

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

CIVIL APPLICATION NO. 133/02/2018

ATHUMANI AMIRI APPLICANT

VERSUS

**1. HAMZA AMIRI
2. ADIA AMIRI**

}

..... RESPONDENTS

**(Application for extension of time within which to institute an appeal from
the Judgment of the High Court of Tanzania of Tanzania)**

(Massengi, J.)

dated the 31st day of December, 2015

in

Land Case No. 28 of 2010

RULING

29th March & 3rd April, 2019

NDIKA, J.A.:

By a notice of motion lodged on 28th December, 2017, Athumani Amiri, the applicant herein, seeks against the respondents, Hamza Amiri and Adia Amiri, an enlargement of time within which to institute an appeal against the judgment of the High Court of Tanzania at Arusha dated 31st December, 2015 in Land Case No. 28 of 2010. In support of the application, the applicant deposed an affidavit. Responding, the respondents affirmed a joint affidavit in reply, strongly opposing the application.

Briefly, this application arises from the dispute between the applicant and the respondents over ownership of landed property described as Plot No. 16, Block 'W', Area 'F', Levolosi Ward, Arusha. Being unhappy with the way rental income from that property was being appropriated, the applicant sued the respondents in Land Case No. 28 of 2010 before the High Court at Arusha claiming to be owning 41.6% shares of the suit property as against 41.6% shares and 16.8% shares held by the first and second respondents respectively. He prayed for payment of TZS. 124,800,000.00 being the value of his shares in the suit property. In the alternative, he urged that the suit property be sold and the proceeds thereof be distributed to the co-owners.

The respondents denied the applicant's case, claiming that he was not entitled to any share in the suit property. They also counterclaimed that they were the lawful co-owners of the suit property in exclusion of the applicant. In its decision, the court below found that all the parties herein were co-owners with equal shares and proceeded to decree that each party was entitled to the occupation or use of three rooms of the suit property. Alternatively, the court gave the respondents the option to buy out the applicant by paying him an amount equal to the value of his shares as per a valuation to be determined by the Government Valuer.

Resenting the decision of the High Court, the applicant duly lodged a notice of appeal on 4th January, 2016 in terms of Rule 83 (1) and (2) of the Rules. He also requested vide a letter of 31st December, 2015 received by the Deputy Registrar at the High Court, Arusha on 4th January, 2019 for a copy of the proceedings as per Rule 90 (1). It is evident that the said letter was copied and served upon the respondents in line with Rule 90 (2). Afterwards, on 14th January, 2016 the applicant duly lodged Miscellaneous Land Application No. 3 of 2016 in the High Court at Arusha seeking leave to appeal but that matter was on 14th January, 2017 marked withdrawn with leave to refile on account of technical grounds. Undeterred, the applicant sought and ultimately obtained an extension of time within which to file a fresh application for leave to appeal pursuant to which he was granted leave on 18th September, 2017 vide Miscellaneous Land Application No. 67 of 2017.

In seeking condonation of the delay, the applicant avers in Paragraph 6 through Paragraph 11 of the affidavit:

"6. That through my letters of 18th September, 2017 and 29th September, 2017 I requested the Court to supply me with certified copy of proceedings and order of Miscellaneous Land Application No. 67 of

2017, and exhibits used in Land Case No. 28 of 2010 and the same were positively answered by the Deputy Registrar through his letter dated 16th October, 2017.

7. That on 26th October, 2017 I wrote another letter to the Deputy Registrar requesting him to supply me with the certificate of delay and until 8th November, 2017 the same was not responded by the Deputy Registrar. Therefore, on 9th November, 2017 I wrote another letter reminding the Deputy Registrar of the same and also explaining the trend of events which had taken place in court to the time I was granted leave to appeal.

8. That on 23rd November, 2017 I was supplied with the certificate of delay stating that the aggregate of 64 days was required for the preparation and delivery of the copy of the proceedings therefore the documents were made ready for collection on 7th March, 2016.

9. That I frequently followed up on the response to my letter of 9th November, 2017 I was told it was not ready. On 6th December, 2017 the same was delivered to me by a Court Clerk Talita Kayuli

10. That it is important to include leave to appeal and exhibits used in the Land Case No. 28 of 2010 in the record of appeal.

11. That the intended appeal is seeking to challenge the legality of the decision [of the Court] in Land Case No. 28 of 2010. A copy of the intended Memorandum of Appeal is attached hereto and marked Annexure ATH.4.”

It is evident from the above paragraphs that the applicant attributes the delay to the High Court as follows: first, that the said court's Registry supplied him copies of the proceedings, order granting leave to appeal and exhibits admitted at the trial rather belatedly. That the Deputy Registrar only responded to his request for the documents on 16th October, 2017 after he had sent two reminders. Secondly, that even after the copy of proceedings had been collected, the Deputy Registrar failed to issue a conforming certificate of delay simultaneously as required under Rule 90. It took two reminders for the Deputy Registrar to issue such certificate of delay on 23rd November, 2017. Thirdly, the applicant could not rely on the certificate of delay so issued to lodge his intended appeal on the ground that the said certificate was manifestly incorrect as it only excluded an aggregate of sixty-four days up to 7th March, 2016. Finally, subsequent

effort to have the Deputy Registrar issue an amended certificate of delay was barren of fruit, hence the present application for extension of time to institute the intended appeal.

As indicated earlier, the application is strongly opposed by the respondents. In their joint affidavit in reply, they admit the contents of the first seven paragraphs in the founding affidavit but deny or take issue with the contents of Paragraph 8 through Paragraph 12 as follows:

"4. With regard to Paragraph 8 of the applicant's affidavit, we wish to reply by stating that the applicant after having been supplied with the certificate of delay on 23^d November, 2017 was supposed to file the application for extension of time without further delay, but he didn't file the same until 28th December, 2017, that is, the application was filed 36 days from the date the applicant was supplied with the certificate of delay (i.e., 23^d November, 2017). The applicant's affidavit does not disclose the reasons for the delay.

5. That Paragraphs 9, 10, 11 and 12 of the applicant's affidavit are disputed because the applicant was not diligent enough in making follow up of the necessary steps for his intended appeal and that is why this application was filed after 36

days from the date he was supplied with the certificate of delay, although by the time he was supplied with the certificate of delay already he had obtained leave to appeal and that the said appeal does not stand good chance of success."

In effect, the respondents aver that even though the applicant is not to blame for the delay before the issue of the certificate of delay on 23rd November, 2017, he went to slumber thereafter for over thirty-six days before he lodged the present application.

At the hearing of the application, the applicant appeared in person, unrepresented whereas Mr. Ezra Mwaluko, learned counsel, represented the respondents.

Having adopted the notice of motion, the accompanying affidavit and the written submissions in support of the application, the applicant urged that the delay be condoned primarily on the reason that it arose from the Deputy Registrar's issue of a worthless certificate of delay. He added that the Deputy Registrar refused to amend the certificate even after he was requested in writing to do so. It is further contended that the judgment sought to be challenged was fraught with illegalities as presented in the Draft Memorandum of Appeal annexed to the accompanying affidavit. In

elaboration, it was argued that the court below failed to consider the applicant's final submissions in support of his case and that the first respondent was disproportionately assigned shares in the property. On this contention, reliance was placed on the decisions of the Court in **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] TLR 185; **VIP Engineering and Marketing Limited and 3 Others v. Citibank Tanzania Limited**, Consolidated Civil Reference No. 6, 7 and 8 of 2006 (unreported); and **Amour Habib Salim v. Hussein Bafagi**, Civil Application No. 52 of 2009 (unreported).

In opposition, Mr. Mwaluko assailed the application on two fronts. First, he contended that the applicant gave no account of thirty-six days after 23rd November, 2017 when he was issued with the defective certificate of delay until when he lodged this application on 28th December, 2017. As regards the claim that the impugned judgment was illegal, he countered that the alleged illegalities, if at the exist, were plainly minor evidential issues that could only bring to question the trial court's appreciation and evaluation of the evidence on the record. They did not affect the legality of the decision.

Rejoining, the applicant elaborated that his founding affidavit shows that he requested the Deputy Registrar to amend the defective certificate but the said Deputy Registrar unjustifiably declined to do so as his letter of 6th December, 2017 bears out. He added that even though the application is stated to have been lodged on 28th December, 2017 he presented it to the Court's Sub-Registry for filing on 22nd December, 2017 but that the intervening period partly involving a Christmas break there was some delay in lodging the matter. He thus maintained that he was all along not indolent in the pursuit of the intended appeal.

Ahead of dealing with the substance of this application in the light of the opposing submissions of the parties, I wish to remark that although the Court's power for extending time under Rule 10 of the Rules is both broad and discretionary, it can only be exercised if good cause is shown. It may not be possible to lay down an invariable or constant definition of the phrase "good cause" so as to guide the exercise of the Court's discretion under Rule 10, but the Court invariably considers factors such as the length of the delay, the reasons for the delay, the degree of prejudice the respondent stands to suffer if time is extended, whether the applicant was diligent, whether there is point of law of sufficient importance such as the illegality of the decision sought to be challenged: (see, for instance, this

Court's unreported decisions in **Dar es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987; **Tanga Cement Company Limited v. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001; **Eliya Anderson v. Republic**, Criminal Application No. 2 of 2013; and **William Ndingu @ Ngoso v. Republic**, Criminal Appeal No. 3 of 2014). See also **Devram Valambhia** (supra); and **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

I have given due consideration to all the material on the record and taken account of the submissions of the parties along with the authorities cited. The main point for consideration is whether there is a good cause for condonation of the delay.

To begin with, it is common cause that the applicant duly manifested his intention to appeal by lodging a notice of appeal on 4th January, 2016 and that on the same day he applied for a copy of the proceedings. As there is no dispute that the letter bespeaking a copy of the proceedings was duly copied and served on his adversaries, the applicant was, in terms of Rule 90 (1) and (2) of the Rules, entitled to the exclusion of the entire

period he waited for the preparation and delivery of the copy of proceedings from the computation of the prescribed sixty days' period of limitation. It is also undoubted that the applicant sought and obtained leave to appeal and that after a relentless effort and several reminders to the Deputy Registrar he was finally supplied with copies of the proceedings, the order granting leave to appeal and the exhibits admitted at the trial pursuant to the Deputy Registrar's reply vide his letter dated 16th October, 2017. Sadly, the Deputy Registrar issued no certificate of delay along with the documents so supplied. It took two reminders for the Deputy Registrar to issue a certificate on 23rd November, 2017. This far, the parties appear to be unanimous that the entire period from 4th January, 2016 when the notice of appeal was filed until 23rd November, 2017 when the certificate of delay was issued is fully accounted for.

The contest between the parties herein, therefore, lies in what happened or should have happened after the certificate of delay was issued. Thus, the point for consideration narrows down to whether the applicant fully explained the delay for the period from 23rd November, 2017 when he was issued with the certificate until 28th December, 2017 when he lodged the present application.

As indicated earlier, Mr. Mwaluko, for the respondents, contends that the applicant dawdled for thirty-six days after collecting the plainly defective certificate of delay. He should have acted promptly to apply for extension of time after collecting the defective certificate, so the argument goes. The applicant denies this contention, arguing that he promptly requested the Deputy Registrar to amend the defective certificate to no avail and the latter replied to him vide his letter of 6th December, 2017 declining to do so. He added that even though the application is stated to have been lodged on 28th December, 2017 he presented it to the Court's Sub-Registry for filing on 22nd December, 2017.

I entertain no doubt that the delay in the institution of the intended appeal by the applicant is wholly attributable to the failure on the part of the Deputy Registrar to issue an accurate certificate of delay. Without doubt, the certificate he issued on 23rd November, 2017, excluding an aggregate of sixty-four days only running up to 7th March, 2016, was worthless; the applicant could not rely upon it to institute his appeal. By that certificate, the intended appeal ought to have been lodged by 7th May, 2016 when the prescribed sixty days' limitation, reckoned from 7th March, 2016, expired. Since there is no indication that he ever notified the applicant in writing on 7th March, 2016 that the requested copy of the

proceedings was ready for collection, there was no basis for him to exclude an aggregate of sixty-four days only. In fact, it is uncontroverted that the requested documents were issued in October 2016 after the applicant had sent two reminders, refreshing his standing request for the documents. Even then, the documents were issued without any corresponding certificate of delay. Had the Deputy Registrar issued the documents along with an accurate, and hence, valid certificate, the delay that ensued would have most probably been obviated.

To extend the argument further, I find it significant that if the certificate issued on 23rd November, 2017 were accurate and valid, the applicant would have been availed with a period of sixty days thereafter in terms of Rule 90 (1) of the Rules for him to lodge his intended appeal. It is to my mind quite injudicious and prejudicial to blame him for not accounting for any of part of the period after 23rd November, 2017 until when he lodged this application because the said period would obviously have fallen within the aforesaid sixty days' period. To his credit, he still approached the Deputy Registrar to have the defective certificate amended but the latter stuck to his guns and declined the request out of all proportion vide his letter of 6th December, 2017.

On the basis of the foregoing discussion, I am of the decided view that the applicant has fully accounted for the delay in lodging his intended appeal. In the premises, there is good cause for enlarging the time within which to institute the appeal. This conclusion being sufficient to dispose of the application, I find no reason to deal with the other limb of the matter that time be enlarged on account of the alleged illegality of the judgment intended to appealed against.

In the upshot, I would grant the application and order that the intended appeal be instituted within sixty days from the date of the delivery of this ruling. Costs shall follow the event in the appeal.

Ordered accordingly.

DATED at ARUSHA this 1st day of April, 2019.

G. A. M. NDIKA
JUSTICE OF APPEAL

I certify that this is a true copy of the original




E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL