

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT MOSHI

MISC. LAND APPLICATION NO. 11 OF 2022

(C/F Civil Appeal No. 170 of 2019 Court of Appeal of Tanzania at Arusha, Land Appeal No. 7 of 2017 and Misc. Land Application No. 36 of 2021 of the High Court of Tanzania at Moshi. Originating from Land Application No. 54 of 2016 of Moshi District Land and Housing Tribunal)

ALIASGHER MUKTAR SAAJAN..... APPLICANT

VERSUS

**THE REGISTERED TRUSTEES OF KHOJA SHIA ITHNA ASHER
JAMMAT..... 1ST RESPONDENT**

PROPERTY MASTER LTD..... 2ND RESPONDENT

RULING

08/9/2022 & 10/11/2022

SIMFUKWE, J.

The applicant Aliasgher Muktar Saajan filed this application under **section 11(1) of the Appellate Jurisdiction Act, Cap 141 R.E 2019** seeking the following orders:

- a) That the Court be pleased to extend time to lodge notice of intention to appeal against the decision of the High Court of Tanzania at Moshi (Sumari J) in respect of Land Appeal No. 7 of 2017;*
- b) That, costs of (sic) and incidental to this application abide by the results of this application.*



The application was supported by the affidavit deposed by the applicant. In his affidavit the applicant advanced the reason for the delay being a defective certificate of delay which caused his appeal being struck out on 28th day of September 2021 by the Court of Appeal for being incompetent. That, on 4/10/2021 the applicant lodged Misc. Land Application No. 36/2021 seeking extension of time to lodge notice of appeal which was withdrawn on 24/2/2022 with leave to refile after conceding to the preliminary objection that the application was incompetent. Then on 2/3/2022 the instant application was filed.

The application was ordered to be argued by way of written submission upon the prayer by the learned counsels of both parties whereas the applicant was enjoying the service of Mr. Martin Kilasara learned counsel while the respondent was under the service of Mr. Gwakisa Sambo learned counsel.

In his submission in support of the application Mr. Kilasara commenced by stating the series of events which subsequently led to the instant application. I refrained from reproducing the said events due to the fact that the reason for the delay as already noted herein above was a defective certificate of delay issued by this court.

To cement the advanced reason for the delay, Mr. Kilasara subscribed to the case of **Fortunatus Masha v. William Shija and Another [1997] TLR 154** in which it was held that:

"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."

Relying on the above quoted case, it was submitted that the notice of appeal was filed timely but the subsequent appeal was found later on to be based on an invalid certificate of delay. The learned counsel termed it to be rather a technical delay.

In accounting each day of delay, Mr. Kilasara stated that time was inadvertently wasted since on 31/8/2017 when the applicant first applied to be supplied with necessary documents and then between 08/9/2017 and 12/4/2018 when the applicant was pursuing Misc. Land Application No. 75/2017 for leave to appeal. He said that time was also wasted between 12/4/2018 and 02/5/2019 when the applicant was making follow up of the impugned certificate of delay. That, between 02/5/2019 and 28/9/2021 the applicant was pursuing Civil Appeal No. 170/2019 in good faith. It was alleged further that the applicant filed the instant application without inordinate delay.

Cementing his arguments, Mr. Kilasara cited the case of **Michael Lessani Kweka v. John Eliafye [1997] TLR 152** in which His Lordship Kisanga J.A held that:

"The Court had power to grant an extension of time if sufficient cause had been shown for doing so; in the instant case the Applicant had shown reasonable diligence in correcting the error immediately upon discovery and this conduct warranted consideration for enlarging the time in his favour."



It was contended further that the error on the certificate of delay was occasioned by the Court by grossly miscalculating the days and misspelling the names of parties. The same was unnoticed by both parties until at the latest stage of hearing of Civil Appeal No. 170/2019.

Mr. Kilasara cited **Rule 90 (1) of Tanzania Court of Appeal Rules GN No. 344 of 2019** which provides that:

".... there shall, in computing the time within which the appeal is to be instituted be excluded such time as may be certified by the Registrar of the High Court as having been required for the preparation and delivery of that copy to the appellant."

Reference was also made to the case of **21st Century Food Packaging Ltd versus Tanzania Sugar Producers Association and Two Others, Civil Appeal No. 91 of 2003 [2005] TLR 8** where it was held that:

"It appears to us that the decision sets the principle that if a provision imposes a duty on an authority to cause something to be done, it is up to that authority to see to it that the obligation is performed as required and the blame is squarely on that authority and no one else. Thus, Rule 15 imposes a duty on the registrar or the Registrar of the High Court. If that duty is not carried out properly then it is the registrar or the Registrar of the High Court who is to blame and not, in our opinion, the appellant."

Basing on the above cited authorities it was submitted that the applicant is not entirely to blame for that inadvertent error on the certificate of delay that led to the striking out of the appeal. The learned counsel implored



the Court not to penalize him for that error inadvertently caused by the court.

In addition to the advanced cause of delay, Mr. Kilasara averred that as per the records and as stated in the applicant's affidavit and reply, there are serious triable issues with regard to the breach of the lease agreement and the rights accrued thereof, which are still contested. That, the intended grounds of appeal as will be argued in the intended application for leave to appeal have prima facie merits. It will thus be upon the Court of Appeal to determine their merits but only if leave sought is granted in the interests of justice and fair disposal of this dispute. The learned counsel implored this court to invoke its discretionary power judiciously and extend the time as prayed.

Mr. Sambo learned counsel for the respondent from the outset submitted that the applicant had failed to disclose any sufficient reason to warrant extension of time as sought as well as accounting for each day of delay. He prayed to adopt the counter affidavit filed to oppose the application to form part of their submission. It was elaborated that it was the duty of the applicant to show this court even in a nutshell what he intends to refer before the Court of Appeal for this court to decide whether the same is worth consideration by the Court of Appeal. That, failure to do so makes this application devoid of merits.

Mr. Sambo submitted further that it is a cardinal principle that litigation must come to an end in order to allow citizens to do other economic activities. That, the applicant is trying to use legal technicalities so that the respondent does not enjoy the fruits of the decree issued by this court. The learned counsel was of the view that defects in the documents which

culminated the striking of the appeal before the Court of Appeal was also culminated by negligence of the applicant and his counsel by their failure to re-check the documents if they were proper before filing them before the Court of Appeal. He made a conclusion that they were the one to be blamed and not the deputy registrar.

It was a contention of Mr. Sambo that the applicant had not accounted for each day of delay. He gave an example of 8 days from the date when Misc. Land Application No. 36/2021 was withdrawn to 2/3/2022 when the instant application was filed that the same were not accounted for. He cemented his point by citing the case of **Vietel Tanzania Limited vs. Asa General Supplies and Construction Company Limited, Civil Application No. 126/08 of 2021**, Court of Appeal of Tanzania at Mwanza (unreported); at page 7 the Court held that:

*"Next for my consideration is whether the applicant has accounted for each day of delay in relation to filing of the instant application. It is on record that the respondent was served with the notice of appeal on 20th November, 2020 but this application was filed on 27th January, 2021 over 66 days. That period has not been accounted for. It is settled that, any applicant seeking for extension of time under Rule 10 of the Rules is required to account for the delay of each day. Indeed, the Court has reiterated that position in numerous cases and one of them is **Bashiri Hassan v. Latifa Lukio Mashayo, Civil Application No. 3 of 2007** (unreported) in which the Court emphasized 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 issue of illegality, Mr. Sambo submitted that the applicant had not shown which areas on the face of the record which he is aggrieved and how it appears on records of the court. He said that it is a cardinal principle that when one claims illegality, he has the duty to show how the alleged illegality exists on the face of the records which in fact will not need the court to have microscopic eyes to see. Failure to do so, court of law cannot exercise its discretionary power to extend time. On this, he cited the case of **Kibo Hotel Kilimanjaro Limited vs The Treasury Registrar (Being the legal Successor of PSRC) and Impala Hotel Limited, Civil Application No. 502/17 of 2020**, Court of Appeal of Tanzania at Dar es Salaam (unreported) in which at page 15 it was held that:

*"It is trite that to constitute an illegality, the alleged point of law must be apparent on the face of record such as the question of jurisdiction. In **Lyamuya Construction Company Ltd (supra)**, when referring to the case of **Valambhia (supra)**, the Court said thus: "The Court there emphasized that such point of law must be of sufficient importance" and I would add that it must also be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by a long-drawn argument or process."*

The learned counsel alleged that in the case at hand there is no any legal point which has been demonstrated by the applicant, either by law or



facts, which are sufficient important for the consideration by the Court of Appeal of Tanzania.

Concerning the cases cited by the learned counsel of the applicant, Mr. Sambo stated that the said cases are distinguishable to the case at hand and cannot assist the applicant because the applicant had failed completely to show any sufficient cause to warrant extension of time. That, no triable issues have been shown as alleged which are of sufficient importance to call for attention of the Court of Appeal. He prayed this application to be dismissed with costs for being devoid of merits.

In his rejoinder Mr. Kilasara submitted inter alia that the respondent had misconstrued the essence of the applicant's affidavit and submission in support thereof. He said that it is worth to note that this is an application for extension of time to lodge notice of appeal and not an application for leave to appeal or at all application for extension of time to file revision where a party is expected to show prima facie merits of the intended appeal or revision as the respondents try to insinuate. Thus, the cited case of **Kibo Hotel Kilimanjaro Ltd** is distinguishable and inapplicable herein.

Mr. Kilasara referred to paragraph 6 and 7 of the applicant's affidavit and 4 and 5 of his affidavit in reply which he alleged that are self-explanatory as the applicant stated in a nutshell his grievances and reasons for challenging the first appellate court's decision. Also, the learned counsel cited **Rule 83 (1) and (2) of the Tanzania Court of Appeal Rules, 2019** which provides that:

"Any person who desires to appeal to the Court shall lodge a written notice within 30 days."



Reference was also made to paragraph 17 of the applicant's affidavit at which the applicant has stated that he is eager to pursue his intended appeal to the Court of Appeal. That, the same cannot be worthwhile if leave is not granted and the applicant does not intend to preclude or defeat the ends of justice as suggested by the respondent. That, the conduct of the applicant is well spoken in his affidavit, affidavit in reply and submission in chief.

It was reiterated that the registrar of the High Court has a duty in terms of **Rule 90 (1) of the Rules, 2019** (ibid) to exclude and certify the excluded days used in preparation of record of appeal to the appellant when computing the time within which the appeal is to be instituted. In addition to the case of **21st Century Food Packaging Ltd** (supra), Mr. Kilasara subscribed to the case of **M/s Flycatcher Safaris Ltd. Versus Hon. Minister for Lands and Human Settlements Development and Another, Civil Appeal No. 142 of 2014**, CAT at Arusha in which it was held that:

"We acknowledge the fact that it is the duty of the Registrar of the High Court to issue a proper certificate as required by law."

In that regard, Mr. Kilasara reiterated that the applicant is not to blame for that inadvertent error on the certificate of delay that led to the striking out of the appeal as the error was occasioned by the Court and overlooked by the applicant.

On the issue of accounting for each day of delay, from the outset Mr. Kilasara submitted that the assertion is frivolous and grossly misconceived. He reiterated the historical background of the matter as



deponed in the affidavit of the applicant and insisted that days of delay in the case at hand had been accounted for.

In addition to the case of **Fortunatus Masha** (supra), the learned counsel for the applicant cited the case of **Victor Rweyemamu Binamungu versus Geofrey Kabaka and Another, Civil Appeal No. 602/08 of 2017** CAT at Mwanza (unreported) in which at page 6 and 7 it was held that:

"The period thereafter to 4th December 2017 when the application for revision was struck out constitutes technical delay which should not be blamed on the applicant. The applicant lodged this application on 11th December 2017, barely seven days later. In my conclusion the applicant has made a case for extension of time because he has accounted for the actual delay and took prompt steps in pursuing the matter. The rest of the period was merely technical delay. Consequently, I grant the application."

Regarding the issue of point of law on face of the record, Mr. Kilasara averred that there are triable issues which will be argued in the intended application for leave to appeal and then appeal. That, the applicant will not have that opportunity if he is precluded to lodge notice of appeal out of time.

In conclusion the learned counsel urged this court to invoke its discretionary powers and be pleased to extend the time within which to lodge the intended notice of appeal and thereby initialize the appeal process.

Having considered submissions of both parties as well as their respective affidavits, there is no dispute that the applicant had filed his former notice

of appeal in time but necessary documents were not supplied to him in time. Also, there is no dispute that Civil Appeal No. 170 of 2019 filed by the applicant before the Court of Appeal was struck out on the reason of a defective certificate of delay. What is contested is that the applicant and his counsel were negligent by not checking the impugned certificate of delay that it was defective. The learned counsel for the respondent also faulted the applicant for not accounting for 8 days of delay from 24/2/2022 when Misc. Land Application was withdrawn to 02/3/2022 when the instant application was filed. In addition, Mr. Sambo for the respondent alleged that there was no legal point which had been demonstrated by the applicant. All these three issues raised by the learned counsel for the respondent will be answered in the issue **whether the applicant has shown good cause for this court to grant extension of time to file notice as sought?**

The enabling provision cited by the applicant in his chamber summons, thus **section 11(1) of Cap 141 R.E 2019** empowers the High Court to grant extension of time to file notice of intention to appeal from judgment of the High Court. The reason for the delay advanced by the applicant is that his appeal was struck out by the Court of Appeal on the reason of a defective certificate of delay which rendered his appeal incompetent. The learned counsel for the respondent has not disputed the fact that the applicant acted promptly after being supplied with copy of the Order of the Court of Appeal. What is disputed by Mr. Sambo is 8 days prior to filing of the instant application. It has been underscored by the apex Court of this country in a number of decisions that where the delay is ordinate the application for extension of time should be granted. In the case of **Mpoki Lutengano Mwakabuta and Frida Vumilia Kessy vs. Jane**

Jonathan (as legal representative of the late Simon Mperasoka),
Civil Application No.566/01 of 2018 Hon. Kitusi, J.A, held that:

"It is a period of four days we are talking about and that period, in my view, does not appear inordinate.

I am aware of the requirement for an applicant to account for each day of delay.

The record speaks well of the conduct of the learned counsel for the Applicant that whenever he hit a snag in his pursuit of this matter, he immediately took steps.


I feel inclined to conclude that the period of the delay being only four days, the justice of the case is in favour of granting this application.

For the reason that the applicant's counsel was diligent and that the period of the delay is not at all inordinate, I grant the application."

Emphasis added

In the case at hand, I fully subscribe to the case of **Mpoki Lutengano Mwakabuta** (supra). The delay of 8 days is ordinate and I presume that the days were used in preparation of the application.

On the issue of raising a legal point, I concur with the learned counsel for the applicant that the same is supposed to be raised in an application for leave to appeal to the Court of Appeal. It is on that basis that I did not discuss the grievances raised in the affidavit of the applicant against the decision of this Court, which might be the subject of an application for leave to appeal.



I therefore find the applicant to have shown good cause for the delay. The anomaly being caused by the Court, I grant the application with no order as to costs. The applicant should file his notice of appeal within 21 days from the day of being supplied with copy of this ruling.

It is so ordered.

Dated at Moshi this 10th day of November, 2022.




S. H. Simfukwe

Judge

10/11/2022