

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBIA DISTRICT REGISTRY

AT BUKOBIA

MISC. LAND APPLICATION NO. 146 OF 2021

(Originating from Land Case No. 1 of 2021 at the High Court of Tanzania at Bukoba)

ZAINUL NAUSHAD FAZAL -----APPLICANT

(Administrator of the Estate of the late Nuashad Gulamabbas Fazal)

Versus

ZULFIKAR PYALL SHAMJI----- 1ST RESPONDENT

MURTAZA HUSSEINALI RAJABAL VISRAM----- 2ND RESPONDENT

RULING

20/09/2022 & 28/09/2022

Isaya, J.

There is before this court an application for extension of time to file notice of appeal and application for leave to appeal to the Court of Appeal of Tanzania out of time. The application is made Under Section 11(1) of the Appellate Jurisdiction Act [Cap 141 R.E 2019]. The application is well supported by the affidavit deposed by the applicant one Zainul Naushad Fazal being the administrator of the estate of the late Naushad Gulamabbas Fazal.

The affidavit of the Applicant throws a greenlight on the basis of this application in the following paragraphs: -

"8. That failure by the Applicant to lodge within time a letter applying for records of proceedings in the High Court is not actuated by any negligence or laciness but a misconception of the law and fact that



the said letter which determines the sixty days period within which to file an appeal to the Court of Appeal of Tanzania.

9. That, all the time from 28th day of April, 2021 to 26 November, 2021 is the period of technical delay where the applicant was in court pursuing his grievances, and the period between 26th day of November, 2021 to 3rd day of December, 2021 is the period spent for collection an order of the court, research, consultation and preparation of this application

10. That, the intended appeal is necessary as there are triable issues to be addressed given the fact that bequeath of tittle over the disputed land to the Applicant had never been legally objected, letters of appointment by the Applicant granted by the Bukoba Urban Primary Court had never been appealed against and the court appointed the Administrator general though the matter before and in disregard of the fact that the decease left near relatives;

11. That, grant of orders for leave to file notice and application for leave to appeal to the Court of Appeal out of time is necessary as per current judgment the interest of the applicant over the disputed land is at stake based on illegality referred in the fore above paragraph and on the fact that respondents are illegally occupying and squandering the suit premise in contempt of the judgment”.

The respondents resisted the application through their joint affidavit.

When the application was called on for hearing, Mr. Peter Matete, learned counsel represented the Applicant whereas Mr. Remidius Mbekomize and Derick Zephrine, advocate, represented the Respondent.



Mr. Matete started his submission by informing this court that they abandoned the second part of the application requesting for leave to appeal to the Court of Appeal out of time because it is not a requirement of law at this time. That in this application, they are asking this court to extend time within which to file notice of appeal to challenge the decision in Land Case No. 1 of 2011 which was delivered by this court on the 24th April, 2016. That they applied for extension of time to appeal through Miscellaneous Land Application No. 122 of 2016 which was granted on 2nd December, 2019. They lodged appeal in time as granted but their appeal was withdrawn on the 26th November, 2021 by the Court of Appeal. That the Applicant filed this present application on 06th December 2021.

Submitting on the reasons, he stated that there are legal issues which are going to be determined by the Court of Appeal if the leave is granted considering that bequeath of title over the suit land to the Applicant was not legally objected. The letter of appointment of the Applicant by Bukoba Urban Primary Court has not been appealed against while this court appointed administrator general though the matter before the court was not a probate cause. He submitted that all these are illegalities intended to be taken to the Court of Appeal for determination. To buttress his point, he cited the case of **Eliakim Swai and Another Vs. Thobias Karawa Shoo**, Civil Application No. 02/2016 High Court at Arusha which held that time will always be extended and where a point of law at issue is the question of illegality. He contended that in the matter intended to be appealed against, the illegality is on the face of record because the High Court failed to call the records of probate cause for Bukoba Urban Primary Court but revoked the letter of administration which appointed the Applicant as administrator of the estate.

In an instance which can be seen as deviation from submitting on the application, Mr. Matete submitted that this court has no jurisdiction to grant extension of time for the applicant to submit a letter requesting to be availed drawn order. He cited



the case of **Hirji Abdallah Kapikulila Vs. NCBA Bank Tanzania LDT**, Civil Application No. 489/16 of 2021, Court of Appeal at page 9-10.

He lastly prayed the affidavit of the applicant be adopted in his submission.

On the other hand, Mr. Remidius submitted that there is no good reasons to grant the application. That the Applicant was required to account for the delay from when Civil Appeal No. 466 of 2030 was withdrawn, that is from 26th November, 2021 to 6th December, 2021. He argued that, there is a delay of almost 10 days for complying with the law to file notice of appeal.

He specifically attacked para 9 of the affidavit that the reasons given such as time spent to collect copies of rulings and order, together with research are not enough without further explanation and evidence. He contended that there is no evidence of collecting copies and how long the preparation of records or research was made. He cited the case of **Shembilu Shefaya Vs. Omary Ally** [1992] TLR at page 245 in which the application was dismissed for lack of elaboration. He cited another case of **Inspector Sadick and Another Vs. Gerald Nkya** [1997] TLR 220 to support his point that failure to give sufficient reasons cannot allow the grant of the application.

Mr. Derick, on his part submitted that there is no order that the appeal was withdrawn for being incompetent in Civil Appeal No. 466 of 2020. He submitted that under **Rule, 102 (1) of the Court of Appeal Rules**, the matter withdrawn has no room to come in court again.

In rejoinder, Mr. Matete submitted that Rule 102 (1) of the Appellate Rules does not bar the Applicant, if he wishes, to go for appeal. He contended that the order itself speaks that there was conversation between the bar and the bench before the appeal was withdrawn. He too submitted that **Rule 90 of the Appellate Rules** does not apply in the High Court as cited in the **Hirji Case** (supra). He



clarified that in the present matter, they are applying for time to be extended to file notice of appeal.

Responding on paragraph 9 of the applicant's affidavit, he submitted that as evidence, there are; order of the Court of Appeal, chamber summons and affidavit in which the research and preparation was made. He further submitted that 04th to 5th December, 2021 should be excluded because they were Saturday and Sunday.

He lastly submitted that since the Respondents never responded on the point of illegality means that they have conceded.

Now, having received the submissions from both sides, I should at this juncture start by observing that though Mr. Matete introduced the issue of jurisdiction on an application for extension of time to submit a letter requesting to be availed with copies of proceedings and judgment, I think this should not be a matter of controversy in this present application. This is because the present application seeks to be granted extension of time to file notice of appeal only as submitted by him. Since he informed this court that there is a pending application for extension of time to submit a letter for copies of proceedings and judgment, I am afraid, this cannot be the right forum to determine whether the application should be lodged in the High Court or in the Court of Appeal. Indeed, it is likely to pre-empt in unwarranted way the decision in the said pending application in which such issue is relevant and can be dealt upon. I think I have satisfactorily explained why I should not embark to determine the issue.

In this matter, the court is called upon to determine whether there are sufficient reasons given to allow extension of time to file notice of appeal. In this regard, I have very carefully and dutifully studied the submissions from both sides. In the case of **Tanzania Revenue Authority Vs. Tanda Transport Co. LTD,**



Consolidated Civil Application No. 4 of 2009. The court stated the following factors necessary for grant of the application for extension of time;

"(a) The length of the delay;

(b) The reasons for the delay;

(c) Whether there is an arguable case such as whether there is a point of law of the decision sought to be challenged; and

(d) the degree of prejudice to the defendant if the application is granted."

In another case of **Tanga Cement Company Limited Vs. Jumanne D. Massanga and Amos A. Mwalwanda**, Civil Application No. 6 of 2001, the Court of Appeal stated;

"What amounts to sufficient cause has not been defined. From decided case a number of facts have to be taken into account including whether or not the application has been brought promptly, the absence of any valid explanation for delay, lack of diligence on the part of the applicant".

In the case at hand Mr. Remidius has attacked that the applicant has no good reasons which are supported by evidence as given in paragraph 9 of the affidavit. He had even submitted that the 10 days delays are not accounted for each day and lacks elaboration. Mr. Matete responded during rejoinder that the documents filed by the applicant which include order of the Court of Appeal, chamber summons and affidavit are evidence in that regard. Sincerely, the response given by Mr. Matete in relation to paragraph 9 of the applicant's affidavit still leaves a lot to be desired on the delay. There are no enough explanations as stated but Mr. Remidius. There is however, one factor to examine. Mr. Remidius said the delay was of 10 days. Mr.



Matete has stated that two days among the ten days were Saturday and Sunday. Therefore, deducting the two days, the remaining days will be 8 days. I am inclined to believe and hold that the length of delay is relatively short, not a long delay.

Mr. Matete did submit at length on the point of illegality as a fact which he heavily relied upon. He submitted that the Applicant was bequeathed a tittle over the Suitland. He too was appointed the administrator of the estate by Bukoba Urban Primary Court. The grant of letters of appointment was not appealed against but the court appointed the administrator general though the matter was not a probate cause. He further stated that the High Court never called the records of the Primary Court in its decision to revoke his letters of appointment. He argued that this is illegality on the face of the record. On the other hand, the respondents never challenged this ground on the illegality.

In the case of **VIP Engineering & Marketing Limited & 2 Others Vs. Citibank Tanzania Limited** Consolidated Reference No. 6,7 and 8 of 2006 (unreported) the court sated

"It is therefore, settled that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time Under Rule 8 regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay".

(See also the Case of **Veronica Fubile Vs. National Insurance Corporation & 2 Others**, Civil Application No. 168 of 2008 Court of Appeal of Tanzania Dar Es Salaam).

In the light of the above cited cases, the claim of illegality falls within the ambit of special circumstances which can stand alone as a fact to grant application for extension of time. Since the point of illegality has not been challenged in this matter, I find no reason to faulty it too.



What then can be said of this application? I find the application tenable in law and meritorious. The leave is hereby granted for the applicant to file the notice of appeal not later than 30 days from the date of this order. I make no order as to costs.



A handwritten signature in blue ink, appearing to read "G. N. Isaya".

G. N. Isaya

JUDGE

28/09/2022

Court:

Ruling delivered today this 28th September, 2022 in the presence of Mr. Matete, Advocate for Applicant, who is also holding brief for Mr. Mbekomize, Advocate for Respondents, Mr. Audax, Judge's Law Assistant and Grace Mutoka B/C.



A handwritten signature in blue ink, appearing to read "G. N. Isaya".

G. N. Isaya

JUDGE

28/09/2022