt which started from 14th November 2020 to 7th December 2020 when the filing was complete. The applicant well explained the delays except for the time taken from the date of receiving the order to the date of filing the present application. After receiving the order on 11th October 2020, the applicant prepared the document and his first filing was on 14th November 2020 almost a month later. In my view, and in considering the nature of this matter, the period of one month used to prepare documents for filing this application is reasonable and cannot be considered as inordinate. In the circumstance, I find that the applicant accounted for the delay and the grounds advanced are good enough to warrant the delay and grant of the extension of time.

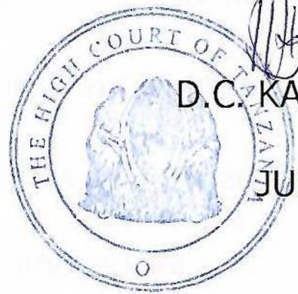
Similarly, the reasons advanced for the delay in admission and registration of the present application are sound reasons. It was demonstrated and undisputed that there was wrong filing in another registry which warranted the re-filing as per annexure IOPA-6. It is also undisputed that there was a delay in the admission of the application after it was filed. In totality, there is a clear demonstration that, the Applicant's action from the date the suit was dismissed until when the present application was filed in court was a real intention to pursue the right in court and the circumstances surrounding the delay is clearly technical. The Applicant has shown that there was intention to pursue the right which unfortunately was so done on the wrong path. Having a chance to rectify the error and pursue the right becomes necessary.

It was admitted that, the prior counsel for the Applicant wrongly preferred a fresh suit instead of an application to set aside dismissal order. But that can neither be considered as ignorance within the meaning of the law nor apathy or sloppiness on the part of the advocate. The fact that the Applicant's counsel preferred a wrong path does not make the court to conclude that it was so done deliberately in apathy or sloppiness of the counsel for the Applicant.

That being said, I find merit in this application and I am of the considered view that, good cause was established to warrant this court to exercise its discretionary powers to grant the extension of time. The application for extension of time to file an application for restoration of Land Case No. 38/2015 before this court is therefore granted. The Applicant shall file the application within the period of 14 days from the date of this ruling. No order for costs is issued.

DATED at **ARUSHA** this, 06th day of June 2022


D.C. KAMUZORA
JUDGE

The seal of the High Court of Tanzania is circular, featuring a central emblem of a lion and a zebra. The text "THE HIGH COURT OF TANZANIA" is inscribed around the perimeter of the seal.