

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 169 OF 2022

(Originating from Land Case No. 34 of 2013)

BETWEEN

ADOLPH MALEKIA SENDEU (Holding Power of Attorney of BETTY
HUBER @ *ELIZABETH HUBER SENDEU*) **APPLICANT**

AND

SILVER SENDEU.....**1ST RESPONDENT**

CHARLES STANSLAUS MALLYA.....**2ND RESPONDENT**

SYLIVESTER PAUL MOSHA.....**3RD RESPONDENT**

RULING

Date of order: 07.10.2022

Date of Ruling: 11.10.2022

KADILU, J.

The Applicant has filed an application for extension of time to file notice of appeal against the decision of the High Court of Tanzania (Land Division) in respect to Land Case No. 34 of 2013. The application is made pursuant to s. 11 (1) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] and is supported by an affidavit of Mr. Gaspar Nyika. The affidavit contains 24 grounds to

support the application. At the date of hearing, the Applicant was represented by Janeth Njombe, Advocate, the 1st and 2nd respondents were represented by Happiness Caroli, learned Advocate while Mr. Godwin Mussa Mwapongo, Advocate represented the 3rd Respondent.

Janeth Njombe, Advocate stated that the decision against which the appellant is seeking to appeal was issued on 29.9.2017 in Land Case No. 34 of 2013. Subsequently, notice of appeal was filed on 9.10.2017. The notice of appeal was filed in time because Rule 68 (1) of Court of Appeal Rules requires notice of appeal for appealing from the High Court to the Court of Appeal to be filed within 30 days. The learned Advocate explained that from the date of decision to 14.4.2022 when the present application was filed, the delay is about 4 years, but the delay was not caused by negligence. The delay was caused by the time spent in prosecuting the appeal in the Court of Appeal which was later struck out for being incompetent.

She elaborated that the appellant's Advocate wrote a letter requesting for copies of judgment and proceedings on 2.10.2017 and filed leave of appeal which was granted on 20.3.2019. On 27/3/2019, the Advocate wrote a reminder letter to the Registry informing that leave was granted the appellant is waiting for copies of judgment and proceedings in order to

appeal. The said copies were handed over to the Advocate for the applicant on 5.8.2019. After perusal, he noticed some errors on records and he wrote a letter to request for correction. On 17/1/2020, the learned Counsel collected the corrected documents.

The Registrar issued a certificate of delay excluding the dates from 2.10.2017 to 28.2.2020, the days which were used for following up copies of judgment and proceedings. The Advocate referred to the case of *Fortunatus Masha v William Shija & Another* [1997] TLR 154 in which the Court of Appeal held that a distinction has to be drawn between cases involving real or actual delays and those which clearly involve technical delays for example, where the original appeal was lodged in time, but had been found to be incompetent and a fresh appeal had to be instituted.

According to her, a technical delay is excusable. She argued that the applicant in this case acted immediately after the appeal was struck out by the Court of Appeal since the application was granted 7 days after the date of struck out. She urged this court to grant extension of time as the applicant has demonstrated promptness in pursuing this matter.

The Counsel submitted further that there is illegality in the decision which is sought to be challenged. She alleges that the applicant was not afforded opportunity to be heard when the point about description of the property was raised by the defendants during the hearing and the applicant was not given chance to cross examine the witness. She asserted that description of the property in dispute was not among the issues raised by the parties and decision of the court was not from the issues raised. Probed on why didn't the Advocate for the applicant claim for cross examination of the witness, her response was that she believes he did, but was denied.

She cited the case of *TANAPA v Joseph K. Magombi*, Civil Application No. 471/18 of 2016, Court of Appeal of Tanzania at Dar es Salaam (unreported) where it was stated that when a point at issue is the one alleging illegality of the decision being challenged, the court has a duty even if it means extending the time for the purpose to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record right. In this application, the applicant is alleging irregularity in the decision of the High Court regarding plot numbers which appeared in nowhere in the issues. This is a good reason for the court to grant extension of time to file notice of appeal.

She also referred 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), where the Court laid down four factors to be considered in granting extension of time. She submitted that the present application fits into the factors stated therein and she prayed for the court to grant the application.

Submitting in opposition to the application, Happiness Caroli, Advocate prayed for the counter affidavits for the 1st and 2nd respondents to be adopted by the court. She stated that the applicant alleges a technical delay.

It is true that the notice of appeal that was struck out was lodged within time, but the appeal was not lodged in time. Unlike in criminal cases where notice of appeal initiates the appeal, in civil cases it is the memorandum and record of appeal which initiate the appeal. The applicant's appeal was struck out in the Court of Appeal for being incompetent. Once the matter is incompetent before the court, one cannot claim a technical delay. Technical delay would be justifiable if the appeal was filed within time, but struck out for lacking a supporting document such as an extracted order.

The same reasons for delay in this application were presented in the Court of Appeal but, were rejected. For example, the Court of Appeal ruled that the certificate of delay which consumed much of the applicant's time is not among the documents required for one to appeal from the High Court to the Court of Appeal. The law is clear that the appeal was to be filed within 60 days. The Advocate knew it, but he neglected to file an appeal within time as required by the law. Negligence is not a good cause for the delay.

Concerning irregularity, the learned Counsel's claim is an afterthought because description of property was raised as issue number four as perfectly reflected in the judgment. Since the issue was raised and decided by the court and the Advocate was present during the hearing, he had a chance to cross examine the witnesses. He cannot claim afterwards that he was not given chance to be heard. She submitted that the applicant has failed to fulfil the factors laid down in the case of *Lyamuya (supra)* so she prayed for the application to be dismissed with costs for lack of merit.

Mr. Godwin Mussa Mwapongo, Advocate prayed for the adoption of the 3rd respondent's counter affidavit. He then reiterated the factors laid down in *Lyamuya's* case and stated that the applicant has failed to show how he fits in those factors. He explained that notice of appeal was supposed to be filed

within 60 days from 17/1/2020 and for not doing so, the applicant was negligent. He argued that this ground alone is enough for the court to dismiss the application because granting the same knowing it was struck out by the Court of Appeal, will be equal to faulting the decision of the Court that the appeal was not time barred.

He averred that in accounting for each day of delay, the applicant is supposed to show how each day of delay was spent in respect to the case. He made reference to the case of *Selemani Juma Masala v Sylvester Paul Mosha & Another*, Civil Application No. 210/01 of 2007, Court of Appeal of Tanzania at Dar es Salaam (unreported). He gave an example that the appeal was struck out on 5/4/2022, but the present application was filed on 14/4/2022 without accounting for the days of delay.

Mr. Godwin objected the applicant's allegation about the irregularity by stating that the affidavit does not show when the irregularity was discovered by the applicant. He told the court that pleadings and annexures are what constitute court's record. Description of the property is well described in page 11 of the judgment and during the hearing, the issue was discussed thoroughly, witnesses testified about it and exhibits were tendered, but were not objected. The applicant did not even challenge the pleadings served to

him by the other parties on this point. Even where there is illegality, it does not prevent the applicant from taking appropriate action in time, waiting to raise it as a reason for delay. He prayed for the application to be struck out with costs.

In rejoining, the Advocate for the applicant restated the contents of the affidavit and what she had submitted in chief. She maintained that the applicant has shown a good cause for the court to exercise discretion in granting the application.

I have considered the affidavits by the parties and submissions by the learned Advocates. I have to acknowledge the vigilance demonstrated by the Advocates in this application and reach authorities they have supplied to the court which have contributed a lot in composing this ruling. Turning to the application at hand, the law is very clear that for extension of time to be granted, the applicant should account for each day of delay, the delay should not be inordinate, he should have shown diligence, not negligence, apathy or sloppiness. Lastly, where the applicant raises illegality which is apparent on the face of record, extension of time must be granted so that the illegality may be determined and rectified by the Court of Appeal.

As already shown, the delay by the applicant was inordinate as the application was filed 4 years after the date of the decision being challenged. Moreover, the applicant has failed to account for each day of delay. The applicant alleged that the delay was caused by the prosecution of his appeal which was later struck out by the Court of Appeal. Nonetheless, he has not accounted for the days from when the said appeal was struck out to the date of filing this application.

Further, the reason for the struck out of the appeal as correctly stated by Advocates for the respondents, was negligence or inaction by the applicant and his Advocate for they knew the appeal was time barred, yet they volunteered the risk of filing it without seeking for extension of time. The Court of Appeal in striking out the applicant's appeal stated that certificate of delay is not a requirement for lodging an appeal to the Court of Appeal. As such, it was unnecessary for the applicant to apply for certificate of delay before filing an appeal. Wasting time to process certificate of delay indicated lack of diligence and the time spent for that purpose cannot be said to have been properly accounted for.

Concerning irregularity as laid down in the case of *Lyamuya Construction Company Ltd v Board of Registered Trustees of Young Women's Christian Association of Tanzania (supra)*, the applicant has raised allegations of irregularity in his affidavit and submissions by his Advocate. He asserts in paragraphs 19-20 of the affidavit that the issue of identity of Plot No. 833, Block 'E' Mbezi Beach and Plot No. 2118 Block 'E' Mbezi Beach were not raised by the parties in their pleadings and the applicant was not given opportunity to be heard, and was therefore condemned unheard.

This ground has been strongly opposed by Advocates for the respondents. With due respect, I see the point in the applicant's contention about this ground. It is a settled position of the law that for irregularity to be used as a ground for granting extension of time, the error must be apparent on the face of record. Reading the judgment of this court that the applicant is seeking to challenge in the Court of Appeal, description of the property in dispute is not clear. The same has been dealt with in page 14 of the judgment in which the court stated partly as follows:

"Since PW1 has failed to prove that the two plots originate from Plot 833 Block E Mbezi Area as she has alleged then hesitant to hold that she is the lawful owner of the same. The Ministry of Lands and Human Settlement will determine the same as I even did not get the opportunity to visit the sites."

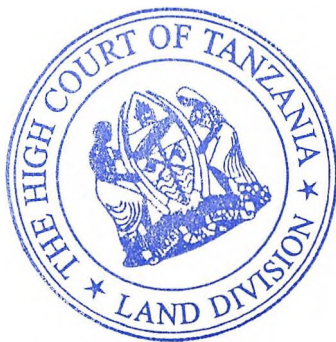
The extract above shows that the disputed property was not determined by the court. The task was left to be undertaken by the Ministry of Lands and Human Settlement. Notwithstanding, the court declared the 3rd defendant (now 3rd respondent) a lawful owner of the suit premises. This has been a point for contention between the parties and in my considered opinion, the issue needs to be determined by the Court of Appeal for the record to be set right. In the case of *TANAPA v Joseph K. Magombi (supra)*, the Court of Appeal quoted an excerpt from the Justice of the Supreme Court of Uganda in *Boney N. Katatuba v Waheed Karim* as follows:

"...the Court will accept either a reason that prevented an applicant from taking the essential step in time or other reason why the intended appeal should be allowed to proceed though out of time. For example, an application that is brought promptly will be considered more sympathetically than the one that is brought after unexplained delay... But even where the application is unduly delayed, the Court may grant extension if shutting out the appeal may appear to cause injustice."

It is clear that the applicant has raised some illegality in the decision that he is seeking to challenge in the Court of Appeal. The **Black's Law Dictionary, 9th Edn. (2004)** at page 815 defines 'illegality' as an act that is not authorized by law. There are vast authorities to the effect that in determining

land disputes, the disputed property should be described clearly. As shown, in the case at hand, the suit property was not well described. In view of this, I am bound by the decision of the Court of appeal in the case of *Eqbal Ebrahim v Alexander K. Wahiyungi* Civil Application No. 235/17 of 2020, that the issue of illegality justifies an extension of time even where the applicant has not shown a good cause for the delay. This was also the position in the case of *Principal Secretary, Ministry of Defence & National Service v Dervan Valambia* [1992] TLR 182.

Accordingly, the application for extension of time to file notice of appeal is hereby granted. The Applicant to file notice within thirty (30) days from the date of this Ruling. No order as to costs. It is so ordered.



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KADILU, M. J.

JUDGE

11.10.2022.