

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. APPLICATION NO. 469 OF 2023

SOPHIA MOHAMED JUMA.....APPLICANT

VERSUS

NMB BANK PLC.....1ST RESPONDENT

NSAMBO & COMPANY.....2ND RESPONDENT

RAMADHANI JUMA MTUNGUJA.....3RD RESPONDENT

Date of last order: 21/11/2023

Date of ruling: 28/11/2023

RULING

A. MSAFIRI, J.

In this Application, the applicant is seeking for the orders of this Court for an extension of time to file an appeal against the decision of Kinondoni District Land and Housing Tribunal (herein the DLHT) in Application No. 81 of 2020. The Application has been brought under Section 41(2) of the Land Disputes Courts Act, Cap 216 R.E.2019. It is supported by the affidavit of the applicant, Sophia Mohamed Juma. The 1st respondent was the only one among the respondents to file her counter affidavit. The same was deponed by Sharifa Karanda, the principal officer of the 1st respondent. The rest of the respondents have neither entered appearance in Court nor filed their counter affidavits hence the matter proceeded in their absence.

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On filing her respective counter affidavit the 1st respondent raised a preliminary objection that having withdrawn extended Land Appeal No. 159/2020 without leave to refile, this Application is misconceived, frivolous and in abuse of the court process as the applicant does not have the right to re-file appeal. The 1st respondent prayed for the Application to be struck out. The preliminary was heard and this Court having heard both parties, overruled the same and ordered the hearing to proceed on merit.

The hearing was conducted orally where the applicant was represented by Ms. Rose Charles Nyatega, learned advocate and the 1st respondent was represented by Mr. Pongolela David, assisted by Ms. Eunice Musami, learned advocates.

Ms Nyatega was the first to kick the ball rolling by praying to adopt the affidavit of the applicant. She submitted that the applicant filed her first appeal on 06/8/2021 and it was within time. It was an Appeal No. 172 of 2021. That the appeal was struck out for non-joinder of parties on 20/9/2022. After 13 days, on 03/10/2022, the applicant lodged a second appeal which is Appeal No. 159 of 2022. That, when this appeal was set for mention, the applicant prayed to withdraw it after discovery that the same was out of time. That the withdrawal order was issued on 18/7/2023. *Alle.*

Ms Nyatega submitted further that the delay was not because of negligence of the applicant but it was due to technical issues which emerged after the matter was already filed in court. To cement her point, she cited Section 21 of the Law of Limitation Act, Cap 89 R.E 2019 which provides for exclusion of time in matters which are bonafide in court but the same has no jurisdiction such as the case being in wrong forum or lack of jurisdiction of the court. That by the provision of the cited Section 21, the parties can be granted the extension of time so as their matter can be adjudicated on merit. She also cited the case of **Bank M (T) Ltd vs. Enock Mwakyusa**, Civil Application No. 520/18 of 2017, CAT at DSM (Unreported).

On account of delay, Ms Nyatega submitted that the first appeal was filed on time. That there was a lapse of 13 days between the decision of the 1st appeal and filing of 2nd appeal. That the present Application was filed ten days after withdrawal order. This was for the reason that the pleadings needed preparation such as online filing and printing.

She cited the case of **Vodacom TZ Public Ltd Company vs. Commissioner General, TRA**, Civil Application No. 101/20 of 2021 CAT at Dodoma, (Unreported) where it was held that ten days are reasonable time to prepare an application. *Alle*

She stated that the applicant's advocate acted diligently and in good faith in attending the matter and the mistake was human one which was acknowledged by the applicant and her advocate.

The counsel prayed that the applicant is entitled to plead technical delay and that the Application be granted as prayed.

On reply Mr. David prayed to adopt the contents of the counter affidavit of the principal officer of the 1st respondent as part of his submissions. He said that they are contesting the Application for the reason that the applicant has not accounted for each day of delay. That the applicant ought to account for even a single day of delay. That there is a period of 13 days from when Land Appeal No. 172 /2021 was struck out up to the filing of Extended Appeal No. 159/2022. Also there is a period of 10 days from when the Extended Appeal No. 159/2022 was withdrawn up to the filing of this Application. That this period has not been accounted in the applicant's affidavit.

He argued that the argument that the counsel for the applicant acted diligently does not form part of the affidavit supporting the Application and they are statements from the bar which cannot form part of evidence.

The counsel submitted further that in the proceedings of the Extended Land Appeal No. 159 of 2022, the applicant prayed to withdraw the appeal

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and the prayer was granted. But there was no prayer of leave to refile. That Order XXIII Rule 1(1) of the CPC provides that for the party to refile the withdrawn suit, one must get the leave of the court. That the applicant has not sought the leave of the court to refile. He argued that in such circumstances, the applicant does not have right to appeal as she waived it when she failed to seek leave to refile.

On technical delay, the counsel submitted that it covers only those time when the applicant was in court. That there are 23 days which was unaccounted for and they cannot be covered under technical delay. He insisted that the applicant has failed to demonstrate sufficient reasons for this Court to grant the sought orders and prayed for the dismissal of the Application with costs.

On rejoinder, the counsel for the respondent submitted that, on the point that the Extended Appeal was withdrawn without leave, it has been adjudicated upon by this Court and if the respondent was aggrieved, they should use the proper channel.

On the issue of advocate negligence and the necessity of the said advocate to swear an affidavit to support the claims, the counsel for the applicant argued that it was not necessary because the act of diligence can be inferred from the legal steps that was continuously taken by the counsel

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in advising and drafting the legal documents which was done promptly. She reiterated her prayers.

In determining the merit of this Application for extension of time, I will start with the point which was raised by Mr David, counsel for the 1st respondent in his submission that the applicant does not have right to appeal as she waived it when she failed to seek leave to refile. Admittedly, the 1st respondent through her counsels have raised this point as a preliminary objection arguing on the contravention of provisions of Order XXIII Rule 1(1) of the CPC. This Court overruled the objection on the sole reason that the withdrawal order of Extended Land Appeal No 159/2020 was not provided to the Court for the same to be able to decide the raised point justly. At page seven (7) of this Court's ruling on the raised preliminary objection, this Court held thus;

"The Court was being referred to the order of Extended Land Appeal No. 159 of 2022 which was allegedly withdrawn with no leave to refile. But since the said order was not attached, this Court cannot rely on mere submissions of the counsel."

Basing on the above quote it is clear that the Court did not determine the point of law on the need of leave to refile but rather it rejected to discuss it as it needed proof to ascertain it. However, the counsel for the respondent has raised it during his submission in the hearing on merit. Since it is a point

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of law and which was not determined during the preliminary objection, I feel obliged to determine the same.

Order XXIII Rule 1 of the CPC permits a party to withdraw a suit or abandon part of his claim. Rule 1(3) provides that where a party withdraw that suit without the permission of the court, he shall be excluded from instituting any fresh suit in respect of such subject matter.

I have taken judicial notice of the proceedings in Extended Land Appeal No. 159 of 2020 which was supplied to the Court by the counsel for the 1st respondent. It shows that on 18/7/2023 before Hon. Kisongo, PRM with extended jurisdiction, the applicant who was then the appellant and was in person, prayed to withdraw the appeal. The prayer was granted and the appeal was marked withdrawn. There was no leave to refile.

Much as I subscribe to the mandatory provisions of law that the applicant ought to have sought leave to refile as the refiling is not automatic, I have taken into consideration that as it is shown clearly in the proceedings, the applicant appeared in person and had no legal representation. Therefore it is my view that she could not have been in grasp of the need of praying for withdrawal with leave to refile. She just prayed for withdrawal for reason that she had observed that the appeal is out of time. In the circumstances which I find them exceptional, I feel obliged to invoke the principle of

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overriding objective and hold that when she was praying for the withdrawal which was granted, being a layman, she was under presumption that she has been granted prayer to withdraw and she can refile the matter. On this point, I find that the applicant has right to refile.

Another mandatory issue which was argued by both rival parties is the mandatory requirement of accounting for the days of delay. This is mandatory condition which among others the applicant has to fulfill in order for the court to exercise its discretion and grant for the extension of time sought.

In the case of **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No.2 of 2010, (2011) TZCA 4**, the Court of Appeal set out the following guiding factors;

- a) The applicant must account for all the period for 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.*

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Guided by the above principle set by the Court of Appeal, it is my finding that the applicant has shown diligence and not negligence while pursuing her matter. In her affidavit, she has stated that the impugned decision of the District Tribunal was delivered on 23/7/2021 and after that she lodged and appeal which was file on 05/8/2021 and it was within time. However the said appeal was struck out on technical grounds on 20/9/2023. On 03/10/2023 she again lodged another appeal which she prayed to withdraw after being advised that it was out of time. The said appeal was withdrawn on 18/7/2023 and the instant Application was filed on 24/7/2023. All these acts by the applicant though encountered by objections of technicalities, shows that the applicant had not slept on her rights but has acted diligently in prosecuting her case.

On unaccounted 23 days which were pointed out by the counsel for the 1st respondent, I find the same is not inordinate. I find so for the reason that the first 13 days were from when Land Appeal No. 172 /2021 was struck out up to the filing of Extended Appeal No. 159/2022. Also there is a period of 10 days from when the Extended Appeal No. 159/2022 was withdrawn up to the filing of this Application. These days are reasonable time for the preparation of the legal documents for filing as it was submitted by the counsel for the applicant. *Alle.*

Since the applicant have already been in Court ready to prosecute her appeal and the delay of 13, and 10 days are not inordinate, I am satisfied that these are sufficient reasons for this Court to grant the sought extension of time.

I hereby grant this Application. The intended appeal to be filed within 21 days from the date of this Ruling. I issue no order as to the costs.

It is so ordered.



A.MSAFIRI

JUDGE

28/11/2023