

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

MISC LAND APPLICATION NO. 366 OF 2021

(Arising from Land Appeal No. 175 of 2019)

ELIAS EDWARD MAYUNGA APPLICANT

VERSUS

ERNEST MASAE 1ST RESPONDENT

MWANTUMU ALLY 2ND RESPONDENT

Date of last Order: 11/08/2022

Date of Ruling: 31/08/2022

RULING

I. ARUFANI, J

The applicant is seeking for extension of time within which to apply for leave to appeal to the Court of Appeal of Tanzania, against the decision of this court, delivered on 16th December 2020 by my learned sister Maghimbi, J. in Land Appeal No. 175 of 2019. The application has its roots from Land Application No. 421 of 2011, filed at the District Land and Housing Tribunal for Kinondoni District at Mwananyamala (henceforth the tribunal). The application was made under section 11 (1) of the Appellate Jurisdiction Act, Cap 141 R.E 2019 (hereinafter referred as the Act).

The application is supported by the affidavit of the applicant and it is opposed by the counter affidavit sworn by advocate Lusajo Willy, counsel for the respondents. Hearing of the application was conducted by

way of written submissions. While the applicant's written submission was drawn and filed in the court by Advocate Erick Gebehard Mhimba, the written submission of the respondents was drawn and filed in the court by Advocate Yangala Mkulago, learned advocate. I commend both sides for filing their written submissions in the court within the time scheduled by the court.

The counsel for the applicant stated that, after the applicant being aggrieved by the decision of the court delivered in Land Appeal No. 175 of 2019, he lodged in the court a notice of appeal to the Court of Appeal against the whole decision of this court. He argued that, this court and the Court of Appeal have set guiding principles to be adhered to when determining the question as to whether or not to grant an extension of time or not in Civil Application No. 111 of 2009 between **Royal Insurance Tanzania Limited V. Kiwengwa Strand Hotel Limited** (Unreported). The Court of Appeal quoted with approval the case of the **Attorney General V. Twiga Paper Products Ltd** (unreported) where the principles were stated to be (i) length of the delay, (ii) reasons for the delay, (iii) the degree of prejudice to the respondent if the application is granted and chances of appeal to succeed if the application is granted.

While being guided by the principles laid in the above cited cases, the counsel for the applicant submitted that, the present application meets the above criteria because the applicant's affidavit has shown

clearly the length of the delay in making this application is not inordinate, the applicant has accounted for the period of delay, the respondent will not be prejudiced if extension of time is granted and there is a great chance of success in the intended appeal.

The counsel for the applicant stated that, the decision which the applicant intends to challenge was delivered on 16th December, 2021 and on 18th December, 2021 he applied to be supplied with certified copies of the judgment and the decree for appeal purpose. He stated that, on 22nd December 2022 he lodged notice of appeal in the court. He argued that, the time to lodge an application for leave to appeal in the court against the impugned decision which is 30 days from the date of delivery of the impugned decision elapsed on 14th January, 2022.

He argued that, the applicant failed to file in the court an application for leave to appeal on time because he delayed to be supplied with certified copies of judgment and decree by the court. He argued that, after the applicant seeing he was out of time, on 31st March, 2021 he filed in the court Misc. Land Application No. 156 of 2021 seeking for extension of time to file an application for leave to appeal to the Court of Appeal but the stated application was struck out on 1st July, 2021 on technical irregularity. He argued that, thereafter the applicant applied for the copies of the order of the court and it was availed to him on 15th July, 2021 and on 23rd July, 2021 refiled the present application in the court.

He submitted that, delay of one week with effect from when the application was struck out was spent in collecting the ruling and drawn order of the court issued in Misc. Land Application No. 156 of 2021 and drafting the documents and taking necessary steps of filing the present application in this court. The counsel for the applicant argued that, in order for the court to grant extension of time the applicant is required to show there is a good cause for granting the sought extension of time. He argued that, the term good cause has not been defined by any statute but it depends on the circumstance of each case. He referred the court to the case of **Selina Chibago V. Finihas Chibango**, Civil Application No. 182 "A" of 2007 (unreported) where the Court of Appeal stated that, no particular reason has been set out as standard sufficient reason for granting extension of time.

While submitting whether the intended appeal has a chance of success, he stated the court has on several occasions refrain from going into the merits of the intended appeal as that would be the task of the Court of Appeal. He submitted that, the court will intervene if there is a point of illegality in the impugned decision and referred the court to the cases of **Transport Equipment Ltd V. D. P. Valambia**, [1993] TLR 91 and **Motor Vessel Sepideh & Another V. Yusuf Moh'd Yussuf & Another**, Civil Appeal No. 91 of 2013 (unreported) to support his submission.

In reply the counsel for the respondents prayed his counter affidavit be adopted to form part of his submission. He argued that, the applicant was supposed to adduce sufficient reason to show good cause for the delay and referred the court to the case of **Lyamuya Construction Company Ltd V. Board of Trustee of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 CAT at Arusha (unreported). It was held in the above cited case that it is discretion of the court to grant or refuse extension of time. He stated the discretion is judicial and so it must be exercised according to the rules of reason and justice, and not according to the private opinion or arbitrarily. He listed the guidelines formulated in the above cited case which are supposed to be considered while determining an application for extension of time.

He argued that, from the date when the judgment and decree were certified by the Deputy Registrar to when the present application was filed in the court about 121 days had elapsed. He submitted that, the said delay was caused by negligence of the applicant and his advocate and negligence is not good defence or excuse for the court to grant extension of time. He submitted that the stated days passed during pendency of the defective application which was struck out and added the applicant should not benefit from his own wrong. He submitted that, granting the kind of application at hand will open up a pandora box which would cause

floodgate of application of similar nature to justify extension of time contrary to our jurisprudence.

He went on arguing that, negligence and lack of due diligence does not constitute good cause as provided under section 11 (1) of the Appellate Jurisdiction Act. He stated that, as admitted at paragraph 14 of the affidavit Misc. Application No. 156 of 2021 was struck out for technical irregularity which is a negligence on the part of the applicant and his advocate and the said negligence and lack of due diligence cannot be condoned. He stated the deposition at paragraph 15 of the affidavit supporting the application that the applicant wrote a letter to the Registrar seeking for copies of ruling and drawn order is another unjustifiable wastage of time.

He stated there was no need of requiring for the said documents because the applicant does not intend to appeal against the stated ruling and drawn order hence, they had nothing to do with this application. He referred the court to the case of **Eliakim Swai & another V. Tobias Karawa Shoo**, Civil Application No. 02 of 2016, CAT at Arusha (unreported) where it was stated that, extension of time may only be granted upon the applicant showing good cause for the delay. He argued that, the applicant has failed to meet the third element of showing diligence and not apathy, negligence or sloppiness in the prosecution of

the matter for granting extension of time laid in the case of **Lyamuya Construction Co. Ltd** (supra).

He contended that, although they agree with the principles set out in the case of the **Attorney General** (supra) cited in the submission of the counsel for the applicant but the applicant has failed to account for the reason of the delay. He submitted that, the applicant cannot establish chance of success of the intended appeal as there is no point of law or an error on the face of record that could have been a good cause for granting extension of time. He referred the court to the case of **Lyamuya Construction Co. Ltd** (supra) where it was emphasized that point of law alleged is in an intended appeal must be apparent on the face of record such as the question of jurisdiction and not one that would be discovered by a long-drawn argument or process.

He submitted that, as there is no irregularity on the face of the record and as 121 days elapsed because of negligence of the applicant's advocate, granting such extension of time will prejudice the respondent from enjoying use of their property and fruits of their judgment. He submitted that, the case has taken 11 years and the respondents have been hindered to enjoy fruits of their judgment due to the fact that the applicant has been instituting numerous cases in the court which have failed to succeed. He submitted that the application has not meet the

requirements for granting the same and prayed the application be struck out with costs.

The court has carefully considered the submissions made by the counsel for the parties and it has gone through the affidavit and counter affidavit filed in the court by the parties. The court has found the issue to determine in this application is whether the applicant has been able to satisfy the court he was prevented by sufficient reason to lodge in the court an application for leave to appeal to the Court of Appeal against the impugned decision of this court he intends to challenge before the Court of Appeal. The court has framed the above issue after seeing it is provided under section 11 (1) of the Appellate Jurisdiction Act upon which the application is made that: -

"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 notice of intention to appeal from a 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."

The court has found the wording of the above quoted provision of the law shows the power of the court to grant or refuse extension of time is on its discretion. That is because the word used in the quoted provision of the law is the word "may" which when used in a provision of law to confer a function to be performed, it connotes discretion and not mandatory for the function to be performed. However, as provided in the above quoted provision of the law the stated discretion is supposed to be exercised only where the applicant has demonstrated sufficient reason for granting extension of time sought. The above view of this court is getting support from the case of **Meis Industries Limited & Two Others V. Twiga Bankcorp**, Misc. 11 Commercial Cause No. 243 of 2015, HC Com. Div. at DSM (unreported) where it stated that: -

"It must be put clear that this court has discretion to extend time under section 11 (1) of the Appellate Jurisdiction Act but such discretion can only be exercised if sufficient reason has been given by an applicant".

Although the stated view was being stated in respect of the Court of Appeal but the court has found the position of the law stated in the referred case is equally applicable in this court. Since the law as stated hereinabove requires an applicant of extension of time to give sufficient reason for being granted extension of time is seeking from the court, the

question to ask here is what constitutes "sufficient reason" used in the above cited provision of the law. The court has found the said term is not defined in the above cited Law. The reason for not defining the same in the statute is to the view of this court because such term is required to be interpreted after taking into consideration circumstances surrounding each particular case. The above view of this court is being bolstered by the what was stated in the case of **Regional Manager, TANROADS Kagera V. Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007, CAT at DSM (unreported) where the Court of Appeal of Tanzania stated that: -

"What constitute "sufficient reason" cannot be laid down by any hard and fast rules. This must be determined by reference to all the circumstances of each particular case. This means that the applicant must put before the court material which will move the court to exercise its discretion in order to extend the time limited by the rules."

The court has found that, there are some factors which have been considered by our courts to be sufficient cause to move the court to exercise its discretionary power to grant extension of time for doing anything required to be done under the law. Some of those cases include the cases of **Tanga Cement Company Limited V. Jumanne D. Massangwa & another**, Civil Application No. 6 of 2001 (unreported),

Lyamuya Construction Company Limited, Royal Insurance Tanzania Limited and the **Attorney General** (supra) where some factors or principles to be considered in granting or refusing extension of time were stated to be as follows: -

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

Having seeing what the applicant is required to establish to move the court to grant him extension of time is seeking from the court the court has found it is now appropriate opportune to see whether the applicant has managed to satisfy the court he was delayed or prevented by sufficient reason to lodge the application he intends to lodge in the court out of the time prescribed by the law.

The court has found as stated by the counsel for the applicant and as deposed in the affidavit supporting the application, the reason for the applicant to delay to lodge his application for leave to appeal to the Court of Appeal in the court within the time was due to the fact that he delayed to receive copies of judgment and decree of Land Appeal No. 175 of 2019

from the court. The court has found the counsel for the applicant deposed in his affidavit that, after delivery of the impugned judgment on 16th December, 2020, he requested his fellow advocate to write a letter to the court on 18th December, 2020 seeking to be supplied with the copies of judgment and decree of the court and the letter written by his fellow advocate was received by the court on 21st December, 2020.

He stated further that, as he was not supplied with the sought copies of the judgment and decree of the court, on 13th January, 2021 they wrote another letter to remind his request of being supplied with the copies of judgment and the decree sought in the previous letter. He argued that, despite the fact that he made several follow up but it was until 21st January, 2021 when he was supplied with the copy of judgment for Land Appeal No. 175 of 2019. He submitted that, after perusing the copy of judgment supplied to him, he discovered it was wrongly dated as it was dated 12th December, 2021 while the judgment was delivered on 16th December, 2021.

The counsel for the applicant deposed further in his affidavit that, after discovered the said error he instructed his colleague to write a letter to the court to request the said judgment to be corrected and the correct copies of the judgment and decree were supplied to him on 23rd March, 2021. He submitted that, after receiving the correct copies of the judgment and decree and found the applicant was out of time to apply

for leave to appeal to the Court of Appeal, on 31st March, 2021 he filed Misc. Land Application No. 156 of 2021 in the court seeking for extension of time to apply for leave to appeal to the Court of Appeal. He stated the mentioned application was struck out on 1st July, 2021 for technical irregularity and on 23rd July, 2021 he filed the present application in the court.

The court has considered the above stated sequence of events as deposed in the affidavit of the counsel for the applicant and argued in his submission and find there is sufficient materials placed before the court by the counsel for the applicant to establish that, he sought for the copies of the judgment and decree of the court delivered in Land Case No. 175 of 2019 which the applicant intends to challenge before the Court of Appeal and he delayed to be supplied with the sought documents.

The court has found that, although the impugned judgment was delivered on 16th December, 2020 but the correct copies of the judgment and decree of the court was supplied to the counsel for the applicant on 23rd March, 2021. That was after passing more than 97 days from when the impugned judgment was delivered and 91 days from when the notice of appeal was lodged in the court by the applicant. The court has found that, although there is no requirement placed under section 47 (2) of the Land Disputes Courts Act, Cap 216 R.E 2019 which governs application for leave to appeal to the Court of Appeal in matters like the one before

the court that an application for leave to appeal is required to be accompanied by impugned copies of judgment and decree but to the view of this court those documents are important for the purpose of enabling the applicant to construct a sound application for leave to appeal to the Court of Appeal.

The court has arrived to the above finding after being of the view that, grant of leave to appeal is not automatic as there must be a point of law worth to be considered and determined by the Court of Appeal. The above view of this court is getting support from the case of the **Bishop Roman Catholic Diocese of Tanga V. Casmir Recharad Shemkai**, [2019] TLR 159 where it was held that: -

*"It is settled law that grant of leave to appeal is not automatic. It is discretionary. However, the court has invariably developed some factors that should be considered so as to determine whether to grant or not leave to appeal. **It has insisted that for leave to be granted there must be a point of law worth being considered by the Court.**"*[Emphasis added].

From the above quoted excerpt and specifically the bolded part it is crystal clear that a party seeking for leave to appeal to the Court of Appeal is required to establish he has a point of law deserving to be considered by the Court of Appeal. Under that circumstances it cannot be said a party who has sought for a copy of an impugned decision for appeal purposes

and delayed by the court to get the same can be denied extension of time to apply for leave to appeal to the Court of Appeal. In the premises the court has found the delay of the applicant to get copies of judgement and decree of the court is a sufficient reason for the period he delayed to get the stated documents to be excluded from the period of time he was required to apply for leave to appeal to the Court of Appeal.

The court has also found the applicant stated that, after being supplied with the copies of judgment and decree of the court on 23rd March, 2021, he filed in the court an application for extension of time to apply for leave to appeal on 31st March, 2021 but the application was struck out on 1st July, 2021 for technical irregularity. The court has found that, although the counsel for the respondents stated the delay of the applicant to apply for leave to appeal was due to negligence of the applicant and his advocate but the court has failed to see clear and substantiated negligence committed by the applicant in seeking for leave to appeal to the Court of Appeal.

The court has come to the stated view after seeing that, as stated earlier in this ruling the applicant cannot be denied extension of time for the period he was waiting to be supplied with certified copies of the impugned judgment and decree of the court. The court has considered the issue of Misc. Application No. 156 of 2021 which was struck out on technical irregularity which the counsel for the respondent argued

extensively is a negligence which cannot be a sufficient reason for granting extension of time sought.

The court has been of the view that, although it is true that it has been stated in number of cases decided by our courts that negligence is not a good cause for granting extension of time and it can be stated the application of the applicant was struck out because of mistake committed by his counsel who prepared the said application, but to the view of this court it is not every mistake committed by an advocate is a negligence which can be used to refuse to grant extension of time. The above stated view of this court is getting support from the case of **Murai V. Wainana (Number 4) 1982 KLR 38** where it was stated at page 47 of the cited case that:

"The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictate."

Although the above cited decision is just a persuasive decision as is a foreign decision but the court has found it was stated inter alia by the Court of Appeal of Tanzania in the case of **China Henan International Cooperation Group Co. Ltd V. Salvand K. A. Rwegasira**, Civil Application No. 43 of 2006 (unreported) that: -

"It is a well-established principle that, the object of courts is to decide the rights of the parties and not to punish them for mistakes they made in conduct of their case by deciding otherwise than in accordance with their rights. I know of no kind of error or mistakes which if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the indiscipline but for the sake of deciding matters in controversy."

Since there is no any material put before the court to establish the mistake caused the applicant's previous application to be struck was caused by negligence of the applicant and his advocate and not a normal human mistake, the court has failed to see any merit in the argument made by the counsel for the respondent that, the delay of the applicant to apply for leave to appeal is due to negligence of the applicant and his counsel. To the contrary the court has found the period the applicant was pursuing the application which was struck out was a technical delay which as stated in the case of **Fortunatus Masha V. William Shija and another** [1997] TLR 154 the period the applicant was prosecuting the stated application is supposed to be excluded from the period of the delay.

The court has found that, if the period of time the applicant was waiting to be supplied with copies of the judgment and the decree of the

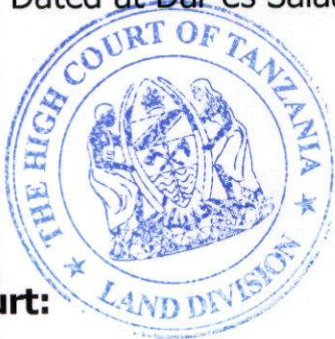
court is supposed to be excluded from the period of the delay and the period he was pursuing the application which was struck out is also supposed to be excluded from the period of the delay, then it is the finding of this court that, the applicant has managed to account for all period of the delay which is a requirement for granting extension of time as stated in the cases of **Lyamuya Construction Company Limited, Royal Insurance Tanzania Limited** and the **Attorney General** cited earlier in this ruling.

The court has found the argument by the counsel for the respondent that the applicant was not diligent in applying for leave to appeal to the Court of Appeal and his delay was caused by apathy and sloppiness is not supported any material put forward before this court in the application at hand. The court has also considered the argument by the counsel for the respondents that if the applicant will be granted extension of time is seeking from this court the respondents will be prejudiced as they will be delayed to use their property and delay to enjoy the fruit of their judgment but find if the application will be refused the applicant will be more prejudiced as he will be denied his right of being heard in the application, he want to file in this court.

Consequently, the court has found the applicant's counsel has managed to establish there is sufficient reason for the court to exercise its discretionary power to grant the applicant extension of time is seeking

from this court. In the upshot the applicant is granted extension of time to file in this court his application for leave to appeal to the Court of Appeal against the decision of this court delivered in Land Appeal No. 175 of 2019. The application for leave to appeal to the Court of Appeal to be lodged in the court within fourteen (14) days from the date of this ruling. Each party to bear his own costs. It is so ordered.

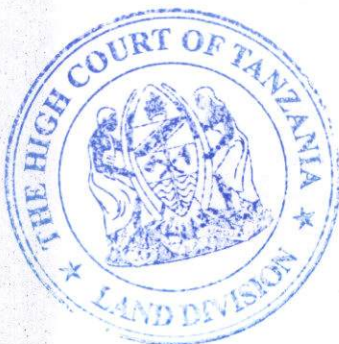
Dated at Dar es Salaam this 31st day of August, 2022



I. Arufani
JUDGE
31/08/2022

Court:

Ruling delivered today 31st day of August, 2022 in the presence of Mr. Jacob Kaisy and Mr, Steven Byabato, Advocates for the applicant and in the presence of both respondents in persons. Right of appeal to the Court of Appeal is fully explained.



I. Arufani
JUDGE
31/08/2022