

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(LAND DIVISION)  
AT DAR ES SALAAM**

**MISC LAND APPLICATION NO. 391 OF 2021**

*(Arising from Misc. Land Appeal No. 13 of 2019 of the High Court Land Division)*

**THOMAS MARTIN KIAMA ..... APPLICANT**

**VERSUS**

**SAID ALLY MUHAWI** (The Administrator of the Estate  
of the late **ALI SAID MUHAWI**) ..... **RESPONDENT**

*Date of last order: 10/08/2022*

*Date of Riling: 24/08/2022*

**EX PARTE RULING.**

**I. ARUFANI, J**

This ex parte ruling is for the application lodged in this court by the applicant seeking for the following orders: -

- 1. This Honourable Court be pleased to extend time within which the applicant may file an application seeking this court to certify that there is point of law involved in the appeal against the decision of High Court of Tanzania (land division) at Dar es Salaam in Misc. Land Appeal No. 13 of 2019 by Hon. Makani, J dated 15<sup>th</sup> June, 2020.*
- 2. That subject to granting of the above prayer, this honourable court be pleased to certify that there is a point of law involved in the appeal against the decision of High Court of Tanzania*

*(land division) at Dar es Salaam in Misc. Land Appeal No. 13 of 2019 by Hon. Makani, J dated 15<sup>th</sup> June, 2020.*

*3. Costs of the application to be in the main case*

*4. Any other relief as this Honourable Court deems fit and just to grant.*

The application is made under section 11 (1) of the Appellate Jurisdiction Act, Cap 141 R.E 2019, section 47 (3) of the Land Dispute Courts Act, Cap 216 R.E 2019 and Rule 46 (1) of Tanzania Court of Appeal Rules of 2009. The application is supported by an affidavit sworn by Mr. Emmanuel Ndanu, advocate for the applicant. The application was entertained ex parte against the respondent after the court being satisfied the respondent was dully served but failed to appear in the court without any reason which was communicated to the court. The court ordered the counsel for the applicant to argue the application by way of written submission.

The counsel for the applicant prayed to adopt what is deposed in his affidavit and its annexures and stated in his submission that, after delivery of the decision of this court in Misc. Land Appeal No. 13 of 2019 the applicant was aggrieved by the decision of this court. He stated that, the applicant sought to be supplied with certified copies of judgment, decree and proceedings of the case.

He argued that, before being supplied with the said documents and after seeing he had delayed to lodge in the court a notice of appeal which is the initial step before lodging an application for certificate that there is a point of law need attention of the Court of Appeal, he filed in the court an application for extension of time to lodge the notice of appeal in the court out of time and the application was granted on 30<sup>th</sup> June, 2021.

He argued that, while pursuing the above application for extension of time on 25<sup>th</sup> August, 2020 he was notified by the Registrar of this court that they delayed to get the documents they sought from the court due to errors which were in the judgment which were supposed to be rectified. He submitted that, as the time for lodging in the court an application for certificate that there is a point of law worth to be determined by the Court of Appeal had already elapsed, he filed the present application in the court seeking for extension of time to lodge in the court an application for certification that there is a point of law worth to be determined by the Court of Appeal.

He submitted that, in order for extension of time to be granted one has to adduce good cause for the delay and referred the court to the case of **Lyamuya Construction Company Ltd V. Board of Trustees of Young Women's Association of Tanzania**, Civil Application No. 2 of

2010 (unreported) where it was stated among the factors to be taken into account in determination of application for extension of time are: -

- 1. The applicant must account for all the period for 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 and*
- 4. If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged.*

The counsel for the appellant submitted how the applicant has managed to satisfy all the factors listed in the above cited case. He stated in relation to the first factor that, the applicant has managed to demonstrate in his affidavit how he has accounted for all period of the delay from when the judgment in Misc. Land Appeal No. 13 of 2019 was delivered on 15<sup>th</sup> June, 2020 to when the present application was filed in this court. He submitted that throughout the stated period of time the applicant was in the corridors of the court as evidenced by the documents annexed in the affidavit supporting the application.

He argued in relation to the second factor that, the applicant was allowed by the court to lodge in the court a notice of appeal within 30 days from 30<sup>th</sup> June, 2021 and he lodged the same on 26<sup>th</sup> July, 2021

which was well within 30 days given by the court. He contended that the application at hand was lodged in the court on 30<sup>th</sup> July, 2021 which is just after 4 days from the date of lodging the notice of appeal in the court.

As for the third factor he stated that, it is deposed in the affidavit supporting the application that, the applicant has demonstrated diligence in taking necessary steps for the purpose of challenging the impugned decision. He argued that, the applicant has never been negligent at any juncture. He stated the delay to apply for the certificate that there are points of law need to be considered by the Court of Appeal was due to the delay to obtain certified copy of the judgment which was not occasioned by the applicant but by the court's Registry.

Coming to the last factor, the counsel for the applicant argued that, there are points of law of sufficient importance such as illegality of the decision sought to be challenged. He submitted that the applicant has established this factor as demonstrated at paragraph 8 of the affidavit supporting the application. He argued that, there are two illegalities appearing in the impugned decision which as demonstrated at paragraph 8 of the affidavit supporting the application needs to be considered and determined by the Court of Appeal.

He argued that, the decision of the tribunal did not feature opinion of the assessors. He added that, both District Tribunal and the High Court

they never considered the stated serious irregularity and illegality. He supported his argument by referring the court to the case of **Edina Adam Kibona V. Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017 (unreported) where it was stated that, it is unsafe to assume the opinion of the assessors which are not on the record by merely reading the acknowledgment of the chairman in the judgment.

He submitted that it is now a settled principle of the law that failure to consider opinion of assessors is a serious irregularity. He stated that, as the decision of the Ward Tribunal did not consider the opinion of the assessors it is a good cause for granting extension of time sought in the application. He submitted further that the stated illegalities are sufficient ground for the court to grant certificate of point of law involved in the appeal. He went on submitting that, the applicant has adduced good cause for condoning the delay and has managed to establish there are points of law involved in the intended appeal. Finally, he prayed the court to grant him certificate of points of law to be determined by the court of appeal.

Having carefully considered the submission filed in the court by the counsel for the applicant and after going through the chamber summons and its supporting affidavit, the court has found as stated at the outset of this ruling the applicant is seeking for two orders. He is seeking for

extension of time to lodge in the court an application for certificate that there are points of law in the impugned decision delivered by this court in Misc. Land Appeal No. 13 of 2019 which need to be determined by the Court of Appeal. After being granted the afore stated extension of time the applicant is urging the court to certify there are points of law need to be considered and determined by the Court of Appeal.

Starting with the application for an order of extension of time the applicant is seeking from the court, the court has found proper to have a look on what is provided under section 11 (1) of the Appellate Jurisdiction Act upon which the application is made. The cited provision of the law states as quoted hereunder: -

*"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 the notice of intention to appeal from the 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".*

From the wording of the above quoted provision of the law it is crystal clear that, the court is vested with discretionary power of granting

or refusing to grant extension of time for doing what is stated in the above quoted provision of the law. The court has arrived to the above finding after seeing the word used in the quoted provision of the law is the word “may” which as provided under section 53 (1) of the Interpretation of the Laws Act, when such word is used to confer power, it is required to be construed to imply that the power so conferred may be exercised or not, at discretion.

However, the position of the law as stated in number of cases decided by this court and the Court of Appeal is that, the discretionary power vested to the court by the quoted provision of the law is required to be exercised judiciously. One of the cases where the stated position of the law was emphasized is in the case of **Ngao Godwin Losero V. Julius Mwarabu**, civil application no. 10 of 2015. CAT at Arusha (unreported), where the Court of Appeal of Tanzania stated that: -

*"Is the matter of general principle that whether to grant or refuse an application ... is entirely on the discretion of the court, but that discretion is judicial and so it must be exercised according to the rules of reason and justice".*

While being guided by the position of the law stated in the above quoted case, the court has found the question which one may ask is which rules of reason and justice are required to be used to guide the court in



deciding to grant or refuse extension of time sought. The court has found the answer to the above question can be found in the case of **Elias Msonde V. R**, Criminal Appeal No. 93 of 2005 where Mandia, JA (as he then was) stated that: -

*"We need not belabor, the fact that it is now settled law that in application for extension of time to do an act required by law, all that is expected of the applicant is to show that he was prevented by sufficient or reasonable or good cause and that the delay was not caused or contributed by dilatory conduct or lack of diligence on his part".*

The term "sufficient or reasonable or good cause" used in the above quoted part of the decision of the Court of Appeal which a party seeking for extension of time is required to show to the court are not defined in any provision of the law. However, some of the factors which our courts are required to consider when determining whether "reasonable or sufficient or good cause" has been given by a party seeking for extension of time have been given by our courts in different cases. Some of those cases include **Tanga Cement Company Limited V. Jumanne D. Massangwa & another**, Civil Application No. 6 of 200 and the case of **Lyamuya Construction Company Limited** (supra) cited to the court by the counsel for the applicant.

While being guided by the position of the law stated in the above quoted authorities the court has found proper to determine this application by basing on the factors given in the case of **Lyamuya Construction Company Limited** (supra) used by the counsel for the applicant to persuade the court to grant the applicant extension of time is seeking from this court.

I will start with the first factor which requires an applicant to account for all the period of the delay. The court has found it is deposed in the affidavit of the applicant and expounded in the submission filed in the court by the counsel for the applicant that, the impugned decision was delivered on 15<sup>th</sup> June, 2020. After the judgment being delivered, the applicant engaged his counsel to assist him to appeal against the impugned decision. The affidavit supporting the application shows on 17<sup>th</sup> August, 2020 the applicant sought to be supplied with certified copies of judgment, decree and proceedings in respective of Misc. Land Appeal No. 13 of 2019.

The affidavit supporting the application shows on 25<sup>th</sup> August, 2020 the applicant was notified by the Deputy Registrar of this court through the letter which is annexure TMK - 3 in the affidavit supporting the application that, the documents requested were ready for collection and informed them the delay to supply the said documents to him was caused

by rectification which was supposed to be done in the judgment. As the documents intended to be used by the applicant in the intended appeal were ready for collection on 25<sup>th</sup> August, 2020 and the applicant was pursuing for extension of time to lodge notice of appeal in the court out of time.

The counsel for the applicant argued that, the application for extension of time to lodge notice of appeal out of time was granted on 30<sup>th</sup> June, 2021. He stated the notice of appeal was filed in the court on 26<sup>th</sup> July, 2021 and the present application was filed in the court on 30<sup>th</sup> July, 2021. From those sequence of events the court has found the applicant has managed to convince the court he has managed to account for all period of the delay. That makes the court to find the first factor has been fulfilled in the present application.

Coming to the second and third factors, the court has found from what has been stated in relation to the first factor there is nowhere it can be said there is inordinate delay on the side of the applicant or he has not shown diligence. The court has also found there is no way it can be said there is apathy, negligence or sloppiness on the side of the applicant in the prosecution of the intended appeal.

As for the fourth factor the court has found it is deposed at paragraph 8 of the affidavit supporting the application that there are two illegalities

which one of them is that the opinion of the assessors was not considered which as stated in the case of **Edina Adam Kibona** (supra) is a serious irregularity. In the light of all what have been stated hereinabove the court has found there is no justifiable reason to desist to grant the applicant extension of time is seeking from the court.

Having found the applicant has managed to establish he deserves to be granted extension of time to lodge in the court the application for certificate that there are points of law need to be considered by the Court of Appeal, the next step is for the court to consider whether the applicant is entitled to be granted certificate that there are points of law worth to be considered by the Court of Appeal. The court has found the points of law the applicant intends to be considered by the court of appeal are deposed at paragraph 8 of the affidavit supporting the application.

The points of law deposed in the afore mentioned paragraph shows the applicant intends the Court of Appeal to determine whether the High Court was correct to uphold the decision of the District Land and Housing Tribunal without considering that the opinion of the assessors was never considered. Another point is whether the High Court was correct to uphold the decision of the District Land and Housing Tribunal without considering the same did not take into consideration documentary evidence tendered before the trial Ward Tribunal.

To the view of this court the stated grounds of appeal contains mixture of both points of law and facts. The court has found as stated in the case of **Saida Saidi V. Saidi Mohamed**, [1989] TLR 206 the above listed points being mixture of points of law and facts they worth to be certified for consideration and determination by the Court of Appeal in the intended appeal.

In the premises the court has found the two orders sought from this court by the applicant are meritorious and deserves to be granted. Therefore, the applicant is granted extension of time to apply for certificate that there are points of law worth to be considered by the Court of Appeal. After being granted the stated extension of time, the court is hereby certifying that the points of law listed under paragraph 8 of the affidavit supporting the application are mixed points of law and fact worth to be considered and determined by the by the Court of Appeal. As the application was heard and determined e x parte, the court has found it is proper and justifiable for the interest of justice to make no order as to costs in this application. It is so ordered.

Dated at Dar es Salaam this 24<sup>th</sup> day of August, 2022



*I. Arufani*  
I. Arufani

**JUDGE**

24/08/2022

**Court:**

Ruling delivered today 24<sup>th</sup> day of August, 2022 in the presence of Mr. Ndanu Emmanuel, learned advocate for the applicant and in the absence of the respondent. Right of appeal to the Court of Appeal is fully explained.



*I. Arufani*

I. Arufani

**JUDGE**

24/08/2022