

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 285 OF 2019

REALAND COMPANY LIMITEDAPPLICANT

VERSUS

SIGN INDUSTRIES LIMITED1ST RESPONDENT

**AFRICAN MARINE SURVEYORS &
CONSULTANT LIMITED2ND RESPONDENT**

**(Application for extend of time within which may file notice of appeal
against the decision of the High Court of Tanzania (Land Division)
at Dar es Salaam**

(Teemba, J.)

**Dated the 2nd day of December, 2016
in**

Land Case No. 37 of 2013

RULING OF THE COURT

28th March & 20th April, 2022

MAKUNGU, J.A.:

When the application was set for hearing, the applicant was represented by Mr. Juma Nassoro, learned counsel whereas the respondents, though duly served on 8-3-2022 did not enter appearance thus, the hearing of the application proceeded in their absence under Rule 63 (2) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules).

The applicant, REALAND COMPANY LIMITED, has lodged this application seeking an order for extension of time to file a notice of appeal

against the decision of the High Court, Dar es Salaam District Registry Land Case No. 37 of 2013 dated 2.12.2016. The application is brought by way of notice of motion lodged under Rules 10, 48 (1) (2), 45A (1) (a) (3) of the Rules on the ground that:

1. Despite the fact that the applicant instructed its advocate to challenge the judgment and decree of the suit the advocate (Mr. Panya) did not file notice of appeal. The non-filing of the notice of appeal was a wrong committed of the advocate, the applicant, in the interest of justice, should not shoulder the load.
2. The applicant immediately upon discovering that the advocate did not file notice of appeal, took necessary steps to rectify the mistake by filing Misc. Land Application No. 55 of 2017.
3. The judgment and decree of the Land Case No. 37 of 2013 dated 2.12.2016 in the High Court is tainted with illegalities.

The application is supported by an affidavit deposed by Mr. Suleiman Nassor Al- Hilal the Managing Director of the applicant. On the other hand, the respondents neither filed an affidavit in reply nor a written submission to oppose the application.

For a better appreciation of the issues raised herein, it is important to explore the background of the matter and the factual setting giving rise to this application. According to the affidavit in support of the application, the applicant was a lawful purchaser and owner of plot No. 41/63 Central Area, India and Zanaki Streets-Dar es Salaam, bought from the 2nd respondent. That, on 14.9.2012 the 1st respondent was evicted by the 2nd respondent from the said plot and instituted the Land Case No. 37 of 2013 claiming *inter alia* general damages against the applicant and 2nd respondent. On 2.12.2016 the trial court ordered that the 1st respondent be paid a sum of Tsh. 40,000,000/= as general damages and the applicant to pay the costs of the suit.

Aggrieved by the decision, the applicant immediately on 5.12.2016 instructed her counsel learned advocate Mr. Panya to initiate the process of appeal to the Court of Appeal by filing necessary documents to challenge the decision. Upon receipt of copies of application for the Bill of Costs the applicant became aware that the advocate did nothing to initiate an appeal to the Court. That, non filing of the notice of appeal to the Court and failure to apply for copies of judgment, decree, proceedings and exhibits was caused by the applicant's former advocate despite being duly and

timely instructed to do so. It is on record that the applicant had earlier on lodged a Misc. Land Application No. 55 of 2017 seeking for an extension of time to lodge notice of intension to appeal but the said application was refused. Hence the present application brought by way of **second bite**.

Submitting in support of the application, Mr. Nassoro commenced his submission by fully adopting the contents of the notice of motion, the supporting affidavit and his written submissions. In his written submissions, Mr. Nassoro narrated the historical background to this application as indicated above, he then argued that, the applicant intends to appeal against the judgment of the High Court dated 2.12.2016. He contended that, upon delivery of the said judgment, immediately took necessary steps to instruct its former advocate to initiate process of appeal. He submitted further that, the applicant became aware that its advocate did not file the notice of appeal on or about April, 2017, and immediately on 18.4.2016 took the file from him and instructed Nassor Co. Advocate to take over where Misc. Land Application No. 55 of 2017 for extension of time was filed in the High Court. As such, Mr. Nassoro, urged me to find out that the delay is pure negligence of the advocate and the applicant should not be punished for an error committed by the advocate and more specifically

where the error is well within the domestic affairs of the advocate. Reinforcing his argument, Mr. Nassoro invited me to consider the decision of this Court in **Sebastian Stephen Minja v. Tanzania Harbours Authority**, Civil Application No. 35 of 1996 (unreported).

On the illegalities, Mr. Nassoro argued that the impugned decision is tainted with illegalities as the High Court judge relied on hearsay evidence and the applicant condemned to have breached the contract and pay damages while he was not privy to the contract. To bolster his proposition, he referred to the case of **Principal Secretary Ministry of Defence and National Service v. Devram P. Valambia** [1992] TLR 185 and **Kalunga and Company Advocates v. National Bank of Commerce Ltd** (2006) TLR, 235. He then submitted that the reasons advanced by the applicant constitute good cause to warrant grant of extension of time within the purview of Rule 10 of the Rules. He finally urged me to grant the application.

On the other hand, the respondents did not file an affidavit in reply to contest the application. Hence the averments in the applicant's affidavit remain uncontested.

Having heard Mr. Nassoro, the main issue for my consideration is whether the applicant has furnished good cause for the delay to warrant the grant of this application.

It is essential to reiterate that the Court's power of extending time under Rule 10 of the Rules is both wide ranging and discretionary but the same is exercisable judiciously upon good cause being shown. 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 delay involved, the reasons 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 a constitutionally underpinned right of appeal. There are numerous authorities to this effect including; **Dar es Salaam City Council v. Jayantilal P. Rajani** Civil Application No. 27 of 1987; **Elia Anderson v. Republic**, Criminal Application No. 2 of 2013 and **Attorney General v. Tanzania Ports Authority & other**, Civil Application No. 87 of 2016 (all unreported) to mention but a few.

Another factor to be considered is whether there is a point of law of sufficient importance such as, illegality of the decision sought to be

challenged. Among the decisions on this point include, **Principal Secretary of Defence and National Service (supra), Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 and **Arunaben Chaggan Mistry v. Naushad Mohamed Hussein & 3 others**, Civil Application No. 6 of 2016 (both unreported).

Now in the application at hand, it is common ground that the impugned decision subject matter of the intended appeal was handed down 2.12.2016. The applicant manifested his intension to appeal against that decision by instructing its advocate to lodge a notice of appeal on 5.12.2016 within time, but the said advocate did nothing to initiate an appeal to the Court of Appeal. On or about April, 2017 upon becoming aware of the failure of its advocate, applicant then took its case file from former learned advocate and instructed Mr. Nassoro to take over where Misc. Land Application No. 55 of 2017 who unsuccessfully applied for extension of time which was refused by the High Court.

In her ruling the learned judge said *inter alia*:

"It would appear to me that the applicant wants to impress upon me that his application is meritorious

because what happened is not his fault but of the counsel."

Further, the learned judge stated as follows: -

".... the facts in the affidavit does not insulate the applicant from being ladled negligent."

If the above observation by the learned judge is anything to go by it would seem that the applicant's application for extension of time to appeal to this Court was refused because of the negligence of his counsel in pursuing the appeal.

In considering applications for extension of time courts are required to exercise their discretion judicially. In the present case the High Court refused the application because of negligence on the part of the applicant's counsel. In the case of **Sebastian Stephen Minja** (supra) as cited in somewhat similar case in **Abbas Essaji v. Gordhan Dewji Solank** (1-1967) H.C.D. 279, the Court stated that;

"Justice would be better served by not barring applicant's application for an extension of time because of counsel's error."

In the premises, I agree with Mr. Nassoro that extension of time should not be refused merely because of the negligence of the advocate of a party seeking such remedy. Thus, I shall be guided accordingly.

On the issue of illegality contained in the impugned decision, it was the submission of Mr. Nassoro that the judgment intended to be challenged by way of appeal was based on hearsay evidence and the applicant condemned to pay damages on ground of having breached the contract which he was not privy to.

I am mindful of the fact that, as a single Justice, I am not supposed to dig much on the alleged illegality but only to consider as to whether the same constitutes good cause to warrant grant of this application. However, in deciding as to whether the pointed illegality in this application amount to an illegality envisaged under Rule 10 of the Rules, I wish to refer to the decision of this Court in the case of **Principal Secretary Ministry of Defence** (supra) where the Court stated that:

*"In our view **when the point at issue is one alleging illegality of the decision being challenged, the court has a duty even if it means extending the time for purpose to ascertain the point and if the alleged illegality***

be established; to take appropriate measure to put the matter and the record right."

[Emphasis added]

See also the case of **Lyamuya Construction Company Limited** (supra) and **Hamida Hamisi v. The Principal Magistrate Mbagala Primary Court and 2 others**, Civil Application No. 118 of 2015 (unreported).

Specifically, in the latter case, the single Justice of Appeal, when dealing with an application for extension of time based on allegation of illegality, cited the case of **Patrobert D. Ishengoma v. Kahama Mining Corporation Ltd, (Barrick Tanzania Balankulu) and 2 others**, Civil Application No. 2 of 2013 where it was stated that: -

*"...I am of the considered view that even though there is a considerable delay in the application, pertinent issues have been raised. Firstly, ... **there is an allegation of illegality, irregularities and impropriety...**, which cannot be brushed aside".*

[Emphasis added].

On account of the alleged illegality demonstrated by the applicant, that is good cause to warrant grant of extension of time as submitted by Mr. Nassoro.

In the premises, I find merit in the application and it is hereby granted. The applicant should lodge the intended notice of appeal within thirty (30) days from the date of this ruling. Costs to follow the event.


It is so ordered.

DATED at DAR ES SALAAM this 14th day of April, 2022.

O. O. MAKUNGU
JUSTICE OF APPEAL

The Ruling delivered this 20th day of April, 2022 in the presence of Ms. Fauzia Kajoki, counsel for the applicant and in absence of the respondent, is hereby certified as a true copy of the original.




C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL