

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

MISC. CIVIL APPLICATION NO. 19 OF 2022

(Arising from Misc. Application No. 12 of 2022 Of the High Court of Tanzania, Bukoba District Registry) and Originating from District Land and Housing Tribunal for Muleba at Muleba in Land Application No. 56 of 2017).

BISORE VILLAGE COUNCIL..... APPLICANT

VERSUS

IGNATIUS SHUMBUSHO.....RESPONDENT

RULING

*14/09/2022 & 07/10/2022
E. L. NGIGWANA, J.*

This is an application for leave to appeal to the Court of Appeal of Tanzania preferred by the Applicant intending to challenge the decision of this court in Misc. Land Application No. 12/2022 which dismissed his application for extension of time to appeal in this court against the decision issued by the District Land and Housing Tribunal for Muleba (DLHT) at Muleba. The same is as usual is brought under chamber summons supported with an affidavit sworn by one Muyengi Muyengi, the learned State Attorney for the Applicant under the provisions of section 5 (1) (c) of the Appellate Jurisdiction Act [Cap 141 R: E 2019], and section 47 (2) and 48 (2) of the Land Disputes Courts Act, [Cap 216 R:E 2019] and rule 45 (a) of the Tanzania Court of Appeal Rules 2009. The same application is opposed by the respondent one Ignatius Shumbusho through a Counter Affidavit sworn by Lameck John Erasto, the learned counsel for the respondent.

The factual background of this case as can be deciphered from the available records, narrate that the applicant herein was a respondent in Land Application No. 56/2017 in the District Land and Housing Tribunal (DLHT) whereas the respondent herein was the applicant who won the case in the said trial tribunal. The applicant was not amused by the decision and therefore filed the appeal (Land Case Appeal No. 104 of 2020) to this court challenging the same. The said appeal was struck out before it was determined on merit before Kairo J, (as she then was) on ground of being filed out of time after the applicant's learned counsel, Muyengi Muyengi had outrightly conceded the Preliminary Objection raised by the respondent.

Thereafter, the applicant's counsel filed Review in this court which he was advised to withdraw (before Kilekamajenga, J.) as the judge could not have reviewed the merit of his fellow judge. The Applicant opted to file an application for extension of time with the intention of challenging the decision of the DLHT. It was placed before Mwenda, J who determined the matter and finally dismissed the application for want of merit. The said decision is the justification why the applicant is before this court seeking a leave to have the same challenged to the Court of Appeal.

Paragraph 10 of the applicant's affidavit contains five legal points of which the applicant views as of general importance for the consideration by the Court of Appeal which has also averred to be intended grounds of appeal to be placed to the Court of Appeal;

- 1. Whether or not the honorable Judge was correct to draw inference that the applicant was negligence on preferring an application and the applicant's reasons for delay was afterthought while an applicant*

advanced the reasons which made the applicant not filing the memorandum of appeal on time and the act of filing the subsequent suits.

- 2. Whether or not the presiding (sic) observed the rules of natural justice during hearing, for not affording applicant extension of time to file an appeal out of time as the act of striking out land case appeal No.104/2020 was occasioned by mistake of law done by parties to the case and presiding judge.*
- 3. Whether or not the presiding judge acted arbitrary on applicant's application as result (sic) dismissed the application though the applicant advanced adequate and substantial grounds.*
- 4. Whether or not the presiding judge acted inappropriate and consequently denying an applicant opportunity for extension of time of which stifle the applicant's intended appeal.*
- 5. Whether or not the presiding judge was justifiable for counting time of delay from 16/11/2021 to 14/01/2022 without considering other circumstances such as the of preparing documents as sufficient reasons for extending time for appeal.*

At the hearing of this application, Muyengi Muyengi, the learned State Attorney represented the applicant whereas Mr. Lameck Erasto represented the respondent. In his submission Mr. Muyengi prayed for the court to adopt the affidavit supporting the application to form part of his submission. He contended that the applicant is praying for leave to appeal to the Court of Appeal of Tanzania, and the reasons for this application have been stated in the affidavit. He made the repetition on the history of this case he had deposed in the affidavit. He added that when the

applicant filed an appeal against the decision of the DLHT in this court, the respondent raised a Preliminary Objection that Appeal No. 104 of 2020 was out of time. He further submitted that, he mistakenly agreed that the same was out of time while indeed, it was not. He added that the said appeal was therefore struck out.

It was Mr. Muyengi's further submission that, upon making research, the applicant filed application for review, in which Review No. 1 of 2021, which was presented before Kilekamajenga, J. who was not ready to review the order of his fellow Judge, and in that respect, the applicant opted to file application for extension of time vide Application No. 12 of 2022 however, the same ended being dismissed with costs before Mwenda, J on the reason that no sufficient cause advanced to warrant the extension of time sought.

He complained that the time ought to have been started running against the applicant from the date he was supplied with the copy of decree and judgment to wit; 13/10/2020, despite the fact that the judgment was read on 08/09/2020. And, from there, appeal was lodged within time. Mr. Muyengi submitted that it is on that note they pray for the case to be taken to the Court of Appeal for the Court to decide whether this court was proper to refuse extension of time to the applicant.

The applicant's learned counsel went on elaborating on whether the High Court considered the right to be heard, and other issues as stated in paragraph 10 of the affidavit. He referred me a case of **Nurbhi Rattansi versus Ministry of Water, Construction, Energy, Land and Environment** [2005] TLR 250, where the Court of Appeal held that where there are contentious issues, leave has to be granted. Mr. Muyengi added

that, as they have stated in paragraph 9 of the affidavit, the intended appeal has overwhelming chances of success. He cited the case of **Harban Haji Mosi and Another versus Omar Hilal Seif and another** (2001) TLR 409, where the court held that leave is grantable where the proposed appeal stands chances of success or where, but not necessarily, the proceedings as a whole reveal disturbing features as to require the guidance of the Court of Appeal. He concluded that if this application is granted the respondent will not be prejudiced. He therefore prayed this application to be allowed with costs.

In a reply submission Advocate Lameck Erasto for the respondent vehemently opposed the application on the grounds that the learned counsel was negligent to pursue his right of appeal. On connection to that, he prayed his counter affidavit to be adopted to form part of his submission. He substantiated that on 14/4/2021, the applicant's counsel before Kairo, J. conceded the Preliminary objection which was raised by the respondent whereas he promised that he was going to lodge an application for extension of time but he did not do so.

Mr. Lameck further submitted that, later on, the applicant through Mr. Muyengi emerged with Review Application, which on 11/11/2021 was withdrawn by the same counsel, Mr. Muyengi Muyengi and that shows that the Applicant was not ready to prosecute the same. Mr. Lameck added that, from the date in which the memorandum of review was withdrawn on 14/4/2021, the Applicant remained silent and came to lodge application for extension of time on 14/01/2022.

He added that in Misc. Land Application 12 of 2022, the Hon. Judge counted the time spent by the applicant from the date in which Application

for review was withdrawn on 14/04/2021 up to when application No. 12 of 2022 was filed. It was Mr. Lameck's submission that the High Court exercised its discretion judiciously as the principle is that; each day of delay must be accounted for. He contended that the Hon. Judge applied the principle from the decisions of the Court of Appeal. Mr. Lameck substantiated that the ruling of the trial judge did not go back to where the decision of the trial tribunal was delivered and when the documents were supplied to the applicant.

It was Mr. Lameck's conviction that, if the Court of Appeal has set in place the principle that each day of delay must be accounted for but the applicant did not do so, therefore he finds nothing to be taken to the Court of Appeal. The learned counsel referred paragraph 10 (1) of the affidavit supporting the applicant's application that touches on the issue of negligence, and it was therefore his submission that the applicant was negligent.

As far as the issue of right to be heard, Mr. Lameck is in agreement that the said right is so fundamental, but refuted the allegation that the applicant was denied that right as he was heard as the proceedings and judgment are self-explanatory. Similarly, he reacted bitterly on the issue that the Judge acted arbitrary, he alerted this court to find it to be baseless and unfounded. He also added that there is nothing arbitrary in the ruling. He contended that it was justifiable for the Judge to rule that each day of delay has to be accounted for.

Responding on the issue that there are contentious issues, he submitted that, in this case, there is the judgment of the District Land and Housing Tribunal therefore, he expected the State Attorney to state those

contentious issues in that judgment, but he did not do so, he thus found the case of **Nurbhi Rantansi** (supra) distinguishable.

Mr. Lameck argued that in this application the State Attorney did not mention or point out what are illegalities if any committed by the trial court. He responded that concerning the issue that the intended appeal has chances of success is no longer a ground of for granting a leave. He buttressed his position by the case of **Tanzania Posts & Communications Corporation versus M/SBS Henrita Supplies** (1997) TLR 141.

He concluded by urging this court to refer the case of **British Broadcasting Corporation versus Erick Sikujua Ng'maryo**, Civil Application No.138 of 2004, CAT at DSM (unreported) where the court set principles to grant leave or to refuse. He similarly invited me to be guided by the case of **Rutagatina C.L versus The Advocate Committee and another**, Civil Application No.98 of 2010, CAT at DSM (Unreported).

In rejoinder, the learned State Attorney agreed that the trial judge started counting the delayed time from when an application for review was withdrawn but he argued that he would have started counting from the original case. He also agreed that leave is grantable at the discretion of the court but such discretion should be exercised judiciously. It is his conviction that **Rutagatina's case** supports his position that there are triable issues in the intended appeal.

After a long dialogue put forward by both learned counsel, I will consider them together with the available record and be able to determine whether the application before me has merit.

To start with, this court has no mandate to go in the merit and deficiency of its own judgment to correct its own errors instead the duty of this court is to see if there are triable issues or disturbing features which need the court of appeal intervention. See the decision of this court in **Johnbosco Rwabutiti versus Sabit Kainamula** Misc. Land Application No. 63 of 2021 HCT at Bukoba (Unreported). It is also trite that Leave will not be granted if this court finds that granting the same will be to waste time for the justices of the Court of Appeal.

In **Rutagatina's case (supra)**, it was held that "*An application for leave is usually granted if there is good reason, normally on a point of law or on a point of public importance that calls for this court intervention*"

In **British Broadcasting Corporation** (Supra), as also relied by the respondent's counsel, the Court of Appeal said;

"Needless to say, leave to appeal is not automatic. It is within the discretion of the Court to grant or refuse leave...Leave to appeal will be granted where the grounds of appeal raise issues of general importance or novel point of law or where the grounds of appeal show prima facie or arguable appeal..... However, where grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted"

I will confine myself on the ruling of this court Misc. Land Application No.12 of 2022 which was a result of an application for extension of time before Mwenda, J, the same is what the applicant was aggrieved with after it was dismissed for want of merit and therefore wants to go to the Court of Appeal to challenge the same. All what seem to be the complaints of the applicant must stem from the same ruling. I will neither discuss the original

tribunal judgment nor any other judgment in this record since it is not intended to be challenged by the applicant to the Court of Appeal. To be more precise, the applicant wants to go to the court of appeal to challenge why the High Court did not extend him time to appeal. At this juncture I am not in a position either to correct even the errors of the trial Tribunal.

In this court when an application for extension of time was filed before Mwenda, J three phases of time delays which were supposed to be accounted for, were as follows: **one** when the applicant filed an application for extension of time, he had to account for the time from when he was supplied necessary documents to appeal on 13/10/2020 up to when he had filed his appeal which was struck out before Kairo, J. This court was satisfied that the same duration of time was accounted for. This court had no problem with that period. **Two**, Again, another period to be accounted was that time when his appeal was struck out for being time barred by Kairo, J up to the time of filing Review, of which this period was of technical delay hence this court found no problem as the applicant had accounted for it. **Three**, the last period which the applicant had not accounted for was the period he had withdrawn his memorandum for review that is to say; on 16/11/2021 up to when he came to file an application for extension of time on 14/01/2022. It was clear from the observation made by this court that the said period was not accounted for.

The findings of this court before Mwenda, J speak itself as quoted herein below:

"In the present application the counsel for the applicant submitted that the delay to lodge his appeal was caused by one; striking out of appeal and review before this court. The applicant being aggrieved by the impugned

decision filed Land Case Appeal No. 104 of 2020 which was marked withdrawn following the court's discovery that it was filed out of time, thereafter he filed application for review instead of seeking leave to appeal out of time. Two that he faced family problems hence he was given 14 days leave to travel to his hometown (Musoma), leave which ended on 14/01/2021. **However, neither, from his submissions nor his affidavit that the applicant advanced reasons for the delay in filing the present application from 16th November 2021 when he came back from leave to 14th January 2022 when this application was presented for filing.** In his submission he said that, upon his arrival from Musoma, he was busy preparing this application but this court is of the view that from 16/11/2021 up to 14/01/2022 is a considerable long time to spend just for preparing this application. After all, during his submissions the learned State Attorney said he handled this matter after it was stuck out at the first time before this court and he later on researched and started other moves of the instituting a fresh matter. This entails the learned State Attorney was already conversant with this matter and needed less time than that to prepare this application. Under S. 122 of Evidence Act [Cap 6 RE 2019] this court draws an inference that there was negligence on the part of the applicant and his reasons for delay are mere afterthought" (**Emphasize supplied**)

The principle of accounting each day of delay has been emphasized in the case of **Juma Shomari versus Kabwere Mambo**, Civil Application No. 330/17 of 2020 (CAT at Dar es Salaam), where it was stated that;

"It is settled law that in an application for extension of time to do a certain act, the applicant should account for each day of delay and failure to do so would result in the dismissal of the application."

This position has been pronounced in various decisions of the Court of Appeal, few of which are; **Hassan Bushiri versus Latifa Lukio Mashayo**, Civil Application No. 3 of 2007, **Ludger Bernard Nyoni versus National Housing Corporation**, Civil Application No. 372/01 of 2018 (Both unreported).

Guided by the above decisions, I am inclined to agree with the respondent's counsel that the Hon. Judge applied a principle of each day of delay to be accounted for. In actual sense, it is apparent that each day the applicant delayed concerning the last third phase when he was back from a leave up to the date of filing application for extension of time was not accounted for.

Indeed, I see no triable issues in the ruling of this court, neither is there any novel legal point of importance which attracts the intervention of the Court of Appeal of Tanzania. I say so because the herein above stated principle was propounded by the Court of Appeal as rightly submitted by the respondent's counsel. It is therefore not expected for the Court of Appeal to give further guidance on the issue which it had formally put a stance.

As regards the issue that right to be heard was not observed and that the trial judge was arbitrary, as they are placed in paragraph 10 of the applicant's affidavit, this court finds them to be vexatious and frivolous as they are not apparent on the face of record.

In the event, the intended appeal presents no triable issues or novel points of law which need intervention by the Court of Appeal of Tanzania, and if taken, will be to waste time of the Court of Appeal. The application is therefore devoid of merit and it is hereby dismissed with costs.

It is so ordered.



E.L. NGIGWANA

JUDGE

07/10/2022

Ruling delivered this 7th day of October, 2022 in the presence of Mr. Muyengi Muyengi, learned State Attorney for the Applicant, Village Chairman Mr. Dominick Damaseni, respondent and his advocate Ms. Erieth Barnabas, Hon. E. M. Kamaleki, Judge's Law Assistant, and Ms. Tumaini Hamidu, B/C.



E.L. NGIGWANA

JUDGE

07/10/2022