

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

**MISC. LAND APPLICATION NO. 449 OF 2019**

*(Originated from the judgment and decree of the District Land and Housing Tribunal for Mkuranga District at Mkuranga in Land Appeal Number number 43 of 2016 which was also originating from Judgment and Decree of Vikindu Ward Tribunal in Land Case number 14 of 2009.)*

**ZAMANA ALLY (MAMA BUSHIRI) ..... APPLICANT**

**VERSUS**

**OMARY CHIPANTA ..... 1<sup>ST</sup> RESPONDENT**

**JUMA BIN JUMA ..... 2<sup>ND</sup> RESPONDENT**

**ALLY LUGOME ..... 3<sup>RD</sup> RESPONDENT**

**SERIKALI YA KIJIKI VIANZI ..... 4<sup>TH</sup> RESPONDENT**

**RULING.**

**S.M. MAGHIMBI, J:**

The Applicant filed this application under the provisions of Section 38 (1) of the Land Dispute Courts Act No. 2, 2002. R.E 2002 ("The Act") praying for this Honorable Court to grant leave to file an appeal out of time, costs of this application and any other orders as the honorable court deems fit and just to grant. The application was supported by an affidavit of the applicant dated 04/08/2019. In this court, the applicant was represented by Mr. Omari Kilwanda, learned advocate while the 1<sup>st</sup> and 2<sup>nd</sup> respondents were represented by Advocate Edward L. Mkungano. Ms. Mary Kavula

represented the 4<sup>th</sup> respondent and the 3<sup>rd</sup> respondent was unrepresented and he did not file his submission so the application was heard ex parte against him. The hearing of this application was conducted by way of written submission.

On the onset of his submissions in support of this application, Mr. Kilwanda prayed for this court to adopt the applicant's affidavit to form part of his submission. He clustered his arguments in two categories, one is whether the delay of the applicant to file his appeal within the prescribed time was due to negligence and two was whether there is a likely hood of success of the intended appeal.

On the reasons for the delay, he submitted that soon after the judgment and decree of the Tribunal dated 2<sup>nd</sup> Aug 2018 in Land Appeal No. 43 of 2016 were issued, the applicant, who is a layman, instructed an advocate known as Bernadetha S. Kinyenje to represent her at the appellate level. That the advocate applied for and timely obtained copies of the judgment and decree and filed Land Appeal No. 111/2018 before this honorable court. On the 11<sup>th</sup> February, 2019, her advocate withdrew the appeal with leave to re file without informing the applicant. That on 18<sup>th</sup> February, 2019 she applied for the copies and being a layman the applicant could not be able to understand the legal procedure that is why she entrusted the advocate who did not perform her duties properly.

He submitted further that it is totally unfair to punish the applicant for the negligence done by her advocate. He supported this argument by citing the case of **Judith Emmanuel Lusohoka vs. Pastory Binyura Mlekule and 2 others, Misc. Land Application No. 74 of 2018** (unreported).

He argued that from the above explanation, it is clear that the act done by the applicant is prudent to show that she did all she could and cannot be blamed or punished for negligence of her lawyer.

Coming to the 2<sup>nd</sup> issue of the chances of success of the appeal, Mr. Kilwanda submitted that the court is required to consider the likelihood of success of the intended appeal, supporting his argument by citing the case of **Samson Kishosha Gabba Vs. Charles Kingongo Gabba [1991] TLR 133**. He argued that the instant case emanated from Land Case No. 14 of 2009 from the Ward Tribunal of Vikindu where the applicant filed the said case as the administratrix of the estate of her late husband. The Ward tribunal decided in favor of the respondent and the applicant lodged Land Appeal No. 1 of 2010 before the District Tribunal which decided in her favor. Subsequently, the respondent filed Misc. Land Appeal No. 40/2011 in this court. The judgment of this court quashed the judgment and decree of the District Tribunal ordering trial denovo before another chairman. At the District Tribunal, the appeal was heard by the same Chairman and not by another Chairman as ordered by the tribunal. Aggrieved, the applicant intends to appeal against that decision hence this application. And that when the judge ordered the trial denovo he specifically ordered it to be tried by different chairman but it was the same chairman Mwakibuja who tried it. Mr. Kilwanda finalized his submission by saying that prayers and orders be granted as prayed in this application.

In his reply, Mr. Mkungano submitted that being a layman is not an excuse because ignorance of the law is not a defense. That the applicant did not account the extent she went to in contacting her advocate (i.e.

Bernadetha) to get any update concerning her appeal as the appeal was withdrawn on 11<sup>th</sup> of Feb 2019 and the instant application was filed on 5<sup>th</sup> August 2019 six months after the applicant's previous advocate failed to communicate the result with her as she claimed.

On the 2<sup>nd</sup> issue of chances of success, Mr. Mkungano submitted that the applicant has a very narrow chance to succeed her appeal as she was supposed to apply for revision instead of an appeal if she wants to challenge the legality of judgment and decree of the District Land and Housing tribunal before chairman Mwakibuja. Mr. Mkungano finalized his submission by praying this court to dismiss this application with costs.

On her part, Ms. Kavula for the 4<sup>th</sup> respondent submitted that the applicant wants to mislead this court by saying that she was not aware on the act of her advocate to withdraw the appeal as she was in court when her advocate prayed to withdraw the appeal. That she was in the position of engaging another advocate to refile the appeal as per the court's order if her advocate withdrew the appeal without her consent.

She further submitted that that the applicant has failed to account for each day of delay as the appeal was withdrawn on 11<sup>th</sup> February 2019 and this application was filed on 5<sup>th</sup> August 2019 which make 177 days of delay but the applicant in her affidavit failed to account for these days instead she said the delay was because of the negligence of her former advocate Bernadetha. To support her argument she cited the case of **Finca (T) Ltd & Another Vs. Boniface Mwalukisa, Civil Application No. 589 of 2018**, High Court of Tanzania at Iringa (unreported) where the court emphasized that the delay of even a single day, has to be accounted for.

She finalized her argument by praying this court to dismiss this application with costs for failure to show good cause.

In his brief rejoinder Mr. Kilwanda reiterated what he submitted in his submission in chief and added that he wondered why the 1<sup>st</sup> and 2<sup>nd</sup> respondents prayed for the applicant's prayers not to be granted because ignorance of the law is not a defense but when it comes to their defective counter affidavits they are praying this court not to consider the legal technicalities because they are laymen.

Having gone through the parties' submissions for and against the application I have noted that indeed the Misc. Land Appeal No. 111/2018 was withdrawn on the 11/02/2019 but contrary what Ms. Kavula's submissions, the records don't show that the appellant was present in person but she was represented by Ms. Kinyenje. On the 18/09/2019 the said advocate applied for copies of ruling. This record shows that indeed the applicant had representation of an advocate who made follow ups on her application. There is also annex. ZAB-4 to the affidavit which shows that in June 2019 she lodged a complaint against her advocate at the Tanganyika Law Society and subsequently on 09/07/2019 the current advocate applied for necessary documents and this appeal was filed in August. I am in agreement with the holding of my Brother Judge, Hon. Matuma in the cited case of **Judith Emanuel Lushoka Vs. PAstory Binyura Mlekula, Misc. Land Application No. 74/2018** (unreported) that a party who is a layperson is not to blame for negligence and irresponsible acts of her advocate. Once a person entrusts the case with her advocate, she need not bother much on the follow ups as she pays for

those services which are mainly on the basis of trust and commitment. Therefore since the applicant has shown some actions promptly taken on her part after she realized the negligence of her advocate, the delay cannot be burden on her from the date the matter was withdrawn while she was not present in court. I am therefore satisfied that sufficient cause for the delay has been shown. Consequently, I allow this application and extend time for the applicant to file her intended appeal. The intended appeal shall be filed in this court within forty five (45) days from the date of this ruling. Costs shall follow cause in the intended application.

***Application allowed.***

Dated at Dar es Salaam this 07<sup>th</sup> September. 2020



  
S.M MAGHIMBI  
JUDGE.