

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT MOSHI

MISC.LAND APPLICATION NO. 13 OF 2021

*(C/F Land Appeal No. 8 of 2019 in the High Court of Tanzania Moshi
District Registry)*

PETER KIMARO..... APPLICANT

VERSUS

SAMWEL MALEO..... RESPONDENT

RULING


10/2/2022 & 11/3/2022

SIMFUKWE J,

The applicant Peter Kimaro filed this application under **section 14(1) and (2) of the Law of Limitation Act, Cap 89 R.E 2019** and any other enabling provision of the Law, seeking for extension of time to file an application for Review against the Judgment delivered on 26th June 2020 by this court on Land Appeal No.8 of 2019 by **Hon. S. B. Mkapa J.**

The application is supported by an affidavit sworn by the applicant himself, which was contested by a counter affidavit sworn by the respondent.

During the hearing of this application the applicant was presented by Mr. Julius Semali learned advocate, while the Respondent was represented by


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Mr. Elia Kiwia, also learned advocate. The matter proceeded by way of written submissions.

In support of the application, the learned counsel for the Applicant prayed to adopt the affidavit sworn by the applicant in support of this application to form part of his submission.

Mr. Julius Semali submitted among other things that the applicant successfully sued the respondent in the Ward Tribunal and in the District Land and Housing Tribunal (DLHT) respectively and he was declared the rightful owner of the disputed land. On appeal, the decision of the DLHT was quashed and set aside on technicalities regarding the visit to the suit land through the judgment which was delivered on 26/6/2020. He continued to state that, the decision did not state whether parties have a right to institute a fresh suit or otherwise what to be done to bring the dispute to an end. Despite the fact that the applicant's claim was on the suit land which he resides as his permanent home with his family, still the respondent forcefully entered the same and constructed a permanent house soon after the decision of this court on appeal and left the applicant herein unsettled.

Since the applicant was not satisfied, he opted to file an application for leave to appeal to the Court of Appeal on 27/7/2020 the decision which was delivered on 12/2/2021. The court did not grant leave on the reason that the applicant has other remedies including filing an application for Review in the circumstances of the case.

As the applicant intends to file an application for review and considering that he is out of time as per **Part III Item 3 of the Law of Limitation**

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Act (supra), hence the need to file this application for extension of time was necessary.

Furthermore, the applicant's advocate submitted that the aim of establishment of courts is to put the parties' disputes to an end and avoid chaos in the society. That, unfortunately in the present situation, the dispute between the parties, regardless of the long process they have gone through, the dispute between them is yet to be determined as the lawful owner has not been declared by the court. Thus, the application for review is necessary to pave a way to substantiate parties' rights.

It was also stated that the applicant was late to file the application for review because he was occupied by other legal actions which is the application for leave to appeal to the Court of Appeal, whose decision recommended the filing of application for review. Mr. Semali contended that this court had once held that if the delay was caused by the applicant being pre-occupied by other court proceedings. He invited the court to visit the persuasive decision in the case of **Zaidi Baraka and 2others vs Exim Bank (T) Limited, Misc. Commercial Cause No. 300 of 2015** (unreported) which held that;

"...it is obvious that the requisite time... expired while pursuing their appeal. This explain they were active pursuing other court proceedings. The circumstances of this case show the applicant were pre-occupied with court proceedings. ...The fact that, the requisite time... expired while pursuing their appeal, that alone in my view is reasonable and sufficient cause for extending their time..."



In that respect, the learned advocate argued that the time for filing the intended application for review expired while the applicant was applying for leave to appeal to the Court of Appeal unsuccessfully. He said that the above decision could assist since similar reason for delay is evidenced and consideration for the interests of justice is witnessed.

Moreover, it was submitted that, extension of time is emphasized by the Court of Appeal as being vested to the total discretion of the court which in the present situation means this Court. He cited the case of **Lyamuya Construction Company Ltd vs Board of Registered Trustee of Young Women's Christian Association of Tanzania, Civil Application No.2 of 2010** in which it was stated that:

"As a matter of general principle, it is the discretion of the Court to grant extension of time. But that, discretion is judicial, and so it must be exercised according to the rules of reason and justice and not according to private opinion or arbitrarily."

Since extension of time is a total discretion of this court, that is exercised judicially according to the rules of justice, it was Mr. Semali's considered view that since the rights of the parties on the disputed land has not been determined yet to date, then it is for the interest of justice that this application for extension of time be granted to re - pave a way to justice for the parties and ensure harmony between them.

In conclusion, Mr. Semali prayed for the court to consider all circumstances of justice and grant this application for extension of time for the applicant to file an application for review as prayed in the chamber summons.



On the other hand, Mr. Kiwia for the respondent disputed the submissions of the applicant's advocate and adopted the respondent's counter affidavit to form part of his submission.

In contesting the application, Mr. Kiwia submitted under two limbs:

- a. Whether the applicant abides to the principle provided by the law in granting extension of time which requires the Applicant to have sufficient reasons for the delay and accounting on each day of delay.
- b. Whether the applicant meets the criteria provided in another principle of law in granting extension of time which requires the applicant to have chances of success if the prayers will be granted.

In respect of the first limb, Mr Kiwia submitted that the applicant's prayer is for enlargement of time to file review out of thirty days prescribed by the law from the time of delivery of impugned decision. He also noted that the applicant's reason for delay is the time which was spent before this court in pursuing leave to appeal to the Court of Appeal, whereby he cited the case of **Baraka & 20thers and the case of Lyamuya Construction Company Ltd (supra)**.

He contended further that, the reasons for delaying to file an application is categorised into two: actual delay and technical delay. In that respect, Mr. Kiwia agreed with the applicant that where there is technical delay as cited in the case of **Zaidi Baraka and 2 others (supra)** that reason it suffices to grant extension of time. However, he argued that the law is very clear that the said right does not exonerate the applicant from accounting unexplainable every day of delay out of those days which the applicant was in the court corridor. Concerning the cited case of **Lyamuya Construction Company Ltd (supra)** Mr. Kiwia argued that it is trite law



that the delay should not be inordinate and that the applicant must account for all days of delay. He also referred to the case of **Hawa Issa Nchirya vs Ramadhan Iddi Nchirya and 2 Others, Civil Appeal No. 27/03 of 2021(unreported)** at page 10 last paragraph where it was stated that:

*"I have no doubt that Mr. Wasonga is aware that it is settled law that in considering application such as this one, the court is guided by established principle to wit, reasons or cause and length for delay, whether the applicant has accounted **for each day of delay** etc."*

The respondent's counsel argued that it is apparent on the face of the court records and not disputed that the intended decision sought to be reviewed (Land Appeal No. 8 of 2019) was delivered on 26/6/2020 and the applicant was pursuing leave to appeal to the Court of Appeal until when it was refused on 12/2/2021. What is in dispute is that the applicant neither in his affidavit nor in the submission accounted for unexplainable of about 115 days for every day of delay from 12/2/2021, the date of delivery of the ruling refusing leave to appeal to the Court of Appeal until when this application for review was filed before this court on 7/6/2021 as per receiving stamp on the chamber summons.

In respect of the principles cited above, Mr. Kiwia was of the view that the applicant offended a principle used in granting extension of time for failure to account for each day of delay from the time when leave was refused to the time when he filed this application. Thus, this application cannot stand and it should be crumbled.

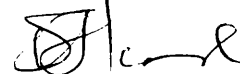


Submitting under the second limb basing on chances of success if the extension of time will be granted; the learned advocate referred the court to the case of **Zuberi Nassoro MH'D vs Mkurugenzi Mkuu Shirika la Bandari Zanzibar, CAT Zanzibar, Civil Application No. 93/15 of 2018** (unreported) at page 9 which held that:

"In considering application under the rule, the court may take into consideration such factors as the length of delay, the reasons for the delay, the chances of success of the intended appeal..."

Basing on this authority the respondent's counsel was of the view that, even if the application will be granted, the applicant will have no chances of success for the reason that the application before the court is incompetent and the same is abuse of court process. It is a trite law that once the applicant has opted to appeal against the impugned decision, the right for review seizes automatically. He made reference to **section 78 of the CPC** and argued that the applicant does not qualify to any of the above prerequisite requirements listed since Appeal No. 8 of 2019 is appealable contrary to section 78 (a) which allow a review for a matter which is appealable but the applicant waived the right and preferred a review. He added that if the applicant had preferred appealing against the impugned decision by filing notice of appeal and craving leave to appeal and at the same time the notice of appeal was not withdrawn then automatically, he waived his right of review.

Thus, while a party preferred an appeal and at the same time the notice of appeal is still in the court registry then he has no opportunity of making any application to the court with intention to dispose the same case before



withdrawing the notice. He argued that doing so is like kicking the ball with two legs. He cemented this contention by referring to the case of **Attorney General vs Tanzania Port Authority and another CAT Civil APPLICATION No.467/47 of 2016 (unreported)** which held that:

"We remark that to allow a party to prosecute an application for revision where one of the parties has initiated the process towards lodging the appeal is to cause confusion in the administration of justice.

...The court stated in clear terms that the notice of appeal does not automatically cease to have effect upon part's (sic) failure to take essential steps to institute the appeal, it emphasized that a notice of appeal ceases to have effect upon a court order it to have been withdrawn in terms of rule 91(a) of the rules."

In respect of this authority, the respondent's counsel argued that the fact that the applicant's notice of appealing to the Court of Appeal against Land Appeal No. 08 of 2019 is still intact in the court registry and there is no evidence that it has been withdrawn, thus this application is incompetent and the remedy is to ignore it by dismissing the same.

In addition, Mr. Kiwia submitted that it has been ruled in several decided cases that review is allowed in very rear cases and it cannot be used as backstairs by unsuccessful parties in rearguing their appeals. He supported this contention by referring the case of **Umalo Mussa vs The Republic, CAT, Criminal Appeal No.19/04 of 2020** (unreported), at page 9 last paragraph, the Court held that:



"As we have been observing, time after time, the review jurisdiction of the court is not a backstairs way for unsuccessful litigant to revive and reargue their cases, and for those reasons, a mere discontent with the judgment of the court cannot form a basis of a review."

Mr. Kiwia thus commented that it was not proper for the applicant to file review after refusal of the leave to appeal to the Court of Appeal since the only remedy available is for him to seek the same prayer from the Court of Appeal by filing second bite application as provided for under **Rule 45 (b) of Court of Appeal (Amendments) Rules, GN 362 OF 2017**, which provides that:

"45. In civil matters-

(a)

(b) Where an appeal lies with the leave of the court, application for leave shall be in the manner prescribed in rule 49 and 50 and within fourteen days of the decision against which it is desired to appeal has been made to the High Court and refused, within fourteen days of refusal..."

Mr. Kiwia also was of the opinion that on the reason that the applicant always loses his case without being condemned costs that's why he always unreasonably comes back to court. He thus prayed for the application to be dismissed on the basis of the applicant's failure to account for each day of delay and filed incompetent application while he is represented. Therefore, in order to avoid reoccurrence of unpleasant behaviour of the applicant of wasting the precious time and money of the court, they prayed for the application to be dismissed with costs.

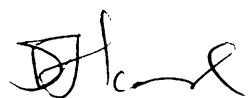


In rejoinder, the learned counsel for the applicant submitted to the effect that, it is not in dispute that the applicant was pre occupied by prior court proceedings since the respondent acknowledged the same which warrant technical delay which is a reason to warrant extension of time. He reiterated that reason for the delay. He also added that he had a challenge of COVID 19 of which the applicant was found positive and hospitalised which barred him from movement hence stayed in Dar es Salaam.

He also contended that this application is serious one distinct from the cases cited by the respondent's counsel since the same is for extension of time to file review and not revision as contended. Granting the same will finalise the dispute between the parties which is yet to be decided by the Court.

Mr. Semali also challenged the contention that there are no chances of success by arguing to the contrary. As to the cited case of **Zuberi Nassoro (supra)**, it was argued that the same is not applicable or related to the present case since it is centered on appeal and not application for review.

It was argued further that, even if the same reason would have been relevant and applicable, yet the applicant is in greater chance of succeeding in the intended application for review since the application aims to pray the court to just order retrial after it has quashed the proceedings on technicalities and remained silent leaving the dispute between the parties undetermined since nobody is declared the lawful owner of the suitland. Thus, the intended application seeks to cure this defect or the overlooked point in the judgment.

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Regarding the argument that there is a pending appeal, Mr. Semali argued that the same is misconception since the application for leave to appeal was determined then no pending appeal and no active notice of appeal as submitted by the respondent since notice of appeal which was filed was followed by the application for leave which was denied on reasons. He referred to **rule 91 (a) of the Court of Appeal Rules of 2009** which states that:

"If a party who has lodged a notice of appeal fails to institute an appeal within the appropriate time, he shall be deemed to have withdrawn his notice of appeal...."

In respect of this rule and **rule 90(1)** it was argued that the notice of appeal is no longer valid before the court.

Responding to the cited case of **Attorney General vs Tanzania Port Authority (supra)** it was argued that the notice of appeal according to **rule 91(a)** of the rules may be ordered withdrawn by the court *suo motto*. Also, this case is different since it dealt with application for revision which could be barred by an appeal while the intended application is for review. Thus, it is not proper to consider that there is pending appeal while the notice is deemed withdrawn.

Replying to the submission that the applicant always loses, Mr. Semali stated that this contention is misleading since the records are clear that he won in the Ward Tribunal and District Land and Housing Tribunal. Only that on technicalities this court quashed the decision and still the respondent was not declared the owner.

The learned counsel for the applicant emphasized the fact that extension of time is the discretion of the court which has to be exercised according



to the rules of justice. Thus, he reiterated that since the parties' rights are yet to be determined, then for the interest of justice this application should be granted.

Lastly, Mr. Semali called upon this court to consider all principles of natural justice and grant this application for extension of time for the applicant to file application for review as prayed in the chamber summons.

I have examined the submissions of both parties together with their respective affidavits. The issue for determination is ***whether the applicant has established sufficient reasons for extension of time to be granted.***

As rightly submitted by the learned advocates, granting the application of this nature is on the discretion of the court. Such discretion has to be exercised judiciously. Therefore, for the Applicant to succeed in this application, he ought to account for each day of delay and upon showing good cause for the delay. In the case of **Shelina Jahangir and 4 others vs Nyakutonya N.P.F. Company Limited, Civil Application No.47/08 of 2020** it was stated that;

*"As a matter of general principle, it is the discretion of the Court to grant an extension of time. However, that discretion is judicial, and so **it must be exercised according to the rules of reason and justice.** Various factors are taken into account when determining what constitutes good cause. Among the factors were stated in *Lyamuya Construction Company Ltd vs. Board of Registered Trustee of Young Women Christian Association of Tanzania, Civil Application No. 2 of 2010 (unreported)*. These are; to account for all*



period of delay which should not be inordinate; the applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take..."
[Emphasis added].

After going through the applicant's affidavit, the reasons for the delay are hard to find since in the said affidavit the applicant listed the chronological events of cases he had filed. In his submission through his advocate, the reason for delay to file an application for review out of time as provided in the Law of Limitation Act was that, the applicant was occupied by other legal actions. In rejoinder he introduced a new reason that he faced a Covid 19 challenge which barred him from travelling.

With due respect, the trend which the applicant's advocate preferred to take is not correct. Starting with the fact that the affidavit did not disclose the reasons for delay; it is trite law that for the applicant to rely on certain facts in the application like this, then he must establish the same in the affidavit. The reasons for the delay as established by the applicant's counsel in his submission is just a mere statement from the bar since it is not reflected in the applicant's affidavit. In the case of **Hassan Kapera Mtumba Vs. Salim Suleiman Hamdu, Civil Application No. 505/12 of 2017 (CAT-unreported)** it was stated that;

*"Mr. Chanjarika submitted further that, it was the respondent who will suffer the most, as since 2nd September, 2013 it is the applicant who is collecting rents and benefiting from the disputed property. With respect, we find the submissions by Mr. Chanjarika on this point **to be a mere counsel's statement made from the Bar. Mr. Chanjarika ought***



to have submitted those facts in the affidavit in reply. Unfortunately, that was not done. See our previous decisions in **Fweda Mwanajoma & Another v. Republic**, Criminal Appeal No. 174 of 2004 and **Farm Equipment Company Limited v. Festo Mkuta Mbuza**, Civil Application No.111 of 2014 (unreported), where the Court declined to consider a statement made by the counsel from the Bar. Similarly, in the application at hand, this submission by Mr. Chanjarika cannot be considered by this Court.” [Emphasis added].

In the light of the above authority, basing on the fact that the applicant did not disclose the reasons for the delay to file application for review in time but discloses the same in his submissions, then the same are mere statements coming from the bar and not evidence which I am not inclined to rely on.

Even if we assume that the reasons were established in the affidavits still the applicant did not account for each day of delay and these are my reasons. **First**, from 26/6/2020 when the impugned decision was delivered to 7/5/2021 when the applicant brought this application it is about ten months which the applicant failed to account for. Again from 12/2/2021 when the application for leave was dismissed to 7/5/2021 when the applicant brought this instant application it is about more than 80 days which the applicant failed to account for.

In those circumstances, I agree with Mr. Kiwia for the respondent that the applicant has failed to present sufficient reasons for this court to exercise its discretion to grant the extension of time sought. In view of the



aforesaid, I find the entire application devoid of merit and it is hereby dismissed with costs.

It is so ordered.

Dated and delivered at Moshi this 11th day of March 2022.



S. H. SIMFUKWE

JUDGE

11/3/2022

