

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA

MISC. APPLICATION NO. 17 OF 2023

(Originating from HC. Civil Appeal No. 57 of 2021)

DAMAS MATIKU NYANG'ANYI.....APPLICANT

VERSUS

1. AKIBA COMMERCIAL BANK
2. MASHOKA AUCTION MART
3. GERALD KISUNGA MASINDE**RESPONDENTS**

RULING

3rd & 5th May, 2023

DYANSOBERA, J.:

This is an application for extension of time in which to apply for leave to appeal to the Court of Appeal against the decision of this court in Land Appeal No. 57 of 2021 delivered on the 16th December, 2022. The application has been filed by way of a Chamber summons and is supported by two affidavits of Damas Matiku Nyang'anyi (the applicant) and Stephen Charles Kaswahili, the applicant's counsel.

The brief facts of the case are that the 3rd respondent purchased the appellant's house at the public auction conducted by the 2nd respondent. The 1st respondent had instructed the 2nd respondent to sell the appellant's

house after the latter neglected to service the loan. The 3rd respondent then filed a suit before the District Land and Housing Tribunal at Mwanza in Land Application No.80D of 2019 against the 1st and 2nd respondents as well as the appellant claiming to be declared as the lawful purchaser of the suit premises. He also claimed for an order against the 1st and 2nd respondents handing over of the premises to him or refund of Tshs. 6, 000, 000/= and an order for vacant possession against the appellant. The Hon. Tribunal Chairman, on 18th January, 2019, found for the 3rd respondent by declaring him the lawful owner of the suit premises and ordering the applicant to give vacant possession.

The suit proceeded ex parte against the applicant after he defaulted appearance despite being served through substituted service by way of publication in Uhuru Newspaper. The appellant's efforts to have the ex parte judgment against him set aside proved futile. His appeal to this court (Hon. Kahyoza, J.) in Civil Appeal No. 57 of 2021 was dismissed with costs on 16th December, 2022 for being incompetent. The applicant did not seek leave to appeal to the Court of Appeal within the prescribed time hence this application.

According to the affidavits and the submission of learned Counsel for the applicant, three grounds have been raised.

One, failure to be notified on the date of the delivery of the judgment, two, the sickness the applicant succumbed to on 12.1.2023 and three the irregularities.

Expounding on these grounds, Mr. Stephen Kaswahili contended that the Civil Appeal was heard on 28th June, 2022 and scheduled for delivery of judgment on 25th October, 2022 but was adjourned to 31st October, 2022. That judgment was not delivered on the set date; instead, it was adjourned to be delivered on notice. No notice was, however, issued to either the applicant or his learned Counsel. It is averred under paragraph 7 of the applicant's affidavit that on 13th January, 2023 that, Counsel for the applicant, upon making a follow up, was told by the court clerk one Jackline Samwel that the judgment was already delivered on 16th December, 2022.

With respect to sickness, it is contended on part of the applicant that on 13.01.2021 it was the last official day for the applicant to bring her application counting from 16.2.2022 when the judgment was delivered. Counsel argued that on 12th day of January, 2023, the applicant fell sick and was admitted at Salaaman Health Centre up to 17th January, 2023 when he was discharged but then was given a three days' bed rest. It is not until on 21st January, 2023 when he resumed his normal duties and notified and instructed his Advocate to pursue further steps. However, the 21st and 22nd

February, 2023 were week end days hence making them fail to prepare and file the application. It was not until on 23rd day of January, 2023 when they prepared the application and managed to file it on line on 24.01.2023.

It is the applicant's contention that the delay to file the application for leave was not caused by the negligence of either himself or his counsel but was due to the applicant's sickness and not their being informed about the date of judgment.

Resisting the application, Mr. Galati Mwantembe, learned Advocate for the respondent, at first, adopted the counter affidavit of Gwakisa Gervas. He submitted as follows. With regard to the grounds for delay, Counsel for the respondents, submitted these grounds are insufficient to warrant the court grant the extension of time. He explained that according to the sick sheet attached to the affidavit, it is shown the applicant was admitted from 12.01.2023 and discharged on 17.01.2023 under rule 44 (2) of the Court of Appeal Rules, the application for leave to go to the Court of Appeal have to be filed within 30 days. Counting from 16.12.2022, Counsel for the respondent argued, thirty days were expiring on 15.01.2023 which means that the applicant had enough time to apply within time. He was of the view that it is the law that the applicant has to account for each day of delay. Counsel refuted the applicant's argument that they were not aware of the

date of the delivery of judgment and maintained that the judgment was delivered in their presence.

According to the impugned judgment, Mr. Galati argued, it is the judgment of their own appeal in which case they had their primary duty to follow up their appeal as the respondents did and managed to know the date of judgment. It would amount to bad precedents if parties now blames on court officials, the court clerks in particular Blames to court should not be condoned as grounds of extension of time. Mr. Galati insisted on the last ground that is the illegality at page 10 of the affidavit of Damas Matiku Nyang'anyi, it was counsel's that, the factors stated from (1) to (iv) of para 10 of the affidavit do not quality as grounds for extension of time as not every illegality quality as a ground.

Submitting on the alleged illegalities, learned Counsel for the respondent argued that the Court of Appeal has given directions on which illegality can constitute a sufficient cause. He cited the case of **Lyamuya Construction Co. Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania CAT – Arusha** Civil Application No. 2 of 2010 at page 9 of the typed judgment. According to him the factors enumerated under para 10 amount to grounds of appeal when the leave is granted. They do not constitute sufficient grounds for

extension of time, Counsel for the respondents insisted. He prayed this application to be dismissed with costs.

In another dimension, Counsel for the respondents implored that even if the application is granted, then each part to bear its own costs as the applicant has not demonstrated diligence in pursuing the application

On his part, the 3rd respondent, resisting the application, argued that the court clerk was very cooperative. He related what the court clerk informed him as to how he could receive the judgment on the date of delivery.

In his short rejoinder, Counsel for the applicant reiterated almost what he had submitted in chief insisting on the grounds for the delay.

In **Osward Masatu Mwizarubi vs Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010 (unreported) the Court of Appeal observed:-

"What constitutes good cause cannot be laid down by any hard and fast rules. The term 'good cause' is a relative one and is dependent upon the party seeking extension of time to provide the relevant material in order to move the Court to exercise its discretion."

In the application in question, the issue is whether the circumstances leading to the delay as stated by the applicant constitute sufficient cause.

On the failure to be notified on the date of delivery of judgment, I need not do more than quoting what this court stated at the time of delivering the ruling

'Court: *Ruling delivered in the presence of Mr. Gervas Gwakisa virtually although he muted. I was unable to communicate with him. The respondent was absent. B/C Jackline did not connect to the virtual court'*

Sgd
J. R. Kahyoza
JUDGE
16/12/2022

It is obvious that at the time of delivering the ruling, the respondent, the present applicant, was not present. There is no evidence showing that he was notified. It is trite that a party must be notified of delivery date of judgment.

On the issue of sickness, there is no dispute that falling sick is a *force majeure* to be relied on as a ground of delay in taking a requisite action. However, this depends on some factors. For instance, the applicant must prove that the sickness had any bearing on the applicant's failure to take a legal action and that the sickness has been proved.

In the instant application, the applicant has proved both the existence of sickness and its bearing on his failure to take a legal action.

With respect to the alleged illegalities, I must state that this is a mere application for extension of time and not a substantive application for leave. Whether or not those alleged illegalities amount to grounds of appeal will be sufficiently canvassed in the substantive application for leave to appeal.

For the stated reasons, I find this application meritorious. The same is granted. Time is extended and the applicant should file his application for leave to appeal to the Court of Appeal within thirty (30) days from the time of delivery of this ruling.

Each part to bear its own costs.



W.P. Dyansobera
Judge
5.5.2023

This ruling is delivered this 5th day of May, 2023 in the presence of Mr. Stephen Kaswahili, learned Counsel for the applicant and Mr. Gwakisa Gervas, learned Advocate for the respondents. The 3rd respondent is also present.



W.P. Dyansobera
Judge