

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LAND DIVISION
AT MOSHI**

MISC. LAND APPLICATION NO. 29 of 2023

(C/F Land Application No. 121 of 2020 of Moshi District Land and
Housing Tribunal at Moshi)

NAIMAN OLEMKORO APPLICANT

VERSUS

MICHAEL LAZARO LENGERE 1ST RESPONDENT

MATHAYO LAZARO LAIZER @ LAITAYO 2ND RESPONDENT

RULING

20/11/2023 & 04/12/2023

SIMFUKWE, J.

In this application, Naiman Olemkoro, the applicant herein is seeking for extension of time to appeal against the ruling in Land Application No. 121 of 2020 delivered on 23rd April, 2021 by the District Land and Housing Tribunal for Moshi at Moshi (trial tribunal). The application has been brought by way of chamber summons under **section 41(2) of the Land Disputes Courts Act, Cap 216 R.E 2019**. It is supported by an affidavit

deponed by Thomas Emanuel Kitundu, learned counsel for the applicant. In their joint counter affidavit, the respondents resisted the application.

Briefly, the background of the matter is that the applicant herein instituted a land case against the respondents claiming ownership of land measured 4½ acres located at Munge Village, Donyomuruak Ward, within Siha District in Kilimanjaro region. Prior to the hearing of the application, the respondents raised preliminary objection on point of law to the effect that the said suit was res judicata. On 23/04/2021 the trial Chairman delivered the ruling in which he sustained the preliminary objection and dismissed the application with costs.

Dissatisfied, the appellant herein eagerly wishes to appeal to this court against the said ruling. However, since he is out of time, he filed the instant application for extension of time.

At the hearing of the application, the applicant was represented by Mr. Thomas Kitundu, learned counsel whereas the respondents were represented by the learned counsel Mr. Willence Shayo.

Supporting the application, Mr. Kitundu referred to **section 41 (2) of the Land Disputes Courts Act** (supra) which provides that:

"41(2) An appeal under subsection (1) may be lodged within forty-five days after the date of the decision or order:

Provided that, the High Court may, for the good cause, extend the time for filing an appeal either before or after the expiration of such period of forty-five days."

Explaining the above provision, Mr. Kitundu argued that, under the proviso of the above section, the High Court may extend time to file an appeal either before or after expiry of 45 days after delivery of judgment.

In respect of the reasons for the delay to file the appeal, the learned counsel said that the same are found in his affidavit dated 3/7/2023. He prayed the said affidavit to be adopted to form part of his submission. He stated that, apart from the cited provision, there is a number of decisions which state that the applicant must account for each day of delay. He made reference to the case of **Hamis Mohamed as the Administrator of the Estates of the late Risasi Ngawe vs. Mtumwa Moshi (Administratrix of the Estate of the late Moshi Abdallah)**, Civil Application No. 407/17 of 2019 at page 56 (CAT). It was argued that the meaning of good cause was stated by the Court of Appeal in the case of

Yusufu Same and Another vs. Hadija Yusufu, Civil Appeal No. 1 of 2002 at page 9, second paragraph as follows:

"It should be observed that the term "sufficient cause" should not be interpreted narrowly but should be given a wide interpretation to encompass all reasons or causes which are outside the applicant's power to control or influence resulting in delay in taking any necessary step."

Also, the learned counsel cited the case of **Rev. Elihuruma Minja and 2 others vs. Athumani Iddi Fundi**, Civil Application No. 81/12 of 2022 at page 5 second paragraph, where the Court of Appeal held that:

"However, what constitutes good cause has not been defined, although this court has in various instances stated a number of factors to be considered. They include, whether or not the application has been brought promptly; the absence of any or valid explanation for the delay; the lack of diligence on part of the applicant, the applicant be able to account for the entire period of delay and existence of a point of law of sufficient importance involved in the impugned division".

In the present case, the learned advocate specified that, after delivery of the impugned decision on 23/4/2021, on 29/4/2021, the applicant's counsel filed a letter (**Annexure NAIM-1**) requesting to be issued with copy of judgment and proceedings which was supplied to him on 17/5/2021. Thereafter, on 21/5/2021, the applicant filed Land Appeal No. 22 of 2021 before this court which was heard by way of written submissions. In his judgment, Hon. Mwenempazi, J discovered that before the trial tribunal the respondents were two, while copy of judgment had only one respondent. He required the parties to address him on that issue. On 17/12/2021 both parties appeared before Hon. Mwenempazi, J and conceded to the anomaly. Then, the court remitted the case file to the trial tribunal and ordered the said anomaly to be rectified. The said appeal was left pending until on 8/11/2022 when another judge who had a cleanup session advised them that, the said appeal should be withdrawn with leave to refile. Thus, the appeal was marked withdrawn with leave to refile.

Mr. Kitundu continued to narrate that; the applicant made follow up to the trial tribunal unsuccessfully. He decided to change his Advocate Festo Makawia for failing to make follow up of his matter at the tribunal. After being instructed on 21/6/2023, Mr. Kitundu perused Land Appeal No.

22/2021 and filed a letter requesting to be supplied with important documents. Also, after being informed that the trial records were at the trial tribunal, on 22/6/2023 they filed a letter at the trial tribunal requesting to be supplied with rectified ruling, order and proceedings. The said documents were supplied to them on 03/7/2023. The learned counsel was of the view that, the delay was beyond control of the applicant as it was held in the case of **Yusufu Same** (supra).

Mr. Kitundu continued to submit that, soon after being supplied with the documents on 03/7/2023, on the same date the applicant filed this application online. On 4/7/2023 the application was admitted and on 5/7/2023 court fees were paid. Thus, the application was filed promptly after being supplied with copy of the decision of the trial tribunal.

It was expounded further that, counting from 23/4/2021 to 17/5/2021, there is a delay of 24 days only. Otherwise, the applicant could not appeal without being supplied with necessary documents. Moreover, from 17/5/2021 to 21/5/2021 when the first appeal was filed, only four days had elapsed. From 21/5/2021 to 8/11/2022, 536 days had elapsed which were used to prosecute Land Appeal No. 22 of 2021. From 8/11/2022 to 3/7/2023 when the applicant was supplied with rectified ruling, 237 days

had elapsed as the applicant was waiting to be supplied with rectified ruling. From 3/7/2023 to 5/7/2023 only two days had elapsed. Based on the above illustration, Mr. Kitundu believed that the applicant has accounted for 801 days of delay of which he was waiting to be supplied with necessary documents.

The learned counsel went further and cited **Section 19(2) of the Law of Limitation Act, Cap. 89, R.E. 2019** which was discussed by the Court of Appeal in the case of the **Registered Trustees of the Marian Faith Healing Centre @ WANAMAOMBI vs. The Registered Trustees of the Catholic Church, Sumbawanga Diocese**, Civil Appeal No. 64 of 2006 at page 15, second paragraph. He argued that, pursuant to the said section, that period was supposed to be excluded. He concluded that what he had submitted was deponed under paragraph 2 to 15 of their affidavit together with its annexures.

Apart from the above noted technical delay, Mr. Kitundu averred that, there is illegality in Land Application No. 121 of 2020 as pleaded in the affidavit. He asserted that the trial tribunal decided that the matter was res judicata while the same was not. Thus, such illegality will be investigated by this court in the intended appeal, as it was held by the

Court of Appeal in the case of **Amour Habib Salim vs. Hussein Bafagi**, Civil Application No. 52 of 2009, **Laurent Simon Assenga vs. Joseph Magoso and 2 others**, Civil Application No. 50 of 2016 and **Hamis Mohamed** (supra).

Moreover, Mr, Kitundu averred that the applicant has not slept on his rights as he made follow up of his matter step by step. He was of the opinion that, if this matter will be granted, the applicant will be able to exercise his constitutional right to appeal as provided under **article 13(6) (a) of the Constitution of the United Republic of Tanzania**. Further, granting this application will not prejudice the respondents anyhow as the matter will be determined on merit. That, in their counter affidavit, the respondents have not shown how they will be affected if this application will be granted as it was held in the case of **Mobrama Gold Company Limited vs. Minister for Energy [1998] TLR 426**.

Basing on what he submitted, Mr. Kitundu prayed this application to be granted with costs and any other relief which this court may deem fit to grant.

In his reply Mr. Shayo, adopted the respondents' joint counter affidavit to form part of his submission. He submitted to the effect that this

application has been preferred under **section 41 of the Land Disputes Court Act** (supra). Sub-section (2) of the section provides that this court may extend time to file an appeal upon showing good cause. He was of the view that the applicant has not shown any good reason for his application to be granted.

Mr. Shayo made it clear that, it is not disputed that the decision sought to be appealed against was delivered on 23/4/2021. On 17/12/2021 the applicant conceded that there were some errors in respect of names and prayed for leave to rectify the names on the judgment. However, the applicant never made follow up of the said correction as he did not bring any evidence of the follow up till on 08/11/2022 when the counsel for the applicant prayed to withdraw the appeal on the same reason of rectifying names on the copy of judgment. That, from 08/11/2022, no evidence has been adduced to prove that the applicant prayed for rectification of the judgment. Thus, the argument that he made follow up is without any proof.

Mr. Shayo asserted that, obviously, in our courts when one requests for copy of judgment or rectification, the same is done by writing a letter and there should be proof of the reply of the same. That, in the present case

there is no any letter addressed to the trial Tribunal or to the advocate who was making follow up. He referred 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 of 2010, (CAT) at Arusha, page 6 and 7 which laid down conditions for granting extension of time. He commented that, in this case, the said conditions have not been met.

Concerning the first condition that the applicant must account for all the period of delay; Mr. Shayo was of the view that, counting from 08/11/2022 when the applicant prayed to withdraw his appeal to 03/07/2023 it is more than 237 days which the applicant has failed to justify that he was making follow up. He believed that accounting for the period of delay, includes justification of what is alleged by the applicant.

On the second condition which is to the effect that the delay should not be inordinate, Mr. Shayo argued that, in our case, the applicant's delay is inordinate as the delay is more than 237 days.

On the third condition that the applicant must show diligence and not apathy, negligence or sloppiness, it was Mr. Shayo's argument that the applicant has not shown how he was diligent in making follow up of his

case. Instead, he showed how he was negligent in making follow up of his case.

On the fourth condition that if the court feels that there are other sufficient reasons such as the existence of a point of law of sufficient importance; such as illegality of the decision sought to be challenged, it was contended that in the present case there is no point of law which warrant extension of time as it was stated at page 8 and 9 of the case of **Lyamuya Construction** (Supra). The learned counsel cemented his contention by citing the case of **Nyasinthu Malisa vs. John Malisa**, Civil Application No. 167/01 of 2021 CAT at DSM, at page 11 the Court referred the case of **Bushiri Hassan vs. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported) in which the Court emphasized the need of accounting for each day of delay within which certain steps could be taken. It held that:

"Delay, of even a single day, has to be accounted for otherwise, there would be no point of having rules prescribing periods within which certain steps have to be taken."

In the present case, Mr. Shayo highlighted that the applicant did not bother to file the application in time. Surprisingly, the applicant used very few days to make follow up and succeeded to procure copy of judgment. On 22/6/2023 a request letter was filed praying for corrected copy of judgment and on 03/7/2023, the copy of corrected judgment was supplied. He proposed that the applicant could have done so earlier.

Mr. Shayo concluded that the applicant has not accounted for the period of delay and he failed to meet the conditions set in the case of **Lyamuya Construction** (supra). Thus, the application lacks merit and should be dismissed with costs.

In rejoinder, Mr. Kitundu notified this court that it is not disputed that the impugned decision in this case was delivered on 23/4/2023 and from that date to 08/11/2022, there was a pending appeal. That alone shows that the applicant was diligent. Also, he informed the court that the applicant prayed for copy of judgment by writing a letter (annexure NAIM-1) collectively which was received on 29/4/2021. Considering the fact that the applicant is blind and depended on the service of his advocate. That, even after discovering that the appeal was incompetent, the applicant's advocate continued to make follow up. It is on record that the Registrar

remitted back the case file to the trial tribunal for rectification of the error and the applicant was waiting for the trial tribunal to rectify the said error. Even after withdrawal of the appeal which was pending, the rectification was not yet done. The applicant decided to change an advocate who proceeded where Advocate Zayumba had ended.

Mr. Kitundu reiterated that, after perusing the case file, they wrote another request letter praying for rectified copy of judgment. The said letter is included in annexure NAIM-1 which reminded the Chairman who then worked on the issue. Thus, it is not true that there is no letter to prove follow up of the copy of rectified judgment. Hence, negligence was not on part of the applicant as it is the trial tribunal which was negligent.

Mr. Kitundu reckoned that, pursuant to **section 19(2) of the Law of Limitation Act** (supra), the period of waiting for copy of judgment must be excluded. He insisted that, the withdrawal of the appeal was with leave to refile.

Mr. Kitundu continued to reiterate his submission in chief in respect of technical delay as well as illegality and alleged that all the conditions which were stated in the case of **Lyamuya Construction** (supra) have been met.

Responding to the allegations that the delay is inordinate, Mr. Kitundu replied that the said delay was beyond the control of the applicant. The applicant prepared this application within two days after being supplied with copy of rectified judgment which shows that the applicant was diligent in making follow up of his matter.

Lastly, Mr. Kitundu stressed that the respondents have not stated how they will be prejudiced if this application will be granted; while the applicant will be prejudiced as the errors were occasioned by the trial tribunal.

I have analytically considered the parties' affidavits and rival oral submissions of the learned counsels. The appropriate issue for determination is ***whether the applicant has shown good cause for the court to extend time as sought.***

I wish to start with the obvious that, granting extension of time is the discretion of the court, which should be exercised judiciously. The applicant is required to establish good cause for the court to exercise its discretion. There is no definition of the term 'good cause'. However, as rightly submitted by Mr. Kitundu, case laws have established what amount to good cause. He cited the case of **Yusufu Same and Another** (supra)

which defined the term good cause. In the case of **Brazafric Enterprises Ltd vs Kaderes Peasants Development (PLC)**, Civil Application No. 421 of 2021 [2022] TZCA 624 Tanzlii at page 8 & 9 it was stated that:

"It is noteworthy that there is no universal definition of the term 'good cause'. Therefore, good cause may mean among other things, satisfactory reasons of delay or other important factors which need attention of the Court, once advanced may be considered to extend time within which a certain act may be done. Good cause may include, but not limited to, allegation of illegality committed by the lower court..."

The factors for extension of time which have been referred in the cited case have been established in numerous decisions particularly the case of **Lyamuya construction Limited** (supra) which was cited by Mr. Shayo for the respondents. The said factors/conditions are:

- i. The applicant must account for each day of delay. The Court has gone further and stated that delay of even a single day must be accounted for. See the case of **Nyasintha Malisa** (supra).

- ii. The delay should be inordinate
- iii. The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take and
- iv. Other sufficient reasons such as the existence of a point of sufficient importance; such as the illegality of the decision sought to be challenged.

It is now time to revert to the application before me. The applicant's advocate has advanced two reasons which he urged the court to rely upon to extend time. First, he said that the applicant was supplied with the necessary documents lately. Second, that there is illegality on the impugned ruling of the trial Tribunal.

Starting with the first condition, according to the affidavits of both parties, it was conceded that the first appeal was filed on time that is Land Appeal No. 22 of 2021. However, it was noted that in the said appeal, there was omission of the name of one respondent. Thus, the court ordered the said omission to be rectified by the trial Tribunal. On 8/11/2022 the applicant's advocate prayed to withdraw the said appeal. It was withdrawn with leave to refile.

According to the rectified copy of ruling, it was certified on 03/07/2023 and the copy of the drawn order was issued on 03/07/2023. The applicant filed the instant application on 05/07/2023 two days later. Basing on the above observation, with due respect to Mr. Shayo, the applicant was not negligent as he tried to insinuate. Two days was stated to have been used to prepare this application. Thus, the applicant has managed to establish that he acted diligently in making follow up of his matter.

Also, Mr. Shayo tried to state that, there is no evidence to prove that the applicant prayed for rectification of the judgment. Respectfully, according to **annexure NAIMAN 1** there was a letter dated 21/06/2023 which was received by the trial Tribunal on 22/06/2023. The said letter show that the applicant's advocate requested to be supplied with copy of rectified judgment, decree and proceedings. The rectified copy of ruling was signed and supplied on 03/07/2023. Also, the typed proceedings of Land Appeal No. 22 of 2021 shows that when the said appeal was withdrawn, the said rectification was not yet done that is why the appellant's/applicant's advocate prayed the same to be withdrawn. Therefore, the applicant has exhibited diligence in pursuing his application.

Moreover, under paragraph 16 of the applicant's affidavit, the learned advocate contended that the impugned ruling suffered illegality since the matter was not res judicata. The argument was contested by Mr. Shayo that there is no point of law.

It is undisputed fact that the application before the trial tribunal was dismissed on the ground that the same was res judicata. The issue of res judicata is pure point of law which is worth to be addressed on appeal.

Without prejudice to what has been established herein above, the applicant's Land Appeal No. 22 of 2021 was withdrawn with leave to refile. Thus, I am of considered opinion that the applicant preferred this application to be in a safe side and to avoid preliminary objection which could have been raised by the respondent that the appeal was time barred.

For the foregoing reasons, I find the applicant has established enough materials to warrant granting the application. Hence, I hereby grant the application for extension of time as prayed. The applicant should file his appeal within forty-five (45) days from the date of being supplied with the copy of this ruling. No order as to costs.

It is so ordered.

DATED and **DELIVERED** at Moshi this 4th day of December, 2023.



X

S. H. SIMFUKWE

JUDGE

Signed by: S. H. SIMFUKWE

04/12/2023