

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

MISC. LAND APPLICATION No. 07 OF 2022

(Originating from Land Case No. 01 of 2016 before the High Court of Tanzania at Songea)

NEW KAURU TRANSPORT COMPANY LTD.....APPLICANT

VERSUS

TREASURY REGISTRAR1ST RESPONDENT

THE REGISTERED TRUSTEE OF CATHOLIC

ARCHIOCESE OF SONGEA2ND RESPONDENT

RULING

Date of last order: 06/09/2022

Date of Ruling: 13/09/2022

U. E. MADEHA, J.

This is an application for an extension of time by way of chamber summons made under *section 14 (1) of the Law of limitation Act [Cap 89 Revised Edition 2019]*. The Applicant herein prays for the extension of time in order to file the notice of appeal and appeal out of time to the Court of Appeal against both Judgement and decree of Mrango, J. before this Court in Land Case No.1 of 2016 dated 30th June 2017.

The application is supported by an affidavit duly deposed by the Advocate for the Applicant, Mr. Eliseus Ndunguru. On the adversary side, Mr. Edigy Mkolwe, a Learned State Attorney on behalf of the first Respondent assisted by Mr. Rwezaura Kaijage a Learned Advocate for the second Respondent filed their counter affidavits in reply opposing the application.

It is on record that, in 2017, the Applicant instituted Land Case No. 1 of 2016 before this Court which ended on 30/06/ 2017 his disfavor. Being aggrieved he lodged a notice and craved leave to appeal to the Court of Appeal vide Misc. Land Application No.13 of 2017 which the same was granted on 08/02/2018. However, upon reaching the Court of Appeal, the appeal was struck out on 23/04/2021 for a legal technicality. In fact, the Court of Appeal of Tanzania stated that the appeal was not accompanied by a certificate of delay. Thus, the Applicant opted to file an application (Misc. Application No.5 of 2021) for the extension of time before this Court but the same was struck out for legal technicalities on 19/05/2022. Undaunted, on 22/05/2022, the Applicant then re-filed the instant application.

In the affidavit, among other things, the Applicant has raised the following four grounds alleging the existence of illegalities in the

impugned decision of the High Court which he intends to invite the Court of Appeal to address:

- (a) Whether it was correct for the trial court admit exhibits after the plaintiff has closed their case.*
- (b) Whether it was proper for the trial court to raise a new issue on its own without involving the parties and use the same as the basis of the decision*
- (c) Whether it was correct for the trial court to hold that 2nd Respondent had the capacity to purchase an immovable property without obtaining a written consent from the administrator general.*

When the application was called on for hearing parties consented to argue the appeal by way of a written submission and the filing schedule was complied with accordingly.

Submitting in support of the application, the Applicant commenced his submission by fully adopting the contents of his affidavit. He then contended that, their delay to file the appeal to the Court of Appeal is not intentional but a resultant of legal technicalities hence a technical delay because the appeal was filed timely. To support his argument, he cited the case of **Stephen Ngalabe v. Onesmo Ezekia and another**

Civil Appeal No. 27 of 2020 Court of Appeal of Tanzania at Iringa (unreported) where it was held that technical delay is sufficient ground for extension of time when it is proved that the Applicant was spending his time in corridors pursuing his rights. Moreover, he cited the case of **Fortunatus Marsha v. William Shija and another** (1997) TLR 154 where the Court held that:

"With regard to the second point, I am satisfied that a distinction should be made between cases involving real or actual delays and these like the present one which only involves that can be called the technical delay in the sense that the original appeal was lodged on time but the present situation only arose because the original appeal for one reason or others has been found to be incompetent and a fresh appeal has to be instituted. In the circumstance the negligence if any real reference to the filling of incompetent appeal, not the delay in filling it out, the same cannot be used yet again'

Mr. Eliseus further argued that there are three points of irregularity as raised in paragraph 13 of their affidavit. Thus, he further contended that such are serious legal issues in which the only available remedy is for the Court to extend the time so as to deliberate on them taking into account that the Court of Appeal is the Court of the first (1st)

instance in this appeal. In the upshot, Mr. Eliseus insisted that it has been held several times that illegality is sufficient ground for the extension of time thus he beseeched this Court to grant their prayer by extending time so that the Applicant may file a notice following the expiry of the original notice so raised.

In response, Mr. Edigy strenuously resisted the submission made by Mr. Eliseus. He pinpointed that the governing principle in extending time this Court is the demonstration of sufficient reasons for the delay. To amplify his argument, he referred this Court to the case of **Republic v. Yona Kaponda and 9 others** [1985] T.L.R. 84 where the Court of Appeal of Tanzania stated as follows:

"In deciding whether or not to allow an application to appeal out of time, the Court has to consider whether or not there is sufficient reasons not only for the delay but also sufficient reasons for extending the time during which to entertain the appeal."

He further contended that the same position has been inflated by the Court of Appeal of Tanzania while sitting in Arusha in the case of **Lyamuya Construction Company LTD v. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) where the Court set the

following guidelines in which Courts must observe in deciding whether or not to grant extension of time.

"(a) That, the applicant must account for all the period of delay.

(b) That, the delay should be inordinate.

(c) That, the applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.

(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".

Mr. Egidy contested that, the assertion that the delay to file his appeal to the Court of Appeal was not intentional rather it was a technical delay is with all due respect, a misconception of facts by the Applicant's Learned Counsel. Above all, he emphasized that the technical delay is approved by this Court when the original application or appeal has been filed on time and there is no negligence or sloppiness by the Applicant. To fortify his argument, Mr. Egidy cited the case of **Fortunatus Masha v. William Shija** (supra) where the Court of Appeal held that:

*"A distinction had to be drawn between cases involved real or actual delay and these such as the present one which only involved **technical delays in the sense that the original appeal was lodged in time but has been found to be incompetent for one or another reasons and afresh appeal has to be instituted**" (emphasis is theirs)*

He averred that a careful study of the time since when Misc. Application No. 5 of 2021 was struck out and filing the instant one, time to file the notice of appeal has already lapsed since 11th September 2017. He argued that the Applicant failed to act with diligence and professionalism for failure to apply for the certificate of delay hence technical delay principle cannot be applied in this situation.

To add to it, he asserted that the Applicant has fail to adduce reasons and account each day on both his submission and affidavit. That is, as to where he was from the date when he lodged the notice of intention to appeal which was on 12th July 2017 until the time, he lodged the appeal which was 6th April 2018 which was six (06) months lapsed contrary to the legal requirement whereby, he was supposed to lodge before 11th September 2017. In that regard, the Mr. Egidy further stated that it should be borne in mind that as per paragraph 2 and annexure P-1 of the Applicant's counsel affidavit the lodged notice of appeal which

was struck out for the reasons being time-barred not for want of certificate of delay by the Registrar of the High Court as asserted in paragraph 9 of the affidavit supporting the Applicant's application.

On the issue of existing points of illegality Mr. Egidy emphasized that such point of law must be one that is apparent on the face of the records and of sufficient importance such as the question of jurisdiction not one that would be discovered after the long-drawn arguments or process as it was held in the case of **Attorney General & Tanroads v. Ramadhan Mbwana** Misc. Civil Application No. 797 of 2019 (unreported) to be accepted as a good cause of an alleged illegality. Mr Edigy further stated that the same principle was articulated in the case of **Ngao Godwin Losero v. Julius Nwarabu**, Civil Application No. 10 of 2015 Court of Appeal of Tanzania (unreported). He also referred this Court to the case of **Chandarakant Joshubhai Patel v. Republic** [2004] TLR 218 where the Court while referring to an excerpt in book of MULLA: Civil Procedure Code, 14th Edition, on pages 2335-6 it quoted that:

*"An error apparent on the face of the record must be such as can be seen by one who runs and reads that is, **an obvious and patent mistake and not something which can be established by a***

longdrawn process of reasoning on points on which there may be collectively two opinions. (Emphasize is theirs)”.

The Counsel went on stressing that the Applicant's counsel misconceived the facts and misinterpreted the law as paragraph 13 states that there was an irregularity. That, upon keen observation of the impugned judgment there was no any assertion that the trial Court admitted exhibits after the Plaintiff had closed his case. That, the trial Court records shows that seven (07) exhibits were admitted for the plaintiff and five (05) exhibits were admitted for all the Defendants consequently judgment was delivered accordingly.

Furthermore, the Counsel argued that there is no records on the impugned judgment where trial court raised a new issue that the trial Court framed the issues together with the plaintiff and defendants as agreed as appearing on pages; 15, 16, 17 and 18 of the judgement. The Counsel emphasized that the irregularities purported by the Applicant requires discovery by wrong-drawn arguments and hence cannot fall under the guide as stated in case of **Lyamuya Construction** (*Supra*). Due to the reasons above, the Counsel ultimately beckoned that this Court be pleased to dismiss the application for lack of good cause.

On the other hand, Mr. Rwezaura in support of Mr. Egidy initially craved leave of this Court that their counter affidavit be adopted so that the same forms part of his submission. Afterwards he blamed the Applicant for filling a written submission which did not indicate the parent suit in which this Miscellaneous Application emanates from. Secondly, he contended that the Respondent maintains what she raised as a Preliminary Objection in Misc. Application No.5 of 2022 between the same parties to the effect that the Applicant in this application as it was in Misc. Application No. 5 of 2022 is a non-existing legal person that is not capable of instituting this application.

Besides, Mr. Rwezaura contended that the Applicant was supposed to account for each day of delay from the year 2016 up to when she filed this Misc. Application No. 7 of 2022 which is almost two thousand and two hundred (2200) days. Moreover, the Counsel invited this Court to revisit the principle of estoppel which provides: *'interest rei publicae ut sit finis litium'* meaning that it is for the common good that there should be an end to litigation. He winded that the Applicant's litigation against the second (2nd) Respondent should come to an end because the Applicant has proved not to exist but in the shadow of the advocate.

Therefore, she is maliciously upholding the second (2nd) Respondent legal right. Finally, the Counsel prayed that this application be dismissed.

In rejoinder submission, the Applicant submitted at a considerable length. Briefly, he basically stressed that their delay is a technical one since their appeal was strike out at the Court of Appeal for lack of certificate of delay for exclusion of time spent by them in preparation of records of appeal a fact which has not been disputed by the 1st Respondents in his counter affidavit as such, he can not dispute the same via his written submission.

To reinforce his stand, Mr. Eliseus implored this Court to be guided by the holding in the case of **KABDECO v WETCU LIMITED** Civil Application No.256/11 of 2017 Court of Appeal of Tanzania at Tabora (unreported) where the Court quoted with approval the holding in **Ellakim Swai and Another v. Thobias Karawa Shoo** Civil Application No.2 of 2016 (unreported) which declared that:

"It is not disputed that Civil Application No.1 of 2015 was filed in time. Thus, as for the period of delay between the filling of civil application No. 1 of 2015 and 27.02.2016 when it was strike out for non-citation of section 4(3) of the Appellate Jurisdiction Act which is the enabling provision, that period can conveniently

*be termed as a technical delay on which the applicants are not to blame within the meaning of the decision of this Court in **Fortunatus Masha v. William Shija** and Another [1997] TLR 154 AT 155"*

On the issue of whether their alleged issues of illegality are legal issues enough to impugn the decision of this Court, Mr. Eliseus submitted that such fact has already been deliberated by this Court in Misc. Land Application No. 13 of 2017 as stated in paragraph 5 of the Ruling by Chikoyo, J (as she then was). On top of that Mr. Eliseus reminded this Court that it has no jurisdiction to deal with the merits of intended appeal rather it has to satisfy itself as to the existence of the arguable grounds to merit the attention of the Court of Appeal. To substantiate his point, he referred this Court to several cases including the case of **Binti Mlevi v Halima Mwinsheh** Misc. Land Application No.635 of 2020 High Court of Tanzania at Dar es salaam (unreported), **Grupp v Jangwani Sea Breeze Lodge Ltd**, Commercial Case No. 93 of 2002 (unreported), **KABDECO v WETCU Limited case** (*supra*). On the strength of the afore rejoinder submission, Mr. Eliseus pleaded that this Court be pleased to grant an extension of time for them to lodge the notice of appeal out of time.

From the foregoing it is evident that the application before me is premised under the provision *section 14 of the law of Limitation Act*. The said section empowers the Court to exercise its discretion to grant an application for extension of time, if the Applicant adduces good cause to justify the delay. Further conditions for grant of an extension of time have been explained by the Court in numerous decision such as the ones cited herein above by parties.

Thus, up to this juncture, the key issue for consideration by this Court is whether or not the Applicant has advanced good cause to warrant grant of this application. In this application the Applicant has fronted mainly two reasons for the delay. The first reason being that the delay is technical one and the second reason being existing irregularities (as highlighted herein above in page three (3)) which deserve attention by the Court of Appeal it being the first Court instance for this appeal.

As claimed, it is on record, that the Applicant herein has previous already been granted leave to appeal to the Court of appeal. However, when he filed the appeal, the same was struck out by the Court of Appeal on 23/04/2021 for being time barred. In effect, he was constrained to seek leave for lodging his intended appeal out of time. Which he did vide Misc. Application No.5 of 2021 but the same was

unsuccessful for some legal technicalities whereby the application was found incompetent and consequently struck out on 19/05/2022. Four days later, that is on 25/05/2022 the Applicant refiled the instant application.

With respect to the foregoing, it is my considered view that the Applicant herein has serially stayed woke in pursuit of his intended appeal. The Respondent Counsel argued that the Applicant has not accounted for each day thus the delay seems inordinate but a keen observation of the matter shows that the Applicant did not sleep over his right rather he faced some legal technicalities which occasioned the lapse of time.

On the whole, I find and hold that the delay in the instant case amounts to what is called a technical delay since the first appeal was found incompetent. Negligence if any on the part of the Applicant as claimed by the Respondent is on the filing of an incompetent appeal (which the penalty for the same is struck out) and not on the delay in filing it. Reference may be made to the case of **Fortunatus Masha** (*supra*) at page 155.

On the second reason regarding existence of illegalities/irregularities in the impugned decision, I am mindful that my jurisdiction

is limited into looking as to whether the same amounts to good cause to warrant grant of this application. Digging further into their propriety or otherwise will be equivalent to pre-empting the merits of the judgment of the Court in the appeal.

The Applicant herein presented three grounds of illegalities as featured herein on page three of this ruling. In my considered view, all three points raise issues of illegality or otherwise of the decision of this Court in Land Case No. 01 of 2016 dated 30th June 2017. Being guided by the holding in the famous case of **Principal Secretary Ministry of Defence and National Service v. Devram P. Valambhia** [1992] TLR 387 I find that the grounds adduced herein amount to good cause sufficient to deserve a grant of extension of time.

Basing on the foregoing, I find and hold that the Applicant has explained away the delay in filing the intended appeal to the Court of Appeal. Conclusively, the application has merit and is hereby granted. I give no order to costs. Order accordingly.

DATED at SONGEA this 13th Day of September 2022




U.E. MADEHA

JUDGE

13/09/2022