

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 27377 OF 2023

(Arising out of Land Case No. 42 of 2015 in the High Court of Tanzania Land Division)

MOHAMED S. GHONA APPLICANT

VERSUS

MAHMOUD MWEMUS CHOTIKUNGU RESPONDENT

Date of Ruling: 14/05/2024

RULING

A. MSAFIRI, J.

This is an application for extension of time within which to file the Notice of Appeal out of time in Land Application No. 42 of 2015 which was delivered by this court on 13/04/2018 before Hon. Wambura, J.

The Application was made under Section 11(1) of the Appellate Jurisdiction Act, Cap 141 [R.E. 2019] and Section 95 of the Civil Procedure Code, Cap 33 [R.E. 2019]

The Application was made by way of chamber summons supported with an affidavit deponed by Mohamed S. Ghona (the Applicant), the same was opposed in the counter affidavit deponed by Mahmoud Mwemus Chotikungu (the respondent).

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The hearing was made by way of written submissions in which the applicant was represented by Mr. Richard Karumuna Rweyongeza, learned Advocate while Mr. Benitho Mandele, learned Advocate appeared for the respondent.

The brief history of this matter is that some time in 2015, the applicant instituted Land Case No. 42 of 2015 before this court against the respondent the same was dismissed by this court on 13/04/2018, the applicant was aggrieved with the decision, hence lodged a Notice to Appeal to the Court of Appeal. The said Notice was filed on time on 03/5/2028. The Notice of Appeal was granted by this court and the applicant proceeded to file Civil Appeal No. 336 of 2019 before the Court of Appeal. However, the applicant failed to serve the records of the appeal to the respondent within time as required under Rule 97 (1) of the Court of Appeal Rules, Cap 141 R.E 2019.

The applicant then lodged an Application before the single Justice of the Court of Appeal for an extension of time but it was dismissed. The applicant again filed for reference before the Court of Appeal seeking to challenge the decision of the single Justice of Appeal, but this Application was dismissed as the Court of Appeal withheld the decision of the single Justice. *AMs*

Following that, the applicant then prayed to withdraw the Appeal and the same was marked withdrawn before the Court of Appeal on 06/12/2023.

The applicant has then filed the current application seeking for extension of time to file the notice of appeal still intending to pursue the appeal in the Court of Appeal.

Mr. Rweyongeza learned Advocate on his submission was of the view that this court be pleased to grant extension of time because of illegality as per paragraph 9 of the affidavit in which among other things, it was claimed that the trial went on without the aid of assessors and that there was no dispensation for their attendance.

Mr Rweyongeza posed a question as to whether after the applicant's appeal was withdrawn, the door for his rights was closed. He cited the case of **The Honourable Attorney General vs. Reverend Christopher Mtikila**, Civil Appeal No. 20 of 2007 Court of Appeal of Tanzania (Unreported). He argued that that the applicant still has an opportunity to come back with this application at hand in order to pursue his right. He further submitted that, when the appeal was withdrawn all documents and Notice of Appeal was equally withdrawn hence the first step to comply with mandatory provisions is to apply to file a notice of appeal out of time and this application is envisaged in that regard. *Atle*

Mr Rweyongeza added that the delay was technical thus the applicant need not to be blamed. He cited the case of **Realand Company Ltd vs. Sign Industries Ltd and Another**, Civil Application No. 285 of 2019 at page 5 of the judgment; -

"...It may be not be possible to lay down an invariable or constant definition of the phrase "good cause", but the Court consistently considers such factors like, the length of the delay involved, the reason for the delay; the degree of prejudice, if any, that each party stands to suffer depending on how the Court exercises its discretion; the conduct of the parties, and the need to balance the interests of a party who has constitutionally underpinned right of appeal..."

The counsel was of the view that if the applicant is denied chance to file notice of appeal out of time, he will be deprived the right to appeal. He prayed that this application be allowed and the costs be in the cause.

On response, Mr. Mandele learned Advocate adopted the counter affidavit of the respondent to be part of the submissions and further contended that at this stage it is not open for the applicant to apply for extension of time to file notice of appeal, and that the Notice sought was already served to the respondent before Civil Appeal No. 336/2019 was lodged as per paragraph 3 of the counter affidavit and that the applicant has hesitated to reveal such facts.

He argued that even if the present application was proper, the applicant was supposed to make the application immediately after the *Adle-*

decision by Hon. Mwambegele, J.A. on 10/08/2023 but did not do so. He added that the days from 06/12/2022 to 08 or 11/3/2024 are unaccounted for. He said that this application is both untenable in law and without any merit therefore that the same be dismissed with costs.

There was no rejoinder.

Having gone through the submission of the parties the issue is whether the application is tenable.

According to the facts, the applicant is seeking for extension of time to file Notice of Appeal. The applicant had previously lodged the Notice of appeal within time and lodged an appeal to the Court of Appeal in Civil Appeal No. 336 of 2019 which was withdrawn on what you may call procedural irregularities or technical reasons.

In this application, it is my view that in determining whether the matter is tenable, this court has to tackle two major questions; first whether the notice of appeal which was filed for the first time in this court is still in existence or collapsed when the intended appeal was withdrawn. The second question is whether the applicant has demonstrated sufficient cause for the delay on filing the notice of appeal.

On the first question, it is undisputed by both parties that the applicant filed and was granted by this court, the leave to file a notice of *Appeal*.

appeal with the intention to file an appeal to the Court of Appeal. It is the law that the notice of appeal to the Court of Appeal constitute an appeal before the said higher court. However, due to the technical reasons, the appeal which was already filed as Appeal No. 336 of 2017 was withdrawn. In my view, since the appeal was withdrawn, a notice to appeal cannot stand. It was withdrawn together with the order of withdrawing the appeal. Therefore the current position is that there is no any pending appeal (notice of appeal inclusive) before the Court of Appeal.

I also believe that since the Appeal No. 336 of 2017 was withdrawn, the applicant still has a chance to lodge again the said appeal before the Court of Appeal. I have gone through the Court of Appeal Rules. I have not seen a provision which requires the applicant to seek for leave to refile an appeal which was withdrawn before the Court of Appeal. Hence, since there is no any appeal before the Court of Appeal regarding the matter at hand, the applicant can exercise his right to lodge an appeal.

Rule 83 of the Court of Appeal Rules states that any person who desires to appeal to the Court of Appeal shall lodge a written notice to the Registrar of the High Court. It is not in dispute that this court had previously granted the Notice, but since the appeal was withdrawn, automatically the Notice was withdrawn too. Hence I find that the applicant is right to knock the doors of this court, seeking to lodge the

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notice of intention to appeal but this time, out of time since the time to seek for the same has long passed.

This takes me to the second question on whether the applicant has demonstrated good cause to enable this court to exercise its discretion and grant the sought order.

In his affidavit and submissions in support of the application, the applicant has stated the cause for the grant of the application to be illegalities in the impugned judgment and proceedings. Also, the applicant has hinted at the technical delay. I have considered the historical background of the matter and I am inclined to agree that there is a technical delay as the applicant was in court's corridors at all the time, seeking to attend the appeal he has lodged but due to the fact that he failed to serve the respondent on time, he could not pursue the appeal on merit but has to seek for court's leave to serve the respondent out of time. Following the dismissal of the two applications, then the appeal was withdrawn.

The counsel for the applicant has averred that, even if the court has to agree that there is competent application, then the applicant have not accounted for the days of delay since 06/12/2023 when the appeal was withdrawn before the Court of Appeal.

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However, I find the submission by the counsel for the respondent to be misleading since the records shows that the appeal was withdrawn before the Court of Appeal on 06/12/2023 and the instant Application was instituted in this court on 08/12/2023 being only two (2) days after the withdrawal. I find the two (2) unaccounted days to be reasonable and not inordinate considering the sequence of events in this matter.

I find the Application to have merit and proceed to grant it. The intended notice of appeal to the Court of Appeal to be filed as prayed subject to the time limitation as per the law. Costs shall be in the main cause.

It is so ordered.



A handwritten signature in black ink, appearing to read "A. Msafiri".

A. MSAFIRI
JUDGE

14/05/2024