

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 330 OF 2022

(Arising from Land Appeal No. 107 of 2020)

ADELINA JACKSON BASHUKU 1ST APPLICANT

METE MKENDA 2ND APPLICANT

VERSUS

GERVAS YOTHAM RESPONDENT

RULING

Date of Ruling 02.11.2022

Date of the last order 04.11.2022

A.Z.MGEYEKWA

This is an Application for an extension of time to appeal out of time against the decision of the District Land and Housing Tribunal for Kinondoni District at Mwananyamala in Application No. 107 of 2020 delivered on 26th November, 2021 before Hon. C.P. Kamugisha Chairman.

The Application was made under section 41 (2) of the Land Disputes Courts Act, Cap.216 [R.E. 2019], accompanied by the Chamber Summons of RACHEL MBWAMBO supported by the affidavit of Adelina Jackson Bashuku and Mete Mkenda. The application has encountered an impediment, the respondent has demonstrated his resistance by filing a counter affidavit deponed by Mr. Samuel Shadrack, counsel for the respondent.

When the matter was called for hearing on 4th November, 2022 the applicants appeared in person unrepresented and the respondent enlisted the legal service of Mr. Erick Rweyamamu, counsel holding brief for Mr. Samwel Shadrack, counsel. The 1st applicant prayed to argue the application by way of written submission. By the court's consent, the 1st applicant's prayer was granted whereas, the applicants filed their written submission in chief on 8th October, 202 and the respondent's counsel filed written submission in chief on 24th October, 2022, and the applicants lodged their rejoinder on 28th October, 2022.

In their written submission, the applicants urged this Court to adopt their affidavit to form part of their submission. They submitted that it is trite law that any aggrieved party by the decision of the tribunal might exercise his right to appeal before this Court within the prescribed time. They added that to the contrary the aggrieved party has to show a good and sufficient

cause for his delay to appeal within the prescribed time. To fortify their submission, they cited the cases of **Mariamum Omari Somwana v Salum Salehe Makwaya**, Land Application No. 18 of 2022, **Registered Trustees of the Archdiocese of Dar es Salam v The Chairman of Bunju Village Government & Others**, Civil Appeal No. 174 of 2006 and **Elias Mwakalinga v Domina Kagaruki & 15 Others**, Civil Application No. 12/12 of 2018 CAT whereas the Court held that:-

"The applicant is supposed to show sufficient reasons upon which the court may consider in determining the application for the extension of time, these include:-

- (i) The length of the delay*
- (ii) The reasons for the delay*
- (iii) Whether there is an arguable case such as whether there is a point of law on the illegality or otherwise of the decision sought to be challenged and*
- (iv) The degree of prejudice to the defendant if the application is granted. As can be gathered from the affidavit."*

The applicant went on to submit that Land Appeal No. 107/2020 was dismissed on 26th November, 2021, the applicants had an avenue to challenge the orders made thereto, unfortunately, the applicants came to realize they were out of time. The applicant went on to submit that the 1st

applicant was admitted to Kumburu Care Dispensary on 20th December, 2021 and the 2nd applicant's husband was taking care of her. They referred this Court to a sick chic which was annexed as Annex-2. The applicants went on to submit that the 1st applicant was diagnosed with Covid 19 on 27th December, 2021 and was quarantined, the 2nd applicant contracted the same disease while he was taking care of his wife hence both were admitted at Kerenge health center up to 3rd March, 2022. To support their submission they referred this Court to annexure 2.

They went on to submit that they realized that they were out of time hence they file a Misc. Land Application No. 151 of 2020 for an extension of time on 25th March, 2022, but the same was struck out on 2nd June, 2022 for being incompetent. The applicants stated that they were taking efforts to pursue their rights to appeal. They stated that the time used by parties to prosecute the application with due diligence shall be excluded in computing the time. To support their claims they cited section 21 (1) of the Law of Limitation Act, Cap. 89 [R.E 2019].

The applicants continued to submit that they had no one to help them to pursue their rights since both of them were sick, if they could have a legal representative then that legal representation could have assisted them in pursuing the appeal. To buttress their submission they cite the case of

Madeni Kipande v Mkolokolo Hamis Gayo & Others, Misc. Land Application No. 594 of 2018.

On the strength of the above submission, the applicants urged this Court to grant their application.

In reply to the respondent's counsel submission was brief and focused, he submitted that the applicants' claims that they were suffering from Covid from 20th December, 2021 to 3rd March, 2022 but their documents are mere local dispensaries which are tainted with forgeries since Covid patients were treated in Government Hospital. The counsel stated that the Hospital chic shows that the applicants were outpatients. He claimed that the applicants are residing in Mwananyamala thus they were required to attend at Mwananyamala Hospital but the document is Kinyerezi Dispensary. He insisted that Kerege Health Centre – Bagamoyo is manufactured.

The learned counsel for the respondent continued to argue that even if the documents were correct, they have not accounted for the days of delay from when they recovered on 3rd March, 2022 to 8th April, 2022 when they filed the Land Application No. 151 of 2022. He added that counting the days from 3rd March, 2022 to 8th April, 2022 is 36 days of delay. Stressing on the accounting for days of delay, he stated that the law is clear that in an extension of time the applicants have a duty to account for

each day of delay but they failed to account for 36 days, he added that the Land Application was struck out for being defective on 2nd June, 2022 and the instant application was refiled of 23rd June, 2022 but they did not account for the days of delay. They stated that the applicants at the District Land and Housing Tribunal were represented by advocate Nasra thus, in his view their counsel was in a position to pursue their appeal. within time The counsel distinguished the decision of Madeni Kipande because in the instant case the Land Application was struck out on 2nd June, 2020, from that date to 23rd June, 2022 the applicant did not account for the days of delay.

In conclusion, the learned counsel for the respondent beckoned upon this Court to dismiss the application with costs.

Having carefully considered the submissions made by the learned counsels in their written submission and examined the affidavits and counter-affidavits, the issue for our determination is *whether the application is meritorious*.

I have keenly followed the grounds contained in the applicants' affidavit and the respondent's counter-affidavit with relevant authorities. The position of the law is settled and clear that an application for an 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 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 the case of **Tanga Cement Company Ltd v Jumanne D. Massanga and another**, Civil Application No. 6 of 2001, **Vodacom Foundation v Commissioner General (TRA)**, Civil Application No. 107/20 of 2017 (all unreported).

As amply submitted by the applicants, they have convinced this Court to find that they were unwell. The applicants' ground of sickness is supported but hospital chic and outpatient card. It seems the applicants were treated on 7th December, 2021, 20th December, 2021, and 25th January, 2022. Besides, there is a letter dated 15th March, 2022 from the Doctor Incharge of Kerege Health Center. For that reason I am not in accord with Mr. Shadrack's submissions, I find that the said documents are genuine and a patient can be treated in any Hospital of his / her choice.

I would like to make an observation that as amply submitted by the applicants, they convinced this Court to find that their delay was due to 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 applicants in their affidavit have 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. The days of delay from 3rd March, 2022 to 8th April, 2022 when the applicants lodged the instant application are accounted for. In my considered view this is a technical delay which is explicable and excusable as stated in the case of **Fortunatus Msha v William Shija and Another** [1997] TLR 154, the Court of Appeal of Tanzania held that:-

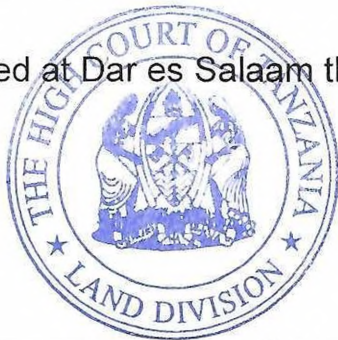
*"A distinction had to be drawn between cases involving real or actual delays and those such as the present one which only involved **technical delays in the sense that the original appeal was lodged in time but has been found to be incompetent for one or another reason and a fresh appeal had to be instituted....**" [Emphasis added].*

Applying the above position of the law, it is crystal clear that the applicants have demonstrated their technical delay in paragraphs 5 and 6 of their affidavit.

Having said so, it is my respectful view that the appellants have adduced sufficient reasons for their delay to lodge an appeal before this Court. Therefore, I proceed to grant the applicants' application. The applicants are ordered to file their appeal within 30 days from the date of this ruling. No order as to the costs.

Order accordingly.

Dated at Dar es Salaam this date 4th November, 2022.



A.Z.MGEYEKWA

JUDGE

04.11.2022

Ruling delivered on 4th November, 2022 in the presence of the applicants.



A.Z.MGEYEKWA

JUDGE

04.11.2022