

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: KOROSSO, J.A., FIKIRINI, AND J.A. And MAKUNGU, J.A.)

CIVIL APPLICATION NO. 327/17 OF 2021

NAKOMOLWA MATEPELI SHILA APPLICANT

VERSUS

MWANAHAMISI ALLY NONGWA RESPONDENT

**(Application for Extension of Time within which to lodge s Notice of Appeal
from the decision of the High Court of Tanzania at Dar es Salaam)**

(Mutungi, J.)

Dated the 19th day of May, 2015

in

Land Case No. 155 of 2010

RULING OF THE COURT

12th June & 25th July, 2023

MAKUNGU, J.A.:

This is an application for extension of time within which to lodge a notice of appeal against the decision of the High Court of Tanzania (Land Division) delivered on 19th May, 2015 in Land Case No. 155 of 2010. The applicant's first application was refused by the High Court (Nkwabi, J) on 28th June, 2021. This, therefore, is a second bite, made under rules 10 and 45A (1) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules).

The application is supported by an affidavit, duly sworn by the applicant. The application has, however, been resisted by the respondent in an affidavit in reply duly sworn by Robert R. Rutaihwa, her advocate.

What comes out from the affidavits is the following short story; the respondent successfully sued the applicant in the High Court of Tanzania (Land Division) at Dar es Salaam. The applicant's appeal to this Court was struck out for not being accompanied by the Ruling of the High Court on preliminary objection raised during the trial which was overruled. Thus when the applicant obtained copies of those requisite documents he had missed the boat because time was not on his side. He applied for extension of time within which to file a notice of appeal but as already indicated, that application was refused. Hence this application.

On 6th June, 2023 the respondent through RK Rweyongeza & Co. Advocates, filed a notice of preliminary objection to the effect that, the application has been filed out of time contrary to the mandatory provisions of rule 45A (1) of the Rules.

When the application was called on for hearing, the applicant was represented by Mr. Wilson Edward Ogunde, learned advocate; whereby the respondent had the services of Ms. Jacqueline Rweyongeza, learned advocate.

Before commencement of the hearing, we informed the parties that we will hear the preliminary point of objection first and then the application on merit.

Briefly, the submission of Ms. Rweyongeza was to the effect that the application is incompetent for being filed beyond 14 days as required by rule 45 A (1) of the Rules. She pointed out that the first application was rejected on 28th June, 2021 and this application was filed on 13th July, 2021 thus being out for one (1) day.

Consequent to the foregoing, the learned counsel prayed for striking out of the application with costs.

In response, Mr. Ogunde dismissed that point for having no merit. He admitted that the 14 days expired on 12th July, 2021 but submitted that the

application was filed and received by the registry on that day as shown at the bottom of the application and therefore the application was duly lodged in time. He prayed the point of objection to be dismissed.

The above preliminary point raised will not detain us much to determine because it has no merit. We say so simple because the respondent's counsel counted 14 days from 28th June, 2021 up to 12th July, 2021 without considering that there was a public holiday in between, that is, 7th July, (Sabasaba) which should be excluded. Thus, considering that aspect of holiday which we take judicial notice in terms of section 59 (1) (g) of the Evidence Act [Cap. 6 R.E. 2019], it is therefore, our conclusion that the application was timely filed and the preliminary objection raised is hereby overruled.

Having disposed of the preliminary point above shown, it is prime time to embark on the merit of the application.

In paragraph 11 of the affidavit, the applicant has pointed out the reason for the delay in filing of the notice of appeal. He averred that the delay was not as result of applicant's negligence but due to the fact that

appeal No. 21 of 2016 that was lodged timely was struck out by the Court for reason of incomplete record of appeal lodged.

There is also a contention of there being an illegality in the decision sought to be challenged. Paragraph 13 of the affidavit pointed out those points of illegality, including, the following; one, whether the suit was time barred or not, and two, whether the High Court was justified to declare the respondent (Legal representative of Kidawa deceased) lawful owner of the disputed piece of land while the same do not form part of the estate of the late Kidawa Seif.

The respondent's affidavit in reply provided a very strong rebuttal by accusing the applicant for negligently filing the appeal without attaching copies of the ruling and decree. At the hearing, Ms. Rweyongeza attacked the applicant for not showing sufficient explanation for the delay of one year after being given 30 days to lodge supplementary record of appeal. She prayed the application be dismissed with costs.

In rejoinder the learned counsel submitted that failure of the applicant to file a supplementary record of appeal after he was given time to do so is

not a reason not to be given another chance. He added that the missing documents were already received by the applicant.

It is settled law that in exercising our jurisdiction under rule 10 of the Rules which is discretionary, we have to be guided by agreed tale signs. These are the length of the delay whether it has been explained away, diligence on the part of the applicant as opposed to negligence or sloppiness and whether or not there is an illegality in the decision sought to be impugned. The 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), is very handy on this. We will just take a look at the length of delay first, and we will go by the observation of the learned High Court Judge in his ruling when refusing extension of time in the first bite. At page 4 of the typed ruling, he said:

"I readily agree with the counsel for the respondent that in the affidavit in support of the application for extension of time there is nothing to suggesting that the applicant accounted for the 63 days of the delay in lodging this application for extension of time within which to lodge, the notice of appeal to the Court of

Appeal. The ground in respect of counting for each day of the delay fails on the part of the applicant."

We are aware of the requirement for an applicant to account for each day of the delay. See **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007; **Bariki Israel v. Republic**, Criminal Application No. 4 of 2011 and **Crispin Juma Mkude v. Republic**, Criminal Application No. 34 of 2012 (all unreported). It is, as submitted by Ms. Rweyongeza, a period of 63 days, in our view, does appear inordinate.

Coming now to the alleged illegality of the decision desired to be impugned, granted that in the case of **The Principal Secretary Ministry of Defence and National Service v. Devram Valambia** [1991] TLR 389, it was held thus:

*"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 the purpose, to ascertain the point and if the alleged illegality be established, to take appropriate measures 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 Bulankulu) 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].

Now, since in the matter at hand, the applicant raises serious issues of law for determination by the Court, it is clear that, though the learned High Court Judge in the first instance rejected that issue, however, we think that it was worthy to be considered by the Court, hence warrant grant of

extension of time. We are therefore satisfied that the alleged illegality falls squarely within the meaning of good cause in terms of rule 10 of the Rules.

In the premises, we 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 delivery of this ruling. Costs to be in the cause. It is so ordered.

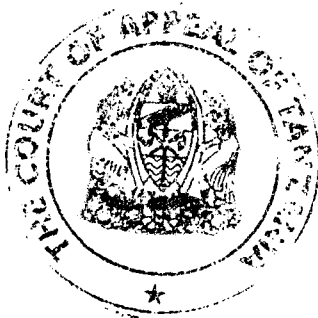
DATED at DAR ES SALAAM this 30th day of June, 2023.

W. B. KOROSSO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

O.O. MAKUNGU
JUSTICE OF APPEAL

The Ruling delivered this 25th day of July, 2023 in the presence of Mr. Wilson Ogunde, learned counsel for the applicant and Ms. Rehema Samuel, learned counsel for the respondent is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL