

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISC. LAND APPLICATION NO. 643 OF 2016

FARAJI ERASTO BASOMINGERA.....1ST APPLICANT
EVETHA ERASTO BASOMINGERA.....2ND APPLICANT
CHALROTE ERASTO BASOMINGERA.....3RD APPLICANT
COLLETHA ERASTO BASOMINGERA.....4TH APPLICANT

VERSUS

AISHA N KINGO (in her personal capacity and in
her capacity as Guardian of **JUNE THOMAS N KINGO** (Minor);
SAMUEL THOMAS N KINGO (Minor); and
DANIEL THOMAS N KINGO (Minor).....**RESPONDENT**

Date of last Order: 24/4/2018

Date of Judgment: 31/8/2018

R U L I N G

MGONYA, J.

The Applicants made this Application under **Section 11 (1)**
of the **Appellate Jurisdiction Act Cap. 141 [R. E. 2002]**; for
orders that:-

***a) That the Court extend time to enable the Applicants
to file and serve Notice of Appeal to the Court of
Appeal of Tanzania against the Judgment and***

Decree of this Court dated 29th December, 2015 to apply for copy of proceedings, Judgment and Decree.

b) That the Court extend time to enable the Applicants to file an Application for leave to Appeal to the Court of Appeal of Tanzania against the Judgment and Decree of this Court dated 29th December, 2015.

The Application is supported by Affidavit sworn by the Andronicus Kembuga Byamungu Learned Counsel for the Applicants.

The Respondent, Aisha Nkingo filed a Counter Affidavit strongly challenging the Application.

The Applicants were presented by Byamungu Learned Counsel whereas the Respondent was represented by Mnyira Advocate.

Upon Advocates' prayer, on 24th April, 2018 this Court ordered the Application be disposed by way of Written Submissions.

In support of the Application, Mr. Byamungu prayed for this Court to adopt the grounds of affidavit to form part of their submission.

The Applicants' counsel submitted that, upon the reasons pointed out in the Affidavit, the delay was not deliberate and there are sufficient reason for the court to extend time as prayed, since the Application has been filed without delay, and that the intended appeal has great chance of prospects.

The Applicants averred that the reasons for delay of about 224 days from the date of Judgment delivery to the time this Application was instituted is to the fact that the Applicants and their Counsel have never been issued with Court summons or notification by way other mean requiring their attendance on the date scheduled for delivering of Judgment in **Land Case No. 264 of 2007**.

In addition to that, the Applicants submitted that, when a court issued an order to deliver Judgment on notice it meant to notify the parties to appear on the scheduled date, hence it was the duty of the Court to issues the Notice in a form of summons to appear. However, there was no any Notice in any form issued to the Applicants. Applicants supported their position with the case of ***MABI AUCTIONEERS (T) LTD VS. NMB HOLDING CORPORATION, Civil Application No. 158 of 2002 (Unreported)***, where it was held that, it is the court's duty to discharge the summons to the parties to appear before the court upon Judgment on notice.

Upon praying this Court to grant the prayer sought, Applicants further submitted that, as a matter of principle, the Court can extend time where there are chances of prospect to the intended appeal like it was observed in a case of ***KALUNGA & CO. ADVOCATES VS. NBC (2006) TLR 235*** in which the Application for extension of time had raised serious allegations of illegality.

Finally, Applicants submitted that this Application has been filed without due delay within 13 days after discovery of existence of the Judgment and Decree by the court.

In the event, the Applicants are praying this Court to grant the order sought.

Responding to the Written submission by Applicants in support of their Application, the Respondent submitted that, the reason for delay stated has no legal basis because the mentioned case was tried under BRN program; and since day one, the Court gave direction to the parties to provide their mobile numbers in case there was any necessary information from the Court; they should be conformed accordingly. Further, even during the trial, the Court in several times used to communicate with the parties and their counsel, using the availed telephone numbers.

The Respondent contended that the Applicants filed this Application after (9) months after the trial Court decision was issued. Further, as the case was under BRN project a prudent person cannot wait for nine months without any reasonable cause to follow up his case; hence the cited reason of non-issuance of notice is misconceived.

Further Respondent argued that, as an ordinary person in Tanzania society who had a pending case in Court as Plaintiffs, they ought to have made follow up to the Court to ascertain the status of their case. The Respondent supported her argument by citing the case of ***MKONGE HOTEL VS. ABDALLAH BETRAM CHINGWILE Misc. Land Application No. 23 of 2013*** where the court granted the prayer after finding that the sufficient cause was found upon the initial action had been taken.

Respondent also referred to paragraph 3 and 4 of the Applicants' Affidavit, where the Applicant averred that they had routine follow up with the information desk by staff of this court. It is the Respondent's view that, the said information is lacking material evidence to support, as it was seen in a case of ***STANDARD GOODS CORPORATION LTD VS. HARAHA CHAND NATHANS CO.***

Also the Respondent submitted that, the Applicants did not disclose in their Affidavit who and which dates they requested information from the Court. On this allegation, they did not furnish the Court with the credible evidence on which steps were taken as to prove their routine follow up. Hence such kind of application by Applicants cannot be granted in the absence of any valid explanation for the delay or lack of diligence on the part of the Applicants; and thus, they have to blame themselves for this serious delay where they have to bear with the consequences from such failure.

On rejoinder, the Applicants reiterate what they have argued in their submission in chief.

After going through the parties' submissions, the grounds of Affidavit and the Counter affidavit, let me revisit the Applicants' prayers before this Court. They are:-

a)Application for extension of time to lodge a notice.

b)Application for leave to Appeal court of Appeal.

I have observed that, the main issue for consideration is whether the **sufficient reasons** has been advanced to warrant this Court to exercise its wide discretionary powers and grant the Application.

It is crystal clear in law that sufficient reasons is a pre-condition for the court to grant extension of time. This is a position of the Court in the case of ***ENTERPRISES VS. EAST AFRICAN DEVELOPMENT BANK, Misc. Civil Application No. 135 of 1996*** where it was held that:-

"It is the law that extension of time must be for sufficient cause and cannot be claimed as right, and that the power to grant this concession is discretionary which is to be exercised judicially upon sufficient cause being shown which has to be objectively assessed by the Court."

It is in the Court's record that the Judgment which the Applicant want to lodge a notice of Appeal and to appeal to the Court of Appeal was issued on **29th December, 2015**. Further, the instant Application before the Court was filed on **4th August, 2016; 215 days** after the Judgment was delivered.

Further, court records reveals that, hearing of case (**Civil Case No. 264 of 2007**) under which this Application arose came to an end of its hearing on **13th October, 2015**. Thereafter, the Court adjourned the matter, to **23rd November, 2015** where the Court ordered that Judgment would be delivered on Notice.

The Applicants reasons for delay is that the Court failed to serve the them or their Advocate with the notice to appear before the court for Judgment delivery. Thus the Court after its order dated **23rd November, 2015**, was duty bound to issue notice to the parties to appear on the date when the court will pronounce the Judgment. I fully concur with the case cited by the Applicants, a case of ***MABI AUCTIONEERS (T) LTD VS. NBC HOLDING CORPORATION, Civil Application No. 158 of 2005 (unreported)*** that; **it was the duty of the Court to notify the parties;** under the circumstances of Judgment on notice.

However, the said position cannot defeat the duty of the Applicant too to act diligently. In our case, the Application before this Court was filed on **4th August, 2016** and the last order of the Court to deliver Judgment on notice was on **23rd November, 2015**; the interval of eight (8) months time. During the entire time the Applicants nor their Advocate made follow up of his case until on **26th July, 2016** when it is said that they became aware for the first time that the Judgment was already delivered on **29th December, 2015**.

From the same, I can't hesitate to say that, I clearly see some elements of negligence on the part of Applicants who was supposed to be on front line to make follow up of their case.

However, they waited for more than seven months without asking progress of the same.

I have carefully perused the court record and I have failed to find any evidence tangible adduced by the Applicants to account each day of delay between **23rd November, 2015** to **26th July, 2016**. In the case of ***AMLIRAN INVESTMENT LTD VS. PRINTPACK TANZANIA AND OTHER*** (Unreported) it was held that:-

"The Applicant ought to explain the delay of every day that passes beyond the prescribed period of limitation."

Unfortunately, this has not been done.

It is the principle of the law that: - **"Who alleges must prove."**

In this case, the Applicants on paragraphs **1 and 4** of their Affidavit in support of the Application, submitted that they made several routine follow up with the court information desk by the staff of the Applicant's Advocate office for issuance the notice of Judgment. But, all those routine follow ups were not evidenced by any document whatsoever to prove that they were making some efforts to know the Judgment date. Their bare allegations cannot hold water under the circumstances. This has been observed in a

case of ***GIBBS EASTERN AFRICA LTD VS. SYCON BUILDERS LTD AND TWO ATHERS, Civil Application No. 5 of 2005 HC***
where it was ruled:-

"Facts deponed upon information from a third party should be supported by a supplementary affidavit from the said third party to be of value"

The Applicants ought to have accompany their Application and Affidavit to support the same with the Affidavit sworn by the Court staff who was attending them to support their allegations.

In the event, the Applicants have failed to show this court evidence on their routine follow up.

Neither, I have not seen in court's record that the Applicants right to be heard was denied as alleged.

In view of the above in totality, I see no sufficient reasons advanced by the Applicants to constitute good cause to warrant this Honorable Court to exercise its discretion to grant the prayers sought by the Applicants.

Having said so, **this Application is accordingly dismissed with costs.**

It is so ordered.



**L. E. MGONYA
JUDGE
31/8/2018**

COURT: Ruling delivered before Hon. S. Ding'ohi, Deputy Registrar in the presence of Advocate Mutongore for Applicants, Advocate Mnyira for Respondent and Ms. Caroline RMA on 31st day of August, 2018 in chamber No. 18.



L. E. MGONYA
JUDGE
31/8/2018