THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(IRINGA SUB-REGISTRY)

AT IRINGA

MISC. LAND APPLICATION NO. 22 OF 2023

(Arising from Land Appeal No. 31 of 2020)

NEBATI MNEMWA ..... APPLICANT

VERSUS

ELIZABETH WIHANO ..... RESPONDENT

RULING

Date of Last Order: 21/05/2024 &
Date of Ruling: 14/06/2024

S.M. KALUNDE, J.:

By a Chamber Summons preferred under section 11(1) of **the Appellate Jurisdiction Act [Cap. 141 R.E. 2019]** the applicant has moved this court for extension of time for the applicant to lodge an application for certificate on a point of law. The application is supported by affidavit dully sworn by NEBATI MNEMWA, the applicant. The application was resisted by the respondent who directed his advocate, Mr. Erick Nyato, learned advocate to swear a counter affidavit resisting the application.

The background to this application may be simply narrated. Through Land Case No. 80 of 2020, the respondent successfully filed a suit against the appellant at the Kijombe Ward Tribunal in Njombe (Henceforth "the trial

tribunal"). The suit at the trial tribunal concerned a piece of land measuring one acre located at Ukomola Village, in the District and Region of Njombe. Disgruntled, the applicant appealed to the District Land and Housing Tribunal for Njombe (Henceforth "the DLHT"). The appeal at the DLHT was registered as Land Appeal No. 15 of 2020. Unfortunately, on the 06th day of October, 2020, the appeal was dismissed with costs.

Still aggrieved, the respondent approached this court in a second appeal through Land Appeal No. 31 of 2020. Bad luck was still on his side, the second appeal was also dismissed on the 23rd day of September, 2021. The appellant wishes to challenge the decision of this court on a third appeal to the court of appeal. However, he cannot do so without a certificate on a point of law. Unfortunately, he is out of time to lodge an application for a certification of a point of law. Hence this application.

To argue the application, the applicant engaged the services of Mr. Leonard Sweke, learned Advocate, whilst the respondent had the services of learned counsel Mr. Erick Nyato.

In support of the application, Mr. Sweke adopted the affidavit filed in support of the application and went on to submit that the impugned decision was delivered on the 23rd day of September, 2021. Immediately thereafter, on the

22nd day of October, 2021, the applicant filed a Notice of Appeal. The learned counsel added that, on the 21st day of October, 2021, whilst processing the appeal to the Court of Appeal, the applicant suffered Gastric Illness. As a result, he started attending clinics at Mbarali District Hospital. According to the learned counsel, the applicant continued to attend hospital until on the 30th October, 2021, when he finally recovered.

Before he could act any further, on the 02nd November, 2021, he felt sick again with the same disease. He went back to hospital and continued to receive medical attention for a further month. According to the learned counsel, on the 02nd day of December, 2021, the situation worsened and he decided to go to a traditional healer called Athanas Sumail Mbopomela. Eventually, he recovered on the 10th day of July, 2023 after a visitation to the traditional healer. Upon recovery, he realized that he was late hence the present application.

The learned counsel concluded that the applicant's main ground for this application is sickness. He added that in accordance with section 5(1)(c) of the Appellate Jurisdiction Act, the applicant was supposed to file the application within 30 days from the date of the decision. However, due to sickness, the present application was brought on the 19th July, 2023. To support his argument, the learned counsel

cited the case of **Fortunatus Masha vs. William Shija and Another** [1997] TLR 154.

In light of the above submissions, the learned counsel prayed that the application be granted because the applicant has demonstrated good cause. He also pressed for costs of the application.

In reply, Mr. Nyato also adopted the counter affidavit filed opposing the application as part of his submissions. Submitting on substance, the learned counsel argued that during the whole delayed period the applicant was not sick, instead he was busy cultivating on the disputed property. regarding the medical chits, Mr. Nyato argued that they were not valid because they were not supported by electronic receipts to back up payments. He also contended that the applicant failed to present a clinic attendance card that shows the applicant attended in hospital successfully to the extent that he failed to file the application on time. The counsel added that the records showing that the applicant attended in hospital consistently was important to prove that the applicant was sick and attended in hospital during the entire one year and ten months when he failed to file the application.

Mr. Nyato contended further that, the applicant's failure to file the application was a result of his own or his advocates negligence because during the same period his

advocate was also representing him in Taxation Cause No. 14 of 2021, which was filed on the 08th day of October, 2021. In the opinion of Mr. Nyato, there was serious inaction and lack of diligence on the applicant and his advocate in taking necessary steps to file the application on time. To support his contention, the learned counsel cited the case of **D.B. Shapriya & Co. Ltd vs New Builders Ltd** (Civil Application No. 146/12 of 2023) [2024] TZCA 345 (9 May 2024) TANZLII, at page 19.

For the above reasons, the learned counsel prayed for the dismissal of the application with costs.

In rejoinder, Mr. Sweke argued that there is no evidence, on record, to support a contention that, during the delay period, the applicant was at home cultivating on the disputed property. Responding on the absence of electronic receipts, the learned counsel argued that it is not a requirement of law that electronic receipts are required to establish sickness.

Responding on the medical chits, the learned counsel submitted that the available medical chits demonstrated a trend in which the applicant attended at the hospital. He also argued that, being a lay person, the applicant could not ask for an attendance card, instead, it was the hospital authorities who were supposed to issue a record of the applicant's attendance to the hospital. He maintained that

the applicant should not be punished for the mistakes of the hospital.

Regarding his engagement in Taxation Cause No. 14 of 2021, Mr. Sweke argued that he was instructed to attend in the said matter around July, 2023 and not in 2021. In his opinion, it is incorrect to suggest that he knew of the application in 2021. The learned counsel insisted that there were sufficient reasons for the application to be granted with costs.

I have considered the applicant's affidavit and the counter affidavit filed in reply together with the submissions by the parties. The issue for consideration is whether the applicant took essential steps in prosecuting the appeal following the judgment delivered by this court on the 23rd day of September, 2021. Section 11(1) of the AJA to which this application is based provides that: -

> *"11.-(1) Subject to subsection (2),* ***the High Court*** *or, where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned,* ***may extend the time for giving notice of intention to appeal from a judgment of the High Court*** *or of the subordinate court concerned, for making an application for leave to appeal or for a certificate that the case is a fit case for appeal,* ***notwithstanding that the time for giving***

the notice *or making the application* ***has already expired.***"

[Emphasis is mine]

Regarding applications for extension of time, through decisions courts have formulated principles that have to be established by the applicant in showing good cause for the delay. There is a chain of decisions insisting upon this position. For example, in 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 (3 October 2011) TANZLII, for instance, the Court of Appeal (Massati, J.A) following principles were stated: -

1. *That, the applicant must account for all the period of delay.*

2. *The delay should not be inordinate.*

3. *The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.*

4. *If the Court feels that there are other reasons, such as the existence of a point of law of sufficient importance, such as illegality of the decision sought to be challenged.*

It is also settled that in accounting for the period of delay courts have insisted that an applicant must account for each day of the delay. The Court of Appeal has also categorically stated that a delay of even a single day has to be accounted for by the applicant. This was in the case of **Bushiri Hassan vs. Latifa Mashayo**, Civil Application No.3 of 2007 (unreported).

The applicant's main contention in this application is that he failed to process the application due to sickness. It is common knowledge that in our jurisdiction sickness has come to be accepted as a good cause for grant of extension of time. This view was well elaborated in the case of **Director Ruhonge Enterprises vs January Lichinga**, Civil Application No 1 of 2006, CAT-DSM and **John David Kashekya vs. The Attorney General**, Civil Application No. 1 of 2012 (all unreported).

It is also the position of the law that for sickness to amount to good cause, an applicants must demonstrate before the court that sickness prohibited them from taking the necessary actions to prosecute the matter. For this, the Court of Appeal in the case of **Hawa Issa Nchirya vs Ramadhani Iddi Nchirya And 2 Others** (Civil Application No. 27 of 2021) [2021] TZCA 450 (7 September 2021) TANZLII, stated:

"Admittedly, the medical report; annexure HAWA 7 to the affidavit shows that the applicant was to attend medical clinic at OPD on monthly basis and physiotherapy on daily basis. Bed that as it may, it is not indicated for how long was the applicant required to attend physiotherapy just as it is not clear from the affidavit when did the physiotherapy end. Under the circumstances, it cannot be said with any degree of certitude whether the delay in instituting the appeal was wholly attributable to the applicant's illness and her admission in a hospital for one week.

In ***Juto Ally v. Lukas Komba & Another****, Civil Application No. 484/17 of 2017 (unreported), the applicant had delayed in serving copies of the notice of appeal on the respondents together with a letter to the Registrar to be supplied with requisite copies for the purpose of the intended appeal. Like in the instant application, the applicant attributed her delay to sickness. Rejecting that assertion, the Court stated that where the applicant's delay is due to illness, she must show how that illness contributed to the delay as opposed to a general statement as it were. In a subsequent decision in* ***Sabena Technics Limited v. Michael J. Luwungu****, Civil Application No. 451/18 of 2020 citing* ***Juto Ally****, the Court reiterated its stance holding that to amount to a good cause for the delay, there must be evidence that sickness had a bearing on the delay."*

In the instant case, it has not been disputed that the impugned decision was delivered on the 23rd day of September, 2021. In terms of rule 83 of the Court of Appeal Rules, 2009, the applicant had thirty days within which to lodge a notice of intention to appeal to the Court of Appeal. The thirty days limitation was expected to expire on the 26th day of October, 2021. However, on the 22nd day of October, 2021, four days before the expiry of time, the applicant successfully lodged a notice of intention to appeal to the Court of Appeal.

Thereafter, in accordance with rule 44 of the Court of Appeal Rules, the applicant was expected to file an application for certificate on a point of law within 14 days from the 22nd day of October, 2021, when the applicant successfully lodged a notice of intention to appeal. The fourteen days expired on the 05th day of November, 2021. In his affidavit, the applicant alleges that, as he was processing his appeal, on the 21st day of October, 2021, he sustained gastric illness. Thereafter, he was admitted for medical treatment at Mbarali District Hospital. The medical chits show that he was discharged on the 02nd day of November, 2021.

I have carefully examined the content of the said affidavit and submissions made by Mr. Sweke. However, with respect, I think the learned counsel and the applicant

have both conspired to tell lies if not to mislead the court. I say this because if the reasons for the applicant's failure to lodge the application for certificate on time was the sickness which befell him on the 21st day of October, 2021, how is it possible that on the 22nd day of October, 2021, the applicant managed to sign and lodge the notice of appeal at the Court of Appeal Registry in Iringa. It clearly defeats logic that an applicant would fall sick on the 21st day of October, 2021, at be admitted at Mbarali District Hospital, in Mbeya Region on the same day; and yet managed to sign and lodge a notice of appeal at the Court of Appeal Registry in Iringa on the 22nd day of October, 2021.

If in deed, the notice of appeal was lodged at the Court of Appeal Registry in Iringa on the 22nd day of October, 2021, the only logical conclusion is that the applicant was not sick on the 22nd day of October, 2021, or at least he was not sick enough to fail to take necessary actions to prosecute his appeal. But clearly, he cannot be sick and admitted in a hospital in Mbeya and show up the next day in Iringa to lodge the notice of appeal.

But even if I were to assume, without deciding here that the applicant was actually sick, I have also examined the attached medical chits and noted some serious lapses and inaction on the part of the applicant. My closer examination of the said chits reveal that the applicant was

allegedly admitted at Mbarali District Hospital on the 21st day of October, 2021, and discharged on the 02nd day of November, 2021. Looking at the above timelines it would appear to me that by the time the applicant was discharged he was well within time to continue processing his appeal by lodging the application for certificate. This is so because by the 02nd day of November, 2021, when the applicant was discharged, he had three days until the 05th day of November, 2021 when the clock of limitation stopped. But he did not take any action to prosecute his appeal. This is a clear indication of inaction on the applicant.

It is also evident from the records that after his discharge, on the 02nd day of November, 2021, the applicant was not re-admitted to any hospital as alleged by Mr. Sweke. The chits supposed that he should attend to a neighboring hospital for check for at least one month. However, there is no record indicating that he attended at any hospital or dispensary during the one month between the 02nd day of November, 2021, to the 02nd day of December, 2021, when he allegedly went to a traditional healer. In view of these circumstances, the period after his purported discharge to the 02nd day of December, 2021, remains unaccounted.

The applicant's further contention is that, on the 02nd December, 2021, he attended *"medical checkup"* to a

traditional healer called Athanas Sumail Mbopomela where he continued treatment until his full recovery. The said Athanas Sumail Mbopomela deponed an affidavit to the effect that he attended the applicant from 2nd December, 2021, to 10th July, 2021 when he managed *"to solve the impugned predicament"*. The contents of the said affidavit are reproduced here under:

[CONTENT OF THE AFFIDAVIT OF TRADITIONAL HEALER]

I have carefully examined the applicant's affidavit and that of the alleged "traditional healer". Having done so, I must say that I look at the contents of these affidavits suspiciously. I say so because there is no sufficient material in the said affidavits to suggest that during the entire period of one year and seven months the applicant was sick and was at all times admitted to the said traditional healer. It was also not pleaded that as a result of his sickness and admission to the said traditional healer he failed to take appropriate actions to process his appeal. For this I associate myself with the decision in the case of **Hawa Issa Nchirya vs Ramadhani Iddi Nchirya And 2 Others** (supra) where it was stated that:

> *"**There is scant material in the affidavit linking the delay with the applicant's sickness** which occurred more than a month after being supplied with requisite copies by*

the Deputy Registrar. Similarly, as submitted by Mr. Kalonga, ***there is not enough material to support a conclusion that the sickness continued*** *as late as 29/10/2020, the date on which the time for instituting the appeal expired."*

[Emphasis is mine]

It is worth noting further that the delay in the instant case is so inordinate that there was a need for the applicant to adequately account for each day of the delay instead of issuing a wholesale argument that he delayed in lodging the application because at the time he was attending treatment at "traditional healer" between December, 2021 to July, 2023.

It is well settled that for the court to exercise its discretion a full detailed and accurate account of the causes of the delay and its effects must be furnished so as to enable the court to understand clearly the reasons and to assess the responsibility. This view was elaborated by the Court of Appeal in the case of **Airtel Tanzania Limited vs Misterlight Electrical Installation Co. Limited & Another** (Civil Application 37 of 2020) [2021] TZCA 517 (21 September 2021) TANZLII, where the having cited the case of **Bushiri Hassan vs. Latifa Mashayo** (supra) the Court stated:

> *"I fully subscribe to the above authority and reasoning. I should add that, beyond our borders, he decision of the Supreme Court of South Africa in a similar vein, in* ***Uitenhage Transitional Local Council v. South African Revenue Service****, 2004 (1) SA 292, that when seeking condonation of delay, a full detailed and accurate account of the causes of the delay and its effects must be furnished for the Court to exercise its discretion accordingly."*
>
> *[Emphasis is mine]*

Looking at the records in the instant case, it is clear that the information in the applicant's affidavit and the affidavit of the traditional healer is so scant as to the linkage between the appellants sickness and his delay in lodging the application for more that 19 months. That period remains an accounted for by the applicant.

I pointed out earlier in this ruling that in proceedings of this nature an applicant must account for all the period of delay. Failure to account for even a single day may result into dismissal of the application. However, as I have pointed out above, the delay in the instant case was so inordinate that it serves more to demonstrate the degree of negligence or sloppiness on the part of the applicant rather than an attempt to account for the delay.

In view of the foregoing, I find that the applicant has not demonstrated to the satisfaction of the court that, he was prevent by any sufficient cause or good cause from filing the application for a certificate on a point of law. The application is thus without merit, and it is hereby dismissed with costs.

It is so ordered.

DATED at **IRINGA** this **14th** day of **June, 2024**.

S.M. KALUNDE

JUDGE