

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

AT DAR ES SALAAM

MISC LAND APPLICATION NO 309 OF 2021

(Arising from Land Appeal No. 79 of 2014)

MONICA SADIKI APPLICANT

VS

SIMON MAINDU RESPONDENT

RULING

Date of last order: 19. 11.2021

Date of Ruling: 26.11.2021

S.M. KALUNDE, J.:

Through **Land Case No. 47 of 2013**, the applicant unsuccessfully filed a suit against the respondent before the District Land and Housing Tribunal for Morogoro District at Morogoro ("**the tribunal**"). The basis of the applicants' case was that the respondent had trespassed into her land which she had legally acquired since 1984 and allowed the one Prisca ("the vendor") to stay therein. Having heard both parties the tribunal was satisfied that the applicant failed to establish her case and ruled that respondent had established in evidence that he was the lawful owner of the disputed property. The suit was consequently dismissed.

Being dissatisfied by the above decision, the applicant preferred and appeal to this Court. The appeal was registered as **Land Appeal No. 79 of 2014**. On 09th July, 2015, this Court (**Hon. R. Mkuye, J** as she then was) dismissed the appeal with costs for lack of merits.

Aggrieved by the decision of this Court and intending to appeal to the Court of Appeal, the applicant filed **Miscellaneous Land Case Application No. 717 of 2015** intending to be allowed to lodge a Notice of Appeal out of time to appeal against the decision of this court delivered on 09th July, 2015. On 06th June, 2017 the application was struck out for being misconceived. Apparently, the applicant had moved the Court under a wrong provision of the law.

Still interested in appealing against the decision of this court, the applicant filed the present application, seeking to extend time within which to file a Notice of Intention to Appeal to the Court of Appeal against the decision delivered on 09th July, 2015. The application is preferred under section 11(1) of **the Appellate Jurisdiction Act [Cap. 141 R.E. 2019]** and section 14(1) of **the Law of Limitation Act [Cap. 89 R.E. 2019]** and is being supported by an affidavit sworn by, Monica Sadiki, the applicant.

On the 31st day of August, 2021, when partied appeared before me, the respondent intimated that he will not be filing a counter affidavit a hearing date. On the 30th day of September,

2021, when the matter came for hearing, the applicant appeared, however, the respondent failed to appear. The Court ordered hearing to proceed **ex-parte** against the respondent.

In her brief submissions the applicant submitted that the present application was filed following an earlier application which had been struck out by this Court for being improperly filed. She blamed her advocate for failure to defend the earlier application. Responding to the question why it took so long to file the present application after the earlier application had been struck out, the applicant claimed that the advocate did not inform her what transpired in court in relation to the struck-out application. She discovered that the application had not succeeded upon being served with a Bill of Cost and an eviction order. In light of the above circumstances, the applicant prayed that the application be granted so that she can file a notice of appeal out of time so that she can fight the recovery of her house on appeal.

Having gone through the pleadings and considered the submissions made in support of the application, the question for my determination is whether the application merited. However, before delving deep into determination of the application, I find it convenient to outline the procedure for filing the Notice of Appeal. The requirement to file a notice of appeal is regulated by Rule 83 (1) and (2) of **the Court of Appeal Rules, 2009, GN. No. 344 of 2019** ("the Rules"). The respective reads as follows:

"83.-(1) Any person who desires to appeal to the Court shall lodge a written notice in duplicate with the Registrar of the High Court.

(2) Every notice shall, subject to the provisions of rules 91 and 93, be so lodged within **thirty days of the date of the decision** against which it is desired to appeal." [Emphasis mine]

In accordance with the above rule, any person desiring to appeal to the Court of Appeal must lodge a written notice within 30 days from the date of the decision. However, the Rules have provided a window for extension of time for a person who fails to lodge the notice as outlined under Rule Rule 83 (1) and (2) above. The window is provided for under section 11 (1) of **the Appellate Jurisdiction Act** (supra). The section empowers this Court to extend time to lodge a notice of appeal. The section reads:

"11.-(1) Subject to subsection (2), **the High Court** or, where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned, **may extend the time for giving notice of intention to appeal from a judgment of the High Court or of the subordinate court concerned, for making an application for leave to appeal or for a certificate that the case is a fit case for appeal, notwithstanding that the time for giving the notice or making the application has already expired.**" [Emphasis is mine]

The above cited provision uses the word "**may**" signifying that the decision to grant or refuse the application is the discretion of the Court. However, it is trite that the discretion in



extending time must be exercised judiciously, regard being on the circumstances of each case. This seems to be the position maintained in several leading cases including in **Benedict Mumello vs Bank of Tanzania**, [2006] 1 EA 227; **Zuberi Mussa v. Shinyanga Town Council**, Civil Application No. 3 of 2007; **Bertha Bwire vs. Alex Maganga**, (Civil Reference No.7 of 2016) [2017] TZCA 133; (20 November 2017 TANZLII); and **Lyamuya Construction Company Ltd. vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, CAT (all unreported).

In **Bertha Bwire vs. Alex Maganga** (Supra) the Court of Appeal stated as follows: -

*"...It is trite that extension of time is a matter of discretion on the part of the Court and that such discretion must be exercised judiciously and flexibly with regard to the relevant facts of the particular case. Whilst it may not be possible to lay down an invariable definition of good cause so as to guide the exercise of the Courts discretion the Court is enjoined to consider, inter-alia, the reasons for the delay, the length of the delay, whether the applicant was diligent and the degree of prejudice to the respondent if time is extended. (See for example this Court's decisions in **Dar es Salaam City Council vs. Jayantilal P. Rajani**, Civil Application No. 27 of 1987; and **Tanga Cement Company Limited vs. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001 (unreported)."*

In the present application, the available records show that the decision sought to be challenged, that is Land Appeal No. 79

of 2014, was delivered on 09th July, 2015. In accordance with rule 83 (2) of the Rules the 30 days for filing notice expired on the 07th August, 2015. Until the expiry of the limitation period, no notice was lodged. Being out of time, the applicant filed Misc. Land Case Application No. 717 of 2015, as alluded earlier, on 06th June, 2017 the application was struck out for being misconceived. Four years later on 29th June, 2021 the present application was filed. With the above timelines, the question for my determination is whether the applicant has explained away the four years delay.

I am mindful of a now settled principle requiring courts to make distinction between cases involving real or actual delays and those which only involve what can be called technical delays. This view was pronounced by the Court of Appeal in several decisions including the case of **Fortunatus Masha vs. William Shija and Another** [1997] TLR 154 and **SalvandK. A. Rwegasira vs. China Henan International Group Co. Ltd**, Civil Reference No. 18 of 2006 (unreported).

In **Fortunatus Masha vs. William Shija and Another** (supra) the Court held 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 delays 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 not

*the delay in filing it. **The filing of an incompetent appeal having been duly penalized by striking it out, the same cannot 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.”[Emphasis is mine]*

Mindful of the above position I will discount the period between the 09th July, 2015 when the decision in Land Appeal No. 79 of 2014 was delivered and 06th June, 2017 when Misc. Land Case Application No. 717 of 2015 was struck out for being misconceived.

Having discounted the above period, I think it would be prudent to consider what happened after Misc. Land Case Application No. 717 of 2015 was struck out. It is common ground that in striking out the above application this Court granted the applicant an option to refile the application subject to the rules of limitation. The Court made the following observation:

“... The Applicant is at liberty to institute the present application to the court of competent jurisdiction subject to limitation of time.”

Unfortunately, the above reminder by the court did not sink in well with the applicant. She did not act promptly in refileing the application, instead she waited approximately four years since Misc. Land Case Application No. 717 of 2015 was struck out to file the present application. The records show that the present application was filed on 29th June, 2021. 

In accordance with the affidavit filed in support of the application, the applicant whined to have lost invaluable time at the instance of improper advice and miscommunication from her former advocate. The miscommunication is attributed to failure to be informed on what transpired in Misc. Land Case Application No. 717 of 2015 by the advocate. In my view, I do not think the applicant is really justified in laying blames to her advocate for whole four years of the present delay, I will provide a brief illustration. **First**, the communication between her and the advocate is the relation cultivated by the agreement of service between the two, she was the one who engaged the advocate based on the engagement she should have been the one to establish frequent channel of communication that would enable her to know the whereabouts of her case, at any rate this was her application, not the advocates case. She cannot now lay the entire blames on her advocate. **Secondly**, the applicant said that she was attending before the court but could not follow the proceedings, this is not supported by any material in her affidavit to suggest that she was indeed present in court and could not follow the proceedings. But again, she had hired an advocate to represent her in the proceedings. I think her advocate was responsible to inform her of what was transpiring in Court. In addition to that, the applicant failed to explain how the improper advice and miscommunication with her former advocate if any, resulted to her to the inability or failure to take the necessary steps within the prescribed time.

Thirdly, there are some elements of inaction and lack of diligence on the part of the applicant in following up her application, and I will demonstrate hereunder. From the records it is clear that Misc. Land Case Application No. 717 of 2015 was struck out on 06th June, 2017. The applicant alleges that she went to court and was informed by one the court clerk namely "**Miss. Carlo**" that her case was not seen in the registry. However, her affidavit does not disclose when she went to see the alleged court clerk. Further to that the said Miss. Carlo did not swear an affidavit to that effect. It is trite that if an affidavit mentions another person as being a source of certain information, then that other person should also depone an affidavit. See **Franconia Investment Ltd vs TIB Development Bank Ltd** (Civil Appl. No.270/01 of 2020) [2021] TZCA 563; (30 September 2021 TANZLII). The applicant cannot, therefore, purport to inform this Court on what the alleged Miss. Carlo said as to the status of the case. That statement should have been made by Miss Carlo herself. That argument is therefore dismissed for not being supported.

In similar vein, the allegations made by the applicant that her son in law **Ian Mdeve** followed up and assisted her in obtaining copies of the ruling in Misc. Land Case Application No. 717 of 2015; and that **Alpha Boniphace** advised her to file a fresh application are unsupported by the affidavits of the respective individuals as such the said assertions cannot be relied on by this Court.

The law is now established that those who come to courts of law must not show unnecessary delay in doing so: they must show great diligence. See **Vodacom Foundation vs. Commissioner General (TRA)**, Civil Application No. 107/ 20 of 2017 (unreported). In the present case, at paragraph 8 of the affidavit filed in support of the application, the applicant alleged that she became aware of the status of Misc. Land Case Application No. 717 of 2015 on the 24th day of April, 2020 upon being supplied with summons from tribunal. However, the present application was filed more than a year later on the 29th day of June, 2021. The position of the law is well settled that for an applicant to succeed, in an application of the present nature, she must satisfy the Court that since becoming aware of the fact that she is out of time, she acted very expeditiously and that the application had been brought in good faith. See **Royal Insurance Tanzania Limited vs. Kiwengwa Strand Hotel Limited**, Civil Application No. 116 of 2008 (unreported). In the instant case the applicant had not provided any explanation why she could not prosecute the matter promptly upon being struck out. That is a clear demonstration of lack of diligence and sloppiness on the part of the applicant.

From the records, it is evident that the applicant delayed for almost four years before filing the present application. if she wanted this Court to condone the delay, she ought to have offered a full detailed and accurate account of the reasons for the delay and how the reasons affected or resulted in her inability to take the steps required by law. Simply put, all she had to do

was to account for the delay and not shoulder the delay to someone else. In circumstances of this case, she has no justification for blaming her advocate or any other person. She was slopy and lethargic.

There was also an allegation that the intended appeal had chances of success because she lost the case before the tribunal on legal technicalities. Apparently, the legal technicalities were not explained. But more importantly, this application was intended to file a notice of appeal against the decision of this Court, not the lower court. However, whether the intended appeal has overwhelming chances of success or otherwise, I think I will not be in a position to comment at this stage, especially given the limited information availed.

Be it as it may, chances of success might not really fit well as a good cause for extension of time. In **Wambele Mtumwa Shahame vs Mohamed Hamis** (Civil Reference No.8 Of 2016) [2018] TZCA 39; (06 August 2018). The Court of Appeal cited **Shanti vs. Handocha** (1973) EA 2007 where the East African Court of Appeal made a distinction between an application for extension of time and that for leave to appeal. The said Court stated: -

"The position of an application for extension of time is entirely different from an application for leave to appeal. He is concerned with showing "sufficient reason" why he should be given more time and the most persuasive reason he can show is that the delay has not been caused or contributed to by dilatory conduct on his part. But there

may be other reasons, and these are all matters of degree. He does not necessarily have to show that his appeal has a reasonable prospects of success or even that he has an arguable case."

The Court went on to observe that:

"The notable criteria in applications for extension of time is to show a good cause and not over whelming chances of success. In any case, that would amount to considering the appeal's merits."

For the foregoing reasons, I am unable to make a finding that the applicant has demonstrated good cause for me to exercise my discretion in extending time as prayed. Consequently, I dismiss the application. However, given that the matter proceeded ex-parte, I make no order for cost.

It is so ordered.

DATED at **MOROGORO** this **26th** day of **NOVEMBER,**
2021.



A handwritten signature in blue ink, appearing to be "S.M. Kalunde".

S.M. KALUNDE

JUDGE