

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY

AT TABORA

MISC. LAND CASE APPLICATION NO.10 OF 2021

(Arising from Land Case No. 17 of 2015)

1. FUNGULIA SWETU FUNDIKIRA }
2. SAID MPAMBIJE KAMAGA }APPLICANTS

VERSUS

1. NYAMENDE SWETU FUNDIKIRA }
2. ZAINABU SWETU FUNDIKIRA }
3. ABASI SWETU FUNDIKIRA }RESPONDENTS
4. KIYUNGI SWETU FUNDIKIRA. Legal
Representative (the Administratrix/
Administrators of Estate the late
SWETU NSIMBA FUNDIKIRA }

RULING

Date: 15/6/2022 & 12/8/2022

BAHATI SALEMA,J.:

The applicants herein, **Fungulia Swetu Fundikira** and **Said Mpambije Kamaga** instituted this application seeking an order that:-

- i. *Time for giving notice of intention to appeal from the judgment of the High court (S.M Rumanyika, J) dated 6th June 2016 in land case no. 17 of 2015 be extended*
- ii. *Costs of this application be provided for Any other relief(s) that this honorable court be pleased to grant*

This application for an extension of time has been made by way of chamber summons under Section 11 (1) of the Appellate Jurisdiction Act, Cap. 141 [R.E 2019]. The application is supported by an affidavit of Mr. Kamaliza Kamoga Kayaga, learned counsel for the applicants.

When the matter was called for hearing, Messrs. Kamaliza Kayaga and Musa Khasim appeared for the applicants, whereas Ms. Esther Mchele and Christina Jackson appeared for the respondents. Both parties urged this court to adopt their affidavits to form part of the submissions.

Submitting in support of their application, the applicant's counsel submitted that the application is made under Section 11 (1) Appellate Jurisdiction Act, Cap.141. The application is supported by the affidavit of Mr. Kamaliza Kamoga Kayaga and prayed to adopt the same.

He further stated that they could not proceed because of the legal technicalities and that technical delay was one of the reasons for the

extension of time. He pegged this argument to the authority found in the case of **Fortunatus Masha Vs. William Shija and another, 1997 TLR 154** (Unreported). Likewise, in **YARA TANZANIA Limited Vs DB. Shapriya and Co. LTD**, Civil Application No. 498/16/2016. He prayed that in paragraph 9 of the affidavit there are grounds worth considering by the court of appeal.

Mr.Khasimu Mussa for the applicants also submitted that the Civil Appeal 106/2018 was withdrawn on 5/5/2021 as AP-C annex but that this application had been filed promptly on 13/5/2021. He beckoned this court to extend time.

In reply, Ms. Mchele, learned counsel opposing the application, prayed to this court to adopt the counter affidavit to form part of her submissions. She submitted that the applicants contend with the technical delay, which was occasioned by the negligence of the applicants since they were not diligent enough to pursue their matter. The appeal was withdrawn on 5/5/2021 for lack of proof of the Notice of Appeal and the letter applying for the record to the respondents. According to her, this presupposes a lack of diligence on the part of the applicant, which in law does not suffice as a sufficient ground for the court that it is tasked to grant.

In respect of the appeal which raises grounds worth being considered by the court of appeal, she submitted that there is nothing new, and the reasoning was well settled by the High Court. She begged this court to dismiss with costs.

Rejoining, Mr. Khasim reiterated his submission in chief that the respondent has submitted that there was negligence. If it was there, the Court of Appeal had struck out the application. This punishment cannot continue and, in respect of legality, on the face of it, it sufficed to be considered by the court of appeal. He prayed to this court for an extension of time under Section 11 of the Appellate Jurisdiction Act, Cap. 141.

Having considered the submissions of the parties and various authorities, the main issue for consideration is whether the application has merit.

It is common ground that an application for an extension of time like the one in hand is under the discretionary powers of this court and the same has to be exercised judiciously. The applicant's task has been to establish sufficient reasons for the delay. There is no hard and fast rule on what constitutes "sufficient reasons" (See the case of **Benedicto Mumello vs. Bank of Tanzania, Civil Appeal No.12 of 2002**).

In determining whether sufficient reasons have been established or not, courts have been taking into consideration several factors such as the magnitude of delay, the applicant's diligence in pursuing the matters, and whether by granting the application the other party will be prejudiced, just to mention a few. The list of factors to be considered is not exhaustive.

Section 11(1) of the Appellate Jurisdiction Act, Cap. 141 [R.E 2019] empowers the High Court when satisfied by the applicant, to extend the time for giving notice of intention to appeal from a judgment of a High Court.

In this application, it is undisputed that the applicants' appeal at the Court of Appeal Civil Appeal No. 106 of 2018 by the Applicants was withdrawn in terms of Rule 102 (1) of the Rules on 5th May, 2021.

As correctly submitted by the applicant's affidavit in support of the application, a technical delay is excusable in opportune circumstances and constitutes a sufficient reason for granting an extension of time. As stated in the case of **Fortunatus Masha** (Supra), the principle of technical delay applies where the previously struck out matter had been filed timely. Like in the present matter at hand, after having withdrawn on 5 May 2021 he promptly applied on 13 May, 2021.

With due respect to the respondent's counsel, since the period spent on the appeal is justifiable, it is apparent from the records that the applicants on 16. February 2018 ultimately lodged Civil Appeal No.106 of 2018 in the court of appeal, which was withdrawn for lack of proof of service of the Notice of Appeal and letter applying for the record to the respondents. The only thing that went wrong on their side was the technical delay, which was well beyond the applicants' control as buttressed in **Fortunatus Masha Vs. William Shija and Another, 1997 TLR 154 (Unreported)**. Likewise, in **YARA TANZANIA Limited Vs DB. Shapriya and Co LTD**, Civil Application No. 498/16/2016.

In my settled view, the sequence, from the date when the disputed decision was delivered by the trial court indicates the applicant was vigorous and active in pursuing its right of appeal against the said decision.

For the above-stated reasons, I, therefore, find the application meritorious and grant it. The applicants are at liberty to file the notice of appeal within ten (10) days and the petition of appeal within 30 days from the date of this order. This application is allowed with no order to costs.

Order accordingly.



A. BAHATI SALEMA

JUDGE

12/08/2022

Ruling delivered under my hand and seal of the court in the Chamber, this 12th day of August, 2022 in the presence of the applicant only.



A. BAHATI SALEMA

JUDGE

12/08/2022

Right to appeal is hereby explained.



A. BAHATI SALEMA

JUDGE

12/08/2022

