IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

CIVIL APPLICATION NO. 7/05 OF 2021

HUSSEIN SALIM FUNGO ..... APPLICANT

VERSUS

JURAD KILANGO ..... RESPONDENT

(Application for extension of time to file application for restoration of appeal from the Judgment and Decree of the High Court of Tanzania (Land Division) at Moshi)

(Mwingwa, J.)

dated the 4th day of May, 2016

in

Land Appeal NO. 3 OF 2016

.....

RULING

13th & 17th July, 2023

KIHWELO, J.A.:

In this application the applicant is seeking enlargement of time within which to lodge an application for restoration of appeal which was dismissed by this Court on 25.11.2019, on account of defaulting appearance. The application has been predicated on rule 10 of the Tanzania Court of Appeal Rules 2009, (the Rules). The application has been preferred by way of Notice of Motion and is supported by an affidavit, duly sworn by the applicant to support his quest. The application has been sturdily resisted by the respondent who filed an affidavit in reply.

In this application there is very scanty information on record to enable me provide a better appreciation of the gist of the background from which this matter stemmed. Under those circumstances, I will only limit myself to the information on record which merely relates to this application for extension of time.

According to the scanty information on record, the applicant is disgruntled by the decision of the High Court of Tanzania, Land Division at Moshi (Mwingwa, J. as he then was) in Land Case Appeal No. 3 of 2016 which obviously arose from the District Land and Housing Tribunal whose details are not on record for the reasons assigned before. The applicant lodged Civil Case No. 244 of 2017 which is the subject of this application. On 25.11.2019 when the appeal was called for hearing the applicant defaulted appearance despite being dully served through the Legal and Human Rights Centre (LHRC) on 13.11.2019, and Mr. Sheck Mfinanga, learned counsel, who was holding brief for Mr. Peter Kibatala, also learned counsel, with instructions to proceed, prayed that since the applicant defaulted appearance despite service being duly done, the appeal be dismissed under rule 112 (1) of the Rules. Consequently, the appeal was marked dismissed in terms of rule 112 (1) of the Rules. Unamused, the

applicant on 20.11.2020 lodged the instant application seeking to enlarge time within which to lodge an application for restoration of the appeal.

At the hearing of the application before me, the applicant appeared in person unrepresented whereas the respondent, like in the High Court was represented by Mr. Sheck Mfinanga, learned counsel, who was holding brief for Mr. Peter Kibatala, also learned counsel, with instructions to proceed.

Upon the applicant being asked to amplify his application, he prayed and was granted leave to adopt the notice of motion and the supporting affidavit. In his submission, the applicant was very brief, understandably, as a lay person, and argued that the delay to lodge the application for restoration of appeal was occasioned by his sickness and not laxity or negligence. In his view, since the matter started way back in 2010 he has never been negligent or laxity. He therefore beseeched me to grant the prayer for extension of time as prayed.

When it was his turn, Mr. Mfinanga, premised his submission by praying and was granted leave to adopt the affidavit in reply which was lodged in Court on 05.07.2023 to form part of his oral arguments. He then went ahead to contend that, the applicant has not complied with the requirements of the law citing the celebrated case of **Lyamuya**

Construction Company Limited v. Board of Registered Trustees of Young Women Christian Association of Tanzania, Civil Application No. 2 of 2010 (unreported) in which the Court discussed at considerable length the criteria to be met for one to be granted extension of time.

Illustrating, the learned counsel argued that the applicant did not meet the criteria as outlines in the case of **Lyamuya Construction Company Limited** (supra) in that the LHRC were duly served with the summons on 15.11.2019 and the matter was fixed for hearing on 25.11.2019, but quite unfortunate neither the applicant nor the LHRC appeared or notified the Court that the applicant was sick, and worse there is no evidence to prove that the applicant phone was damaged as alleged. The learned counsel, further submitted that, the affidavit sworn by one Scolastica Gervas from LHRC was not pleaded anywhere in the affidavit in support of the application and therefore, it has no evidential value.

The learned counsel contended further that, the applicant did not account for each day of the delay because the impugned appeal was dismissed on 25.11.2019 but the instant application was lodged in Court 20.11.2020. He further argued that, whereas the applicant averred that he became aware sometimes in August, 2020 but it took the applicant more than eighty (80) days to lodge the instant application and yet the

applicant has not been able to account for each day of that delay. In his view, the applicant has assigned sickness as the reason for his delay but the applicant was an outpatient according to medical chit which accompanied the application in support and the applicant did not demonstrate when did he recover from his sickness.

The learned counsel submitted that the applicant did not only fail to account for each day of delay but has not demonstrated that he was diligent in pursuing the matter.

In rejoinder submission the applicant did not have much to say other than stressing what he earlier on submitted and reiterated that the application be allowed.

I have painstakingly examined the record and considered the rival arguments and in order to appreciate the essence of the application, I find it appropriate to reproduce the provision of rule 10 of the Rules which reads inter alia that:

> *"The Court may, upon good cause shown, extend the time limited by these Rules or by any decision of the High Court or tribunal, for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after doing of that act: and any*

reference in these Rules to any such time shall be construed as a reference to that time as so extended."

I have reproduced the above provision deliberately in order to facilitate an easy determination on whether the application is founded on sound basis.

At the outset, I wish to point out that, the court's discretion to extend time under rule 10 only comes into existence after sufficient reasons for extending time have been established. In determining whether sufficient reason for extension of time exists, the court seized of the matter should take into-account not only the considerations relevant to the applicant's inability or failure to take the essential procedural step in time, but also any other considerations that might impel a court of justice to excuse a procedural lapse and incline to a hearing on the merits. Such other considerations will depend on the circumstances of the individual cases and include, but are not limited to, such matters as: whether the applicant is able to account each day of delay, the promptitude with which the remedial application is brought, whether there was manifest breach of the rules of natural justice in the decision sought to be challenged on the merits, and the prejudice that may be occasioned to either party by the

grant or refusal of the application for extension of time. This broad approach is preferable as a judicial discretion is a tool, or device in the hands of a court for doing justice or, in the converse, avoiding injustice.

Although rule 10 does not go further to define as to what amounts to good cause. However, case law has it that extension of time being a matter within the court's discretion, cannot be laid down by any hard and fast rules but will be determined by reference to all the circumstances of each particular case. There is, in this regard a litany of authorities to that effect, if I may just cite the case of **Osward Masatu Mwizarubi v. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010 in which this Court stated that:

> *"What constitutes good cause cannot be laid down by any hard and fast rules. The term "good cause" is relative one and is dependent upon the party seeking extension of time to provide the relevant material in order to move the court to exercise its discretion."*

The question is therefore, whether or not the applicant in the instant matter has complied with the conditions for the grant of this application or not. Indeed, the record bears out that on 25.11.2019 the appeal was dismissed for failure of the applicant to appear when the matter was called

for hearing while the LHRC was duly served on 15.11.2019. According to the applicant's affidavit in support of the application, around August, 2020 the applicant made follow up to LHRC about the status of his case just to be informed that the LHRC received a notice of hearing way back on 15.11.2019 but efforts to reach him proved futile.

It is the applicant's averment that his failure to follow up his case was occasioned by his sickness which was caused by injury he sustained on 28. 10.2019. He averred further that, the cell phone too collapsed hence he could not be traced through his cell phone. His argument is that he was not negligent.

Looking critically the evidence on record, I am of the considered opinion that this matter should not detain me. The LHRC was duly served on 15.11.2015 ten (10) days before the date when the matter was fixed for hearing on 25.11.2015. As rightly argued by the counsel for the respondent, neither the applicant nor the LHRC appeared on that particular day and more so, the LHRC did not have even a courtesy to inform the Court that they were unable to trace the applicant. As if that is not enough, according to his own affirmed testimony, the applicant took more than ten (10) months to follow up his issue with LHRC that is from 25.11.2019 when the matter was dismissed to August, 2020. Furthermore,

it took the applicant more than eighty (80) days from August, 2020 when he came to find that the matter was dismissed to 20.11.2020 when the instant application was lodged in Court.

While the applicant argued that sickness was the reason for his delay of more than ten (10) months which in my view, I think, such a convenient escape route is not, unhappily, available to the applicant, he could not assign any reason leave alone plausible reason for the delay of more than eighty (80) days from August, 2020 when he came to find that the matter was dismissed to 20.11.2020 when he lodged the instant application. In my considered view, the applicant has not been able to account for each day of delay, the delay which is very inordinate and that there is no way out the applicant can demonstrate that he was diligent. In the circumstances, the applicant did not meet the settled criteria as outlined in the case of **Lyamuya Construction Company Limited** (supra) which is to account for each day of delay, the delay should not be inordinate and lack of diligence. By any stretch of imagination the applicant had no any grain of diligence in pursuing his appeal.

There is a considerable body of case law in this area to the effect that in an application for extension of time, the applicant is duty bound to account for each day of delay. In the case of **Hassan Bushiri v. Latifa**

Lukio Mashayo, Civil Application No. 3 of 2007 (unreported), faced with analogous situation we held that:

> *"Delay of even a single day has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken."*

Corresponding observations were also made in the case of **Bariki Israel v. Republic**, Criminal Appeal No. 4 of 2011 (unreported).

Similarly, the applicant is duty bound to have brought the application in question with reasonable promptness which is not the case in the instant application in which the applicant took more than eighty (80) days. This Court has considered the issue of delay in lodging the application as one of the grounds for not granting the application for enlargement of time. In the case of **Attorney General v. Tanzania Ports Authority and Another,** Civil Application No. 87 of 2016 the Court held that:

> *"What amounts to good cause includes whether the application has been brought promptly, absence of any invalid explanation for the delay and negligence on the part of the applicant."*

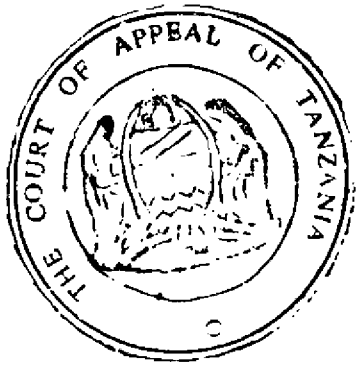
To that end, I must conclude that the applicant has not demonstrated any good cause that would entitle him extension of time. In

the result, this application fails and is, accordingly dismissed. Given the circumstances of this matter, each party to bear own costs.

DATED at **MOSHI** this 17th day of July, 2023.

P. F. KIHWELO
JUSTICE OF APPEAL

The Ruling delivered this 17th day of July, 2023 through Video Link at Dar es Salaam in the presence of the applicant in person unrepresented and Ms. Faith Mwakikoti, learned Counsel for the respondent is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL