IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT IRINGA

MISCELLANEOUS LAND APPLICATION NO. 24 OF 2010

RASHID MWANGAYEKA ..... APPLICANT

VERSUS

JOHN NZIGILWA ..... RESPONDENT

22/10/2014 & 31/10/2014

RULING

Kihwelo J.

In the present application before this honourable court the applicant is essentially seeking to move this court to enlarge time for filing the appeal. The Chamber Summons was supported by the Affidavit affirmed by the applicant.

When this matter came for hearing of the application Mr. Ngoda, learned counsel appeared for the applicant while Mr. Chaula, learned counsel appeared for the respondent.

Arguing for the applicant Mr. Ngoda who supported the application submitted that Section 38(1) of the Land Disputes Courts Act, 2002 and in particular the proviso empowers the honourable court to extend the time for filing the appeal provided the appellant is able to adduce before the court good and sufficient cause. He further argued that, the onus is upon the appellant to show that he was prevented by good cause to file the appeal out of time.

He cited the case of **Range Chacha V. Elias Nyirabu** (1967) HCD 115 in which Plat, J (as he then was) had the following to say;

> *"Although the Defendant might have been as such a month out of time in lodging his appeal to the High Court he had produced evidence that he was sick during that time and the application would therefore be allowed."*

The counsel for the applicant mindful of the fact that this court is not bound by the decision in **Range Chacha's** case he cited a decision of the court of Appeal of Tanzania in **Ali Linus V. Tanzania Harbours Authority** (1988) TLR 5 where the Court of Appeal had the following to say;

> *"Its not a matter of courtesy but a matter of duty to act judiciously that requires a judge not likely to dissent from the considered opinions of his brethen."*

He therefore persuaded this honourable court to follow the reasoning in **Range Chacha's** case (supra). The learned counsel further argued that they also relied on Section 95 of the Civil Procedure Code, Cap 33 of the Revised Edition 2002 which gives inherent powers to the court and cited the case of **Juma & Jaffar V. Bhambra** (1967) EA 326 which also discussed where and how to apply inherent powers of the court.

The learned counsel went further to assert that, the ends of justice requires that the applicant's application before the hourable court be determined in the applicant's favour.

Mr. Chaula, learned counsel for the respondent, resisted the application for extension of time for the reason that the applicant did not adduce sufficient ground for extending time. He contended that for the extension of time to be granted the court has to consider sufficient reasons established by the applicant and cited the case of **Caritas Kigoma V. KG Dewsi Ltd** (2003) TLR 420.

In further reply to the appellant's submission the learned counsel contended that the medical records accompanied by the application clearly indicates that the applicant was discharged from hospital on 29th February, 2008 for out of patient treatment and that for this reason the applicant had recovered enough to pursue the appeal by following up judgment and proceedings of the District Land and

Housing Tribunal. He further contended that the decision of the District Land and Housing Tribunal was delivered on 30th December, 2009 and the applicant obtained copies of judgment and proceedings on 26th February, 2010 but did not file the present application until 3rd December, 2010.

The learned counsel added that as out patient the applicant could have lodged the appeal in time. He cited the case of **Charles Mkoloma V. Minister for Labour & 3 Others**, Civil Appeal No. 19 of 2004 Court of Appeal of Tanzania (unreported) where the court had the following to say;

> *"As an out patient the applicant could have taken due diligence to make follow up on the judgement and proceedings to pursue the appeal on time ---"*

Finally the counsel for the respondent in further attacking the applicant that he did not demonstrate sufficient and good cause as required by Section 38(1) of the Land Disputes Court Act, 2002 he cited the case of **Alhaj Abdallah Talib V. Eshakwe Ndoto Kiweni Mushi** (1990) TLR 108 and made the following quotation;

> *"The delay to file an appeal caused by the appellant connotes negligence and inaction and this can not be a sufficient reason to warrant grant of extension."*

It appears, however, that the quotation by the learned counsel in **Alhaji Abdallah Talib's** case (supra) is with due respect misleading and non existence. This is admittedly, self defeating because as an officer of the court the counsel for the respondent either ignored or overlooked his primary duty to assist this court in arriving at a just decision and instead mislead the court at the expense of winning his client's case. This in future should not be tolerated as Advocates at all times should be reminded that the first duty is to assist the court. It is only secondary that their duty is upon their clients.

In his brief rejoinder the learned counsel for the applicant stated that since the applicant was incapacitated by 75% therefore common sense dictates that he be accorded special treatment. He also stressed that the authorities cited by the counsel for the respondent supports the applicant's prayer and finally he argued that the scheme of Section 38(1) of the Land Disputes Courts Act, 2002 in particular the proviso seeks to rescue the appellant who has not filed the appeal in good time.

With the facts available I have no doubt the issue to be determined is whether the applicant has **reasonable or sufficient cause** on which this court may exercise its discretion and extent the time for filing the appeal.

Admittedly both counsels have done justice to the honourable court for their well researched and thought of submissions and arguments made before this honourable court which is a clear manifestation of their preparedness. This is very commendable save for the counsel for the respondent's conduct which I have expressed my concern.

It is a settled principle of law that an application for extension of time is the discretion of the court but that discretion must be exercised judiciously. The Court of Appeal of Tanzania Msofe J. A in **Martha Iswalile Vicent Kahabi V. Marieth Salehe & 3 Others**, Civil Application No. 5 of 2012 CAT at Mwanza (unreported) had the following to say;

> *"---- It is common ground that an application of this nature is at the discretion of the court. In exercising the discretion the court must be satisfied that there are good ground to decide in favour of an applicant."*

Looking at the sequence of events as clearly indicated in Annexture "RM" referred to at paragraph 4 of the Affidavit that is medical treatment records and as rightly submitted by the counsel for the respondent the applicant since 29/02/2008 attended out patient treatment which means he was not bed-ridden so had he been diligent, he would have filed the appeal within time.

The above position as rightly submitted by Mr. Chaula was adopted in the case of **Charles Mkoloma** cited above where Munuo, J.A (as she then was) had the following to say;

> *"We agree with Kaji, J.A that as an outpatient, the applicant could, if he had exercised due diligence, have processed the application for extension of time. Under the circumstances, illness was not sufficient cause for extending time."*

Even in the instant application the applicant has not succeeded to convince this court that he was prevented to file the appeal within time by **reasonable or sufficient cause** to warrant this court extent the time.

As a result, the application for extension of time is dismissed with costs.

It is so ordered.

P.F. KIHWELO

JUDGE

31/10/2014

Ruling delivered on 31st October, 2014 in the presence of Mr. Ngoda for Applicant and Mr. Chaula for Respondent.

P.F. KIHWELO

JUDGE

31/10/2014