

IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

MISC. LAND APPLICATION NO. 60 OF 2022

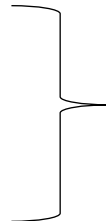
(C/F Civil Appeal No. 170 of 2019 Court of Appeal of Tanzania at Arusha; Land Appeal No. 7 of 2017 High Court of Tanzania at Moshi and; Original Application No. 54 of 2016 Moshi District Land and Housing Tribunal))

ALLASGHER MUKTAR SAAJAN..... APPLICANT

VERSUS

**THE REGISTRER TRUSTEES OF
KHOJA SHIA ITHINA AHER JAMMAT**

PROPERTY MASTER LTD.



RESPONDENTS

RULING

Date of Last Order: 15.08.2023

Date of Judgment: 11.09.2023

MONGELLA, J.

The applicant herein has preferred this application under **Section 11(1) of the Appellate Jurisdiction Act** seeking extension of time to apply for leave to appeal to the Court of Appeal against the decision of the High Court of Tanzania at Moshi in Land Appeal No. 7 of 2017 and to be granted costs of this application.

According to the facts deposed in the applicant's affidavit, he successfully filed Application No. 54 of 2016 against the respondents in the District Land and Housing Tribunal for Moshi at Moshi. The

respondents then successfully appealed to this court vide Land Appeal No. 7 of 2017. He then lodged Notice to Appeal to appeal to the Court of Appeal and duly filed an application for leave to appeal to the Court of Appeal.

On 20.05.2019 the applicant lodged Civil Appeal No. 170 of 2019 before the Court of Appeal which was stuck out for being time-barred. He then filed Misc. Land Application No. 11 of 2022 for extension of time to lodge notice of appeal which was granted. He now seeks for extension of time to lodge leave to appeal to the Court of Appeal.

One Faysal Kamal, principal officer of the 1st respondent, challenged the application vide his counter affidavit. The 2nd respondent was duly served but did not appear to challenge this application, hence the same has been determined *ex parte* against her.

The application was argued by written submissions as requested by the parties and ordered by the court. The applicant was represented by Mr. Martin Kilasara while the 1st respondent was represented by Mr. G K. Sambo, both learned advocates.

Mr. Kilasara commenced his submissions by adopting the applicant's affidavit. He cited **Section 11(1) of the Appellate Jurisdiction Act** [Cap 141 R.E. 2019] and **Rule 10 of Tanzania Court of Appeal Rules** GN. 344 of 2019 to support his application. He briefly explained that upon being aggrieved by the decision of this court, on 31.08.2017, the applicant applied for copies of judgment and decree in appeal. On 04.09.2017 he lodged his notice of appeal and on 08.09.2017 he applied for leave to appeal to the Court of Appeal vide Misc. Land Application No. 75 of

2017 which was granted on 12.08.2018. He subsequently filed his appeal on 20.05.2019 after being granted certificate of delay. However, the Court of Appeal found that the certificate was defective as parties were wrongly referred to and the court had miscalculated the time whereby it excluded the period from 31.08.2017 to 26.03.2019 instead of 04.09.2017 to 28.02.20219. The Court of Appeal thus struck out the appeal.

He averred that upon the Court of Appeal striking out Civil Appeal No. 170 of 2019, the leave of appeal granted automatically ceased to exist. That, the applicant applied for extension of time to lodge the notice of intention to appeal to the Court of appeal vide Misc. Land Application No. 11 of 2022 and has now filed this application as instructed under **Section 47 (2) of the Land Disputes Court Act**, Cap 216 RE 2019 and **Rule 45 of the Court of Appeal Rules**.

Mr. Kilasara explained that the striking out of Civil Appeal No. 170 of 2019 was a technical delay since the application for leave to appeal had been filed timely, but the appeal was found incompetent as the certificate of delay was found invalid. He supported his argument on the delay being technical with the case of **FORTUNATUS MASHA vs. WILLIAM SHIJA AND ANOTHER [1997] TLR 154**.

He averred that time was inadvertently wasted from 31.08.2017 when the applicant was first supplied with necessary copies then filed his notice for intention to appeal on 04.09.2017, pursued Misc. Land Application No. 75 of 2017 for leave to appeal, followed up on certificate of delay and pursued Civil Appeal No. 170 of 2019 which he did in good faith.

That, more time was wasted in obtaining the copies of the Court of Appeal order issued in the Misc. Land Application No. 170 of 2019. Then Misc. Land Application No. 36 of 2021 was filed for extension of time to lodge notice of intention of appeal which was withdrawn with leave to refile. That, the applicant then lodged Misc. Land Application No. 11 of 2022 whereby he was granted extension of time to lodge his notice of intention to appeal and has now filed this application seeking for extension of time to lodge an application for leave to appeal.

Mr. Kilasara contended that the delay was thus not inordinate or caused by lack of due diligence because since Civil Appeal No. 170/2019 was dismissed, he acted diligently and promptly to file the present application and the same warrants consideration in enlargement of time for him to file leave to appeal. He cited the case of **MICHAEL LESSANI KWEKA vs. JOHN ELIAFYE** [1997] TLR 152 to support his prayer for enlargement of time.

Mr. Kilasara further contended that the certificate of delay was erroneous but inadvertently drafted by the Deputy Registrar and the excluded days were miscalculated. The parties as well wrongly recorded the same thereby leading to the appeal being struck out. That, the said error was clearly occasioned by the court and it was not seen by either party to the case. He maintained that **under Rule 90 (1) of the Court of Appeal Rules** the Deputy Registrar is required to exclude time required for preparation and delivery of the copies to the appellant. That the applicant was not to blame for the failure of the Deputy Registrar to perform his duty. He supported this stance with the case of **21ST CENTURY FOOD PACKAGING LTD. vs. TANZANIA SUGAR PRODUCERS ASSOCIATION AND TWO OTHERS**, Civil Appeal No. 91 of 2003.

Mr. Kilasara finalized his submission by submitting that there are triable issues with regard to breach of the said lease agreement and rights accrued thereof, which are still contested and the same can only be entertained in an appeal before the Court of Appeal. That, all the intended grounds of appeal as will be argued in the intended application for leave to appeal have prima facie merits to be determined by the Court of Appeal. He prayed that this court invokes its discretionary powers judiciously to extend the time as prayed.

In reply, Mr. Sambo first prayed to adopt the counter affidavit of Faysal Kamal as part of his submissions. He averred that that Mr. Kilasara failed to account for each day of delay and establish sufficient reasons to warrant extension of time as sought in the chamber summons.

On the failure to account for each day of delay, Mr. Sambo argued that the civil appeal was struck out because the applicant and his counsel were not diligent enough to read the said certificate of delay and ended up using a defective certificate of delay. That, they were negligent for both, failing to read their certificate and not seeking to rectify the same while they had time to do so, hence the case of **21ST CENTURY FOOD PACKAGING LTD. vs. TANZANIA SUGAR PRODUCERS ASSOCIATION AND TWO OTHERS** (supra) is distinguishable to the case at hand.

He added that the appeal was struck out on 28.09.2022 but this application was filed on 22.11.2022 and thus the applicant did not account for the delay from 28.09.2021 to 22.11.2022. That, even counting from the day he was given time to file the notice of appeal which was 10.11.2022, he filed his notice on 11/11/2022 and this application was filed on 21.11.2022 making 10 days unaccounted for. He cited the case

of **IBRAHIM TWAHIL KUSUNDWA AND ANOTHER vs. EPIMAKI S. MKOI AND ANOTHER** (Civil Application No, 437 of 2022) [2022] TZCA 625 TANZLII, maintaining that every day has to be accounted for otherwise there would not be a point of having rules prescribing periods within which certain steps have to be taken. He had the stance that the failure to account for each day is sufficient reason for this application to be dismissed.

Mr. Sambo further argued that the delay was not technical as suggested by the applicant and the applicant was sloppy and there is no reasonable cause to warrant the extension of time as no reasonable explanation for the delay has been provided. In that consideration he distinguished the case of **MICHAEL LESSAN KWEKA vs. JOHN ELIAFYE** (supra) and that of **FORTUNATUS SHIJA AND ANOTHER** (supra). He had the argument that the cited cases are inapplicable in the present case as the circumstances are completely different. He urged the court not to be persuaded by the same.

Mr. Sambo finalized by arguing that the applicant's affidavit did not disclose any triable issues to warrant the attention of the Court of Appeal, hence there is no arguable appeal before the Court of Appeal. He prayed for the application to be dismissed with costs for want of merit.

Rejoining, Mr. Kilasara submitted that the assertion by Mr. Sambo that the applicant has not accounted for the days of delay is frivolous, unfounded and grossly misconceived. That the learned counsel has misconstrued the essence of the applicant's affidavit. That, the applicant tried to demonstrate reasons for delay being that the judgment was delivered on 31.08.2017 and the applicant applied to be

supplied with necessary copies. That, he filed the defunct application for leave on 08.09.2017 and leave was granted on 12.04.2018, but he obtained necessary documents on 02.05.2022 and lodged the record and memorandum of appeal which was struck out on 28.09.2021.

He added that after being struck out, the applicant followed up on the necessary orders which he obtained on 01.10.2021 and finally filed Misc. Land Application No. 36 of 2021 to seek for extension of time to lodge notice of appeal and to apply for leave to appeal which was withdrawn on 24.02.2022. That, thereafter, the application at hand was filed after leave to lodge notice of appeal was granted in Misc. Land Application No. 11 of 2022, whose proceedings and order were availed to the applicant on 21.11.2022. He thus maintained that this application has been filed without inordinate delay and that the case of **IBRAHIM TWAHIL KUSUNDWA** (supra) was indeed distinguishable.

He further maintained that the first application for leave to appeal was filed within time but became invalid because the appeal was struck out for being incompetent due to being preferred under an invalid certificate of delay. That, the applicant's delay was rather a technical delay, hence undistinguishable from the case of **FORTUNATUS MASHA** (supra) and should therefore be distinguished from actual delays. He supported his stance with the case of **VICTOR RWEYEMAMU BINAMUNGU vs. GEOFFREY KABAKA AND ANOTHER** (Civil Application No. 602 of 2017) [2020] TZCA 290 TANZLII and that of **African Banking Corporation (T) Ltd vs George Williamson Ltd** (Civil Application No. 349 of 2018) [2019] TZCA 184 TANZLII, in which the case of **LYAMUYA CONSTRUCTION CO. LTD vs. BOARD OF REGISTERED OF YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF**

TANZANIA (Civil Application 2 of 2010) [2011] TZCA 4 TANZLII, was also cited.

Mr. Kilasara further elaborated that leave to file notice of appeal out of time was granted and the same has been filed since 11.11.2022 and served to the respondent. That, without the leave to appeal the applicant cannot access the Court of Appeal and in that respect the applicant seeks extension of time to apply for leave. He added that it is within that application for leave that the question on whether the issues are triable before the Court of Appeal will be discussed. Still insisting that the applicant has been diligent in pursuing his right to appeal to the Court of Appeal, he implored this court to extend the time sought to accord the applicant the opportunity to abide with the procedural rules of obtaining the requisite leave to appeal.

Upon considering the arguments by the learned counsels for both parties, it appears that the applicant has knocked many doors since the delivery of the judgment by this court in Land Appeal No. 07 of 2017 on 31.08.2017. He first applied for necessary copies on 31.08.2017; lodged a notice of appeal on 04.09.2017; and then applied for leave to appeal on 08.09.2017 vide Misc. Land Application No. 75 of 2017 which was granted on 12.08.2018. After preparing records for appeal and being supplied with certificate of delay, the applicant successfully accessed the Court of Appeal on 02.05.2019 vide Civil Appeal No. 170 of 2019 only for the same to be struck out for being incompetent due to an invalid certificate of delay issued to him. This has been well reflected in the order of the Court of Appeal issued on 28.09.2021.

The applicant has therefore proved that the initial application was struck out due to an error occasioned by the Deputy Registrar. I agree that this was the case and is well reflected in the order by the Court of Appeal

Since the appeal was struck out for being incompetent the delay thereof was technical. The question as to accounting for the delayed days cannot be advanced in connection to the dates prior to the filing of the defunct appeal. The Court of Appeal addressed a similar issue in **BANK M T. LTD vs. ENOCK MWAKYUSA** (Civil Application 520 of 2017) [2018] TZCA 291 TANZLII in which, among others, it cited the case of **FORTUNATUS MASHA vs. WILLIAM SHIJA AND ANOTHER** (supra) whereby it stated:

*"... a distinction should be made between cases involving real or actual delays and those, like the present one, which only involves what can be called technical delays in the sense that the original appeal was lodged in time but the present situation arose only because the original appeal for one reason or another has been found to be incompetent and a fresh appeal has to be instituted. In the circumstances, the negligence, if any, really refers to the filing of an incompetent appeal and not the delay in filing it. **The filing of an incompetent appeal having been duly penalized by striking it out, the same cannot be used yet again to determine the timeousness of applying for filing the fresh appeal.** In fact, in the present case, the applicant acted immediately after the pronouncement of the ruling of this Court striking out the first appeal."*

The Court further stated:

"The applicant Bank, having been duly penalized by having Civil Appeal No. 109 of 2012 struck out

*by the Court and the High Court (Labour Division) dismissing Miscellaneous Application No. 133 of 2017, **the same cannot be used yet again to determine the timeousness of applying for filing the fresh Notice of Appeal in a bid to file a fresh appeal.** On the authority of the decisions of the Court cited, that was an excusable technical delay on the part of the applicant which constitutes good cause..."*

A similar approach was also taken in **VICTOR RWEYEMAMU BINAMUNGU vs. GEOFFREY KABAKA & ANOTHER** (Supra).

As to whether the applicant has shown diligence in pursuit of his rights. Upon the appeal being struck out, the leave of appeal ceased to exist, and time had lapsed, he sought to be served the order of the court of appeal which he received on 01.10.2021. On 04.10.2021, he filed Misc. Land Application No. 36/2021 seeking enlargement of time to lodge notice and leave to appeal which was struck out for being an omnibus application. He then successfully applied for enlargement of time to lodge notice of intention to appeal to the Court of Appeal vide Misc. Application No. 11/2022.

The respondent has averred that the applicant failed to account for each day of delay between 28.09.2021 to 22.11.2022 being the date when the Court of appeal order was issued and the date the application at hand was filed. I have observed the applicant's affidavit in which he disclosed that the relevant order was served to him on 01.10.2021 and he then filed Misc. Land Application No. 36 of 2021 on 04.10.2021 which was withdrawn on 24.02.2022, then filed Misc. Land Application No. 11 of 2022 on 02.03.2022 which was allowed on 10.11.2022.

From the supporting affidavit and submission in chief by Mr. Kilasara, there is nowhere stated the time the notice of appeal was lodged after being granted extension of time to file the same on 10.11.2022. It is only stated that the notice of appeal was filed and a copy served to the respondents. The record shows that the application at hand was filed on 21.11.2022 and it is in that respect the counsel for the 1st respondent contended that there are 10 days that remain unaccounted for. I, in fact, agree with the 1st respondent's counsel that the 10 days from the extension of time to file notice of appeal to the date of filing the application at hand constitute further delay which ought to have been accounted for as required under the law.

In **LYAMUYA CONSTRUCTION CO. LTD vs. BOARD OF REGISTERED OF YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF TANZANIA** (supra) the Court of Appeal set a guideline to be observed in granting extension of time. The Court expounded:

"As a matter of general principle, it is in 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. On the authorities however, the following guidelines may be formulated: -

(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 intends to take.

(d) If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as

the illegality of the decision sought to be challenged.

It was in his rejoinder submission that Mr. Kilasara tried to account for the further delayed 10 days. He contended that he obtained the copies of the Ruling and Drawn Order by the High Court on 21.11.2022. This is however a new fact. It was neither pleaded in the supporting affidavit nor advanced during submission in chief. The said ruling and order were also not attached to the pleading though in his rejoinder submission, Mr. Kilasara contended to have attached the copies on the pleading. The law is trite that parties are bound by their own pleadings and facts not pleaded cannot be argued. See: **BARCLAYS BANK T LTD. vs. JACOB MURO** (Civil Appeal No. 357 of 2019) [2020] TZCA 1875 in which while referring to its previous decisions in **JAMES FUNKE NGWAGILO vs. ATTORNEY GENERAL** [2004] TLR 161; **LAWRENCE SURUMBU TARA vs. THE ATTORNEY GENERAL & 2 OTHERS**, Civil Appeal No. 56 of 2012; and **CHARLES RICHARD KOMBE t/a BUILDING vs. EVARANI MTUNGI & 3 OTHERS**, Civil Appeal No. 38 of 2012, held:

“We feel compelled, at this point, to restate the time-honoured principle of law that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored.”

The Court further referred with approval a passage in an article by Sir Jack I. H. Jacob titled **“The Present Importance of Pleadings,”** first published in Current Legal Problems (1960) at p. 174, which states:

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation."

In consideration of the above cited authorities, the explanation given by Mr. Kilasara on rejoinder submission as to the further delay cannot be entertained as it was not pleaded.

In his supporting affidavit, the applicant pointed out that there are illegalities in the decision he intends to appeal against in the Court of Appeal. However, neither in the said affidavit nor in his counsel's submissions were the illegalities explained for this court to ascertain whether they meet the criteria warranting extension of time.

From the foregoing observation, the applicant is found to have failed to account for the further delayed days between the date he was granted extension of time to lodge the notice of appeal or the date he lodged the notice of appeal and the date the application at hand was filed. The application is therefore dismissed with costs.

Dated and delivered on this 11th day of September 2023.



X 

L. M. MONGELLA
JUDGE

Signed by: L. M. MONGELLA