

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 504 OF 2019

(Arising from the Decision of the High Court Land Division in Misc. Land Appeal
No. 15 of 2017)

LEOCADIA RUGAMBWA APPLICANT

VERSUS

ASIA MZEE MKWANGA 1ST RESPONDENT

ALFRED NDUNGURE 2ND RESPONDENT

RULING

Date of Last Order: 29/03/2021 &

Date of Ruling: 07/05/2021

S.M KALUNDE, J:-

The Applicant **Leocadia Rugambwa**, is aggrieved by the decision of this Court in **Misc. Land Appeal No. 15 of 2017** dated 10th December, 2018 he intends to appeal to the Court of Appeal. Being out of time to file a Notice of Appeal, he decided to file the present application in which she is seeking for an order for extension of time to file Notice of Appeal out of time. The application is brought under **Section 11 (1) of The Appellate Jurisdiction Act, Cap. 141 R.E. 2019** and supported by three Affidavits one from **Mpaya Kamara** the Learned Advocate for the Applicant, and two others from **Leocadia Rugambwa** the Applicant and **Gilbert Dedan** the son of the Applicant.

Briefly, this matter originated from the Bunju Ward Tribunal, in **Land Case No. 115 of 2013**, the Applicant lost the case, and therefore, he filed **Misc. Land Application No. 141 of 2015** at the District Land and Housing Tribunal for Kinondoni seeking to an order for stay of execution of Ward Tribunal award. Again he was unsuccessfully. He appealed to this Court under **Misc. Land Appeal No. 15 of 2017** which is now intended to be appealed against to the Court of Appeal.

Through their affidavits, the applicants advanced two reasons for the grant of the orders sought; firstly, they lost track of the scheduled delivery of the judgment of this Court in **Misc. Land Appeal No. 15 of 2017** because they were attending a funeral of one of their partners; secondly, they claim that there are some irregularities in the decision of this Court.

The applicants requested that the appeal be argued by written submissions. Leave was granted and parties filed their written submissions in support of their positions in this case. The applicants' submission were drawn and filed by learned counsel **Mr. Mpaya Kamara** while those of the Respondents were drawn in gratis by **Irene Felix Nambuo** from Legal and Human Right Centre.

In support of the application Mr. Mpaya submitted that the reasons for delay of filing notice of Appeal on time due to lose track of the Case status as the result the Judgment was delivered in absence of the Applicant. The reasons of losing case track were due to the fact that the applicant's lead counsel passed away on the 5th November, 2018 therefore they could not attend on 06th November, 2018 when the matter was called for mention and subsequently fixed for judgment on

10th December, 2018. His claim was that they were not informed of the date of the delivery of the judgment. In support of that position he cited the provisions of **order XX rule 1** of the **Civil Procedure Code, Cap. 33. R.E. 2019** and the decision in **Cosmas Constructions Co. Ltd vs. Arrow Garments Ltd** (1992) T.L.R. 127.

On the second limb, Mr. Mpaya argued granting of extension of time in the present case was necessary to afford the Court of Appeal with an opportunity to cure some irregularity in the decision sought to be challenged. He cited the case of **Etiennes Hotel vs. National Housing Corporation**, Civil Reference No. 32 of 2005 (Unreported) and **Principal Secretary, Ministry of Defense and National Service vs. Devram Valambhia** (1992) T.L.R 185 for the proposition that, given that there is illegality in the impugned decision extension of time should be granted regardless of whether or not reasonable explanation has been provided by the applicant.

In reply the respondents acknowledged that extension of time was the discretion of the Court. However, they added that such discretion should be exercised judiciously based on elaborate grounds. The respondents enumerated the grounds to include length and reason of delay. They cited the case of **Mbogo vs Shah** [1968] E.A. Further to that, the respondents argued that the judicial discretion must be guided by law, for that they referred the Court to the statement of **Lord Manfield** (in **Rex vs. Wilkes** (1770) 4 Burr as cited by **Sir Jocelyn, P**, in **Povey vs. Povey** (1971) 2WLR 381 at 387 thus;

"... discretion, when applied to a court of justice means sound discretion guided by law. It must be

governed by rule and not by humour. It must not be arbitrary and fanciful but legal and regular..."

In addition to that the respondents argued that **Misc. Land Appeal No. 15 of 2017** was not an *ex parte* proceeding imploring that the decision in **Cosmas Constructions** (supra) was not applicable. The respondents went on to argue that, non-appearance by the appellant or their advocate at the date of delivery of the judgment demonstrated the highest degree of negligence. They implored that the appellant were not diligent in prosecuting their appeal. The respondents concluded with a prayer that the application be dismissed for lack of merit.

Mr. Mpya rejoined that in interpreting what amounts to "**sufficient cause**" courts must accord a wide interpretation. To support his view he cited the case of **Felix Tumbo Kisima vs. TTCL and Another Civil Application No. 1 of 1997 TLR** (sic) holding that;

"It should be observed that sufficient cause should not be interpreted narrowly but should be given a wide interpretation to encompass all reasons or causes which are outside the applicant's power to control or influence resulting in delay in taking any necessary step"

He contended that there was illegality in the decision sought to be challenged and to support that view, he cited the case of **Arunaben Chaggan Mistry vs. Naushad Mohamed Hussein and 3 Others**, Civil Application No. 6 of 2016 and **Attorney General vs. Consolidated Holding Corporation and Another**, Civil Application No. 26 of 2014 both unreported. He insisted that the application be granted as prayed.

I have gone through the affidavits and records of the application and submissions made by the parties. I have also considered the authorities filed for and against the arguments advanced in the application. Upon such consideration, I am satisfied that, the prime question for my determination is whether or not this application is merited.

To establish the merit or otherwise, of the application, I think it would be worthwhile to look at the guiding provision. It is not in dispute that the time line for filing a Notice of Appeal is provided for under Rule 83 (1) and (2) of **the Court of Appeal Rules, 2009**. In accordance with the said rule, any person desiring to appeal to the Court of Appeal must lodge a written notice within 30 days. Rule 83 (1) and (2) provides:

"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 mine]*

In case one fails to lodge a notice on time s. 11 (1) of **Cap. 141 R.E. 2019** empowers this Court to extend time lodge the same. The 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. [Emphasis added]

In accordance with the above quoted section this Court has the discretion to extend the time for giving notice of intention to appeal from a judgment notwithstanding that the time for giving such has already expired. However, before exercising that discretion, the applicant has to demonstrate that he was precluded from filing the Notice of Appeal on time by some **“good cause”** or **“sufficient cause”**.

As rightly pointed out by Mr. Mpaya, what amount to “good cause” or “sufficient cause” has not been defined, however, in considering whether sufficient of good cause subsists court take consideration several factors. These factors were enumerated in **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) they include:

- 1. The applicant must account for all the period of delay.*
- 2. The delay should not be inordinate.*
- 3. The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.*
- 4. If the Court feels that there are other reasons such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged.”*

In the instant case the decision sought to be challenged was delivered on the 10th December, 2018 and immediately thereafter copies of the

certified judgment were made available for collection by the parties. In accordance with rule 83 (2) the 30 days for filing notice expired on the 10th January, 2019, however, the present application was filed on 23rd August, 2019, almost seven (7) months after expiry of the time limit fixed by law. The applicant allege that they were not notified of the date of delivery of the judgment.

Records in **Misc. Land Appeal No. 15 of 2017** show that on 26th September, 2018 it was ordered that the appeal be argued by way of written submissions and it was fixed for mention on 06th November, 2018. On the day the appellant were represented by **Mr. Herriel Munisi**, learned advocate who was holding brief for Mr. Mpaya, in fact it was Mr. Munisi, for the appellant who made a prayer for written submissions. When the matter came for mention on 06th November, 2018 the appellant were unrepresented and all the respondents appeared in person. The Court ordered that judgment be delivered on 10th December, 2018. Again neither the appellant nor his advocate were present at the date of delivery of the judgment. As a result, on 10th December, 2018, the judgment was delivered in the absence of the appellant or their advocate, but in the presence of the respondents.

Mr. Mpaya argued that they did not make it to Court on 06th November, 2018 because one of their partners at the firm passed away. There was no any material or evidence to support this allegation. Further to that there is no any reason or explanation on his part to explain why they did not appear on 10th December, 2018 when the matter was fixed for judgment. It is trite law that for the Court to exercise its discretion there must be some materials before it. This position was held in **Ratman vs Cumarasamy and Another** [1964] All 3 933, in which it was held that:

"The rules of the Court must, prima facie be obeyed, and, in order to justify a Court 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 provide a time table for the conduct of litigation."

Further to that, Mr. Mpya cited the case of **Cosmas Constructions** (supra), however, that case is not applicable in the present circumstances because in that case the matter had proceeded **ex parte** against the appellant. In the present case parties were ordered to file written submissions and they complied with the orders. A date for mention was fixed in the presence of the parties. However, the applicant, who ought to be following up on his case, did not appear on the next date when the matter was fixed for judgment. Common sense would dictate that the counsel would follow-up on what transpired in court because he was aware of the date. But, he did not do so, or at least there is no explanation why he did not follow up and no evidence shows he did.

To make matters worse, the applicant did not appear on both dates. One would think that, if indeed there was a funeral of a partner, the advocate would have sought for the appearance of the applicant in person or someone else, but that did not happen. The counsel did not even consider to have his fellow advocate hold brief for him.

But, that is not all, the applicant has failed to demonstrate when did they become aware of the decision and what steps were made. Instead

they waited until the execution proceedings at the tribunal were revived and that is when they realized that **Misc. Land Appeal No. 15 of 2017** had been determined. That is clear demonstration of laxity, negligence and the highest degree of inaction by the counsel for the applicant and the applicant as well.

The position of the as stated in **Lyamuya Construction Company** (supra) for extension of time to be granted the applicant must account for all the period of delay. In case of a delay, the delay should not be inordinate; and not due to negligence or sloppiness in the prosecution of the action. In essence, the applicant has to show diligence, and not apathy in his actions. In the presence case there is no sufficient reasons that has been adduced for the seven (months) delay. I find that this reason lacks merit.

On another limb the applicant alleged illegality in the decision sought to be challenged. It is now established law in this country that where a point of law involves the illegality of the decision that by itself constitutes sufficient reason to grant an extension of time even if the appellant's intended appeal is out of time. See **Kashinde Machibya vs. Hafidhi Said**, Civil Application No. 48 of 2009 (unreported). However, for illegality to amount to sufficient reason, it was held in **Lyamuya Construction Company** (supra) that

"Illegality must be apparent on the face of records, such as the question of jurisdiction; not one that would be discovered by long drawn argument or process."

Upon consideration of the alleged illegality advanced in the present case, I am satisfied that the same do meet the standard or threshold to

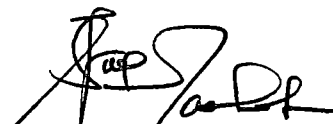
justify the extension of time. I say so because the alleged illegalities are not apparent on the face of record of the impugned decision. I am supported in this view by the decision in **Elias Masija Nyang'oro & Others vs Mwananchi Insurance Co. Ltd** (Civil Appl. No. 552/16 of 2019) [2021] TZCA 61; (02 March 2021)

*"The reason behind being that the claimed illegality is not apparent on the face of record and therefore does not meet the settled threshold. (See **The Principal Secretary Ministry of Defence and National Service v. Devram Valambia** [1991] TLR 387). Therefore, find that the points of illegality raised by the applicants do not constitute good cause warranting extension of time sought."*

This Court, as the Court of Appeal held in the above cited case, finds that the alleged points of illegality raised by the applicants do not constitute good cause warranting extension of time sought.

That said, I find that the applicant has failed to adduce sufficient cause for this Court to exercise its discretion in granting extension of time to file a notice of appeal out of time. The application has no merit and it is hereby dismissed accordingly. No order for costs is made. It is so ordered.

DATED at DAR ES SALAAM this 07th day of APRIL, 2021.


S.M. KALUNDE
JUDGE

