

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND APPLICATION NO. 71 OF 2018**

(Originating from Land Appeal No. 1 of 2015)

**SAMSON MAKOMBA ..... APPLICANT**

**VERSUS**

**FATUMA RAJABU ..... RESPONDENT**

**RULING**

**S.M KALUNDE, J.:-**

In this application, the applicant, **SAMSON MAKOMBA**, is moving this Court for extension of time within which to lodge a Notice of Appeal out of time. The applicant intends to challenge the decision of this Court in **Land Appeal No. 1 of 2015** which was delivered on 15<sup>th</sup> December, 2017. The application is preferred under **section 11 (1) of the Appellate Jurisdiction Act, Cap 141 R.E 2019**. In support of the application, the applicant filed a four (4) page affidavit stating the facts giving rise to the application and the grounds thereto.

In response, the respondent filed a counter affidavit objecting to the application by the applicant. The respondent alleged that, delay in logging the Notice of Appeal was occasioned by the applicants own negligence to inform his advocate of the pronouncement of the judgment. The respondent prayed that the application be dismissed with costs.

The facts giving rise to the present application are that, on 11<sup>th</sup> September, 2014 the applicant here in filed before this Court **Land Appeal No. 1 of 2015**. He sought to challenge the decision of the District Land and Housing Tribunal for Ilala in **Land Appeal No. 12 of 2012**. The decision sought to be challenged was delivered on 15<sup>th</sup> December, 2017 in the applicants' presence and absence of his advocate. His advocate was allegedly already on Christmas leave in Moshi.

In accordance with the pleadings, the applicant obtained copies of the typed judgment and decree of the Court on 19<sup>th</sup> January, 2018. According to the applicant's affidavit, his advocate resumed work on 23<sup>rd</sup> January, 2018 leading up to the filing of the present application on 09<sup>th</sup> February, 2018.

The Court granted leave that the application be argued by way of written submissions. The Applicant's submissions were drawn and filed by Advocate **Amin M. Mshana** while Respondent submissions were drawn in gratis by learned counsel **Irene Felix Nambuo** from Legal and Human Right Centre.

The main ground for the delay advanced by the applicant is delay in being supplied with copies of the judgment and decree. In support of the argument it was argued that, by 19<sup>th</sup> January, 2018 when the applicant obtained copies of judgment and decree, he was already late by some 34 days. He added that since the law required a notice to be filed in 30 days, the applicant was late by 4 days. In his view the appropriate course of action for the applicant was to file the present application. He added that by the time the applicant filed the present application on 09<sup>th</sup> February, 2018 they were well within the 30 days window counted from the date of receiving copies of judgment and decree. He implored that the applicant acted reasonably and diligently.

In addition to that the applicant argued that his appeal had overwhelming chances of success. He therefore pleaded that the application be granted with costs.

In response Ms. Nambuo argued that, for one to file a Notice of Appeal it was not a legal requirement that they should wait for copies of the impugned decision. Conversely, she appeared to suggest that the present application was misconceived, her view was that, since this application originates from the decision of the Ward Tribunal, the appropriate procedure should have been for the applicant to file an application for certification on a point of law.

Responding on the argument that the delay was occasioned by an advocate being on leave, she argued that the requirement of the law is for the applicant to account for each day of the delay. She reasoned that the applicant has failed to account for each day of the delay. To support the argument she cited the case of **Lyamuya Construction Company Ltd. vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, CAT (unreported).

On whether chances of success was ground for extension of time, Ms. Nambuo said that the position of the law presently is that chances of success is no longer a ground for extension of time. To support this view she cited the case of **Linus Furaha Shao vs. NBC**, Civil Application No. 9 of 1999. She concluded that the applicant has failed to advance good cause for extension of time, she thus prayed for the Court to dismiss the application with costs.

In rejoinder the applicant argued that, in accordance with rule 83 (3) of the Court of Appeal Rules, 2019, it is a requirement that a Notice of Appeal must state whether the Notice is ***"intended to appeal against the whole or part only of the decision and where it is intended to appeal against part only of the decision, shall specify the part complained of"*** on that account

the applicant implored that it was impossible for him to comply with the above requirement without first having gone through the decision of this Court.

On the question whether leave should be preceded by an application for certification on a point of law, the applicant rejoined that in accordance with rule 83 (4) of the Court of Appeal Rules, 2009, one has to file a notice first before making an application for certificate on a point of law. To bolster the argument he cited the decision of this Court in **Meatu District Council vs Wesons Tanzania Limited**, Commercial Case No. 53 of 2008.

Having considered the submissions made by the parties, the question for my determination is whether this application is merited. The starting point, in my view, would be the moving provision. This application was preferred under section 11 (1) of Cap. 141. The said section reads:

*"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."*

In the present application the respondent argued that the applicant was required to apply for certification on a point of law instead of a Notice of Appeal. Rule 83 (1) of the Court of Appeal

Rules, 2019 is specific that any person desirous to appeal must file a notice with the high court. The rule states:

*"83.-(1) Any person who desires to appeal to the Court **shall lodge a written notice in duplicate with the Registrar of the High Court.**"*

*(2) **Every notice shall, subject to the provisions of Rules 91 and 93, be so lodged within thirty days of the date of the decision against which it is desired to appeal.**" [Emphasis added]*

The requirement to file a notice is in addition to the requirement to file for an application for a certificate that a point of law. However, the Rules are clear that one need not to apply for a certificate that a point of law before filing a notice of appeal. On this, I agree with the Counsel for the Applicant. Rule 83 (4) of the Rules provides:

*"When an appeal lies only with leave or on a certificate that a point of law is involved, it shall not be necessary to obtain the leave or the certificate before lodging the notice of appeal."*

Reverting back on the merits of the application, the applicant argument is that he late in filing the appeal because of the delay in obtaining the copies of judgment and decree of this Court from which he would prepare a notice. He also contended that by the time he obtained a copy of the judgment and decree his advocate was on Christmas leave. Admittedly, between the middle of December to late January each year the Court is on vacation.

The position under the Court of appeal rules that a court vacation shall not be reckoned in computing time limited for any act or proceeding under these Rules. Rule 8 of the Rules states:

*"Save as is provided in Rule 8, in computing time limited for any act or proceeding under these Rules a court vacation shall not be reckoned unless that day is the last day of that time, in which case it shall be excluded from that computation."*

That said, in accordance with the Courts annual calendar, the period between 15<sup>th</sup> December, 2017 to 30<sup>th</sup> January, 2018 the Court must have been on Court vacation, that period is excluded in computing the 30 days' time limit set out under rule 83 (2) of the Rules. Having excluded the Court vacation in terms of rule 8, and in acknowledging that this application was filed on the 09<sup>th</sup> February, 2018. I find that the applicant acted diligently and within reasonable time sufficient for this Court to exercise its discretion in condoning the delay.

For the foregoing reasons, the application is granted without costs. The Applicant is to file the Notice of Intention to Appeal within 21 days from the date of obtaining certified copied of this decision.

It is so ordered.

**DATED at DAR ES SALAAM this 17<sup>th</sup> day of MAY, 2021.**

  
**S.M. KALUNDE**  
**JUDGE**

