

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION CASE NO. 7877 OF 2024

FADHIL KASSIM APPLICANT

VERSUS

ZAITUNI MTSIMBE RESPONDENT

04/06/2024 & 20/06/2024

RULING

A. MSAFIRI, J

This is an application for extension of time for the applicant to file a Notice of Appeal to the Court of Appeal against the decision in Land Appeal No. 83 of 2016 before the High Court of Tanzania (Land Division) at Dar es Salaam, delivered on 28/04/2016 by Hon. B.R. Mutungi, J.

The application was brought under Section 11(1) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 and Section 21 of the Law of Limitation Act, Cap 89, R.E. 2019. The application was by way of chamber summons supported with an affidavit deposed by Fadhil Kassim (applicant), the same was opposed by the counter affidavit deposed by Zaituni Mtsimbe (respondent).

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The application was disposed of by way of written submissions whereas the applicant was represented by Mr. Melchzedek Joachim learned Advocate from Legal Human Right Centre, while the respondent was represented by Mr. Daibu Kambo Advocate.

Mr. Joachim learned Advocate submitted that the applicant is seeking for extension of time to file Notice of Appeal basing on the reason that the delay was technical rather than actual delay. He was of the view that the applicant was busy in court corridors trying to pursue his right in in other proceedings in which the appeal in the Court of Appeal was lodged within time, however, it was later, on 15/3/2024 struck out for being incompetent.

He submitted further that when the appeal was struck out in the Court of Appeal, the applicant acted immediately to request the copy of the ruling within which was supplied to him on 28/03/2024, and filed this application was on 08/04/2024, taking into consideration that the applicant had requested and was getting the legal aid services from the Legal & Human Right Centre.

Mr. Joachim was of the view that this court should consider where the delay is technical to grant the application by excluding the time waiting

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for the ruling from the Court as per Section 21(1)(2) of the Law of Limitation Act, which provides; -

'(1) In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting, with due diligence, another civil proceeding, whether in a court of first instance or in a court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is incompetent to entertain it.

(2) In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting, with due diligence, another civil proceeding, whether in a court of first instance or in a court of appeal, against the same party, for the same relief, shall be excluded where such proceeding is prosecuted in good faith, in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it. '

He also cited the case of **Bank M T. Ltd vs Enock Mwakyusa** (Civil Application 520 of 2017) [2018] TZCA 291 22 October, 2018 at page 8-10 where the ratio decidendi of the said distinction was captured in the case of **Dr. Fortunatus Lwanyantika Marsha vs Dr. William Shija and another** (Civil Appeal 43 of 1996) [1997] TZCA 51 (10 January 1997) where the Court of Appeal was of the view opinion that; -

'A distinction had to be drawn between cases involving real or actual delays and those such as the present one which clearly only involved technical delays in the sense that the original appeal was lodged in time but had been found to be incompetent for one or another reason and a fresh appeal had to be instituted. In the present case the applicant had acted immediately after the

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pronouncement of the ruling of the Court striking out the first appeal. In these circumstances an extension of time ought to be granted.'

He prayed that this court be pleased to grant the application.

On reply, Mr. Daimu learned Advocate adopted the counter affidavit deponed by the respondent and further stated that the applicant's appeal No. 228 of 2021 was time barred hence incompetent before the Court.

He further stated that there was no technical delay since the applicant had filed an incompetent appeal hence, the same was struck out. That granting application to the applicant is causing an endless litigation hence that the applicant should not be extended time as per the reasons advanced in paragraph 10, 11, 12, 13, and 14 of the counter affidavits.

On rejoinder, the applicant admitted to have previously applied for extension of time and granted, but that when was pursuing his right by way of appeal in the Court of Appeal, he made errors within which the applicant was penalised by striking out the appeal, and that now the applicant wants to clear the errors and continue to pursue the right in the Court of Appeal, and that he should not be penalised twice.

Having gone through the submissions of the parties, it is obvious that the grant of extension of time is court discretional whether to grant or refuse. *AMs*

However, the applicant must state good and sufficient cause to convince the court to grant the application. In this application it appears that the applicant's appeal was struck out by the Court of Appeal for being incompetent, this was also admitted by the respondent under paragraph 6 of the counter affidavit.

It is my view that the applicant was very active in court corridors trying to pursue his right, hence the fact that his first appeal was found incompetent and struck out cannot be used to punish him twice and deny him extension of time where there is sufficient cause for delay and that delay is not inordinate.

For the above reasoning, I proceed to grant the application as prayed. The applicant should file the intended Notice of Appeal within 14 days from the date of this Ruling. Costs shall follow the events.

It is so ordered.



A. MSAFIRI

JUDGE

20/06/2024