

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

MISC LAND APPLICATION NO.

196 OF 2023

(Originating from Misc. Land Application No.138/2018)

JUMAA MUSHIHIRIAPPLICANT

VERSUS

GABRIEL ANDREW.....1STRESPONDENT

ALOYCE MAMKU.....2NDRESPONDENT

DAVID A. NOBLE.....3RDRESPONDENT

JOHN PETER MAJURA.....4TH RESPONDENT

RULING

Date of last order:29/2/2024

Date of Judgment: 13/3/2023

MWAIPOPO, J:

This is an Application for extension of time within which an Applicant can file Notice of Appeal out of time. The Application is made by way of Chamber Summons under section 11(1) of the Appellate Jurisdiction Act Cap 141 RE 2019 and any other enabling provisions of the law.

It is supported by the sworn Affidavit of Advocate Luko Stephen for the Applicant and opposed by the Counter Affidavits of Gabriel Andrew, Aloyce Mamku, David A. Noble and John Peter Majura who are the 1st, 2nd, 3rd and 4th Respondents respectively

The hearing of the Application proceeded orally. At the commencement of hearing, the Applicant was represented by the learned Advocate Stephen Luko while the Respondents were represented by learned Advocate George Mushumba.

In his submissions, the learned counsel for the Applicant began by urging the Court to adopt the contents of his Affidavit and find that it discloses reasons for the delay. He referred the Court to the case of **Lyamuya Construction Ltd Vs. Board of Trustees of Young Women Christian Association of Tanzania Civil Application No. 2 of 2010** to drive his point home that an Application for extension of time is in the discretion of the Court however that discretion is judicial and must be exercised according to rules of reason and justice. He adumbrated further that the case of **Lyamuya Construction (supra)** has set out basic conditions, which are to be met before the court can hold that there are sufficient reasons for extension of time. He emphasized that the Applicant has been diligent in pursuing the matter, that there has been no inordinate delay and the impugned decision is fraught with misdirections on points of law and therefore illegal.

According to his submissions based on Affidavit, the learned counsel stated that; he currently represents the Applicant and has also been representing him in Application No. 119/2019 which was for leave to appeal to the Court of Appeal of Tanzania. The same was granted by Ho. Dr. Mango, J hence he is conversant of the facts he was about to depone.

He stated that filed an application No. 48/2014 before the District Land and Housing Tribunal at Kibaha against the Respondents whereby he lost the case and same was decided in favour of the Respondents.

The Applicant being aggrieved and dissatisfied with the judgment and Decree of the Tribunal went further to look for an advocate so that he could help him file an appeal to the High Court. That at the time he was looking for an Advocate and when he secured his services he was still within time, however when he filed the same there happened a point that the matter was out of time (which he argues that it was not true if the days are counted from the date the judgment was delivered to the day an Application was filed it is clear that the Applicant was within the days of his liberty to file an Appeal). He was thus subjected to file an Application for extension of time (before Kerefu J as she then was) whereby he lost again against the Respondents in Misc. Application no. 138/2018. The Applicant immediately filed a Notice of Appeal to the Court of Appeal of Tanzania and other processes relating to the Appeal to the Court of Appeal of Tanzania were initiated and also filed an Application number 119/2019 seeking for the Court to grant leave to the Applicant to file an Appeal in the CAT against the decision of the Honorable Court given on the 8th February 2019 in Misc Land Application No. 138/2018, which was determined before Hon. Mango Judge in favour of the Applicant.

The Applicant finalized the process to appeal to the CAT and lodged an Appeal within time to the Court, however he came to find out that the Certificate of Delay in Misc. Land Application number 138/2018 as per the request to be supplied with copies of the proceedings, Ruling and Drawn Order in the said matter was defective since it was not bearing

the number of the case he was appealing against as the Certificate of Delay was bearing the number of Misc. Land Application no. 119/2019 instead of no. 138/2018 hence he wrote a letter for rectification of the same whereby the Court did rectify the same on 6th July 2022 and supplied the Applicant with a correct certificate of delay to be relied upon by the Applicant in his Appeal.

That while the Court was rectifying the said Certificate of Delay, the Applicant was still making follow up to the District Land and Housing Tribunal for Kibaha to be supplied with copies of the proceedings in Application number 48/2014, since the decision was given, he had not been supplied with the copies despite several reminders to the Tribunal. This went on until the time he filed his Appeal in March 2022. In the mean time the Applicant anticipated that he would have filed a supplementary record of appeal within fourteen days from time when the Appeal was filed believing that he would have already been supplied with the copies of the proceedings from Kibaha which was proved futile and an appeal was lodged in March without being complete for lacking the said proceedings records. However the said proceedings came to be supplied in May 2022 and the rectified certificate of delay was later supplied in July 2022. At that point in time the Applicant realized that if the said Appeal would proceed for hearing before the CAT would be struck out for being incompetent. That after having been supplied with the correct certificate of delay on 6th July 2022 and proceedings from the Tribunal they visited the Court of Appeal several times to enquire about the proceedings of the Appeal and if the case has already been scheduled for hearing so that if not he could file an Application to withdraw the same and file a proper one. That on 13th December 2022

and 20th day of February 2023 the Applicant filed Applications to the CAT repeatedly to withdraw an Appeal which was incompetent before it including a letter which was also filed, so that the Applicant could file the correct record and hence appeal against the decision in Misc. Land Application number 138/2018.

That upon that Application, the Court of Appeal granted an Application and made an order of withdrawing the Appeal on 2nd of March 2023. That from 3rd day of March 2023 till when the Application was filed in Court on 6th of April 2023, the Applicant was preparing this Application for extension of time so that he could serve the Respondents again.

The learned counsel has contended in his submissions that the Applicant has been diligent in pursuing this Application and his appeal as he has been busy in court pursuing the records, filing the Appel and when he noted that it had some defects, he made efforts to withdraw it. The court would note that if the Applicant had not filed the said withdrawn appeal he would not have had a chance since he would not have been on time.

Similarly, the learned counsel submitted that the Applicant prays for extension of time since there is a point of law of sufficient importance. In the challenged decision the Hon. Judge did not consider the fact that the Applicant was within time when he lodged his Misc. Application no. 138/2018. If the Hon. Judge had counted the days since the date of the decision in Application no.48/2014 at the Tribunal for Kibaha and the date the Judgment was issued and collected, he would have found that the Applicant was within time to lodge his appeal to the High Court. This is the point of law for examination by the Court of Appeal. The learned

counsel thus prayed for extension of time to lodge Notice of Appeal to the Respondents so that the Applicant can also file a proper record of appeal for determination since all the records are available and present for justice to be done to the parties.

The learned counsel further argued that since the Appeal was lodged in March 2022 until the time the Applicant lodged an Application for the withdrawal of the Appeal and when the order was given on 2nd March 2023 the said application was within the Court of Appeal. Therefore, under section 21(2) of the Law of Limitation Act Cap 89 RE 2019, he prayed for exclusion of time for all the period that the matter has been in the Court of Appeal and the period the Applicant has been processing documents from the DLHT and rectification of Certificate of delay. The Court should also consider the fact that the Applicant acted promptly immediately after noticing the defects to have all the documents corrected and applications he wrote for withdrawing the appeal as well as the immediate action he took in filing the instant Application. The learned counsel asserted that because of the important point of law to be determined he prayed for the Court to allow the Application so that justice could be done to the parties. He emphasized that the Respondents would not be prejudiced anyhow if they would allow the Application.

The learned counsel further responded on some aspects of the Counter Affidavits as follows;

Firstly, he denied para 8 of the Counter Affidavit, that the Applicant stated in his Affidavit supporting the Application for stay of execution of Decree arising in Application no. 48/2014 that he was supplied with

Judgement and Decree on 6th March 2018. Instead he submitted that the proceedings were supplied to the Applicant in May 2022 and the Appeal was presented in Court in 2023. That is the reason that made the Appeal incompetent.

Secondly, with regard to the delay of 229 days, which he took to withdraw the incompetent appeal, the learned counsel stated that he had already submitted the reasons for the delay and his goal was to have the appeal filed within time. In the same vein the 229 days fall within the days the matter was already within the Court of Appeal. It includes also the days the Applicant made follow up efforts to withdrawal the Appeal so that he could file a proper one.

In conclusion, the learned counsel submitted that at all the time the Applicant was not sleepy or negligent, he tried to take necessary steps to ensure that the Appeal is proper before the Court. He thus prayed for the Court to allow the Application so that the Court of Appeal can determine the rights of the parties. He referred the Court to the case of **Boney Katimba Vs. Wahid Karim Civil Appeal no 27/2007** which was quoted with approval by the Court in the case of **Prosper Baltzaar Kileo and another Vs. Republic, Criminal Application no. 1/2010, page 532, TLR** where it was stated that for an Application that is brought promptly, it will considered more sympathetically than the one that is brought after un-explained delay. Even where the Application is unduly delayed the Court may grant extension of time if shutting out the Appeal may appear to cause injustice. That unless the Application is granted the Applicant is going to suffer not only for what will be lost but will also not get justice.

Submitting in rebuttal, the learned counsel for the Respondents on his part disputed all the grounds for extension of time for the following reasons:

One, he disputed the Affidavit for being sworn by the counsel for the Applicant, instead of the Applicant and no authorization from the Applicant has been shown.

Secondly, he cited negligence of the counsel for the Applicant who decided to file an incompetent appeal when he was not yet supplied with proceedings and had an incompetent certificate of delay. He contended that, the counsel ought to have waited until when he was supplied with the correct version of the records before filing an incompetent Appeal.

Thirdly, with regard to the proceedings, he submitted that the Applicant has not attached any copies to show that he was applying for proceedings. Similarly, contrary to his averments, in the current Affidavit, the Applicant in his Affidavit in Miscellaneous Application No.267/2019 stated that he was supplied with Judgment and Decree on 6th March 2018. He argued that it was not proper for the Advocate to state facts different from those of the client.

Fourthly, the learned counsel for the Respondent contended that, the Applicant delayed to notify the court to withdraw his incompetent Appeal for 229 days and they have not counted for that. He contended that Section 21 (1) of the Law of Limitation Act Cap 89 R.E 2019, which has been applied by the Applicant, only covers bonafide litigators.

Furthermore, the counsel for the Applicant has not shown proof before the Court on how he made follow-ups to the Court of Appeal of Tanzania to know the date of the hearing of the case. It is just a statement from the bar.

With regard to the issue of the important point of law to be determined, the learned counsel for the Respondents submitted that the Court acts in accordance with the law. The Applicant was given leave to argue his case. He had all the necessary documents. The Court cannot assist those who slumber on their rights. He further contended that the arguments on an important point of law are misplaced. The Applicant should argue those issues in the Application for filing the Appeal and for that reason he ought to have acted promptly and diligently, as this is a court of law and not sympathy.

The learned counsel for the Respondents contended that, the Application has not met the threshold stated in the case of **Lyamuya construction case** (supra) since the Applicant has not been able to account for the delay and has not been diligent. Similarly, he has not pleaded any illegality. He contended that the Applicant had all the documents in his hands to enable him file a competent appeal. He quoted the case of **Lyamuya construction (supra)** quoted with approval in the case of **TANESCO vs. Mfungo Leonard Majura and 15 others, Civil Application no. 141, reported in 2017 at page 325 TLR** and prayed for the Application to be dismissed with costs for failure to meet the thresholds stated in those cases.

In rejoinder the counsel for the Applicant reiterated his submissions in chief.

Having gone through the rival submissions of the parties above, the pertinent question for consideration is whether the Applicant has assigned good cause for this Court to exercise its discretionary power of extending time under section 11(1) of the Appellate Jurisdiction Act. The provisions of the said section do not specify the factors to be considered by the Court in determining whether or not to extend the time, however, from decided cases, some factors have been established which provide guidance on whether or not good cause has been established by the Applicant. As stated by the Parties, the case of **Lyamuya Construction Company Ltd (supra)** has set out the following factors;

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

The above factors were also stated in the case of **Damas Assey and Another Vs. Raymond Mgonda Daula and others, Civil Application No. 232 of 2008 CAT at DSM** (unreported) see also the case of **Maro Wambura Vs. Chacha Nyamahemba, Misc. Land Application No. 25 of 2021 MCT Musoma.**

Based on the submissions of the parties, I have observed that the Applicant has pleaded reasons, which are based on technical delay. i.e. based on delay in obtaining records and presence of a point of law of sufficient importance for determination in the appeal.

With regard to the concept of delay, the Applicant in his submissions has narrated how he lost the case before the Tribunal in Land Application No. 48/2014 and pursued the route of appealing against the said decision, whereby he was found to be out of time vide the decision in Misc. Application 38 of 2018 Further, he has also submitted on the delay in getting the records, and the fact that when they were supplied they were also incomplete as only the judgment and Decree were supplied first leaving the proceedings, which were availed later on. Similarly, the Applicant has submitted on the incompetency of the certificate of delay, which bore a different/wrong number of the case in which he was appealing from that is Misc. Application 38 of 2018. The correct version was supplied later on after rectification. However, in between the time for waiting for complete records and correct certificate of delay, the Applicant filed his Appeal to the Court of Appeal within time in the hope of filing a supplementary record of Appeal and after realizing that the Appeal was defective, and had already been filed, made efforts to follow

up on the hearing date and withdraw the incompetent appeal so that he could file an appropriate and proper appeal. He wrote Applications and letters to that effect. Further, on the date the appeal was set for hearing, the Applicant prayed to withdraw the Appeal from the Court of Appeal, so that they could rectify the defects. The Appeal was then withdrawn on the 3rd of March 2023 and the Application for extension of time was immediately prepared and filed on the 6th April 2023.

It is my firm position that the foregoing steps taken by the Applicant in filing his initial Appeal on time and the efforts made towards the rectification of the Appeal after noticing that it had a defect or it was defective for lack of complete records and competent certificate of delay, the subsequent follow up of the hearing date and the withdrawal of the matter after it was fixed for hearing and the preparation and filing of the instant Application in the following month after the withdrawal order was given by the Court of Appeal, in a bid to rectify the Appeal records, suggest that the Applicant acted diligently and with promptness in taking steps to pursue his intended Appeal and more specifically to remedy the defect that led to the withdrawal of his matter at the Court of Appeal.

I am convinced that the period which the Applicant used to pursue his matter since the filing of the 1st Appeal record to its withdrawal before the Court of Appeal as well as the filing of the instant Application for extension of time can conveniently be termed as "technical delay".

In the case of **Fortunatus Masha Vs. William Shida and Another 1997 TLR 154 the CAT at page 155**, cited with approval in the case of **Zahara Kitindi and Another vs Juma Swalehe and 9 others**

Misc. Civil Application No.9 of 2016 CAT Arusha, the Court stated that: -

"A distinction should be made between cases involving real or actual delays and those like the present one which only involve what can be called technical delay in the sense that, the original Appeal was lodged in time but the present situation arose only because the original appeal for one reason or another has been found to be incompetent and a fresh Appeal has to be instituted. In the circumstances, the negligence if any really refers to the filing of an incompetent Appeal and not the delay in filing it. The filing of an incompetent Appeal having been duly penalized by striking it out, the same can not be used yet again to determine the timeousness of applying for filing the fresh Appeal. In fact, in the present case, the Applicant acted immediately, after the pronouncement of the ruling of this court striking out the first Appeal.

It is thus my considered view that the Applicant has explained away the delay to my satisfaction, in the light of **Fortunatus Masha case (supra)**. The filing of Civil Appeal No 103 of 2022, without having complied with procedures of having complete records and correct certificate of delay having been withdrawn from the court for being incompetent, cannot be used again to determine the timeousness of applying for filing the fresh Notice of Appeal out of time. It is no gain saying that the Applicant acted within a reasonable time after the pronouncement of the decision of the CAT of withdrawing the matter.

He cannot be blamed for the incomplete records and incompetent Certificate of Delay which was supplied to him. Therefore, the arguments and cases cited by the counsel for Respondents that the Applicant acted negligently, that he has not provided sufficient reasons and had all the records in his hand are irrelevant in the circumstances of this matter as analyzed above and are hereby denied and dismissed. The cases cited are distinguishable in the sense that that the Applicant has met the requirements stated in the case of **Lyamuya construction Ltd supra**), **TANESCO case** (supra) as well as in light of the case of **Fortunatus Masha** (supra). The Applicant has been able to prove before this Court that his delay is based on technical reasons as opposed to actual delay.

Further that, the Applicant never rested in pursuing his matter. He has been in court corridors since the filing of the incompetent appeal [**see the case of Wambele Mtumwa Shahama vs Mohamed Hamis Civil Reference No.8/2016**].

The learned counsel for the Respondents in his submissions also raised an issue that, the Applicant ought to have sworn himself in the Affidavit, instead of the Advocate who has not been authorized by the Applicant.

Upon my careful consideration of the issue, I find the argument by the counsel for the Respondent lame since Advocates can swear on behalf of their clients and verify appropriately in the verification clause as long as they are authorized. The learned counsel for the Applicant has indicated under para 1 of the Affidavit that he has been an Advocate for the Applicant since he filed Miscellaneous Application no. 119/2019. The learned counsel for the Respondent has not provided any evidence or

proof from the Applicant denying that learned Advocate Stephen Lucco is not his Advocate or has not been engaged by him. The Respondents have thus failed to discharge their burden of proof under section 110,111 and 112 of the Evidence Act Cap 6 RE 2019. This Court cannot entertain their unsupported arguments from the learned counsel for the Respondents.

Similarly, with regard to the issue of the Applicant being supplied with proceedings much earlier on, I have heard the submissions of the counsel for the Applicant and perused his Affidavit and observed that, the proceedings were supplied in May 2022. I have further perused the said Affidavit of the Applicant in Misc. Application No.267/2019 and noted that under para 4 it refers to the Applicant making a follow up of the certified copies of Judgment and Decree only the same were obtained on 6th March 2018 (but not the proceedings). The said paragraph also refers to the payment he made for for judgement, Decree and Proceedings. Therefore, the arguments by the counsel for the Respondents that the Applicant was supplied with the Judgement, Decree and proceedings do not hold water and are hereby dismissed, as the Applicant was only supplied with Judgment and decree.

The foregoing said and done, I am satisfied that the Applicant has advanced before this Court sufficient reasons as to why he should be granted extension of time to file a fresh Notice of Appel out of time as per the criteria set in **Lyamuya construction Ltd case** (supra) and I, in the premise, grant the prayer for extension of time sought in the Chamber Application. Thus the reasons advanced by the Applicant on technical delay are enough to dispose the Appeal. I will not labor on the

second ground advanced by the Applicant on the presence of an important point of law to be determined in the Appeal.

In the upshot, the present Application for extension of time within which the Applicant can file Notice of Appeal out of time is allowed. The Applicant should file the intended Notice of Appeal within 30 days from the date of Ruling. The circumstances of this case are such that there should be made no order as to costs. I therefore make no order as to costs.

DATED at DAR ES SALAAM this 13th day of March 2024.


S.D. MWAIPOPO
JUDGE
13/3/2024



The Ruling delivered this 13th day of March 2024 in the absence of the Applicant, 2nd and 3rd Respondents, and in the presence of 1st and 4th Respondents is hereby certified as a true copy of the original.


S.D. MWAIPOPO
JUDGE
13/3/2023

