

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT ARUSHA

MISC. LAND APPLICATION NO. 41 OF 2022

(C/f the High Court of Tanzania at Arusha, Misc. Land Application No. 58 of 2021, and Land Appeal No. 22 of 2020, Originating from the District land and Housing Tribunal for Arusha, Application No. 117 of 2014)

SEVERINE A. MALLYA 1ST APPLICANT

JOVITA P. MSELE 2ND APPLICANT

Versus

CHARLES WILLIAM (Legal Representative of

the late William Kichao)RESPONDENT

R U L I N G

Date of last Order: 30th September, 2022

Date of Judgment: 5th October, 2022

MALATA, J.

The Applicants, **Severine A. Mallya** and **Jovita P. Msele** were aggrieved by the decision of this Court (Mzuna, J.), in Land Appeal No. 22 of 2020 that was delivered on 23rd July, 2021. They intended to appeal to the Court of Appeal, as a matter of law, they filed an application for leave to appeal to the Court of Appeal vide Misc. Land Application No. 58 of 2021. The Application was confronted by a preliminary objection challenging its competency. The preliminary objection was conceded by the Applicants' counsel. This Court,



(Kamuzora, J.) struck out the application for being incompetent on 31st March, 2022. The Applicants are still desirous to pursue their right, have preferred this application imploring the Court to extend time within which to file leave to appeal to the Court of Appeal.

The application is supported by affidavit deposed by Ms. Aziza Shakale, the Applicants' learned advocate. The Respondent contested the application in a counter affidavit deposed by Mr. Duncan Joel Oola, the Respondent's counsel. In the affidavit, the Applicants under paragraphs 6, 7 and 8 of stated that they had in time filed application for leave but the same was struck out due to human error and that the same was not intentional. They finally stated that they are still eager to appeal to the Court of Appeal but found themselves out of time prompting thus application. The Respondent in the counter affidavit blamed the Applicants stating that they committed professional error and not human error.

At the hearing of the application, both Ms. Shakale and Mr. Oola, learned advocates appeared for the Applicants and Respondent respectively. Submitting in support of the application, Ms. Shakale, urged the Court to allow the application stating that the error committed by the Applicants through their advocate was human error worth

consideration to grant the orders sought. She stressed that after the application for leave was struck out, the instant application was promptly filed. She accounted that the application was filed only eight days after the Misc. Land Application No. 58 of 2021 was struck out. To reinforce her argument, the learned counsel referred, the Court to the following decisions: **Dodo Tekway vs Republic**, Misc. Criminal Application No. 74 of 2020 (H.C Arusha) & **Bahati Musa Hamisi Mtopa vs Salum Rashid**, Civil Application on No. 112/07 of 2018-CAT (both unreported). In the former case this Court considered promptness in filing the case as ground for extending time, and in the latter case, the Court of Appeal considered human error as sufficient cause for the delay.

On his part, Mr. Oola parted ways with the Applicants' counsel insisting that what was committed by the Applicants is professional error as opposed to human error. Differentiating the two, Mr. Oola stated that wrong citation of applicable law is not a human error but a professional error which is not a justification for the omission warranting extension of time. He distinguished the cases cited by the Applicants' counsel stating that in **Dodo** (supra), this Court discussed existence of technical error, which is not the case at hand as the Applicants rely on human error. In

the latter case, the Court of Appeal dealt with human error which is distinct from the striking out of the application as per the case under consideration, which is purely professional error. Mr. Oola prayed for dismissal of the application with costs.

In her rejoinder submission, Ms. Shakale maintained what she submitted in the submission in chief, pressing for the application to be allowed

After thorough consideration of the affidavits for and against the application as well as the oral submissions of both counsel for the parties, the issue for consideration is whether the Applicants adduced sufficient reasons to warrant them the extension of time sought.

Extension of time for a party to do an act that ought to have been done within specific period, is entirely in the discretion of the Court. However, it has been cautioned that such discretion is judicial so it must be exercised according to the rules of reason and justice and not arbitrarily. The guiding principles in considering whether to extend time or not have been reaffirmed by the Court of Appeal in its numerous decisions. For example, in the case of **Ngao Godwin Losero vs Julius Mwarabu**, Civil Application No. 10 of 2015 (unreported) the Court of Appeal quoted

with authority the decision of the defunct Court of Appeal for Eastern Africa in the case of **Mbogo vs Shah** [1968] EA which held thus:

"All relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reason for the delay, whether there is an arguable case on the appeal and the degree of prejudice to the defendant if time is extended."

See also: **Lyamuya Construction Company Limited vs Board of Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010; **Benedict Mumello vs The Bank of Tanzania**, Civil Appeal No. 12 of 2002; **Blue line Enterprises Ltd vs East African Development Bank**, Misc. Civil Cause No. 135/95; **Alison Xerox Sila vs Tanzania Harbours Authority**, Misc. Civil Reference No. 14 of 1998 (all unreported); and **Kalunga and Company Advocates vs The National Bank of Commerce Ltd.** [2006] TLR 235, among others.

The question is whether the Applicants in this application have furnished sufficient reasons for the delay. It is undisputed fact that the Applicants filed in time Misc. Land Application No. 58 of 2021 applying for leave to appeal to the Court of Appeal, which was struck

out for being incompetent. It is also undisputed that as pleaded under paragraph 6 of the Applicants' affidavit that the said application was struck out on 31st March, 2022. The record shows that the instant application was filed on 8th April, 2022, which is eight days after the application was struck out.

In the first place, the Applicants were not idle, they filed their application on time only that the application was struck out on technical reason. Whether the application was struck out for human error or professional error as battled by both counsel, that seems not to be an issue since the Applicants did not stay idle. Technical delay has been considered as sufficient reason for extending time. There is a plethora of Court of Appeal decisions to that effect, including: **Bank M. (Tanzania) Limited vs Enock Mwakyusa**, Civil Application No. 520/18 of 2017; **Salvand K. A. Rwegasira vs China Henan International Group Co. Ltd**, Civil Reference No. 18 of 2006; **Zahara Kitindi & Another vs Juma Swalehe & 9 others**, Civil Application No. 4/05 of 2017; **Yara Tanzania Limited vs DB Shapriya and Co. Limited**, Civil Application No. 498/16 of 2016; **Samwel Kobelo Muhulo vs National Housing Corporation**, Civil Application No. 302/17 of 2017 (all unreported) and **Fortunatus**

Masha vs William Shija and Another [1997] TLR 154. In

Fortunatus Masha (supra), the Court held:

"A distinction had to be drawn between cases involving real or actual delays and those such as the present one which clearly only involved technical delays in the sense that the original appeal was lodged in time but had been found to be incompetent for one or another reason and a fresh appeal had to be instituted. In the present case the applicant had acted immediately after the pronouncement of the ruling of the Court striking out the first appeal. In these circumstances an extension of time ought to be granted."

Second, it is undisputed that the Applicants spent only eight days in preparing and filing the present Application. That manifests that the Applicants did not sleep over their rights. The delay is not inordinate, they showed diligence by filing the instant application promptly. That warrants the grant of the extension of time sought. The application is thus found meritorious.

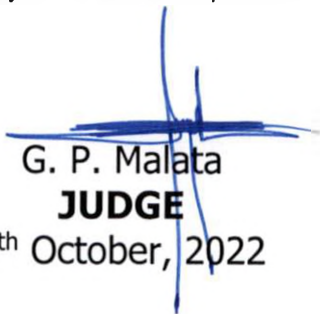
In the event and for the foregoing reasons, the application is allowed. The Applicants are granted fourteen (14) days to file their application for

leave to appeal to the Court of Appeal from the day of this ruling. Costs
be in the cause.

It is so ordered.

DATED at ARUSHA this 5th day of October, 2022




G. P. Malata
JUDGE
5th October, 2022