

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 386 OF 2020

*(Originating from a decision of the Morogoro District Land and Housing Tribunal in
Land Application No. 96 of 2017)*

JONATAS SHABANI APPLICANT

VERSUS

ELINA RASHID RESPONDENT

RULING

Date of last Order: 06.12.2021

Date of Ruling: 08.12.2021

A.Z. MGEYEKWA, J

The applicant filed this application before this court seeking for leave to appeal before this court, out of time against the decision of the Morogoro District Land and Housing Tribunal dated 16th September, 2019 before Hon. O.Y. Mbega. The application was made under section 41 (2) of the Land Dispute Court Act, Cap.216 [R.E2019].

The application is supported by an affidavit deposed by Jonatas Shabani, the applicant. The respondent resisted the application and has

demonstrated his resistance by filing counter affidavit deposed by Elina Rashid, the respondent.

When the matter came for court orders the respondent did not appear whereas the applicant represented himself before this court. The court ordered the matter to be argued by way of written submission, the applicant was required to file his written submission before or on 02nd September, 2021, and the respondent was required to file his reply on 05th October, 2021.

However, nothing has been filed by the respondent, to-date, and no word has been heard from him on the reason for the inability to conform to the court schedule. This being the position, the question that follows is: what is the next course of action? The settled position is that failure to file written submissions, when ordered to do so, constitutes a waiver of the party's right to be heard and prosecute his matter. Where the inability is on the part of the respondent, the consequence is to order that the matter be heard ex-parte.

This position is consistent with the Court of Appeal of Tanzania holding in the case of **National Insurance Corporation of (T) Ltd & Another v Shengena Ltd**, Civil Application No. 20 of 2007 at DSM (unreported), it was held that:

"The applicant did not file submission on the due date as ordered. Naturally, the Court could not be made impotent by the party's inaction. It had to act ... it is trite law that failure to file submission n(s) is tantamount to failure to prosecute one's case."

Similar, in the case of **Tanzania Harbours Authority v Mohamed R. Mohamed** [2002] TLR 76; **Patson Matonya v Registrar Industrial CourtofTanzania & Another**, Civil Application No. 90 of 2011 and **Geoffrey Kimbe v Peter Ngonyani**, Civil Appeal No. 41 of 2014 (both unreported). In consequence of the foregoing, it is ordered that the matters be determined *ex-parte*, by considering the application based on the submission filed by the applicant.

In his submission, the applicant s=prayed for this court to adopy=t his affidavit and form part of his submission. He submitted that the main reason for his delay to appeal was because his brother Zakaria Shabani was very ill, and he was very busy taking care of him. He added that unfortunately, his brother passed away on 12th November, 2019 and he had to take charge of all funeral arrangement. All the time the applicant was not aware that it has taken him a long time to file his appeal before this court.

The applicant went on to submit that he lost all court documents including the intended appeal decision in respect to Case No. 96 of 2017, the event was reported to the Police Post in which was granted the loss report the same is attached as Annexure A dated 17th February, 2020. It was his view that the delay was not caused by negligence but by a genuine reason that was beyond his control. The applicant's Advocate added that the applicant being a layperson was busy seeking for legal aid service to assist him in preparing his documents, unfortunately, the days lapsed, until 06th April, 2020 when he lodged Misc. Land Application No. 183 of 2020 was struck out by this court for being incompetent.

On the strength of the above submission, the applicant urged this court to grant his application otherwise, he will suffer great loss if the respondent will execute the Judgment of the tribunal.

I have keenly followed the grounds contained in the applicant's affidavit and the respondent's counter-affidavit with relevant authorities. The position of the law is settled and clear that an application for extension of time is entirely the discretion of the Court. But, that discretion is judicial and so it must be exercised according to the rules of reason and justice as it was observed in the case of **Mbogo and Another v Shah** [1968] EALR 93.

Additionally, the Court will exercise its discretion in favour of an applicant only upon showing good cause for the delay. The term “good cause” having not been defined by the Rules, cannot be laid by any hard and fast rules but is dependent upon the facts obtained in each particular case. This stance has been taken by the Court of Appeal in a number of its decision, in the cases of **Regional Manager, TANROADS Kagera v Ruaha Concrete Company Ltd**, Civil Application No.96 of 2007, **Tanga Cement Company Ltd v Jumanne D. Massanga and another**, Civil Application No. 6 of 2001, **Vodacom Foundation v Commissioner General (TRA)**, Civil Application No. 107/20 of 2017 (all unreported). To mention a few.

From the affidavit evidence and oral submissions by the learned counsel for the applicant, it is evident that the applicant is a layperson who represented himself at the initial stage. The issue for determination is *whether the applicant has made a case that warrants an extension of time.*

The position of the law is very settled and clear when it comes to application for extension of time to appeal. There are plethora of legal authorities in this respect. In the case of **Benedict Mumelo v Bank of Tanzania** [2006] 1 EA 227 the Court of Appeal of Tanzania decisively held:-

"It is trite law that an application for extension of time is entirely in the discretion of the Court to grant or refuse it, and that extension of time may only be granted where it has been sufficiently established that the delay was with sufficient cause."

Needless to say, the court has gone further to interpret and distinguish categories of delay between real delay and technical delay for purposes of determining whether the application for extension of time merits granting or not. This was clearly stated in the landmark case of **Fortunatus Masha v William Shija & Another** [1997] TLR 154 in which the court held that:-

"A distinction had to be drawn between cases involving real or actual delays and those such as the present one which clearly only involved technical delays in the sense that the original appeal was lodged in time but was incompetent for one or another reason and a fresh appeal had to be instituted. In the present case, the applicant had acted immediately after the pronouncement of the ruling of the court striking out the first appeal. In these circumstances, an extension of time ought to be granted."

A cursory perusal of the court records reveals that after the delivery of the judgment on 16th September, 2019, the applicant was taking care of his ill elder brother who passed away on 12th November, 2019. The records reveal that the applicant was not aware of the days of filing an

appeal within time. The evidence which the applicant produced before this court is a ruling of this court for an extension of time in respect to Misc. Land Application No. 183 of 2020 dated 23rd June, 2020 whereas this court struck out the application for being incompetent. The applicant has also attached a lost report dated 16th February, 2020 which shows that the applicant reported at the Police Station that he lost all his court original documents.

I have considered the efforts taken by the applicant that he filed an appeal without being conversant with the required procedure and ended by the court to strike out his appeal. It is apparently clear from records that the applicant made an effort thereafter to institute another application before this court without success and merely on technical grounds.

In paragraphs 12 and 13 of the applicants' affidavit, the applicant has shown that he is still interested in pursuing the appeal against the decision of the District Land and Housing Tribunal for Morogoro, however, the time for filing an appeal to this court expired. Therefore, I considered the fact that the applicant is still interesting to see that justice is done. I have also considered the fact that the right of appeal is not only a statutory one but also a constitutional right, of which a person cannot be lightly denied when this court is there to determine the applicant's rights. In my view, once an


appeal is eventually lodged before this court, this court will have to determine unpretentious issues brought by the applicant.

I will, in the circumstances exercise my discretion under section 41 (2) of the Land Dispute Courts Act, Cap. 216 [R.E 2019] and proceed to grant the application for extension of time to file an appeal out of time against the decision of the District Land and Housing Tribunal for Morogoro in Land Application No.96 of 2017. The same to be filled within thirty (30) days from today. No order as to costs.

Order accordingly.

Dated at Dar es Salaam this date 08th December, 2021.




A.Z.MGEYEKWA
JUDGE
08.12.2021

Ruling delivered on 08th December, 2021 in the presence of the applicant in the absence of the respondent.




A.Z.MGEYEKWA
JUDGE
08.12.2021