IN THE HIGH COURT TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS LAND APPLICATION NO. 832 OF 2022

WILBROAD KANYANA..... APPLICANT

VERSUS

MICHAEL N. KAPUFI AND ANOTHER.....RESPONDENT

RULING

25.9.2023 & 8.12.2023

K.D. MHINA, J.

Under ***section 11(1) of the Appellate Jurisdiction Act, Cap. 141 [R.E 2019]***, the application was preferred by the applicant seeking an extension of time to appeal against the decision in Land Appeal No. 28 of 2010 delivered on 27th June 2014 before Hon. Mansoor, J. In the chamber summons, he prays for the following orders;

1. *That the Court be pleased to extend time for the applicant to issue Notice of Appeal after the 1st one had expired as well as the attendant leave to appeal to the Court of Appeal of Tanzania against the decision in Land Appeal No. 28 of 2010 delivered on the 27th day of June 2014 before Hon. Mansoor, J. which has its origin from Land Application No. 482 of 2009 Hon. Kaare, in the District Land and Housing Tribunal for Kinondoni Dar es salaam*
2. *Costs for this Application*
3. *Any other reliefs that the Court may deem fit and just to grant.*

The application was supported by the affidavit of the Applicant, Wilbroad Kanyana, which expounded the grounds of the application.

The applicant had the services of Mr. Amin Mohamed Mshana learned advocate, while Mr. Kelvin Kidifu, a learned advocate, appeared for the 1st respondent. The 2nd respondent, though duly served, did not enter appearance.

As gleaned from the pleadings, a brief background of the application is important for understanding the context within which the application arises.

In 2005, the applicant lost a case before the District Land and Housing Tribunal for Kinondoni. He appealed to the High Court Land Division to challenge the decision, which he lost again in 2014.

The applicant lodged a notice of appeal in the same year but was never heard for undisclosed reasons. That includes his advocate's initiatives, which also failed to bear fruit; hence, he decided to engage another advocate to team up with the former in 2018.

The newly engaged advocate, who had passed away in 2021, informed the applicant that the records filed in 2014 could not be found. Thus, he filed Miscellaneous Land Application No. 201 of 2021, which was later struck out for lack of a copy of the judgment and decree.

While tracing the whereabouts of such records, the applicant failed and claimed to have been told by one Ally Kassim, the administration officer, that such documents could not be found.

The applicant again filed Miscellaneous Land Application No. 632 of 2021 before Hon. Arufani, J. followed by another subsequent Miscellaneous Land Application No.427 of 2022 before the same

Honourable Judge, and both were withdrawn with the liberty to re-file, hence, this application.

Mr. Mshana, by way of a written submission, averred that in Land Application No. 482 of 2005, the 2nd respondent was wrongly sued without giving notice as required by the law under section 97 of the Local Government (Urban Authorities) Act, 1982.

The learned advocate stressed that upon dismissal of Land Appeal No. 28 of 2012, he filed an application for leave, which had not been heard and cannot be traced, and that the delay was caused by the various applications an applicant filed to the court with follow-ups. And that the application was filed in time, only that it did fail to mature because of the loss of records, which was occasioned by the Court and not the Applicant.

The counsel maintained that since the notice could not be found, it was therefore it was lost; hence, there was no longer any notice before the court.

Further, the counsel was of the opinion that the loss of the Court records was a technicality blamable upon the court, the consequence of which the Applicant ought not to suffer.

He urged this Court to invoke the principle of overriding objective, as per the case of ***Stephen Maliyatabu vs. Sarah Isaya Dyoya***, which requires the court to deal with cases justly and avoid procedural technicalities.

On extension of time, the counsel submitted further that the extension is a discretion and the court must exercise it judiciously, as per criteria provided in the case of ***Metro Petroleum Tanzania Limited and three others vs United Bank of Africa,*** Civil Application No. 530/16/2018.

He maintained that the applicant was not negligent; rather, he was diligent and that the duration between one application and another was not that long; hence, it should be considered.

He also submitted that the issue of illegality is sufficient ground for the grant of an extension of time. And in the impugned decision, the proceedings were irregular in the following manner;

1. *There was a P.O. on lack of Statutory Notice, which the 2nd Respondent prayed to withdraw, but there is no record as to whether it was granted or declined.*
2. *Six respondents sued, but the judgment contained only one person, the applicant herein.*
3. *There is also no statutory notice, and the tribunal had no power to ignore it.*
4. *There was no order of exparte proceedings, though there was exparte judgment, citing the case.*
5. *The exparte order to allow the counsel for the applicant should have been recorded. It should not remain in the judge's mind only.*

In reply to the submission, the learned counsel for the 1st respondent argued that the application has no merit, as the Notice of Appeal filed on 11th July 2014 was still pending before the court for it had never been withdrawn by the Applicant in line with ***Rule 77(1) of the Court of Appeal Rules, 2009 nor strike out in line with Rule 81(1) and (2) of the Rules***.

The counsel added that if the records are not found, the procedure is not to file a fresh notice of appeal but to order the duplicate with the available documents, such as a copy of the notice of appeal, which could have facilitated the creation of the duplicate file. He further argued that instead of making a follow-up, the applicant did nothing but file notices,

including serving the 1st respondent with a copy of the notice three years later.

The learned advocate maintained that the applicant failed to account for all the period of delay and that there should be an end to litigation, of which the period of seven years cannot be termed as ordinate delay. He added that the acts exhibited by the applicant depict a lack of diligence, apathy, negligence and or sloppiness in his pursuit of the intended appeal, as there was no formal correspondence as to the follow-ups in the court from the year 2014 -2018 when he inquired the status of the Land Appeal No. 28 of 2014.

Regarding the overriding objective principle, the counsel argued that it does not exonerate the Applicant from his duty to follow up on his case. He submitted no correspondence from the Court signifying the alleged error; hence, it does not amount to a technical delay.

He cited ***Tanzania Revenue Authority and Tango Transport Co. Ltd and Tanzania Revenue Authority***, Consolidated Civil Applications No. 4 of 2009 and 9 of 2008 (unreported), where the Court stated that an extension of time would be granted upon resolving the following factors;

(a) the length of the delay

(b) the reasons for the delay

(c) whether there is an arguable case, such as whether there is a point of law on the illegality or otherwise of the decision of the decision sought to be challenged

(d) the degree of prejudice to the defendant if the application is granted.

He added that the applicant was also required to account for every single day of delay.

Having gone through the affidavit and the submissions made by the parties, the issue is whether the applicant has advanced good or sufficient cause to warrant this court to grant an extension of time.

Notably, what constitutes good cause is not defined, but it depends on the circumstances of each case. For instance, the Court of Appeal in **The International Airline of the United Arab Emirates vs Nassor,** Civil Application No 263 of 2016 (Tanzlii) held that:

> *"In order for the court to establish whether there was a good cause or sufficient reason, depends on whether the application for extension has been brought promptly as well as whether there was diligence on the part of the applicant."*

Further, it was stated by the Court of Appeal in ***CRDB (1996) Limited vs. George Kilindu,*** Civil Appeal No 162 of 2006 (Tanzlii) that:

> *"...sufficient cause may include, among others, bringing the application promptly, valid explanation for the delay and lack of negligence on the part of the applicant".*

Before going to the merits or demerits of the application, I have to deal with what was contained in paragraphs 4, 5 and 6 of the applicant's affidavit.

The applicant stated that after the decision of this Court in Land Appeal on 27 June 2014, the applicant filed the notice of appeal and an application for leave to appeal on 11 July 2014.

But the application for leave was never heard, and its whereabouts were unknown. Further, in his written submissions, he submitted that the notice could not be found.

In paragraph 15, the applicant stated that one Ally Kassim, the administration officer of this Court, informed him that the case file's whereabouts were unknown.

Having gone through the rival arguments for and against the above issue, I have the following;

One, it is a trite that and the law is straight- forward that whenever another person is mentioned in an affidavit, unless that person swears his own affidavit, the adduced evidence touching that person will be considered as hearsay evidence.

Therefore, failure to annex an affidavit of Ally Kassim, as a person material to the application, who alleged that the file was lost that assertion remains hearsay. There is a plethora of authorities in this issue, such as the case of ***Benedict Kimwaga vs. Principal Secretary Ministry of Health***, Civil Application No. 31 of 2000, CAT (unreported), where it was held that;

> *"If an Affidavit mentions another person, that other person has to swear an affidavit. However, I would add that, it is so where information of that other person is material evidence because without the other Affidavit, it would be hearsay".*

Therefore, there is no evidence that the notice of appeal and the pending application for leave to appeal titled Land Appeal No. 28 of 2014 were lost.

Two, even if we believe that the documents, i.e. the notice of appeal and the application for leave to appeal, were lost, the law on the procedure of dealing with lost case files.

In ***Robert s/o Madololyo vs Republic***, Criminal Appeal No. 486 of 2015, the Court of Appeal directed that when the Court is faced with

the problem of missing records, the records should be reconstructed by involving all stakeholders.

Further, in ***Mfaume Shaban Mfaume vs Republic***, Criminal Appeal No. 194 of 2014, the Court of Appeal also directed that where it is impossible to reconstruct, a retrial should be ordered.

But in the circumstances of this application where the alleged missing records are the records of this court, if it is impossible to reconstruct the record, this court should strike out the case involving the missing records from the register to pave the way for the parties to file the case a new case or application.

Therefore, filing a fresh and new application is not an option or procedure when the allegations of missing records happen and are proven.

Third, there is no evidence that the alleged filed notice was either struck out or deemed to have been withdrawn by the Court Appeal. In the absence of such evidence, this Court cannot close its eyes and assume that there is no pending notice.

Flowing from above, the application is not proper before this Court for the reasons I elaborated above. Therefore, I don't see a reason to determine its merits or demerits.

Consequently, the application is struck out with costs.

THE HIGH COURT OF TANZANIA
LAND DIVISION

K.D. MHINA
JUDGE
8/12/2023