

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 203 OF 2022

(Arising from Land Application No. 214 of 2015 - Hon. S.H. Wambili)

ANDREW J.M. KITENGE.....APPLICANT

VERSUS

MAUA HAMIS RAI..... 1ST RESPONDENT

ALEX MSAMA.....2ND RESPONDENT

RULING

Date of order: 23.09.2022

Date of Ruling: 05.10.2022

KADILU, J.

This is an application for extension of time to file appeal out of time against the decision of Kinondoni DLHT in Land Application No. 214 of 2015 by Hon. S.H. Wambili, Chairman. The application is made under s. 41(2) of the Land Disputes Courts Act [Cap. 216 R.E. 2019] and is supported by an affidavit of Andrew J.M. Kitenge, the Applicant.

The affidavit consists of the following grounds:

1. The applicant herein was the applicant in Land Application No. 214 of 2015 before Kinondoni DLHT claiming to be declared the rightful owner of Plot No. 200, Block B Msasani Village.
2. Hon. S.H. Wambili, Chairman of DLHT dismissed the application with costs on 17/2/2022.
3. On 3/3/2022, Advocate for the applicant wrote a letter requesting for copies of judgment and decree in order to lodge the appeal against the said decision.
4. Advocate for the applicant kept on following up to collect such copies until on 19/4/2022 when the same were handed to the applicant.
5. At the time copies of judgment and decree were handed to the applicant, the time to file appeal had already expired, hence, the applicant filed this application seeking extension of time.
6. In case the extension of time will not be granted, the applicant will continue to suffer irreparable loss as he was unlawfully evicted from his house and rendered homeless.

The 1st respondent did not file a counter affidavit or appear in person or through an Advocate, despite being served with summons by different modes including publication in Mwananchi Newspaper. The 2nd respondent filed a counter affidavit opposing the application and contended that the judgment was ready for collection on 17/2/2022, but the applicant did not collect it timely. He averred further that the application is not justified because the applicant has not accounted for each day of delay in his affidavit. The 2nd respondent stated further in his affidavit that no good cause for the delay has been shown by the applicant warranting the court to grant extension of time as sought.

On the day of hearing, the applicant was represented by Mr. Paschal Kihamba, Advocate and the 2nd respondent was represented by Mr. Rajabu Mrindoko, learned Advocate. Mr. Kihamba, Advocate submitted first in an effort to motivate the application. He submitted that the delay to file the appeal was caused by failure to obtain copies of judgment and decree in time. He told the court that although judgment was pronounced on 17/2/2022, the applicant could not appeal without copies of judgment and decree. He wrote a letter to request for copies of judgment and decree on 3/3/2022, but the same were supplied on 19/4/2022 when, according to him,

time for appeal had already expired on 4/4/2022. He referred this court to the case of *Mbogo v Shah* [1968] EA 93 in which the court held *inter alia* that, in determining whether or not to grant extension of time, the court should consider the degree of prejudice for the respondent if the extension is granted.

He submitted that the cause of delay was to fulfill a legal requirement of obtaining copies of judgment and decree to enable him to appeal. He stated that the delay was for 21 days only and no prejudice will be occasioned to the respondent if the extension of time is granted. The learned Advocate invited this court to invoke the provisions of s. 3B (1) (a) of the CPC [Cap. 33 R.E. 2019] together with the grounds set out in the applicant's affidavit to grant this application.

Mr. Rajabu learned Advocate for the 2nd respondent resisted the application. He submitted that the court has discretion to grant extension of time where there is sufficient cause for the delay. He pointed that the discretion is judicial because it should be exercised in accordance with the rules of reason and justice and not according to personal opinion or arbitrary. Mr. Rajabu referred this court to 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 (unreported), in which the factors to be considered by the court in determining any application for extension of time were laid down.

The factors are firstly, the applicant should account for all the days of delay, secondly, the delay should not be inordinate, thirdly, the applicant should show diligence and not apathy, negligence or sloppiness in the action that he intends to take; and fourthly, if the court feels that there are other reasons such as existence of the point of law or illegality in the decision being challenged, it may grant the extension of time.

He submitted in this application that the judgment was delivered on 17/2/2022, but the applicant did not request for a copy until 3/3/2022. Moreover, the copies were handed to the applicant on 19/4/2022, but he did not file the application until on 2/5/2022, 13 days after collection of the required documents. The Advocate argued that the 13 days have not been accounted for, and this shows that the applicant and his Advocate were not diligent in conducting this matter. He concluded that, since the applicant has not raised any ground of illegality which the court could rely on granting the application, this application has to be dismissed with costs for lack of merit.

Mr. Paschal, Advocate for the 2nd respondent rejoined that they filed the application 3 days before presentment of physical documentation to the court. The filing was done electronically. Thus, the 13 days which the applicant's Advocate alleged that have not been accounted for were spent in e-payment for the requested copies of judgment and decree. He stated that they had to pay for the copies electronically and then present the evidence of payment physically so that the payment receipts could be given to them. He therefore submitted that the case of Lyamuya cited by the Counsel for the applicant is not applicable in this case because it was decided before e-filing system. It cannot be used in the current application to rule that the delay was inordinate. He then prayed for the application to be granted with costs.

I have examined the affidavits of the parties and submissions by their Advocates and I now turn to determine the application at hand. As per the records, judgment was pronounced on 17.2.2022 and the request for the copies of judgment and decree was made on 3/3/2022. The applicant has not justified as to why he delayed in requesting for the copies of judgment and decree for 13 days. Further, the present application was filed on 2/5/2022, also 13 days after the copies of judgment and decree were

supplied to him on 19/4/2022. Therefore, the delay of about 26 days could not be accounted for by the applicant.

According to Lyamuya's case, for the application for extension of time to be granted, the delay should not be inordinate. I agree with the Counsel for the applicant that in court processes, the 26 days cannot be regarded as an inordinate delay. However, the applicant failed to show diligence because in accordance to the provisions of s. 19 (2) of the Law of Limitation Act [Cap. 89 R.E. 2019], the days spent in obtaining copies of judgment and decree are not considered in computing the limitation period.

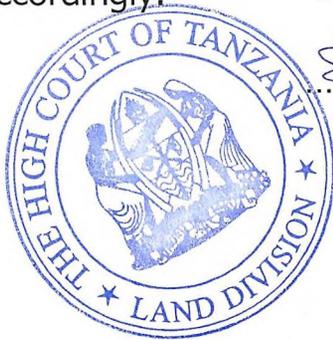
In view of this, the limitation period started to run against the applicant on 19/4/2022 when he obtained the copies of judgment and decree. As such, on 2/5/2022 when the applicant filed an application for extension of time, he was still within time to file an appeal because under s. 41 (2) of the Land Disputes Courts Act under which the application is brought, the appeal was supposed to be filed within 45 days after the date of decision. Thus, at the time of filing this application, the applicant could file the appeal instead.

Nonetheless, I am mindful of Article 13 (6) (a) of the Constitution of the United Republic of Tanzania on the right to appeal, Article 107A (1) (e) of the same Constitution and the coming into effect of the overriding objective

principle which discourages unduly use of technicalities and encourages the courts to focus on substantial justice.

In this regard and in the interest of justice, the application for extension of time is hereby granted with costs. The applicant to file appeal within 30 days from today.

Order accordingly.



KADILU, M. J.

JUDGE

05/10/2022.

Ruling delivered on the 5th Day of October, 2022 in the presence of Mr. Paschal Kihamba, learned Advocate for the Applicant, also holding brief for Mr. Rajabu Mrindoko, learned Advocate for the 2nd Respondent.



KADILU, M. J.

JUDGE

05/10/2022.