

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MUSOMA SUB REGISTRY**

**AT MUSOMA**

**MISC. LAND APPLICATION NO 16 A OF 2022**

**NORTH MARA GOLD MINE LIMITED .....APPLICANT**

***VERSUS***

**SINDA NYAMBOGE NTORA ..... RESPONDENT**

**RULING**

4<sup>th</sup> October & 1<sup>st</sup> November 2022

**F. H. Mahimbali, J.**

The applicant intends to appeal before the Court of Appeal of Tanzania against the judgment and decree of this Court in Land case No. 1 of 2019 dated 26<sup>th</sup> February 2020. As she is out of time, has preferred this application under section 11(1) of the Appellate Jurisdiction Act, Cap 141 R.E 2019 seeking for the indulgence of this Court granting her with the extension of time to file Notice of Appeal.

The background facts behind this application can be summarized this way. The applicant was dissatisfied with the decree and judgment of this Court dated 26<sup>th</sup> February 2020 in Land case No. 1 of 2019, She

dully lodged her Notice of Appeal and later filed her appeal to the Court of Appeal which was registered as Civil Appeal No. 457 of 2020. However, as it was not filed within 60 days after the decision of this Court, the applicant had to apply for Certificate of Delay. As per Applicant's affidavit, the Certificate of Delay was issued, but due to some challenges on the completeness of the requested copies, the applicant kept on asking for some other certificates of delay until when she got the right copies. This then made her being in possession of several copies of the Certificates of Delay from the first supplied to the last most relevant Certificate of Delay. Unfortunately, the last issued Certificate of Delay had no accompanying letter from the Deputy Registrar indicating rectification of the previous certificates of delay issued by the office of Deputy Registrar. On these legal challenges encountered by the Court of Appeal, her appeal before the Court of Appeal was then struck out for being incompetent on the basis that the applicant legally cannot rely on any of the certificates of delay to benefit from the exclusion of the days in terms of rule 90(1) of the Court of Appeal Rules, thus the basis of this current application starting the process afresh.

The application has been resisted by the respondent on a point of law and fact. On point of law, it has been argued that this application has been filed without being accompanied with a copy of decree appealed against. On point of fact, the respondent resisted the application as the reasons stated in the affidavit accompanying the said application are of no merit and it is the applicant her self to blame for inaction and that the current application is of no merit and it be dismissed with costs.

The hearing of the preliminary objection was done simultaneously with the hearing of the application itself. Thus, this ruling will determine both arguments in the event the preliminary objection is turned down.

During the hearing of the application, the applicant was represented by Mr. Waziri Mchome learned counsel whereas the respondent was represented by Mr. Michael Kaijage and Edwin Aron learned advocates.

In arguing the preliminary objection, Mr. Kaijage as well as Mr. Edwin Aron submitted that since there is a missing copy of decree of the judgment to be appealed against, renders this application incompetent as it is a very essential document. It was submitted that,

this court cannot act on an incompetent application. That in not being accompanied by a copy of decree to be appealed against, the application is on vacuum space. It is the decree of the case which states the rights and duties of the parties to the case. As it is missing, they prayed that the application is bad in law, thus incompetent and liable for being struck out with costs.

In rebutting the respondent's objection, Mr. Mchome submitted that what is relevant in an application for extension of time, the Court has to consider what is mandatory as per law: Is there any judgment of the court to be appealed against, are there sufficient grounds of the said application? Thus, so long as decree emanates from the judgment and that so far it is undisputed that there was such a judgment and an extracted decree from it, for purposes of this application, it suffices for its consideration by the Court.

However, in the event this court finds this information is insufficient, it be guided by the decision of the Court of Appeal in the case of **Sanyou Service Station vs B. P. Tanzania Ltd** (now PUMA ENERGY TANZANIA Ltd), Civil Application No 185/17 of 2019, CAT at Dar es Salaam (unreported) at page 10, the Court has powers to amend for any defect raised in the preliminary objection as per

overriding objective principle. Therefore, any incompetence can now be cured. He prayed that this preliminary objection be overruled with costs, otherwise this court is powerful enough for the interests of justice to order an amendment.

On the merit of the application, Mr. Mchome submitted that the applicant has filed this application which is supported by an affidavit of the applicant for extension of time to file notice of appeal to the CAT against the decision of this Court (Kahyoza, J) in land case no 1 of 2019 dated 20<sup>th</sup> February, 2020. Mr. Mchome submitted that, the application for those copies of proceedings were done timely. As per annexure "WM3" the certificate of delay, only excluded 60 days instead of 111 days. It was then replaced by the subsequent certificate dated 3<sup>rd</sup> August, 2020, also had errors as parties were not properly designated instead of plaintiff and defendant; they were designated as appellant and respondent (annexure WM4). An application to rectify those errors was made and granted (annexure WM6). Thereafter the third certificate of delay (annexure WM7) was issued excluding 180 days. An appeal was then lodged on 22<sup>nd</sup> October 2020 (29 days later). But during the hearing of appeal, the Court of Appeal *suo-mutto* (annexure WM8) – found the certificate of delay being defective as well on reason that

there was no letter from the office of Deputy Registrar rectifying the former certificates of delay issued for the same purpose. The appeal was then struck out. Thus, from the date of delivery of judgment to the date of filing of the current application, there are good grounds for the said delay and that each day has been dully accounted for as per CAT's decision (annexure WM8 and WM10) which is dated 9<sup>th</sup> May 2022.

He however added that, just after the delivery of the CAT's decision on 9<sup>th</sup> May 2022, it was erroneously dated. The rectified copy was then availed to her on 23<sup>rd</sup> May, 2022. This current application was filed online on 23<sup>rd</sup> May, 2022.

That the applicant is negligent as per respondent's counter affidavit, he disputed it. As per the case of **Fortunatus Masha vs William and Another** 1997 TLR 154 (CA), what is seen as delay is not actual delay but technical delay. See also the case of **Salvand K. A. Rwagasira vs China Henan International Group Co Ltd**, Civil Reference No 18 of 2008, CAT (at page 9 and 10). In the current application, there is no such negligence established. In the absence of that negligence, it is a fit case for this court's consideration.

Relying in the case of **Nasosro Abubakar Hamis and another vs Wakfu and Trust Commission Zanziabr and others**, Civil Appeal No 245 of 2020, CAT at Zanzibar at page "6", that parties should not be punished by the negligence caused by court, instead the court which did that mistake has a big share of blame. He argued that, in this case, if the applicants had any mistake, was therefore penalised by the striking out order. With this, he humbly prayed that this court to grant the application as prayed.

In countering the application, Mr. Edwin Aron argued that reading the applicant's affidavit and the submission made by her counsel, it is not true that this Court is to blame for the said issued defective certificates but the applicant herself as she procured the said certificates in a dubious transaction. Therefore, he wondered how the court is to blame instead of himself.

With the principle enunciated by the CAT in **Salvand K. A. Rwegasiya**, he is in agreement with it, but the circumstances of that case are distinguishable with the current case. Thus, is not applicable at all.



With the second ground “on accounting of each day of delay, as per paragraph 16 of the applicant’s affidavit, there is no proof that the rectified annexure is dated 23<sup>rd</sup> May 2022. What is clear on record is this, the CAT’s decision is dated 9<sup>th</sup> May 2022 and not 23<sup>rd</sup> May 2022 as purported. Thus, there are about 15 days uncounted for. That to him, is a subsequent negligence. Therefore, failure to account for each day of delay renders the application incompetent. He therefore prayed that this application be struck out with costs under order XXXIX, rule 37 of CPC.

Adding from what has been submitted by Mr. Edwin Aron, Mr. Kaijage submitted that as per paragraph 5 of the counter affidavit countering paragraph 6 of affidavit supporting the application, the manner the said certificates of delay were procured, was in a dubious transaction. They were all procured in violation of the rules and in bypass against the respondent. On this, he invited me to have a look at page 3 – 4 of the CAT’s decision in Civil Appeal No 457 of 2020.

He argued further that as per paragraph 12 of the affidavit in support of the application, the averment of the learned counsel are false. The law is, a false affidavit cannot be acted upon (see **Ignzio**



**Massina vs Willow Investment Sil**, Civil Application No 21 of 2001,  
CAT at Dar es Salaam at page 3

*"An affidavit with tilted truth is not affidavit and cannot be relied upon to support an application. False evidence cannot be acted upon to resolve any issue. The false hood of this case, goes to the root cause of the application".*

In this case, as the proceedings were dully certified since 27/03/2020, yet the learned counsel is by hooks and cooks trying to implicate the Deputy Registrar on inaction, this is not acceptable. With the cited case of **Nassoro Abubakar and Marne Services** (supra), he nodded with the principle laid, however in the circumstances of this case, it is the counsel himself who is to blame and not the court. Thus, the same principle now be used/applied against him.

In his analysis, the learned counsel not only has he failed to account for each day of delay, but has also failed to adduce good grounds for grant of the said extension of time.

In the case of **Shelina Jahangir vs Nyakatony NPF Co Ltd**, Civil Application no 47/08 of 2020, for such an application to stand, there must be adduced good cause for its grant.

As to the negligence, he concluded his argument by submitting that it is clear that as per facts in this case the applicant is to blame as held in the case of **Paradise Holiday Resort Ltd vs Theodore N. Lyimo**, Civil Application No 335/01 of 20118, CAT at Dar es Salaam. He prayed that this application be dismissed with costs.

In his rejoinder submission, Mr. Mchome submitted that, what was before the CAT was competency of the appeal and what is now before this Court is the competency of the application. These are two things different.

As the office issuing certificates of delay didn't cancel the former issued, then it is the court then to blame and not a party, reacted Mr. Mchome. Moreover, he added that there is nothing submitted as regards to the wrong designation of the parties as appellant and respondent instead of plaintiff and defendant.

The blame that the applicant/Mr. Mchome procured the certificates of delay without following proper procedures merely because he did not copy the respondent, he countered it as well. Otherwise, he submitted that this may equally apply to the respondent because there are a lot of correspondences made between the

respondent and Deputy Registrar as well without copying them to the applicant or making the applicant aware.

On accounting of each day of delay, paragraphs 16 and 17 of the affidavit are self/explanatory. They suffice to account of the said 15 days on the transactions stated in paras 16 and 17.

He added further that, the duty of computation of days for issuing proper certificates of delay has never been the applicant's duty but Registrar's necessary duty.

On the procedure of copying letters to the other party, he replied that it is not the requirement of law but adopted good practice.

He winded up by submitting that, it is undisputed that those three certificates were issued by the court. How were they issued it is not the applicant's fault but court. On this, he humbly prayed that this application be granted.

In a careful analysis of the submissions by the parties's counsel, I have now to respond the issues posed for this Court's consideration.

As far as the Preliminary Objection raised that the application is bad for not being accompanied by a copy of decree, I agree with Mr.

Mchome, that has never been a mandatory requirement of the law. Nevertheless, for a preliminary objection to qualify, it must be purely based on point of law. It is on point of law if there is a provision of law that is violated or an acceptable legal principle in usage. In the current matter, with due respect, none has been pointed out by the respondent for the preliminary objection to qualify the attention of the Court. In any case, I would have been inspired by the position of the Court of Appeal in **Sanyou Service Station vs B. P. Tanzania Ltd** (now PUMA ENERGY TANZANIA Ltd), Civil Application No 185/17 of 2019, CAT at Dar es Salaam (unreported), that the Court has powers to amend for any defect raised in preliminary objection as per overriding objective. That said, the preliminary objection raised is hereby overruled for being misplaced as there is no law pointed out that has been infringed by the applicant in filing the application for extension of time without accompanying the copy of decree to be appealed against, in the event the application is granted. So far in my understanding of the law, that has never been the legal requirement for making such an application competent. The said preliminary objection is thus overruled for being unqualified.

As regards to the merit of the application, I am aware that it is merely a Court's discretion to award or otherwise. However, the same must be exercised judiciously. What the Court has to consider whether there are good causes and or accounting for each day of delay.

All in all, guided by the minimal guidelines set by the Court of Appeal in the case of **Ngao V. Godwin Losero**, Civil Application No. 10 of 2015 at page 4, making reference to the case of **Lyamuya Construction Company Ltd Vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, (Civil Application No. 2/2010 – unreported), **TanESCO Vs. Mfungo Leonard Mkajura** (civil Appeal No. 94/2016) the Court of Appeal reiterated the following guidelines for the grant of extension of time.

- a) The applicant must account for all the period of delay.*
- b) The delay should not be inordinate.*
- c) The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he is intending to take.*
- d) If the court feels that there are other sufficient reasons such as existence of a point of law of sufficient importance; such as the illegality of the decisions ought to be challenged.*

In reaching this verdict, I have dispassionately considered and weighed the rival arguments from parties through their respective counsel. For sure I am mindful that to refuse or grant this application is the court's discretion. However, to do so there must accounted reasons for that. In **Mbogo Vs. Shah** (1968) EA the defunct Court of Appeal for Eastern Africa held:

*"All relevant factors must be taken into account in deciding how to exercise the discretion to extend time....."*

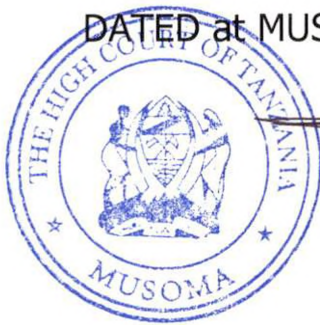
In the circumstances of this case, I am satisfied that there has been good cause. The good cause is, the last issued Certificate of Delay had no accompanying letter from the Deputy Registrar indicating rectification of the previous certificates of delay dully issued by the Deputy Registrar. That in any case, has never been the party's duty but central duty of Deputy Registrar/ Registrar as per law.

I am also satisfied that there has not been any delay or negligence just after the Court of Appeal's ruling dated 29<sup>th</sup> April 2022 and delivered to parties on 9<sup>th</sup> May 2022. Instead, the applicant's counsel has been quick and sharp to act promptly by filing this current application. In any case there has been a thorough explanation/accounting by the applicant from the date the said ruling

(9<sup>th</sup> May 2022) to the date this application was filed in Court (Para 17 of the affidavit in support of the application).

That said, the application is hereby granted as prayed. The applicant is hereby authorised to file his Notice of Appeal within 30 days as per law from today.

DATED at MUSOMA this 1<sup>st</sup> day of November, 2022.



F. H. Mahimbali

Judge

**Court:** Ruling delivered this 1<sup>st</sup> day of November, 2022 in the presence of Mr. Mchome Advocate for the applicant, Mr. Gidion Mugo, RMA and respondent is being absent.

F. H. Mahimbali

Judge