

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

MISC. LAND APPLICATION NO. 41 OF 2021

(C/F Land Case No. 7 of 2012 of the High Court of Tanzania at Moshi)

BASILISA THOMAS SAWERE.....APPLICANT

Versus

ONEST PHILIP.....1ST RESPONDENT

CLEMENCE O. MBOWE.....2ND RESPONDENT

ZAINA HUSSEIN.....3RD RESPONDENT

RULING

16/8/2022 & 13/9/2022

SIMFUKWE, J.

The applicant Basilisa Thomas Sawere has filed an application for extension of time within which to file notice of appeal against judgment and decree of the High Court and leave to appeal out of time against the same decision in Land Case No. 7 of 2012. The application has been preferred under **section 11 (1) of the Appellate Jurisdiction Act, Cap 141 R.E 2002**. It is supported by the affidavit of Ms Elizabeth Maro Minde learned counsel for the applicant which was contested by counter affidavits of the respondents.

The brief facts as captured from the records is that, the applicant herein instituted Land Case No. 7/2012 before this court against the respondents claiming the following:



- 1. A declaration that the property at Plot No. 6 Block WW comprising of CT No. 056045/20 is a joint matrimonial property of the Plaintiff and 1st Defendant.*
- 2. Declaration that the disposition made of the suit property by the 1st Defendant to the 2nd Defendant as unlawful, null and void ab initio.*
- 3. Unconditional release and restoration of the property to the Plaintiff and the 1st Defendant.*
- 4. Payment of general damages.*
- 5. Costs be provided for*
- 6. Any other reliefs this Honourable Court deems fit and or just to grant.*

Judgment was delivered on 7/12/2015. The applicant being dissatisfied with the outcome issued a Notice of Appeal. Then, the applicant applied for extension to file an appeal to the Court of Appeal which was granted on 25/11/2016. Leave to appeal was granted on 3/10/2017. Unfortunately, the Deputy Registrar issued a Certificate of Delay with a wrong date of requesting for requisite documents. Consequently, the appeal of the applicant collapsed for being supported by a defective Certificate of Delay. Hence, the instant application.

Parties prayed to argue the application by way of written submissions. Ms Elizabeth Minde argued the application for the applicant. The 1st and the 3rd respondents were unrepresented while Ms Neema Mutayagulwa opposed the application for the 2nd respondent.

Ms Minde submitted inter alia that the applicant is desirous of pursuing her appeal as it involves landed property jointly acquired but which was fraudulently transferred to the 2nd respondent. The intended grounds of



appeal were annexed to the affidavit of the learned counsel as annexure A8. The learned counsel alleged that the intended appeal has overwhelming chances of success.

In support of the application, Ms Minde pointed out that in cases of this nature for the court to grant an application for extension of time, the following must be shown:

- a) Account of each day of delay must be shown by the applicant.
- b) That, the intended appeal raises fundamental points of law

On the issue of accounting for each day of delay; Ms Minde listed the chronological dates of events from delivery of judgment in Land Case No. 7/2012 on 07/12/2015. She stated that Notice of Appeal was issued on 07/12/2015. A letter requesting for requisite documents was written on 4/12/2015 and received on 07/12/2015. Extension of time to appeal was granted on 25/11/2016. Leave to appeal was granted on 03/10/2017. Reminder letter requesting for documents are dated 16/7/2017 and 04/10/2017 respectively. The impugned defective Certificate of Delay was issued on 25/7/2018. It was ordered to be defective on 04/10/2021 and the instant application was filed on 20/10/2021.

It averred by Ms Minde that the applicant was at all times diligent in following up and taking appropriate actions timely. She said that the delay as shown above for which leave is being sought is a technical delay. Thus, the applicant is exempted from accounting such time. The learned counsel cited the case of **Eliakimu Swai vs Thobias Karawa Shoo, Civil Application No. 2/2016**, Court of Appeal at Arusha (unreported); in which Hon. Mwambegele at page 12 of the judgment noted with approval



the judgment in **Fortunatus Masha versus William Shija and Another [1997] TLR 156** where it was held that:

"A distinction should be made between cases involving real or actual delays and those like the present one which only involve what can be called technical delays in the sense that the original appeal was lodged in time but the present situation arose only because the original appeal for one reason or another has been found to be incompetent and a fresh appeal has to be instituted. In the circumstances, the negligence if any really refers to the filing of an incompetent appeal not the delay in filing. The filing of an incompetent appeal having been dully penalised by striking it out, the same cannot be used yet again to determine the timeousness of applying for filing the fresh appeal. In fact, the present case, the Applicant acted immediately after the pronouncement of the ruling of this Court striking out the first appeal."

On the issue that, the intended appeal raises fundamental points of law; Ms Minde from the outset referred to the case of **Samson Kishoka Gabba Versus Charles KingongoGbbi [1990] TLR 133** where it was held that:

- i. *In determining whether or not to allow an application for leave to appeal out of time, the Court has to consider reason for the delay as well as the likelihood of the intended appeal.*
- ii. *N/A*



Ms Minde emphasized that the intended grounds of appeal say it all. That, refusal to recognize the applicant as a wife in the light of the glaring evidence was conveniently used to justify the illegal transfer. She added that, the noted ground and other grounds deserve analysis by the Court of Appeal.

Ms Minde finalised by praying this application to be granted and that costs be in the course.

In his reply, the 1st respondent supported the application on two reasons: That the account given regarding reasons for the delay and the fact that the Deputy Registrar issued a defective certificate of delay. Second, that it is true that the applicant has demonstrated diligence at all times.

Ms Neema Mutayagulwa for the 2nd respondent opposed the application by stating that the applicant has failed to account for 17 days of delay in filing his application. She stated that the 2nd respondent does not dispute the time and events that took place since delivery of judgment in Land Case No. 7/2012. That, the 2nd respondent is concerned with the time from 4th October, 2021 when Civil Appeal No. 276/2018 was struck out by the Court of Appeal of Tanzania to the date of filing the application at hand. It was stated further that there are no depositions of facts in the affidavit of Elizabeth Maro Minde as to what happened between the specified period of time. The applicant simply ignored the well-established principle that each day of delay must be accounted for.

It was submitted further that much as the power to extend time is discretionary the duty falls squarely upon the applicant to lay down materials upon which the court can exercise its discretionary powers. Ms Neema said that in the application at hand, the applicant has completely

failed to lay any material to enable this court to grant the application and give orders in favour of the applicant.

The learned counsel for the 2nd respondent prayed to adopt paragraph 10 of the counter affidavit of the 2nd respondent in support of the deposition that the applicant has failed to account for the above noted 17 days.

Concerning the cited case of **Eliakim Swai** (supra), Ms Neema contended that it was distinguished by the Court of Appeal decision in the case of **Airtel Tanzania Ltd and Misterlight Electrical Installation Co. Ltd and Arnord Mulasheni, Civil Application No. 37/01 of 2020**, Court of Appeal at Dar es Salaam in which the Court refused to grant an extension of time after the applicant failed to account for three (3) days of delay. The Court restated the position in **Bushiri Hassan vs Latifa Lukio Mashayo, Civil Application No. 03/2007**, that:

".....Delay of even a single day, has to be accounted for, otherwise there would be no point of having rules prescribing period within which certain steps have to be taken."

On the other hand, it was stated that in the case of **Eliakim Swai** (supra) the court did not inquire into what made the applicant delay for two (2) weeks since the previous application was struck out to the date of filing. The court just made a sweeping statement that the applicants acted within the ambits of requisite promptness to lodge the appeal. That, in the case of **Airtel Tanzania Limited** (supra), the Court went further to elaborate that the applicant who alleged that the bank process delayed the filing was supposed to have an affidavit from the bank office showing those facts; failure of which the court disregarded the argument by the

counsel for the applicant and found that the 3 days of delay were not accounted for.

Thus, it was the 2nd respondent's submission that in the circumstances that the applicant has not in any way explained what happened between 4th October 2021 and 20th October 2021 when this application was filed, leaves a lot to be desired. Consequently, this honourable court cannot use its discretionary power as a blanket to cover up and overlook the unexplained 17 (seventeen) days of delay as it will amount to injudiciously exercise of the discretionary powers as the Court of Appeal put in the case of **Airtel Tanzania Limited** (supra), that:

"Therefore, since this application has failed to account for each day of delay, the application cannot stand as there is no material upon which the court can exercise its discretion under rule 10 of the rules to grant the application."

The learned counsel for the 2nd respondent, prayed that the application be dismissed with costs.

In her reply the 3rd respondent referred to her counter affidavit in which she deposed that the applicant has not advanced good or sufficient cause to warrant granting extension of time. She prayed to adopt the contents of the said counter affidavit to form part of her submission. Corroborating the submission of the 2nd respondent, the 3rd respondent submitted that the applicant had completely failed to account for the days between 4th October 2021 to 20th October 2021 when the said application was filed.

It was stated for the 3rd respondent that, instead of accounting for the delay, the applicant has emerged with a new issue trying to seek sympathy of the Court at paragraph 13 of the affidavit of the applicant

that the applicant has at all times been diligent in ensuring that the appeal to the Court of Appeal of Tanzania is filed so as to enable the Court to reassess the emerging issues and points of law. It was humbly submitted that the Court is not moved by sympathy rather by laws and its principles thereof.

It was stated further that the requirement to account for each day of delay in taking an action cannot be over emphasized. To cement her argument, the 3rd respondent cited the case of **Finca (T) Limited and Another vs Boniface Mwalukisa, Civil Application No. 589/12 of 2019**, Court of Appeal of Tanzania (unreported) at page 7 where the Court quoted with approval the decision in the case of **Bushiri Hassan** (supra).

Lastly, the 3rd respondent drew the attention of this court that the applicant's submission at page 5 first paragraph contain arguments which were not deponed in her affidavit. She was of the opinion that to consider the said arguments in this application will amount to determining the merit of the appeal. The 3rd respondent prayed this court to be pleased to dismiss the applicant's application with costs.

I have considered submissions of both parties. According to the submissions of the respondents, they do not dispute causes of delay prior to 4th October, 2021. In other words, the respondents have conceded to the technical delay as submitted by the learned counsel for the applicant. The 2nd and 3rd respondent were of the opinion that the applicant had not accounted for the days of delay from 4th October 2021 to 20th October 2021 when this application was filed. The issue is *whether this application deserves to be granted*.



In the case of **NGAO GODWIN LOSERO v. JULIUS MWARAIJU, CAT, Civil Application No. 10 of 2015** (Unreported) it was held that: -

"As a matter of general principle that whether to grant or refuse an application like the one at hand is entirely in the discretion of the Court. But that discretion is judicial and so it must be exercised according to the rules of reason and justice."

In this case, as rightly submitted, the applicant has tirelessly shown diligence in pursuing her intended appeal which from the outset, she managed to file; thus, Civil Appeal No. 276 of 2018 which was struck out on 4th October 2021 for being supported by a defective Certificate of Delay. I find the time from 4th October 2021 to 20th October 2021 which is 16 days, reasonably to have been used to prepare the instant application although it was not stated explicitly by the applicant.

In the case of **Attorney General vs Consolidated Holdings Corporation and Another, Civil Application No. 26 of 2014** (unreported) the Court of Appeal stated inter alia that:

*"...in each case the court must be satisfied; by the reason(s) of the delay, the length of delay, **the degree of the prejudice to the respondent if the application is granted;** and the point of contention in the intended action."*Emphasis added

In the circumstances of this case, I am of settled opinion that the respondents won't be prejudiced if this application is granted. Rather, it is in the interest of justice to ensure that the dispute between the parties is determined on merit to its finality.



In the event, I hereby grant leave to file Notice of Appeal and leave to appeal as sought. The applicant is granted 21 days to file her Notice of Appeal. Time shall commence to run from the date of being supplied with a copy of this ruling and drawn order. No order as to costs.

It is so ordered.

Dated at Moshi this 13th day of September, 2022.




S.H. SIMFUKWE
JUDGE