

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC. LAND APPLICATION NO. 549 OF 2021
(Arising from Land Case No. 25 of 2004)

FREDERICK LWEZAULA APPLICANT

VERSUS

MOHAMED F. DOSSAJI RESPONDENT

RULING

Date of Last Order: 14/4/2022

Date of Ruling: 19/4/2022

A. MSAFIRI, J

This is a ruling on an application by Fredrick Lwezaula. He is seeking for the following orders:-

- 1. This Honourable Court be pleased to extend time upon which the Applicant may file notice of appeal to the Court of Appeal against the Judgment and Decree of the High Court of Tanzania (Land Division) at Dar es Salaam in Land Case No. 25 of 2004 by Hon. Kileo, J (as she then was) dated 08th March 2006.*
- 2. Costs of this application.*
- 3. Any other relief(s) as this Hon. Court may deem just to grant.*

The application is made under section 11(1) of the Appellate Jurisdiction Act, Cap 141 R.E 2019 and is supported by two affidavits one of the applicant herein and the second is of advocate Edward Maiga Lisso.

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With leave of the Court the application was argued by way of written submissions. The submissions on behalf of the applicant were drawn and filed by Robert Lawrence Mosi, advocate, while submissions in reply on behalf of the respondent were drawn and filed by Godwin Musa Mwapongo, advocate.

According to the pleadings, I have managed to construct a brief history of this matter. The applicant was a defendant in the Land Case No. 25 of 2004 before this Court, on which, the impugned judgment was delivered on 08/3/2006. The judgment was in favour of the plaintiff who is now the respondent. The applicant was aggrieved by the decision and instituted the appeal to the Court of appeal of Tanzania by filing a Notice of Appeal dated 13/3/2006. The applicant also filed the memorandum of appeal. However, on the date of the hearing of that appeal, the Court of Appeal struck out of the same on the reasons that the appellant has not sought first the leave of the High Court to appeal to the Court of Appeal.

The applicant then through Application No. 388 of 2018, again sought for extension of time to file notice of appeal to the Court of appeal. That application was struck out by this Court for having been filed under wrong provisions of law. After sometime, the applicant has once again come to this Court seeking for extension of time to file Notice of appeal against Land Appeal No. 25 of 2004.

Submitting in support of the application, Mr. Mosi urged this Court to determine the application on the following issues;

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- i). Whether the applicant has pointed out any illegality in the judgment intended to be challenged.
- ii). Where there is sufficient cause to grant the application.
- iii). Whether the applicant has accounted for delay.

On the issue of illegality, Mr. Mosi stated that, illegality or matter of law which is worth to be considered by the higher Court is in itself, a sufficient ground or cause for extension of time. He pointed the points of law/illegalities which is stated at paragraph 14 of the affidavit of the applicant which are worth to be considered or determined by the Court of Appeal.

The counsel cited numerous cases to support this issue of illegality among them being the case of **Principal Secretary, Ministry of Defence and National Services vs. Devram Valambhia** [1992] TLR 182.

On the issue of the advancing of sufficient cause for delay, Mr. Mosi stated that the applicant in his affidavit at paragraphs 3 to 9, has given sufficient cause for this Court to grant the application. He submitted that, after the delivery of the impugned judgment, the applicant through his advocate Julius Ndyanabo, lodged a Notice of Intention to appeal. That, unfortunately, the advocate filed the said Notice without also seeking for leave to appeal. The appeal was therefore struck out on 15/3/2010. By that time, the applicant's advocate Mr. Ndyanabo had passed away.

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Mr. Mosi submitted that, the applicant did his task by instructing legal counsel who in one way or another did not handle the matter properly. That, the instructed legal counsel whom the applicant believed were knowledgeable with the law and procedures lodged a defective application which was also struck out on 16/8/2018 by the High Court.

The counsel stated that, there is also a matter of applicant's sickness whereby he has been hospitalized several times as per the medical chits annexed on the affidavit. Mr. Mosi argued that, it is the position of law that sickness is among the sufficient cause for extension of time.

On the issue of accounting for delay, Mr. Mosi stated that, from paragraphs 1 to 12 of the applicant's affidavit, there is an account of each time which has passed and what the applicant was doing. He prayed for the Court to exercise its discretionary power and grant extension of time for the applicant to file notice of appeal to the Court of Appeal.

In opposition, the respondent filed two counter affidavits. In submission, Mr. Mwapongo counsel for the respondent prayed to adopt the two counter affidavits as part of the submission. He countered that the applicant has failed to account for each day of delay as required by the law. He stated that, the first application for extension of time was struck out by this Court on 16/8/2018. That, from 17/8/2018 up to 03/9/2019, there is no explanation in the affidavits as to what the applicant was doing.

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That, the applicant travelled to Bukoba, and later he came back to Dar es Salaam on May, 2021, but it is not known which day he arrived in Dar es Salaam and what he was doing in May-September 2021, when he withdrew instructions from Law Associates.

He said that, the applicant signed the chamber summons and affidavit on 06/10/2021 but he has not accounted as to what he was doing on 01-5/10/2021. To support his arguments he cited numerous cases among them the case of **Selemani Juma Masala vs. Sylvester Paul Masha & another**, Civil Application No. 210/01 of 2017, CAT at Dar es Salaam (Unreported)

Mr. Mwapongo, pointed to the Court on the contradictions which are in the two affidavits supporting the application. He stated that, in the affidavit of Edward Maiga Lisso, he said that it was the applicant's daughter one Hagila whom he was dealing with in pursuing this matter. However, in the applicant's affidavit, it was the applicant himself who was pursuing this matter and that the applicant has not stated in his affidavit that his daughter ever pursued this matter. He added that, there is no affidavit of the said Hagila to support the claims of Mr. Lisso.

He submitted further that the cases cited by the applicant are distinguishable from the present application. He prayed that the application should not be granted and the applicant should bear the costs.

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In rejoinder, Mr. Mosi prayed to reiterated his submissions in chief and added that, the applicant has categorically accounted for the delay at paragraph 3 to 15 of the affidavit on what has transpired from 08/3/2006 when the judgment was delivered, to the time when the instant application was filed in Court. He added that the cases cited by the counsel for the respondent are distinguishable from this application.

Having carefully considered the submissions made by the learned counsels in their written submissions and examined the affidavits and counter affidavits, together with the authorities referred to this Court by parties, the issue for determination is whether the applicant has adduced sufficient reasons to warrant this Court to grant his application for extension of time to file a notice of appeal to the Court of appeal.

The Court is conferred with powers to deal with present application under Section 11 of the Appellate Jurisdiction Act which provides that this Court may extend the time for giving notice of intention to appeal from the judgment of a High Court notwithstanding that the time for giving notice has already expired. However, this is on discretion of the Court where sufficient cause has been established by the applicant.

This principal has been set in numerous cases by the Court among them being the case of **Benedict Mumello vs. Bank of Tanzania**, Civil Appeal No. 12 of 2002, where the Court of Appeal held that;

"It is trite law that an application for extension of time is entirely in the discretion of the Court to grant or refuse it,

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and that extension may only be granted where it has been sufficiently established that the delay was with sufficient cause

What amount to sufficient cause has not been defined. From decided cases, a number of factors have been taken into account, including whether or not the application has been brought promptly, the absence of any valid explanation for the delay, lack of diligence on the part of the applicant”.

In this application, the applicant after the delivery of impugned judgment on 08/3/2006, filed the notice of appeal on 20/3/2006 which was on time. However, the appeal before the Court of Appeal was struck out for incompetency on 15/3/2010. From that date no any application was filed in Court until in June, 2018 when Application No. 388 of 2018 for extension of time to file notice of appeal to the Court of Appeal was filed in Court. The same was struck out on 16/8/2018 for wrong citation of the provision. From there, then nothing was filed before this Court until when this current application was filed in 12/10/2021.

In his submissions, the counsel for the applicant has based his submissions on the three issue i.e. whether the applicant has pointed out any illegality; whether there is sufficient cause to grant the application; and whether the applicant has accounted for the delay.

On its part, this Court will determine the merit of this application basing on the guidelines set in the case of **Lyamuya Construction Company**

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Limited vs. Board of Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010. The guidelines are;

- i). The applicant must account for all the period of delay.*
- ii). The delay should not be inordinate.*
- iii). The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.*
- iv). If the court feels that there are 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.*

On the point of the applicant's accounting for each delay, Mr. Mosi for the applicant has stated that in his affidavit, the applicant has accounted for each day of delay. I have read the applicant's affidavit. It shows that, after the appeal which was filed in the Court of Appeal was struck out in 15/3/2020, the applicant entrusted the matter with his advocate Mr. Rweyongeza to take necessary action. The applicant went back in Bukoba where he lives. Due to ill health and old age, he could not travel back and forth to Bukoba to Dar es Salaam to make follow up.

The applicant attached a copy of medical chits to prove that he has been to and from various hospitals in Bukoba receiving medical treatment. The hospital discharge forms shows that the applicant was sick on diverse dates, i.e. in March, 2007, May 2009, July 2012, February, 2014, June 2016 and July, 2017.

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That, he was forced to travel back to Dar es Salaam in June 2018 and withdrew instructions from Mr. Rweyongeza. After that he instructed Law Associates Advocates to handle the matter. That through their services, the Application No. 388 of 2018 was filed but as said earlier, it was struck out for incompetency.

Again, the applicant could not file the matter in Court promptly for the reason that he instructed his attorneys who promised to refile a proper application but could not do so.

On 03/9/2019 the applicant travelled from Bukoba to Dar es Salaam to follow up on the matter where he said that he signed an affidavit in support of an application which was to be filed but it was not filed. That from there, he frequently attended medical treatment at various hospitals. He attached copies of the medical chits (discharge forms) from the said hospitals.

However, I have noted that, the attached documents which supposedly the applicant attended medical treatment from various hospitals are of 2007, 2009, 2012, 2014, 2016 and 2017, which was before the Misc. Application No. 388 of 2018 was struck out in August 2018.

The applicant said he was hospitalized at Kilimanjaro Christian Medical Center from 30th April 2021 and discharged on 04th May, 2021 and attached a copy of discharge form.

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However, there is no explanation of what happened from 03/9/2019 when the applicant claimed to have signed an affidavit in preparation for filing another application, to 30th April 2021 when the applicant said to have hospitalized. The only explanation is that after filing the said affidavit, the applicant waited to be informed of hearing date by his attorneys.

After going through the affidavits, it is my view that, first, the applicant has failed to account for each day of delay as I have observed that, he did not explained away the period of 03/9/2019 to April, 2021.

In the affidavit of Edward Maiga Liso, the advocate has stated at paragraph 7 of his affidavit that, sometimes on 03/9/2019, the applicant signed an affidavit related to an application for extension of time to file a notice of appeal which was received by the Court on 12 December, 2019. However, there is no any proof that the same was received in Court as claimed. Furthermore, the request for a copy of the record of appeal in Civil Appeal No. 38 of 2006 to the Registrar of Court of Appeal of Tanzania was filed in 30th June 2021 that does not explain away the year 2019.

Second, it is my view that, the delay is inordinate as the first attempt at the Court of appeal was in 2010 when the same was struck out and the second attempt was in 2018 about eight years later.

I am aware of the applicant's assertion that he was living in Bukoba and has entrusted his attorney to follow up on the matter. However I

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believe that from 2010 to 2018, it is a long time for the applicant to have "entrusted" his said advocate and not pursue on the matter. I have also considered that the applicant has attached copies of discharge forms to prove that he was sick.

Taking a look at those discharge sheets, they show that in 2009, the applicant was admitted for five days and discharged. There is nothing on the year 2011. He was admitted again for five days in 2012. There is nothing on the year 2013. Again he was admitted for seven days in 2014, there is no any information on the year 2015, until he was admitted for seven days in June, 2016. The applicant was admitted again for four days in 2017, there is no account for the year 2018, 2019 and 2020. Much as I agree that the applicant was at sometimes sick and in unstable health condition as he has put it in his affidavit, there are gaps of the years which remains unexplained.

Third, I find that, the applicant and his advocates have shown negligence and apathy on their side although he is shifting the blame to his advocates. It took eight years from 2010 to June 2018 for the applicant to take action after having let the matter in the hands of his advocate. For the person who claims to have interest on the matter, I find that to be a long time to realize negligence or sloppiness on the part of his advocate. I find that there was negligence on the part of the applicant and also negligence on the part of his advocates.

According to the case of **Omari R. Ibrahim vs. Ndege Commercial Services Limited**, Civil Application No. 83/01 of 2020, CAT, Dar es

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Salaam (unreported), ignorance of law or negligence on the part of the advocate is not a valid reason for extension of time.

Furthermore, the apparent negligence is shown in the filing of Application No. 388 of 2018 when the same was struck out for citing a wrong enabling provision. The negligence is much actuated by the fact that the applicant was at all times claimed to have engaged advocates to represent him who are well versed with the law.

The applicant has also raised the issue of illegality as a reason for grant of extension of time. In the case of **the Principal Secretary, Ministry of Defence and National Service vs. Devram Valambhia (supra)**, it was held that;

"in our view, when the point at issue is one alleging illegality of the decision been 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 record straight".

However, the Court of Appeal in the case of **Lyamuya Construction (supra)**, went on to elaborate further on when the point of illegality can be taken as a sufficient cause for extension of time. The Court observed that;

"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in VALAMBIA'S case, the Court meant

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*to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted be granted extension of time if he applies for one. The Court there emphasized that such point of law must be that of the sufficient importance and, **I would add that it must be apparent on the face of the record such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process.** (Emphasis is mine).*

Applying the above statement of principle to the application at hand, I have gone through the illegalities as pointed in paragraph 15 of the affidavit of the applicant. What I see is the grounds of appeal which are intended to be presented or submitted before the Court of Appeal after dissatisfaction of the applicant by the judgment of this court in Land Case No. 25 of 2004. These are the grounds of appeal which will be discovered by a long drawn argument or process as they are the issues which were raised and deliberated as per the impugned judgment.

From this analysis, I conclude that the applicant has failed to demonstrate any sufficient cause that would entitle him extension of time within which to file a Notice of appeal to the Court of Appeal.

This application fails and is hereby dismissed with costs. Right of appeal explained.

It is so ordered.

A handwritten signature in blue ink, appearing to read 'Aelle'.

Dated at Dar es Salaam this 19th day of April, 2022.



A handwritten signature in blue ink, appearing to read "A. Msafiri", written over a horizontal line.

A. MSAFIRI,
JUDGE