

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 529 OF 2020

(Arising from the Land Appeal No. 75 of 2017 before Hon. Kente, J. originating from the District Land and Housing Tribunal at Ilala in Land Appeal No. 169 of 2010,)

PIUS H.W.OGUNDE APPLICANT

VERSUS

EDWARD ELIA NGALA RESPONDENT

RULING

Date of last Order: 17.11.2021

Date of Ruling: 18.11.2021

A.Z. MGEYEKWA, J

This ruling is in respect of an application for extension of time to file an application for leave to appeal to the Court of Appeal of Tanzania. The application was brought under section 11 (1) of the Appellate Jurisdiction Act, Cap. [R.E 2019]. The application is supported by an affidavit and a Supplementary affidavit both deposed by Pius H. W. Ogunde, the

applicant The application has encountered formidable opposition from the respondent and has demonstrated his resistance by filing a counter-affidavit and a supplementary counter affidavit both deposed by Mr. Edward Elia Ngala, for the respondent.

At the hearing of the application, the applicant enjoyed the able services of Mr. Laurent Mtanga, learned counsel whereas the respondent enlisted the legal services of Mr. Alex Kaaya, learned counsel.

Getting this court underway was Mr. Laurent for the applicant. Reiterating what was deposed in the supporting affidavit, the learned counsel asserted that the applicant wants to file an appeal against the decision of this court, however, he found himself out of time thus he lodged the instant application for an extension of time to file leave to appeal. He submitted that it is in their knowledge that leave is supposed to be lodged within 30 days from the date of the judgment The learned counsel contended that Mr. Charles Alex, the applicant's Advocate fall sick since 2018 and he is seriously ill, he added that the learned counsel for the applicant attended medical treatment in various hospitals and now he is treated in Ocean road, therefore, he was unable to file a notice of appeal within time. The learned counsel for the applicant went on to argue that

the applicant himself encountered family problems, he was attending and caring his sick brother who passed away. It was his further submission that the applicant trusted his Advocate to handle the application thus it was beyond his control.

The learned counsel for the applicant did not end there, he contended that the property in dispute is the applicant's property therefore in case the application will fail then the applicant's family will suffer loss.

On the strength of the above submission, the applicant's Advocate beckoned upon this Court to grant leave to the applicant to file an appeal out of time.

In his reply, the respondent's Advocate started by urging this court to adopt the counter affidavit and supplementary counter affidavit of the respondent and form part of his submission. Mr. Alex strongly opposed the applicant's application. He contended that the applicant's Advocate grounds does not hold water since Mr. Charles, learned counsel has a firm whereby other Advocates could have been assigned to handle the clients' case.

Mr. Alex did not end there he went on to argue that in the application of the bill of costs the matter was attended by another Advocate one

Consolata Kaiza. It was his view that the applicant's Advocate could have instructed another Advocate to represent the client. He urged this court not to consider the flimsy reasons of the learned counsel for the applicant. Mr. Alex argue that the applicant's Advocate did not account for each day of delay. To fortify his submission he cited the case of **Ramadhani J Kiwaani v TAZARA**, Civil Application No. 401 of 2019.

In conclusion, the respondent urged this court to disregard the applicant's application for an extension of time.

In his rejoinder, the learned counsel for the applicant maintained his submission in chief. He added that in SASA Advocates firm there is only one Advocate and it is the owner himself one Charles. Mr. Laurent argued that Consolata Kaiza is not working with SASA Advocate firm instead she was hired to handle the matter. He stressed that even he is coming from another law firm. It was his submission that the applicant and his Advocate were not negligent. Insisting, he stated that they have accounted for days of delay. Mr. Laurent ended by urging this court to grant the applicant's application to file leave out of time at the Court of Appeal of Tanzania to challenge the decision of this court.

From the learned counsels' rival submissions, this Court is called upon to determine whether a case has been made out to warrant this court to

exercise its discretion and grant an extension of time. 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 & 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.

I preface my analysis by addressing two grounds on which the learned counsels have butting heads in the course of their submissions. The first relates to the account of days of delay and that the learned counsel for the applicant's sickness. The respondent's contention is that this delay

has not been explained out. The applicant's Advocate argument is that they have accounted for each day of delay. The basis for the delay is stated as well in their affidavit and supplementary affidavit. The applicant in his supplementary affidavit has narrated in length how they found themselves out of time in filing an application for leave to go to the Court of Appeal of Tanzania. From the date when the judgment of this court in respect to Land Appeal No. 75 of 2017 was delivered on 20th August, 2018. In September, 2018, the applicant instructed Mr. Charles Alex, learned counsel to represent him in court. He narrated how Mr. Charles Alex pursued an appeal to challenge the decision of this court to the Court of Appeal of Tanzania.

The applicant stated that his Advocate fall sick from September, 2018 to December, 2020 whereas he attended medical treatment at Ekenywa and a letter confirmed that he was attending medical treatment. The applicant in his supplementary affidavit stated that his Advocate to date is unwell that was the reason why Mr. Laurent, learned Advocate from another law firm took over the matter. In his affidavit specifically on paragraphs 5 and 6 the applicant explained that his brother fall sick and passed away in 2020.

After taking into consideration what has been stated in the affidavit filed by the applicant in his affidavits and the applicant's Advocate submission, I would like to make an observation that as amply submitted by the applicant's Advocate, he has convinced this Court to find that the applicant's delay was due to his Advocate sickness which is explicable and excusable as stated in the case of **John David Kashekya v The Attorney General**, Civil Application No. 107 of 2012 CAT (unreported). The Court of Appeal of Tanzania held that: -

"Sickness is a condition which is experienced by a person who is sick. It is not a shared experience. Except for children which are yet in a position to express their feelings, it is the sick person who can express his/her conditions whether he/she has the strength to move, work and do whatever kind of work he is required to do."

Moreover, the applicant in his affidavit and a supplementary affidavit has accounted for the days of delay by narrating the sequence of events from the date when the decision of this court was delivered to the date when the application was lodged in this court. This court cannot ask more from the applicant and applicant's Advocate rather the court is satisfied that the experience by the person who faced the said problems is not a shared experience.

Guided by the above cited case of **John David Kashekya**, I am bound by the Court of Appeal of Tanzania decision to reach a verdict in this application that sickness is reasonable ground for a delay to file an application out of time as long as the applicant has convinced this court to believe him. Therefore, I do differ with the respondent's submission and I do not want to be pessimistic that the learned counsel could have instructed other Advocate to proceed with the case. It suffices to find out that Mr. Charles Alex who was handling the applicant case fell sick and to date he is unwell.

In the upshot, I proceed to grant extension of time to the applicant to file an application for leave to appeal to the Court of Appeal of Tanzania within 21 days from today.

Order accordingly.

Dated at Dar es Salaam this date 18th November, 2021.



A.Z.MGEYEKWA

JUDGE

18.11.2021

Ruling delivered on 18th November, via audio teleconference whereby Mr. Alex, learned counsel for the respondent and the applicant was present.




A.Z.MGEYEKWA
JUDGE
18.11.2021