

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

MISC. LAND CASE APPLICATION NO.614 OF 2021

(Arising from Miscellaneous Land Application No. 40 of 2019)

ELIUS A. MWAKALINGA.....APPLICANT

VERSUS

DOMINA KAGARUKI.....1ST RESPONDENT

FARIDA F. MBARAK.....2ND RESPONDENT

FARID AHMED MBARAK.....3RD RESPONDENT

RULING

Date of Last Order: 09. 02.2022

Date of Judgment: 30.03.2022

MWENEGOHA, J

This application came under section 11(1) of the Appellate Jurisdiction Act, Cap 141, R.E 2002. It is a leave to extend the time within which the applicant can be allowed to file a notice of appeal against the decision of this court, delivered on 23rd May, 2019 by Mkeha J, vide Misc. Land Application No. 612 of 2017. The same is supported by the Affidavit of the applicant's Advocate, Mr. Gaspar Nyika. On the other hand, the application was opposed by the 1st respondent. She is the only respondent among the three mentioned here in above to file her counter Affidavit, sworn by her Advocate, Thomas Eustace Rwebangira. The 2nd and 3rd respondents didn't appear to defend this application; hence the

application proceeded ex-parte against them. Either, hearing of the application was by way of written submissions. Rosan Mbwambo appeared for the applicant, while the 1st respondent enjoyed the legal services of Thomas Eustace Rwebangira.

Submitting in support of the application, the applicant's counsel was of the view that, the reasons for delay to file the notice of appeal are well stated in the affidavit of Gaspar Nyika. That, the delay was a technical one as the applicant depended on the decision of the Court of Appeal in the application by the 1st respondent to strike out the notice of appeal.

This is due to the fact that, once the notice of appeal has been filed in respect of the matter which an appeal is intended, all other matter have to cease. That, when the 2nd and 3rd respondents filed an appeal, the applicant had to wait for the respondent to file Memorandum and records of appeal.

Further, the applicant depended on the application by the 1st respondent to struck out the notice of appeal in Civil Application No. 99/77 of 2020 for him to proceed with his intended appeal. Therefore, the delay in filing the intended notice of appeal is a technical delay and it is justifiable. After all, this application was filed immediately after the 1st respondent's application to struck out the Notice of Appeal. The delay was a technical one and not caused by the applicant's lack of diligence, since the same was stayed pending the determination of the application by the 1st respondent.

The counsel for the applicant cited the case of **Ngao Godwin Lasero versus Julius Mwarabu, Civil Application No. 10 of 2015 (2015)**, where the court cited in approval the case of **Mbogo versus Shaha (1968) EA**, where it was held that,

"All the relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of delay, the reasons of delay, whether there is arguable case on appeal and the degree of prejudice to the defendant if time is extended".

He also cited the case of **Lyamuya Construction Company Limited V. Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No.02 of 2010, Court of Appeal, (unreported)**, where it was held that ;-

"As a matter of general principle, it is the discretion of the court to grant extension of time. But that discretion is judicial, and so it must be exercised according to the rules of reason and justice and not according to private opinion or arbitrarily. On the authorities however, the following guidelines may be formulated; -

- 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.*
- d) If the court feels that, there other sufficient reasons as the existence of point of law of sufficient importance; such as illegality of the decision sought to be challenged".*

Another reason for lodging the instant application as stated in the filled written submissions by the applicant's counsel is the existence of illegalities in the impugned decision. He maintained that, now it is settled that, a point of illegality if it is at issue, constitutes a sufficient ground for extension of time, as stated in **Mohamed Salum Nahd versus Elizabeth Jeremiah, Civil Reference No. 14 of 2017 (unreported)**,

and **The Principal Secretary, Ministry of Defense and National Service versus D.P Valambia (1992), TLR 185.**

In reply, the counsel for the 1st respondent was of the view that, the delay by the applicant to file his intended appeal was inordinate. The application has come about 2 years and 1 one month. The reason stated by the applicant that he failed to file the notice of appeal because he was served with the notice of appeal of the 2nd and 3rd respondents is misconceived. That, he could at least take a step to file Notice of address for service as required by rule 86(1) (a) of the Tanzania Court of Appeal rules.

Based on these facts, it is obvious that the applicant stayed idle, without taking any step-in relation to his intended appeal. In this case, the appeal was supposed to be filed by 2019, 22nd of August. And the 14 days expired on the 5th September 2019. The applicant was supposed to account for each day of delay from when he was served with the notice of appeal, that is on the 1st of April, 2020 to 13th July, 2021 when the application to struck out the notice of appeal was heard, as stated in **Airtel Tanzania Limited versus Misterlight Electrical Installation Co. Ltd & Another, Civil Application No. 37/01 of 2020, Court of Appeal of Tanzania, at Dar Es Salaam (unreported)**. His conducts did not portray expedition and he was not diligent in pursuing his intended cause.

As for the point of illegality, the 1st respondent's counsel was of the view that, the alleged illegalities are not apparent on the face of records, neither were they demonstrated in the applicant's affidavit. The same are not on point of law hence they should be accorded no weight by the court as stated in **The Registered Trustees of Bakwata versus The registered Trustees of Dodoma General Muslim Association, Civil**

Application No. 512/03 of 2019, Court of Appeal of Tanzania at Dodoma (unreported).

In rejoinder, the applicant's counsel reiterated his submissions in chief and added that, the applicant has successfully provided sufficient reasons to warrant the grant of extension of time. Therefore, his application should be allowed so that he can file a notice of appeal as prayed in the chamber summons.

I have considered the submissions of both parties as well as the affidavit and counter affidavit against the application. The issue is whether the instant application has merits or not.

Basically, the applicant has relied on two reasons for lodging the application at hand. Firstly, is what he his counsel termed as a technical delay. That, the delay was a technical one as the applicant depended on the decision of the Court of Appeal in the application by the 1st respondent to strike out the notice of appeal, see paragraph 19 of the affidavit of Gaspar Nyika. The respondent's counsel strongly contended that the applicant has not accounted for the days of his delay. That, the same is an inordinate delay, caused by his failure to act diligently. It was insisted that, the applicant could have at least taken a step to file Notice of address for service as required by rule 86(1) (a) of the Tanzania Court of Appeal rules.

In my opinion, I find the applicant's reason for delay as stated in here in above to be a sufficient reason warranting his application to be allowed. I say so based on the decision of the court given in **Oswald Masatu Mwinzarubi versus Tanzania Fish Processors LTD, Court of Appeal of Tanzania, Civil Application No. 13 of 2010 (Mwanza Registry, (unreported)** that,

"What constitutes good cause cannot be laid down by any hard and fast rules. The term good cause is a relative one and is dependent upon the circumstances of each individual case. It is upon the party seeking extension of time to provide the relevant material in order to move the court to exercise its discretion."

The circumstances appeared during the time which the applicant was supposed to file his intended notice of appeal, technically prevented him from doing so, owing to the existence of another notice of the same nature over the same matter, **see Aero Helicopters (T) Ltd versus FN Jensen (1990), TLR, 142 and also the case of William Mugurusi versus Stella Chamba (2004), TLR 406.** It is obvious that, his delay is justifiable, therefore extending his time for the intended cause is inevitable. That being said and done, I see no reason of discussing the second reason raised in relation to the lodging of this case, that is the existence of illegalities in the impugned decision. This is due to the fact that, the findings on the first reason are sufficient to dispose the entire application.

Eventually, the application is allowed with no order as to costs. The applicant is given 14 days to lodge his notice of appeal accordingly.



T.N. Mwenegoha.

Judge

30/03/2022