

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

**MISCELLANEOUS LAND CASE APPLICATION NO. 2 OF 2022
MOSHI MUNICIPAL COUNCIL.....APPLICANT
Versus
BARNABA MIROSHI..... RESPONDENT**

Last Order: 3RD August 2022

Date of Ruling: 13TH September, 2022

RULING

MWENEMPAZI, J.

This is an application for extension of time to file an appeal out of time. The applicant, Moshi Municipal Council has brought this application under section 41 (2) of the Land Disputes Court Act, Cap. 216 R.E 2019 (the Land Disputes Act), Section 95 of the Civil Procedure Code Cap 33 R.E 2019 (the CPC) and Section 14(1) of the Law of Limitation Act, Cap 89 R.E.2019. The application was through a chamber summons supported by an affidavit sworn by Jimson Msemwa who is a senior land officer working for the Applicant.

Responding to the application the respondent filed a counter affidavit through Mr. Elikunda George Kipoko learned advocate.

The hearing of the application was by way of filing written submissions. Mr. Moses Muyungi learned state Attorney filed submission in support of the application while Mr. Elikunda George Kipoko learned advocate filed a reply submission opposing the application.

In his submission, Mr. Muyungi stated that the applicant has been filling a number of applications for extension of time to file appeal against the ruling in Misc. Land Application No. 252/2019 but in all those applications the court has not exercised its discretionary powers judiciously. He argued that considering various efforts exercised by the applicant it will be prudent for this honorable court to grant the application.

Submitting further Mr. Muyungi stated that since the decision of the District Land and Housing Tribunal for Moshi dated 24/11/2008 was ex-parte the Applicant was unaware as to what transpired until 10/02/2014 when the Respondent was in a move to execute the ex-parte judgment. Mr. Muyungi argued that from that time the applicant had been tirelessly going on through the court's process for rescuing the situation until this moment. He contended that in that account the Applicant had demonstrated the reasons as to why he is out of time hence the present application.

Concluding his submission Mr. Muyungi stated that since the issue at hand is that of land then the Applicant should be accorded with an opportunity to defend her interests as she is the holder of the title deed of the land in dispute. The learned state attorney was also of the view that granting of the application for extension of time would not jeopardize or prejudice the interest of the Respondent rather than subjecting both parties to fair

hearing and justice. From his submission he prayed for the application to be granted.

Responding to the applicant submission, Mr. Kipoko first prayed to adopt the counter affidavit that was filed opposing the application. He then submitted that the law is settled that in an application for extension of time the applicant must first account for all the period of delay; secondly, he must state clearly the time when he got the copies of judgment and decree because failure of which the application should be dismissed. Thirdly, that the delay should not be inordinate and lastly the applicant should show diligence and not apathy, negligence or sloppiness in prosecution of the action that he intended to take. In support of the four stated principles, Mr. Kipoko, learned Advocate referred this court to the case of **LYAMUYA CONSTRUCTION COMPANY LIMITED VS. THE BOARD OF REGISTERED TRUSTEES OF YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF TANZANIA**, Civil Application No. 2 of 2010 (unreported). And another case of **COSMAS CONSTRUCTION CO. LTD VS. ARROW GARMENTS LTD 1992 TLR** where it was held that:

"Without disclosing when the applicant got to know of the existence of the judgment it is not possible to gauge the extent of the delay. No sufficient cause for the delay has been established."

The learned counsel was of the view that the applicant had failed to meet the above stated principles based on the two cited cases he thus urged this court to dismiss the application with cost.

Submitting further Mr. Kipoko stated that the applicant has failed through his affidavit to provide the basis or criteria for this court to exercise its discretion to warrant extension of time.

Challenging the Applicant's affidavit, the learned counsel submitted that in the first paragraph facts deponed by the deponent have not been substantiated hence cannot be acted upon. Submitting further the learned counsel stated that on the second paragraph of the applicant's affidavit where it is alleged that on 22nd July 2021 the Applicant received notification from the Assistant Registrar of Titles intending to effect change of ownership, the learned counsel argued that the statement is hearsay as there is no proof to substantiate the same. He cited the unreported case of **Kigoma Ali Malima v. Abbas Yusuf Mwingamno**, Civil Application No. 5 of 1987 where it was held that:

"...sometimes a slight lapse by an advocate may be overlooked, but not a lapse of fundamental nature like the non-supply of any supporting evidence for an application for enlargement of time".

On the third paragraph Mr. Kipoko submitted that the fact it is acknowledge under this paragraph that the ex-parte decision on Application No. 62/2008 was delivered in favour of the respondent

On 24/11/2008 it suffices to conclude that the Applicant knew that the judgment was delivered on that date only that they did not take any

necessary step to challenge the said decision. It was his submission that the action by the applicant amounted to apathy, negligence and sloppiness in prosecution of an action he intended to take.

Regarding the fourth paragraph of the applicant's affidavit Mr. Kipoko submitted that what is stated on that paragraph are mere allegations and hearsay as no proof has been provided.

With respect to the fifth paragraph, he submitted that the Applicant wasted much more time by filling an application for stay of execution instead of application for setting aside ex-parte judgment.

On the sixth paragraph, he submitted that the Applicant failed to show the exact date which they took action after their successful appeal against the ruling which dismissed their application for stay of execution. That they did not indicate the exact date which they filed the application for extension of time to set aside the said ex-parte decision therefore he contended that the court would not be able to gauge the time of delay. Not only that but also Mr. Kipoko argued that if the Applicant had stated the date which the application No. 252 of 2019 was filed, it would enable this court to gauge the promptness and the extent of delay of the applicant. Supporting his argument, the learned counsel cited the case of **COSMAS CONSTRUCTION COMPANY LTD V. ARROW GARMENTS LTD** [1992] TLR 127.

With respect to the seventh paragraph the learned counsel submitted that what is contained therein are extraneous matters and hearsay as there is no evidence to support the allegations.

On the eighth paragraph Mr. Kipoko submitted that like the previous paragraph on the present one also contained hearsay and extraneous matters which do not provide any good ground for this court to exercise its discretion. He submitted that the respondent had disputed the entire paragraph but the applicant who alleged did not provide any proof of the allegations. The learned counsel further submitted that the Applicant has admitted to have done nothing from 17/12/2019 when the ruling subject of this application was delivered to 17/01/2022 when the current application was lodged. He argued therefore that the Applicant has failed to account for 762 days of delay when she said nothing transpired during the period.

With respect to the ninth paragraph Mr. Kipoko submitted that there is no proof of dishonest alleged by the Applicant and that it is just the Respondent who has been taking steps to enjoy the fruit of his decree delivered by the court since 2008 which is about fourteen years.

Regarding paragraphs ten, eleven, twelve and thirteen Mr. Kipoko submitted that the contents are extraneous and hearsay as they do not meet the principle and criteria for the court to rely on and grant extension of time. That the applicant had not pointed to any illegality in the ruling in Application No. 252 of 2019 which is subject of this application. He also argued that the Applicant had shown any public interest for this court to grant extension of time to the contrary the Applicant had failed to account for each day of delay and that the delay is inordinate to the extent of causing prejudice to the Respondent.

Mr. Kipoko further submitted that having gone through the contents of Applicant's affidavit he was of the opinion that the same did not provide material necessary for this court to grant extension of time. He submitted further that the Applicant had failed to account for each day and time he spent in court corridors and outside without applying for extension of time. Citing a number of cases, the learned counsel urged this court to find that the application lacks merit and dismiss it with cost.

After giving due consideration to the submission by both parties, I will now proceed to determine the merits of this application. In this application the Applicant is praying for extension of time to file appeal against the ruling in Misc. Land Application No. 252/2019. The time limitation for lodging an appeal of this nature is forty-five (45) days as provided for under **section 41(2) of the Land Disputes Courts Act, Cap 216 R.E. 2019**(the LDCA). The law has further given this court powers to extend the time if good cause is shown. This provision of the law states;

*"(2) An appeal under subsection (1) may be lodged within forty-five days after the date of the decision or order: Provided that, **the High Court may, for the good cause**, extend the time for filing an appeal either before or after the expiration of such period of forty-five days". [Emphasis mine]*

Based on the above cited provision granting extension of time is totally upon the discretion of this court. In that regard, the Applicant seeking extension has to advance good cause for this court to grant it. Good cause as stated in the law is a relative term, the Court of Appeal of Tanzania in

the case of **Jumanne Hassan Bilingi vs. Republic**, Criminal Application No.23 of 2013(CAT-unreported) stated thus:

*"...what amounts to good cause is upon the discretion of the Court and it differs from case to case but basically various judicial pronouncements defined good cause to mean **reasonable cause which prevented the applicant from pursuing his action within the prescribed time.**" (Emphasis added).*

The reasons upon which this application is grounded on are found under paragraph seven of the affidavit in support of the application. It is stated under paragraph seven that;

"While preparing to appeal against the said ruling, the Applicant learnt of the demise of Barnaba Mirosh, the decree holder in land Case No. 62/2008. However, that fact had not been disclosed by the Respondent's advocate or anybody who was following before the court in all proceedings in six applications herein before. At the same time, it is yet to be known as to who is the administrator of the estate of the late Barnaba Mirosh, hence the Applicant was in predicament. Meanwhile the dispute plot was craved through regional authorities, by Tanzania Railway Corporation and it is now under use by them."

In determining the merits of this application, the issue is whether the above account has demonstrated good cause to warrant grant of the application. Examining the reasons provided under paragraph seven of the affidavit, it is apparent that the applicant has not been able to give

sufficient reason which would amount to good cause as illustrated under section 41 (2) of the Land Disputes Act, (supra).

The decision subject of this application was delivered on 17/12/2019. The application at hand was lodged on 17/01/2022, the applicant had 45 days from 17/12 2019 to file her intended appeal but she did not do so. The law requires the applicant to account for each day of delay for there to constitute good cause. Gauging from the date the decision was pronounced to the date when the applicant lodged the present application about 720 days or two years have passed and ought to be accounted for. Examining the affidavit in support of this application nowhere has the applicant accounted for each day of delay as required. The claim that the Respondent died is not supported, therefore facts alleged under paragraph seven of the affidavit cannot be relied upon by this court to arrive to its decision because what is stated is completely hearsay which is inadmissible. The applicant alleged to have been in predicament on what to do after she learnt of the demise of the Respondent but that notwithstanding the law is clear as provided for under **Order XXII rule 1 of the Civil Procedure Code**, Cap 33 R.E. 2019 that, "*the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives*". In this case therefore even if it was true that the Respondent did pass away, his death should not have been a bar to the applicant to take further action like filling an appeal if she wished to as alleged in the affidavit. Therefore, this is absolutely not a good cause to warrant grant of this application.

Furthermore, what is depicted from the affidavit in support of this application is that the applicant had been negligent in delaying to file his anticipated appeal within the required time. Under paragraph seven it is alleged that the applicant was preparing to appeal against the ruling but reading further on paragraph eight the applicant admits that they did nothing until 22/7/2021 when they received a notification from the Assistant Registrar of Titles that he was intending to effect change of ownership of the suit land in favor of the respondent. Yet still the applicant has not shown whether she took any action afterwards. No account has been advanced as to what transpired from the date of the ruling to the date when the present application was lodged in this court.

Based on what has been discussed above it is my considered opinion that the applicant has failed to prove to this Court as to why she is seeking for leave to file her appeal out of the prescribed time. The applicant has given a number of reasons in the affidavit in support of the application but failed to attach any evidence to support her claims. Thus, this court has not found any good cause as required by the law to warrant grant of the order sought. The law insists if there is good cause so as to be granted extension of time.

In conclusion, I find this application devoid of merits, and therefore dismiss the same with costs. It is so ordered.




T. MWENEMPAZI
JUDGE
13TH SEPTEMBER, 2022