

**IN THE HIGH COURT OF TANZANIA**  
**(LAND DIVISION)**  
**AT DAR ES SALAAM**  
**MISC LAND APPLICATION NO. 224 OF 2016**  
***(Arising from Land Case No. 55 of 2008)***

**TANESCO CO. LTD.....APPLICANT**

**VERSUS**

**MUFUNGO LEONARD MAJURA & 14 OTHERS.....RESPONDENT**

**RULING**

**28/2/2018 & 6/4/2018**

**MZUNA, J.:**

This is an application to extend time to the applicant so as to seek leave to appeal to the Court of Appeal. The application is preferred under section 11(1) of the Appellate Jurisdiction Act, Cap 141 RE 2002.

During hearing of the application, the applicant was represented by Mr. Makubi, Mafuru and Chamba, the learned advocates while Mr. Vedasto Audax, Stanley Mahenge and Ditric Mwesigwa, learned advocates represented the respondent.

The main issue is whether there exist sufficient reasons for the delay?

Arguing in support of the application, Mr. Makubi, the learned counsel submitted that the affidavit of Mr. Epafra Antony Njau should be adopted

as part of the submission. Reading from the filed affidavit, it is stated that judgment was entered in favour of the respondents on 5<sup>th</sup> February, 2015 vide Land case No. 55 of 2008. They were claiming ownership of the pieces of land at Guluka Kwalala, Ukonga, Dar es Salaam allegedly unlawfully acquired by the applicant.

That, the applicant instructed IMMMA Advocates so as to lodge an appeal and copy of the judgment was served to them on 11<sup>th</sup> February, 2015 however by the time they instructed IMMA advocates to institute the application time for leave to appeal had already expired. So, on 3<sup>rd</sup> March, 2015 they filed Miscellaneous Land Application No. 59 of 2015 for extension of time. However, on 13<sup>th</sup> July 2015 the applicant made an application to amend the said application the prayer which was granted and the amended application was filed on 7<sup>th</sup> September, 2015.

However there was raised the preliminary objection to the amended application which was argued by way of written submissions. That ruling was delivered on 26<sup>th</sup> February 2016 contrary to the earlier order of 11<sup>th</sup> March 2016. That, since the applicant was not aware, she made an application for the copy of the ruling which was served on 14<sup>th</sup> March, 2016. Their application was struck out for improper citation of the law hence the present application.

The learned counsel further touched on S. 11(1) of the Appellate Jurisdiction Act, Cap 141 RE 2002 that it allows court to extend time even if time has expired and no specific grounds are stated therein. He submitted that there is merits in the intended appeal to the CAT because the acquisition of land was done by the Government under the Land Acquisition Act not the

applicant. That if it was done without following the laid down procedure or that the amount of compensation paid was too minimal the blame should be placed on the Government not the applicant. He referred this court to the case of **TanESCO vs. Mufungo Leonard Majura & Others**, Civil Application No. 94 of 2016 CAT at Dar es Salaam (unreported) and that of **VIP Engineering & Marketing Ltd & 2 Others vs. CITIBANK Ltd**, Consolidated Civil Reference No. 6, 7 and 8 of 2006, CAT at DSM (unreported) at Page 22. In both cases, the court held that any challenge on ground of illegality is a sufficient ground to extend time.

He further made reference to the case of **Mobrama Gold vs. Minister for Energy** [1998] TLR 425 where the court held that the application if it does not constitute a procedural abuse, the extension should be granted.

The learned counsel prays for application to be allowed based on the reasons that the intended appeal raise some issues of law and that the delay was not caused by negligence but by technical errors and therefore a technical delay. That there are sufficient reasons shown in the filed affidavit. Above all that the filed counter affidavit has not shown any injury that the respondents may suffer in case the application is granted. That they have nothing to lose because the decreed money has been deposited in court. Unlike the respondents, he further said, it may be at their disadvantage if they win in the appeal while the money had already been given to them. He further prayed for costs.

On the other hand, Mr. Audax Vedasto, the learned advocate argued to counter such submission that the application has not disclosed any sufficient cause for extension of time.

Responding to the first limb of the submission as per he filed affidavit that they were not negligent, it was his submission that it is now the law that a party must establish what made him be late. That they never gave an account for the delay.

Second that the application was filed about a year, one month and 12 days which has lapsed which is contrary to Rule 45(b) of the Court of Appeal Rules 2009 which requires that the application for leave to appeal must be filed within 14 days of the decision. That they have failed to account for those days and there is no sufficient cause shown.

That, Para 6 – 14 of the affidavit, the applicant purports to explain up to 14<sup>th</sup> March, 2016. The application was filed 17 days later. Even if the court agree with their explanation still there is unexplained 17 days. The application is still out of time.

The learned counsels referred to the case of **Dar es Salaam City Council vs. S. Group Security Co. Ltd**, Civil Application No. 234/2015 Court of Appeal, at Dsm (unreported); **Karibu Textile Mills Limited vs. Commissioner General (TRA)**, Civil Application No. 192/20 of 2016 CAT (DSM) unreported. That all the above cited cases deals with the issue of failure to account for the delays and the remedy is to dismiss the application.

The learned counsel submitted that the period when she was supplied with copy of judgment should not be excluded because it is not shown when

the same was applied. He referred to the case of **Akida J. Goroto vs. Rajani Group of Companies**, Misc Civil Appeal No. 5 of 2007 (HC) at page 5 and that of **Alex Maganga vs. Director Msimbazi Centre**, [2004] TLR 212 (CAT). He argued, based on the above case laws that for an application for leave, attachment of copy of the decision is not mandatory. Therefore, it was not necessary for this application to wait for copy of judgment.

The learned counsels also touched on para 8 and 7 of the affidavit which says about spending time for advice. It was their view that it is irrelevant that is why time was set by law. They referred to the case of **Dar es Salaam City Council vs. S. Group Security Limited**, Misc. Civil Application No. 405 of 2014, (HC) at page 3.

Actually according to him, the attached notice of appeal shows that the applicant had already formed mind to appeal when she prepared same. That in the affidavit there is a period of 4 months and 10 days running from 13/07/2015 when Land application was filed to 03/03/2015 when the applicant received an order to amend Land Application No. 59/2015. That they challenge this period. Actually the application was amended even before serving it to the other parties.

That there is negligence on their part. Paragraph 10 of the affidavit talks about issue of amendment which took another one month and 24 days. Nothing has been explained to account for those days of the delay.

That Para 10 & 13 of the applicant's affidavit is also a sign that 5 months have not been accounted for. There was wrong citation leading to the striking out of the application which they say was negligence for the advocate not to cite the proper provisions. They referred to the case of

**William Shija vs. Fortunatus Masha** [1997] TLR 213, at Page 218 and that of **Anthony Ngoo and Another vs. Kitinda Kimaro**, Civil Appeal No. 33 of 2013 CAT at Arusha (unreported).

That the allegation in para 13 and 14 that the applicant became aware of the ruling latter is not supported by the letter annexed to the ruling. It was their view that the court should find that there is no good cause for the delay.

Further that the strict observance of the law of limitations is stated in the case of **Allison Xerox Sila vs. Tanzania Harbours Authority**, Civil Reference No. 14 of 1998 CAT at Dsm (unreported), Page 5 – 6. That sympathy should not override the rules due to negligence of the advocate.

In the second ground, there was an argument that the appeal stands chances of success. That the allegation that it was for the Government to pay for compensation not for TANESCO and the alleged illegality is not shown in the filed application either in the affidavit or anywhere. He submitted that it was submitted from the bar by the advocates. It should be ignored. The issue of who should pay is not stated anywhere otherwise Party has to join a 3<sup>rd</sup> party which was not the case here and therefore it should not be considered. He referred to the cases of **Tina & Co. Ltd & 2 Others vs. Eurafrican Bank (T) Ltd (BOA BANK) T. Ltd** Civil Application No. 86 of 2015 CAT at Dsm (unreported) and **Morandi Rutakyanurwa vs. Petro Joseph** [1990] TLR 49 (CAT) that, as a matter of law chamber summons must be supported by an affidavit not otherwise.

That in case of an illegality there must be an obvious error. Reference was made to the case of **Tauka Theodory Ferdinand vs. Eva Zakayo**

**Mwita And 3 Others**, Civil application No. 300/2017 of 2016 (CAT) at Dsm unreported.

Finally, in the case of **Allison Xerox Sila vs. THA** (Supra) Page 6 talks about illegality not correctness of the decision that is a point to be considered. Therefore, they argue that the issue of illegality cannot stand.

As for the argument that no injustice if the application is granted simply because the said money is deposited in court, they submitted that the applicants have stayed for 3 years and above since when the judgment was delivered and the matter has taken too long. Justice delayed is justice denied. That it is about 13 years since when the cause of action arose.

That in their counter affidavit they have indicated that there was an application for striking out of the notice of appeal by respondents. This application was brought subsequent to such application which is pending to the CAT. That this application was filed to pre-empt the application to strike out the notice of appeal for failure to file the application for leave out of time. They referred to the case of **Kantibhai M. Patel vs. Dahyabhai F. Ministry** [2003] TLR 437 Page 443. That no application can pre-empt the PO before another appellate court. The application should be dismissed.

In his rejoinder submission, Mr. Makubi, the learned counsel submitted that the affidavit discloses good cause. That the issue of illegality is a point of law which constitute good cause. The allegation that the delay was for the waiting of the copy of judgment is not true. That the advocates were not negligent. He further disputed the allegation that this application is intended to pre-empt their application because these are two different applications.

He prayed for this application to be granted so that the appeal should be heard on merits.

I thank the learned counsels for their earnest submissions. I have thoroughly read the cited case laws along with the filed affidavit and counter affidavits.

Going back to the issue, Section 141 of the Appellate Jurisdiction Act, Cap 141 RE 2002 allows extension of time by High Court *"for leave to appeal... notwithstanding that the time...has already expired."*

The powers vested to this court to extend time though discretionary by its nature must be exercised judicially. That position was clearly stated in the Privy Council in the case of **Ratnam Cumarasamy** (1965) 1 WLR 8 at page 12 that:

*"The rules of court must, prima facie, be obeyed, and, **in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion.** If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time-table for the conduct of litigation."*

(Underscoring mine).

That position was cited with approval in the case **Kalunga And Company Advocates Versus National Bank of Commerce Ltd**, Civil Application No. 124 of 2005, CAT at Dar es Salaam (unreported)



As a matter of law, leave to appeal to the Court of Appeal must be filed within 14 days from the date of the decision (see Rule 45 (b) of the Court of Appeal Rules). Now, has the applicant accounted for each day of the delay?

The challenged decision is Land case No. 55 of 2008 was delivered on 5<sup>th</sup> February, 2015. It would seem in between there was consultation with the advocates and application for relevant judgment as can be gathered in paragraphs 7 and 8. However, there was filed an application for extension of time on 3<sup>rd</sup> March, 2015 which was then amended on 7<sup>th</sup> September, 2015. Their application was struck out on the ground of improper citation. That was on 26<sup>th</sup> February, 2016. The present application was then filed on 31<sup>st</sup> March 2016.

Now, has the applicant accounted for the period between 5<sup>th</sup> February 2015 to 3<sup>rd</sup> March, 2015 and 26<sup>th</sup> February, 2016 to 31<sup>st</sup> March 2016?

Mr. Vedasto Audax, the learned counsel has argued that there is unexplained period of 17 days and therefore the application is still out of time. That even paragraphs 10 and 13 of the affidavit shows that 5 months have not been accounted for.

Reading from the filed affidavit, the 14 days' time during which the application ought to have been filed is from 6/2/2015 to 20<sup>th</sup> February, 2015. The alleged application for extension of time was filed on 3<sup>rd</sup> March, 2015 and therefore the period to account for is from 20<sup>th</sup> February to 3<sup>rd</sup> March 2015 which is about 11 days.

These are the days which Mr. Vedasto Audax the learned counsel has said was attributed by negligence on the part of the advocate for the applicant

and therefore does not constitute sufficient reasons for the delay. One thing which is clear is that the alleged reason of illegality where the filed application was struck out are sequence of events from 3<sup>rd</sup> March 2015 onwards and therefore irrelevant to the fact in issue. However, the interpretation of extension of time on grounds of illegality is very broad. In the case of **Citibank (Tanzania) Ltd vs. T.T.C.L. & Others**, Civil Application No. 97 of 2003, CAT, unreported, the court held that:

*"...a claim of illegality or otherwise of the challenged decision or order or in the proceedings leading to the decision."*

Mr. Makubi, the learned counsel for the applicant has strenuously insisted that there exist grounds of illegality on account of the issue of acquisition of land which is not the powers vested to the applicant. In other words he seems to suggest that there is an arguable case in the intended appeal. This argument reminds me the decision in the case of **Shanti vs. Hindochi & Others** [1973] E.A 207 where an application for extension of time was distinguished to that of leave to appeal. In the former, as in the present case, one has to show *"sufficient reasons why he should be given more time."* That *"the delay has not been caused or contributed by dilatory conduct on his part...he does not necessarily have to show that his appeal has a reasonable prospect of success or even that he has an arguable case..."* That would mean the argument on the merits or demerits of an appeal is not central.

However, all things being equal, I am prepared to buy a story that the court cannot deny a party a right to be heard specially so where there is no 'procedural abuse' and or that no 'prejudice' is caused to the opposite party

as it was held in the case of **Mobrama Gold vs. Minister for Energy** (supra), the position which I fully subscribe to. This is based on the fact that 11 days cannot be said to be long delay. I say so just to demonstrate how the discretion has been exercised. In the case of **Mwita Mhere vs. R** [2005] TLR 107 the court defined judicial discretion by citing **Black's Law Dictionary**, 6<sup>th</sup> edition, and held that:

*"Judicial discretion is the exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law...the court has to demonstrate, however briefly, how the discretion has been exercised to reach the decision it takes..."*


Sometimes, court can allow the application for extension of time even though "the application is unduly delayed" if "shutting out the appeal may appear to cause injustice" (see the case of **TanESCO vs. Mufungo Leonard Majura & Others** (supra) where Mwangesi, J A cited with approval the case of **Boney N. Katatumba vs. Waheed Karim**, Civil Application No. 27/2007 (unreported) and that of **Prosper Baltazar Kileo and Another vs. Republic**, Criminal Application No. 1 of 2010 (unreported). That is what is described as illegality of the challenged decision. I am aware that the court was dealing with extension of time for stay of execution however the principles enunciated therein are equally valid to the case under discussion.

I can safely say that the application had been brought "**in good faith**" and therefore there exist sufficient reasons. I grant the application not on the basis of sympathy or that the delay was due to the fact that the applicant was waiting for the copy of the judgment as Mr. Vedasto Audax wanted to impress court. I would have equally ruled otherwise if that was the sole

grounds. Similarly, the case of **William Shija vs. Fortunatus Masha** (supra) talked about the counsel who was "*negligent in adopting the correct procedure*" which the court held "*could not constitute sufficient reason for the exercise of the court's discretion.*" The period under discussion does not cover when the application was struck out and therefore misplaced. Similarly, as well argued by Mr. Makubi, the learned counsel it would be contrary to known procedure if the affidavit could include submission on point of law on the issue of acquisition and payment of compensation as between the Government and TANESCO.

Lastly, though in passing, there was also a mention on the filed objection in the Court of Appeal that this application is meant to preempt the said preliminary objection. With due respect, it is wrong to decide on a matter not before me. Mr. Makubi correctly submitted that all cases pending at the Court of Appeal have no connection with this application.

For the above stated reasons, this application is accordingly granted. I grant 14 days period within which to apply for leave to appeal to the Court of Appeal. I make no order for costs.

  
**M. G. MZUNA,**  
**JUDGE.** 6/4/2018