

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC LAND APPLICATION NO. 48 OF 2021

*(Arising from the Judgment and Decree of this Honourable Court in
Land Case No. 241 of 2013)*

OMARI SALUM CHITANDA *(As Administrator of the Estate of Deceased*

ABDALLAH SEIF.....APPLICANT

VERSUS

REV. WILLIAM MATHAYO MNTENGA.....RESPONDENT

RULING

Last Order: 22/06/2021

Date of ruling: 30/06/2021

B.E.K. MGANGA, J

On 27th January, 2021 the Applicant filed this application applying for extension of time within he can file Notice of Appeal against the Judgment and Decree of this court delivered by Nchimbi, J in ***Land Case No. 241 of 2013***. The Applicant has shown in both the chamber summons and the Affidavit in support of the Application that the Judgment and Decree that he intend to appeal against was ***delivered on 20th April, 2018***. It is not disputed by both parties that on 28th August, 2013 the respondent filed Land Case No. 241 of 2013 against

the administrator of the estate of deceased Abdallah Seif claiming to have entered into agreement with the late Abdallah Seif to purchase his house located at plot No. 15, Block K, Hananasif area within Kinondoni District in Dar es Salaam Region. It is also not disputed that the said Land case was decided in favour of the Respondent. While the Applicant has averred in paragraph 3 of his Affidavit that the judgment was delivered on **20th April 2018**, the Respondent has averred in paragraphs 4, 6 and 11 of his counter affidavit that it was on **20th April 2016**.

When the Application came for hearing on 22nd June 2021, Geoffrey Lugomo Advocate appeared for the Applicant and submitted that the aforementioned Land case No. 241 of 2013 was decided by Nchimbi, J in favour of the Respondent on 20th April 2016 and that the Applicant was aggrieved as a result he instructed Mashaka Ngole Advocate to take necessary steps to enable him to appeal to the Court of Appeal. He went on that, the said advocate assured the Applicant that he has taken necessary steps but later on the said advocate cut off communication with the Applicant. It was at this time, the Applicant noted that there is something wrong as a result he made follow up to the court where he was informed by court clerks that there was no



notice of Appeal filed by the said Mashaka Advocate. He went on that, the Applicant was informed by the court clerks that the said Mashaka Advocate filed Application for review No. **937/2016** whereas the parties were *Saluma Nassoro as the Applicant and Dr. William Mathayo Mtenga* as the Respondent. When the court asked Mr. Lugomo advocate the relationship between the Applicant and the said Saluma Nassoro, he replied that Saluma Nassoro is the mother of the Applicant although he is not sure as to whether she is biological mother or not. Mr. Lugomo submitted further the Applicant learnt that there was no notice of Appeal filed before the court at the time he was already out of time. He attributed the delay to negligence and or incompetence of Advocate Mashaka and not otherwise. He cited three cases namely; ***Bahati Musa Hamisi Mtopa vs. Salum Rashid, Civil Application No. 112/07 of 2018, CAT (unreported), Ghania J. Kimambi vs. Shedrack Ruben Mambi, Misc. Application No. 692 /2018 (High court Labour Divison) Dar es Salaam (unreported) and Keneth Fanuel Shango vs. Tanzania Portland Cement co. Ltd, Misc. Civil Application No. 732 of 2019, High court (unreported)*** to press on me that negligence or incompetence of an advocate is a good ground for extension of time. At the conclusion of his submission he invited me to apply the overriding objective principle provided for under



section 3A(1) and (2) of the Civil Procedure Code to allow this application.

On the other hand, Alex Balomi advocate who appeared for the Respondent resisted the application arguing that it lacks merits. He submitted that there is no sufficient cause in the affidavit of the Applicant for the court to exercise discretion to extend time. Mr. balomi submitted that, the application was filed malafide with intention of delaying execution or satisfaction of the decree that was issued by Nchimbi J on 20th April 2016. He emphasized that the said decree emanate from Land Case No 241 of 2013 and that its judgment was delivered on 20th April 2016 and it is now five years without it being executed. He submitted that there was application for execution No 83/2016 between the Respondent and the Applicant and that the same was determined by the Registrar. He went on to submit that there has been a series of applications including Misc. **Land Application No. 794 of 2018 between the Applicant and the Respondent** whereas the Applicant was applying for review. That, Mashaka advocate was representing the Applicant in the aforementioned application for review and that the same was dismissed by this court (Dr. Mango, J) for being time barred. Mr. Balomi advocate argued that the affidavit by the



Applicant doesn't show as to when the Applicant became aware that there was no Notice of Appeal filed in court and when he instructed another advocate to make this application. He was of the view therefore that, the Applicant has miserably failed to account for every day he delayed to lodge Notice of Appeal from 20th April 2016 i.e the date of judgment to date that is almost five years. In responding to the argument that delay was attributed to, by negligence and or incompetence of Mashaka Advocate, Mr. Balomi submitted that proof is required otherwise the said advocate will be condemned unheard. He insisted that, filing of objection proceedings on behalf of the Applicant by the said Mashaka advocate cannot be said to be incompetence or negligence but it was a matter of choice by the said advocate. He also invited me to disregard the cases cited by counsel for the Applicant as they are distinguishable. He submitted that in the **Bahati's case** (supra), the advocate involved was assigned to the Applicant by legal aid unlike to the herein application at hand. He argued that in the **Shango's case** (supra), the applicant was a Lieutenant Colone who had no time to follow up the case unlike the applicant. He concluded by submitting that, to invoke the overriding objective principle in this application will be a misuse and will open a floodgate of applications for the inordinate delayed Applications. He therefore prayed for dismissal of



the Application with costs as the Respondent has suffered injustice since 2016 when the court decided in his favour.

Replying to submissions by counsel for the Respondent, Mr. Lugomo Advocate submitted that there is no dispute that Mashaka Ngole advocate was engaged by the Applicant to follow up the Appeal. He conceded that Mashaka Ngole advocate was involved in filing and handling in court **Application No. 937/2016** i.e. Objection proceedings between ***Saluma Nassoro as the Applicant and Dr. William Mathayo Mtenga and Omari Salum Chitanda the herein Respondent and Applicant respectively as Respondents*** and that the same was struck out by the court. He conceded further that Application No. 794 of 2018 was between the same parties and that the Applicant was seeking to review the decision of this court in Application No. 937/2016 which was filed by the said advocate Mashaka Ngole. He also conceded that Application No. 794/2018 was argued by Balomi Advocate for the herein Respondent while ***Ganjatuni Shabani who works with him (Lugomo Advocate) in the same chamber of Mzizima Advocates represented the Applicant.*** Replying as to when the Applicant became aware of existence of application No. 794/2018 for review, he said that it was in May 2020 which is why he



approached them in their chambers to write a written submission on his behalf. He submitted that the said application was dismissed by this court (Dr. Mango, J) on 6th November 2020 for being time barred. It was his submission that, after dismissal of Application No. 794/2018, on 27th January 2021 they filed this application. He concluded his submission by submitting that there is no inordinate delay, and that the Applicant has accounted for these five years delay as he was unaware of what was going on. He therefore prayed that the application be granted with costs.

It is clear to me that the decision which the Applicant intend to appeal against was delivered on 20th April 2016 although the Applicant deponed to in his affidavit in support of the application that it was on 20th April 2018. That clarity is found in Paragraph 4 of the Respondent's counter affidavit and judgment of this court (Nchimbi, J) in Land case No. 241 of 2013 attached to the affidavit of the Applicant. The said judgment shows that the last order was on 22/3/2016 and judgment was on 20/4/2016. Now the only issues for determination by this court is whether there are sufficient reasons for extension of time or not.



Extension of time is discretion of the court but it has to be exercised judiciously. The court of Appeal in 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 (unreported)*** has propounded important conditions that has to be considered by the courts in determination of applications for extension of time as follows:-

" (a) The applicant must account for all the period of delay

(b) The delay should not be inordinate

(c) The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action he intends to take

(d) If the Court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance, such as illegality of the decision sought to be challenged."

In arguing this application, counsel for the Respondent argued that the Applicant has failed to account for the period of delay that is almost five years. On the contrary, counsel for the Applicant submitted that he has accounted for. I have examined the affidavit the Applicant and find that he only attributes the delay to the negligence and or incompetence of his

advocate. Mr. Balomi has correctly submitted, in my view, that we cannot condemn the said advocate unheard. Apart from averment that the delay was due to negligent of an advocate, I have found as submitted by counsel for the Respondent that the Applicant and his advocate chose another route instead of appealing but after noticing that they took a wrong one, they want to go to the one they opted not to take earlier. The cases that were cited to me to the effect that negligence and or incompetence of an advocate is a good reason for extension of time are distinguishable and cannot apply in the circumstance of this case and this has not detained me. In the Bahati's case (supra) the ***Court of Appeal held that an error made by an advocate through negligence or lack of diligence is not sufficient cause for extension of time.*** That is the general principle. The court **did not say** that an error made by an advocate through negligence or lack of diligence is sufficient cause for extension of time. What the Court of Appeal said in that case is that, ***in exceptional circumstances surrounding the case, such an error can amount to sufficient cause.*** In the case at hand, the Applicant was under duty to show that exceptional circumstances existed for him to benefit from that exception to the general rule. To the contrary, circumstances in this case are against him as explained herein below.

Counsel for the Respondent submitted that the Applicant has not accounted for the delay for five years. This has been indirectly conceded to by counsel by the Applicant in his reply submission. It is clear that the same advocate who is alleged that was instructed by the Applicant to file a notice of Appeal filed and handled in court **Application No. 937/2016** i.e. Objection proceedings between ***Saluma Nassoro as the Applicant and Dr. William Mathayo Mtenga and Omari Saium Chitanda the herein Respondent and Applicant respectively as Respondents.*** Counsel for the Applicant has conceded that the Applicant has close relationship with the said ***Saluma Nassoro*** who filed objection proceedings in court against the herein Respondent and the Applicant himself. It doesn't click in my mind that the Applicant was unaware of what was being done by the said Saluma Nassoro who is his mother whether biological or not but enjoying the service of an advocate who had instruction from the Applicant to take the route of appeal. Worse still, the same advocate filed Application No. 794 of 2018 between the same parties seeking to review the decision of the court in Application No. 937/2016. This cannot, at any rate of comprehension, be said was incompetence or negligence of the said Mashaka Advocate, rather, it was a gambling choice of the Applicant and the said advocate. It is my settled opinion that, poor choice of the route to take in a case, cannot be considered as a ground for extension of time. The party that took a wrong



route has also to accept the risk thereof. To add salt on the wound, counsel for the Applicant conceded that Application No. **794/2018** was argued by Balomi Advocate for the herein Respondent and ***Ganjatuni Shabani who works with Lugomo advocate in the same chamber of Mzizima Advocates represented the herein Applicant.*** I have found that Application **794/2018** was struck out on 6th November 2020. Funny enough, counsel for the applicant has informed this court that the Applicant became aware of its outcome in May 2020. This information is not in the Applicant's affidavit as such I cannot treat it as evidence. Even if we assume that it is contained in his affidavit, the Applicant has failed to account for the delay from May 2020 to 27th January 2021 when he filed this Application. It should be noted that the herein Parties (Applicant and Respondent) were the same in Application **794/2018** being represented by the advocate from the same office. Now, an advocate from that same office, cannot be heard telling the court that their client (the Applicant) became aware of the outcome of that application seven (7) months after. This, to my opinion, is inordinate delay.

Counsel for the Applicant invited me to consider the Overriding objective principle and allow the application. I decline that invitation because that principle is not meant to circumvent mandatory provisions of

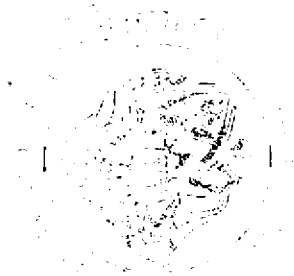


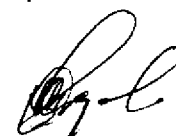
the procedural laws which go to the foundation of the case as it was held by the Court of Appeal in ***SGS Societe Generale De Surveillance SA and another vs. VIP Engineering & Marketing Limited and another***, Civil Appeal No. 124 of 2017 (Unreported). It can be recalled that, it is almost five years from the date of the judgment and decree, the decree holder is still being taken to court by the parties who were aware of its existence from day one. The overriding objective principle cannot be used in that way otherwise we will have endless litigations.

For all what I have said hereinabove, I dismiss the application with costs.

Order accordingly.

Dated at Dar es Salaam this 30th day of June 2021.




B. E. K. Mganga
JUDGE
30/6/2021