

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 82 OF 2022

(Originating from Land Case No. 87 of 2019)

CHACHA MANTAGE..... APPLICANT

VERSUS

FLAVIAN MATHEW NYENDIKUU.....1st RESPONDENT

**NZIGE AUCTION MART &
COURT BROKERS.....2nd RESPONDENT**

RULING

Date of order: 23.09.2022

Date of Ruling: 03.10.2022

KADILU, J.

This is an application for extension of time to file notice of appeal to appeal to the Court of Appeal against the decision in Land Case No. 87 of 2019. Also, the applicant prays for costs of the application. The application is made under s. 11(1) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2002] and is supported by an affidavit of Mr. Job C. Kerario, Advocate for the Applicant.

The affidavit consists of 13 grounds, but for the purpose of this application, I will set out just a few of them as follows:

1. Following execution of the court order on 24.06.2019, the respondents demolished the applicant's residence which left him and his family without place of abode.
2. The applicant preferred a suit in court, Land Case No. 87 of 2019 which was dismissed by Opiyo, J. on 13.11.2019 for being *res judicata*.
3. Aggrieved by that decision, the applicant intended to appeal to the Court of Appeal.
4. On 26.11.2019, he wrote a letter asking to be supplied with certified copies of a ruling, proceedings and drawn order. A copy of that letter was served to the other party.
5. Advocate for the applicant prepared notice of intention to appeal on 25.11.2019 and instructed his clerk to lodge the same.
6. The clerk presented the said notice of appeal to the counter where they were stamped as received.
7. In the 2nd week of February 2022, the Advocate realized that the notice of appeal was not paid for.

8. He endeavoured to look for the signed copies of the notice of appeal as well as ERV for the same, all in vain.
9. The Advocate's efforts to trace the said Clerk proved futile as since he left employment with the Advocate in July 2021, they have not been in contact.
10. The notice was presented timely and was served to the other party timely, but the Advocate's efforts to trace the copies of notice from the Registry did not bear any fruits.
11. Failure to accomplish lodging of the notice was not deliberate rather, was due to the circumstances as explained.

On the day of hearing, the applicant was represented by Mr. Job C. Kerario Advocate, who also sworn an affidavit on behalf of the applicant. The 1st respondent did not appear during the hearing, but he filed a counter affidavit on 25.04.22 through his Advocate, Mr. Barnaba Luguwa. The 2nd respondent never filed a counter affidavit or appeared to oppose the application despite being served summons by publication.

Mr. Job C. Kerario, Advocate motivated the application by restating the facts contained in his affidavit. He conceded that there has been an inordinate

delay in filing the present application. He told the court that, the Court of Appeal was once confronted with a similar situation in the case of *John Eliafye v Michael Lesani Kweka*, [2010] TZCA 68. It stated that the court has power to grant extension of time if sufficient cause for the delay has been shown. He prayed for the court to appreciate the extent to which he has acted diligently in this matter and grant him extension of time to file notice of appeal.

In opposing the application, the 1st respondent stated in his counter affidavit that the applicant did not file notice of intention to appeal as alleged and that he is demonstrating negligence and inadvertency in handling the case.

Therefore, the applicant has failed to give court materials with which to exercise the discretion in granting extension of time. He added that the delay from November 2019 to March 2022 when this application was filed, is inordinate and no good cause has been shown. He concluded that this application is aimed at wasting time of the court.

After considering the affidavits of the parties and submissions thereof, I now determine the application before me. Under s. 14 (1) of the Law of Limitation Act [Cap. 89 R.E.2019], the Applicant is required to account for every day of

delay and give reasonable and sufficient reason for the delay. In this case, the applicant has stated that he applied to be supplied with copies of ruling, proceedings and order. However, he did not indicate the date in which he was given these documents by the court. This is a crucial point which would assist the court to establish the extent of delay because in applications like this, the period of limitation starts to run from the day the applicant is supplied by the copies of the decision, proceedings and order. This is the position under s. 19 (2) of the Law of Limitation Act [Cap. 89 R.E. 2019].

In the case of *Lyamuya Construction Company Ltd v Board of Registered Trustees of Young Women's Christian Association of Tanzania*, Civil Application No. 2 of 2010, Court of Appeal of Tanzania at Arusha (unreported), the Court laid down four factors to be considered before granting extension of time:

- (a) The delay should not be inordinate;*
- (b) The applicant must account for all the period of delay;*
- (c) The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take;*

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

As per the records, the ruling was pronounced on 13.11.2019. The present application was filed on 04.03.2022. Therefore, the applicant delayed to file this application for more than 2 years. As conceded by the Advocate for the applicant, the delay was inordinate and the applicant has failed to account for each day of delay. His Advocate claims to have prepared the notice of appeal on 25.11.2019 which he later realized it was not paid for due to miscommunication between the Advocate and his Clerk. Further, from 25.11.2019 to the 2nd week of February 2022 when the Advocate realized that the notice was not paid for, it was about 2 years and 2 months.

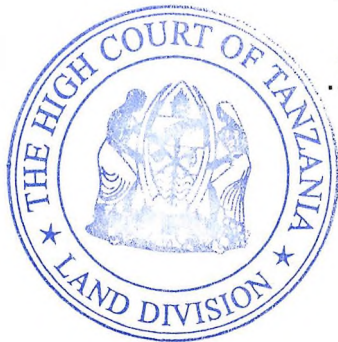
This suggests that there was no follow up by the Advocate after the purported notice was alleged to have been filed. The said Clerk left the employment in July 2021, a year and 8 months from the date when the notice was prepared, and the Advocate did not notice the anomaly. Again, this raises a serious question whether the Advocate was diligent in handling the case because during all this time, the appeal was expected to be ongoing or finalized. In such circumstances, I subscribe to the view by the learned

Counsel for the 1st respondent that Advocate for the applicant failed to show diligence in handling this matter.

Advocate for the applicant alleges in affidavit that there are serious errors of law apparent on the face of record calling for determination by the Court of Appeal. From these assertions, it is clear that the Applicant has raised a point on irregularities in the decision that he is seeking to challenge in the Court of Appeal. The **Black's Law Dictionary, 9th Edn. (2004)** at pg. 906 defines the term 'irregularity' as an act which is not in accordance with the law, method or usage. On the other hand, the word 'illegality' is defined as an act that is not authorized by law.

Nonetheless, in applications like this, the court is usually not availed with all the records for it to identify the said errors. A quick look at the affidavit by the Advocate for the applicant and submissions thereof, I find no proof of such errors. Since there is no substantial evidence of the alleged errors, this court cannot rule with certainty that there was irregularity in records concerning Land Case No. 87 of 2019. Therefore, this ground cannot also be used to granted extension of time in this application.

For the reasons stated herein above, the application fails, and is hereby dismissed with costs. It is so ordered.



Kadilu

KADILU, M. J.

JUDGE

03.10.2022.

Ruling delivered on the 3rd day of October, 2022 in the presence of Mr. Job C. Kerario, learned Advocate for the Applicant.



Kadilu

KADILU, M. J.

JUDGE

03.10.2022.