

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

**MISC. LAND CASE APPLICATION NO. 416 OF 2021**

(Arising from Misc. Land Case Application No. 39 of 2019)

**LUSEKELO ANDWELE MWAMBALASWA.....APPLICANT**

**VERSUS**

**SHAKHA JUMA SAMATA.....RESPONDENT**

Date of Last Order: 10.12.2021  
Date of Ruling: 31.01.2022

**RULING**

**V. L. MAKANI, J**

This is an application by LUSEKELO ANDWELE MWAMBALASWA. He is seeking for the following orders:

- 1. That this Honourable Court be pleased to issue an order for extension of time for the applicant to file notice of appeal to the Court of Appeal of Tanzania from the Ruling g a d Drawn Order of the High Court of Tanzania in Misc. Land Case Application No. 39 of 2019 (Makani, J) delivered on 5<sup>th</sup> October 2020.*
- 2. That the costs of this application be provided for.*
- 3. Any other reliefs that the court may deem first (sic!) and equitable to grant.*

The application is made under Section 11(1) of the Appellate Jurisdiction Act CAP 141 of the laws and is supported by the affidavit of the applicant herein.

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 Mr. James Mwenda, Advocate; while submissions in reply on behalf of the respondent were filed Ms. Irene Nambuo, Advocate of Legal and Human Rights Centre, Legal Aid Clinic.

Before embarking on the substance of the application I would wish to state albeit briefly the history of this matter. On 22/10/2018 the applicant filed Misc. Land Application No. 730 of 2018 for extension of time to set aside the dismissal order of 05/10/2016 in Misc. Land Appeal No. 129 of 2015. This application was granted (Hon. Maige, J)(as he then was) and the applicants were given 30 days to file the application for setting aside the dismissal order. The applicant filed Misc. Land Case Application No. 39 of 2020 but it was dismissed for being time barred (Hon. Makani, J). The applicant filed Misc. Land Application No. 628 of 2020 for extension of time to set aside the dismissal order of 05/10/2016, but this application was also dismissed

(Hon. Opiyo, J) because this court had already decided on extension of time. The applicant has once again come to this court seeking for extension of time to file Notice of Appeal against Misc. Land Application No. 39 of 2020.

Mr. Mwenda said that according to Rule 83(2) of the Court of Appeal Rules, the applicant ought to have filed a Notice of Appeal within 30 days from the date of the Ruling. He said the court has inherent powers by virtue of section 95 of the Civil Procedure Code CAP 33 RE 2019 to grant extension of time and he prayed for the court to exercise this discretion judiciously and grant the prayers by the applicant for interest of justice.

Mr. Mwenda said all this time of about 10 months the applicant has been spending in court amounting to technical delay as established in the case of **Wambura N.J. Waryuba vs. The Principal Sertary Ministry of Finance & Attorney General, Civil Application No. 225/01/2019 (CAT- DSM)** (unreported) where the court said that the time spent in prosecuting the Civil Application No. 200/01/2018 until its determination amounts to an excusable technical delay. He said the applicant has shown diligence and not apathy, negligence, or sloppiness in the prosecution of the matter. He cited the case of

**Tropical Air (TZ) Limited vs. Godson Eliona Moshi, Civil Application No. 9 of 2017.**

Mr. Mwenda further pointed out that there was illegality in the ruling of Misc. Land Case Application No. 39 of 2020 which is sufficient ground for extension of time. He said according, the Judicature and Application of Laws (Electronic Filing) Rules, GN No. 148 of 2018 (the **Rules**) the applicant filed his application online and well within time. He said this is illegality on the face of the record. He said the court can extend time if sufficient reasons have been adduced as in the cases of **Principal Secretary Ministry of Defense and National Services vs. Devram Valambhia [1992] TLR 185, Mumello vs. Bank of Tanzania [2006] TLR 227, Kalunga & Company Advocates vs. National Bank of Commerce [2006] TLR 225** and **Lyamuya Construction Company Limited vs. The Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010 (CAT)**(unreported). He said the applicant has cited sufficient reasons for the delay in filing the Notice of Appeal supported by the relevant authorities. He prayed for the application to be granted.

In response, Ms. Nambuo adopted the counter affidavit that was filed by the respondent. She further said that the applicant has a tendency of filing matters in court after expiry of time. She said in the previous proceedings the applicant failed to account for the delayed days and so he cannot be seen to account for the days now. She relied on the case of **Mbogo vs. Shah [1968] EA** where the Eastern Africa Court of Appeal said in deciding how to exercise the discretion to extend time, factors to consider are length of the delay, the reason for the delay whether there is an arguable case on the appeal and the degree of prejudice to the defendant if time is extended.

On the ground of illegality, Ms. Nambuo said the argument has no merit because the printout **Annexure BMA2** was filed online according to Rule 21(1) of the Rules, the annexure only stipulates the date of submissions and there is no status as to whether the said application was admitted or not. She further cited Rule 23(1) of the Rules time shall begin to run when the Registrar or Magistrate Incharge has notified his acceptance of the document being received in the computer system of the registered user. She said the fact that the status of **Annexure BMA2** was unknown it proves that the said application was not admitted as the applicant had not completed the

filing for the application as he had not paid court fees. She relied upon the case of **John Chuwa vs. Anthony Chiza [1992] TLR 233**. She pointed out that the applicant was given 30 days (by Hon. Maige, J) within which to file his application and time started to run on 20/12/2020 which was the date of the delivery of the said ruling, but the applicant paid for the application on 28/01/2012, 40 days later. Ms. Nambuo said the applicant ought to establish the point of illegality and not to merely assert it. She also pointed out that the law serves the vigilant and not those who sleep (see **Laswaki Village Council & Paresui Ole Shuaka vs. Shibeshi Abebe, Civil Application No. 23 of 1997** (unreported)). She prayed for the application for extension of time to file Notice of Appeal be dismissed as the applicant has failed to establish reasons for the delay.

In rejoinder submissions, Mr. Mwenda said the applicant has given sufficient reasons for delay. He said after the dismissal in Misc. Land Case Application No. 39 of 2019 the applicant managed to file Misc. Land Application No. 628 of 2020 and it was dismissed not for the reasons that the applicant was inactive but that the applicant should have appealed against the decision of Misc. Land Case Application No. 39 of 2019. As for illegality he said that the Rule 21(1) of the Rules

states that once the application is submitted online it is the time when the said document is said to have been filed. He said Rule 23(1) of the Rules only talks about issues of time for service and not when the document was filed in court. He said **Annexure BMA2** shows that the application was filed in time. He said the case of **John Chuwa** (supra) is a long-time case and it was filed before the establishment of electronic system. He said the cases cited by the respondent **Valambhia's case** and the **Tanzania Harbours Authority vs. Mohamed R. Mohamed [2003] TLR 76** and **Lyamuya Construction** (supra) all supports the applicant's case. He said the case of **Luswaki Village** (supra) is distinguishable as the applicant is not waiting for the sympathy of the court and he has never failed to act diligently. He reiterated the prayers for the application to be granted with costs.

The issue for determination is whether the applicant has given sufficient reasons for grant of extension of time to file Notice of Appeal.

It is the principle of law that in determining an application for extension of time the court examines if the applicant has adduced

sufficient reasons for the court to grant the application sought. The court must exercise its discretion in granting such an application. In the case of **Yusuf Same** (supra) the Court of Appeal stated:

*"It is trite law that an application for extension of time is entirely in the discretion of the court to grant or refuse it. This discretion however has to be exercised judicially and the overriding consideration is that there must be sufficient cause for so doing. What amounts to "sufficient cause" has not been defined. From decided cases a number of factors have to be taken into account including whether or not the application has been brought promptly; the absence of any or valid explanation for the delay; lack of diligence on the part of the applicant".*

According to the affidavit and submissions by the applicant the reasons for the delay are that the applicant was in court, but his applications were dismissed, specifically Misc. Land Case Application No. 628 of 2020, because it was not proper as he was praying for extension of time to file an application for setting aside the dismissal order in Misc. Land Application No. 39 of 2020 instead of making an appeal. In my considered view, this reason is short of saying that the filing of Misc. Land Case Application No. 628 of 2020 was negligence on the part of the applicant, more so because he was well represented by an advocate at all times.



Now, can negligence be sufficient reason for grant of extension of time? According to the case of **Omari R. Ibrahim vs. Ndege Commercial Services Limited, Civil Application No. 83/01 of 2020 (CAT-DSM)** (unreported), ignorance of law or negligence on the part of the advocate is not a valid reason for extension of time.

The Court of Appeal in the said case stated:

*"It should be stated once that, neither ignorance of the law nor counsel's mistake constitutes good cause in terms of Rule 10 of the Rules....In the case of Umoja Garage v. National Bank of Commerce [1997] TLR, the Court stated that lack of diligence on the part of the counsel is not sufficient ground for extension of time."*

This was also stated in the case of **Ngao Godwin Lesoro vs. Julius Mwarabu, Civil Application No. 10 of 2015 (CAT-Arusha)** (unreported). In the present case there is an apparent negligence of the applicant and his advocate. Instead of appealing against the decision in Misc. Land Case No. 39 of 2020 they decided to file an application to set aside the dismissal order. The negligence is much actuated by the fact that the applicant was at all times represented by an advocate who is well versed with the law. In that regard the fact that the applicant was in court corridors is negligence from the back door. This reason cannot therefore be sufficient for grant of extension of time to file Notice of Appeal.

Further it was the argument by Mr. Mwenda that there was a "technical delay" which warrants extension of time. However, in my considered view, the decision in Misc. Land Case No. 39 of 2020 was appealable, so the option by the applicant and his advocate to prosecute an application for extension of time which was unsuccessful cannot be termed technical delay. In any case, where there is a mistake in the procedure and it is termed "*time spent in prosecuting a matter in court...*" then there would be no end to litigation. It would have been technical delay if the appeal was filed within time, but due to problems a fresh appeal had to be instituted necessitating the grant of extension of time. But in the present case the applicant did not file an appeal within time, she apparently filed an application for extension of time to set aside the order of 05/10/2016 which is a totally different application; and after failing she has now decided to take the appeal route. The alleged technical delay cannot therefore stand.

The applicant has also raised the issue of illegality as a reason for grant of extension of time. This matter was also raised, argued and determined in Misc. Land Case Application No. 39 of 2020 by this

court, in that respect the very same court cannot discuss it once again as it is functus officio. This reason too has no merit.

For the reasons I have endeavored to establish it is obvious that the applicant has failed to establish sufficient reasons to warrant the court to exercise its discretionary powers to grant extension of time within which to file a Notice of Appeal to the Court of Appeal. Subsequently, the application is dismissed with costs for want of merit.

It is so ordered.

  
**V.L. MAKANI**  
**JUDGE**  
**31/01/2022**

 