

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 105 OF 2022

(Arising from Land Appeal No. 71 of 2017)

AHMED ALLY SALIM.....APPLICANT

VERSUS

DR. BENEDICT MBAWALA.....RESPONDENT


Date of last order: 30/6/2022

Date of ruling: 28/7/2022

RULING

A. MSAFIRI, J.

On the 14th day of March 2022, the applicant lodged an application in this Court by way of chamber summons under Section 93 of the Civil Procedure Code [CAP 33 R.E 2019] (the CPC) and Rule 10 of the Tanzania Court of Appeal Rules of 2019, (the Rules) for the following orders;

- i. *That this Court may be pleased to issue an order for enlargement of time for the applicant to re-file an application for leave to appeal out of time.*
- ii. *Costs of the application. *

- iii. *Any other relief (s) that this Honourable court may deem fit and just to grant.*

The application was taken at the instance of AKSA Attorneys and it is supported by an affidavit sworn by Mosama Elias Matinyi, the advocate for the applicant.

When this application was called on for hearing on 30th June 2022, Ms. Mosama Elias and Mr. Ashiru Lugwisa learned advocates appeared for the applicant and the respondent respectively. The application was disposed of orally.

Ms. Mosama firstly prayed to adopt the contents of the affidavit in support of the application. In her submission she urged the Court to grant the prayers sought because there are sufficient reasons as stated under paragraphs 3-14 of the affidavit in support of the application.

The learned advocate contended further that the delay in lodging the application in time was caused by technicalities as she was supplied late with copies of ruling and drawn order which were necessary to be attached to the present application. She submitted that the copy of ruling in respect of Application No. 458 of 2019 was supplied to the applicant on 7/2/2022. *Atle.*

and the present application was filed on 25/2/2022 which is only 18 days which were spent in preparation of the present application.

On further submission, Ms. Mosama was of the view that this Court has discretion to enlarge time even after the expiry of the first granted period. To fortify her point, she referred to this Court the decision of **Laurent Martin v Bertha John Giita** Misc. Land Application No. 285 of 2021, High Court of Tanzania at Morogoro (Unreported).

The respondent did not file a counter affidavit hence he was precluded from arguing facts contained in the affidavit in support of the application. I allowed him to respond on points of law only.

Mr. Lugwisa firstly contended that this application is incompetent before the court for being preferred under improper provisions of the law. The learned advocate for the respondent stated that section 93 of the CPC and Rule 10 of the Rules are inapplicable to the present application and the proper provision ought to have been Section 11 (1) of the Appellate Jurisdiction Act [CAP 141 R.E 2019], (the AJA).

According to Mr. Lugwisa, the Rules are applicable to the proceedings which are before the Court of Appeal of Tanzania. *Alle*

On further submission Mr. Lugwisa contended that in application for extension of time the applicant is required to demonstrate good reasons for the delay. The reasons advanced by the applicant in the present application are not sufficient, the learned counsel surmised. He contended further that the applicant was not legally required to attach copies of the decision to be challenged.

To fortify his point Mr. Lugwisa referred to me the decision in **Ally Chamani v Karagwe District Council & another** Civil Application No. 411/4 of 2017 Court of Appeal of Tanzania (unreported).

On further submission the learned advocate for the respondent contended that the application was delayed for about 300 days which is inordinate delay and the applicant was required to account on each day lapsed but he has not accounted for each day lapsed.

On rejoinder Ms. Mossama reiterated her submission in chief. Regarding the citation of the enabling provisions of the law, she was of the view that section 93 of the CPC is proper provision because the original time was fixed by the Court hence it is the Court that has powers to grant second extension.

Ms. Mossama contended further that the copy of the ruling was necessary because it would have enabled the Court to know what was decided. She further submitted that the delay was only for 18 days in filing the current application.

Having gone through the submissions of the parties rival and in support of the application, I would like first to deal with the competency of this application as the learned advocate for the respondent maintained that it has been preferred under inapplicable provisions of the law.

The present application has been preferred under Section 93 of the CPC as well as Rule 10 of the Rules. Correctly as submitted by the learned advocate for the respondent Rule 10 is applicable for matters which are before the Court of Appeal which is an enabling provision for applications for extension of time before the Court of Appeal.

Section 93 of the CPC is a provision applicable to this Court for extension of time where the original time was set by the Court. It means that where this Court or subordinate court in which the CPC is applicable set time for something to be done but it was not done within such time then an extension of time can be sought under section 93. *Atto*

Now the question is whether also section 93 of the CPC is inapplicable to the present application. According to the record, this is the second application for extension time. It is on record that the applicant being aggrieved with the judgment of this Court in Land Appeal No. 71 of 2017 intended to challenge the same through appeal. For the reasons stated in the affidavit the applicant was sick hence he sought and was granted an extension of time to lodge application for leave.

He duly lodged the said application but it was struck out for being supported by a defective affidavit. Hence the applicant had to start again the process for extension of time because at the time his application was struck out, he found himself out of time.

I am at one with the learned counsel for the respondent that the proper provision ought to have been Section 11 (1) of AJA. This is because the applicant was to start afresh the process for extension of time. Section 93 of the CPC would be applicable if the applicant did not lodge the application for leave but because he complied with the order of this Court then Section 93 could no longer apply.

It follows therefore that the present application has been preferred under inapplicable provisions of the law, however I find that omission not *Alls.*

to have occasioned any failure of justice as still this Court has jurisdiction to entertain the application.

The Court of Appeal of Tanzania in a number of cases has dealt with this aspect of non citation of the enabling provisions of the law. In the case of **Beatrice Mbilinyi v Ahmed Mabkhut Shabiby**, Civil Application No 475/01 of 2020, Court of Appeal of Tanzania at Dar es Salaam (unreported), the application for striking out notice of appeal was preferred under Rule 89 (1) instead of Rule 89 (2) of the Rules but the Court invoked its powers and caused a proper provision of the law to be inserted and the matter proceeded on merits.

It is for that reason as since there is no any failure of justice which has been occasioned to the respondent by citing inapplicable provision of the law, the correct provision as stated by the respondent ought to be Section 11 (1) of AJA hence I will proceed to determine the application on merits.

The issue which calls for the Court's determination is whether the application has merit.

As stated early in this application, the applicant seeks second extension of time to lodge application for leave. It is trite law that in an *Act.*

application for extension of time to do a certain act, like in present one, the applicant must show good cause for failing to do what was supposed to be done within the prescribed time.

Some of the decisions of the Court of Appeal of Tanzania which require good cause to be shown before the Court can exercise its powers for extension of time are; **Abdallah Salanga & 63 Others v. Tanzania Harbours Authority**, Civil Reference No. 08 of 2003 and **Sebastian Ndaula v. Grace Rwamafa**, Civil Application no. 4 of 2014 (both unreported).

However, what constitutes good cause has not been codified although a number of factors to be considered are; whether or not the application has been brought promptly; a valid explanation for the delay and whether there was diligence on the part of the applicant. (See for instance the cases of **Tanga Cement Company Limited v. Jumanne D. Masangwa & Another**, Civil Application no. 6 of 2001, **Tauka Theodory Ferdinand v. Eva Zakayo Mwita (As Administratrix of the Estate of the Late Aibanus Mwita)** and **Wambura NJ. Waryuba v. The Principal Secretary, Ministry of Finance and Another**, Civil Application No. 225/01 of 2019 (all unreported). *Alle.*

As stated in the affidavit in support of the application, the applicant lodged Misc. Application No. 458 of 2019 but the same was struck out on 24th May 2021 for being accompanied with a defective affidavit hence the applicant ought to have lodged a fresh application which is the present application which was lodged in Court on 14th March 2022. Hence from the date the applicant's application was struck out to the date the present application was lodged almost **more than 9 months** lapsed.

The applicant contended that he was waiting for the copy of the order striking out his former application so as to attach the same in the present application. The applicant's advocate submitted that the said order was necessary as it would have enabled the Court to know what transpired in the former application.

On paragraph 11 of the affidavit in support of the application the applicant states that he requested for the said ruling on 25th May 2021 through a letter which the applicant claimed to have attached it on the affidavit as annexure "E" but I was not able to see the said letter. Even if I were to agree with the applicant that he wrote a letter it was until 5th October 2021 he wrote another letter requesting for the said copy of ruling and again the said ruling was availed to the applicant on 7th February 2022. *Atls.*

I have noted that apart from the applicant not attaching the letter dated 25th May 2021, the letter dated 5th October 2021 was not received in Court as it does not bear the Court's stamp. This is a clear intention on the part of the applicant to mislead the Court. I do not agree with the applicant on his contention that he was supplied with the copy of the ruling on 7th February 2022 because the drawn order shows clearly that it was issued on 30th June 2021 and **not February 2022.**

If at all he was supplied with the said order on February 2022 it is because he never requested it timely. Hence the argument by the applicant that he was making follow up of the copy of the ruling and drawn order is not supported by any evidence.

Suppose truly the applicant was making follow up of the order and ruling, the fundamental question that I ask myself is whether the said order was necessary to be attached in the present application. I am of the settled opinion that it was not necessary because the applicant could have stated in the present application that there was an earlier application but was struck out for being supported by a defective affidavit. That would have been enough. *Alle.*

Again suppose the said order was necessary and it was truly supplied to the applicant on 7th February 2022 as stated on paragraph 14 of the applicant's affidavit there is another hurdle which the applicant ought to have overcome. The present application was filed on **14th March 2022** almost over **33 days** since the applicant was supplied with the said order.

So things be equal the applicant was required to strictly account for each day lapsed. It is settled law that in an application for extension of time to do an act, the applicant is supposed to account for each day of delay. See for instance **Ludger Bernard Nyoni v. National Housing Corporation**, Civil Application No. 372/01 of 2018 and **Mpoki Lutengano Mwakabuta v. Jane Jonathan** (*As Legal Representative of the Late Simon Mperasoka- Deceased*), Civil Application No. 566/01 of 2018 (both unreported). For instance, in the former case the Court stated thus:

"It is settled that in an application for enlargement of time, the applicant has to account for every day of the delay involved and that failure to do so would result in the dismissal of the application"

The applicant has not accounted for each day lapsed since he was supplied with the said order. The learned advocate for the applicant simply *Aello*.

stated the time which was used to prepare the present application but she did not say exactly what preparation was taking place.

In upshot and for the foregoing reasons, I hold that the application lacks merits and it is hereby dismissed in its entirety with costs.



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

**A. MSAFIRI,
JUDGE
28/7/2022**