

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

CIVIL APPLICATION NO. 124/02 OF 2022

**THE HON. ATTORNEY GENERAL.....1ST APPLICANT
MINISTRY OF DEFENCE AND
NATIONAL SERVICES.....2ND APPLICANT
TANZANIA MILITARY ACADEMY.....3RD APPLICANT**

VERSUS

**LEMBUSEL MBASHA.....1ST RESPONDENT
SAIGURAN LEKING'ORIA.....2ND RESPONDENT
MELIYO MOILO.....3RD RESPONDENT
AMANI NJASHI.....4TH RESPONDENT**

**(Application for Extension of Time to File an Appeal Against Judgment
and Decree of the High Court of Tanzania at Arusha)**

(Maghimbi, J.)

dated the 5th day of December, 2016

in

Land Case No. 73 of 2015

RULING

14th August & 1st September, 2023.

KHAMIS, J.A.:

The Honourable Attorney General, the Ministry of Defence and National Services and the Tanzania Military Academy, hereinafter to be collectively referred to as the applicants, have brought this application for an order of extension of time to file an appeal against judgment and decree of the High Court of Tanzania at Arusha in Land Case No. 73 of 2015 (Maghimbi, J) dated the 5th day of December, 2016.

The application was filed by a notice of motion on 3rd day of February, 2022 and predicated under rules 4 (2) (b), 10, and 48 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

The notice of motion was supported by an affidavit sworn by one, Peter J. Musetti, learned Senior State Attorney, who ventured to amplify the reasons for delay. He deposed that, immediately after delivery of the impugned judgment, the applicants requested for copies of the proceedings, judgment, decree and a certificate of delay and filed a notice of appeal on 19th December 2016.

He stated that since leave was a prerequisite, the applicants moved the trial Court for leave to appeal vide Misc. Land Application No. 233 of 2016 which was granted on 22nd September, 2017 (Opiyo, J) and added that the certified copies of the proceedings, judgment, decree and certificate of delay were served on the applicants through the Attorney General's Chambers on the 6th June, 2017.

The deponent stated that soon after the documents were availed to the applicants, one Doscar Rugimbana, learned State Attorney, was tasked to timely prepare and file a record of appeal. However, she left employment "*for personal issues*" prior to completion of the task.

According to the deponent, the file was re-assigned to another State Attorney in the Office of the Attorney General. Due to lack of background on the case, he failed to accomplish the task on time.

It was averred that on 21st December, 2017, through an application lodged at the Sub-Registry of this Court in Arusha, and subsequently christened as Civil Application No. 575/17 of 2018, the applicants approached this Court for extension of time within which to file an appeal. The deponent also disclosed that, the said Civil Application No. 575/17 of 2018 was struck out by this Court (Mwampashi, J.A) on 22nd November, 2021 for failure to comply with some provisions of the Rules.

The deponent attributed the delay in filing the appeal to the restructuring of the Attorney General's Office between 2017 and 2018, which moved cases from the Attorney General's Chambers and other Government institutions, to the Solicitor General. He averred that, the transition impacted on the office *modus operandi* causing delay in re-assignment of files and after re-assignment, new state attorneys required more time to review the files.

This application was opposed through an affidavit in reply sworn by Elibariki Happy Maeda, learned advocate, duly engaged by the respondents.

The deponent attacked the salient points of the application stating that, the respondents were neither served with a letter requesting certified copies of the proceedings, judgment and decree nor a notice of appeal allegedly authored by the applicants. He faulted the office handover allegedly done by Doscar Rugimbana on the reason that it failed to alert the applicants on a pending work regarding this case.

Generally, the deponent challenged each and every allegation of fact advanced by the applicants, partly stating that, the same were within the applicants' personal knowledge and an afterthought.

The deponent equally challenged the grounds of motion and averred that, the High Court judgment was not tainted with any illegalities as alleged or at all. He stated that, the reasons and basis for awarding specific and general damages were judiciously elucidated, exhibit P2 was tendered by PW1 and that, destruction of the respondents' farms was a matter of evidence and not a legal issue.

When the application was called on for hearing, Messrs. Mkama Musalama, Lt. Col. Charles Mkumbi and Ms. Careen Masonda, learned

State Attorneys, appeared for the applicants. Mr. Elibariki Maeda, learned advocate, represented the respondents.

Mr. Musalama addressed the Court on the notice of motion and the rules cited thereon. He adopted the contents of the affidavit in support of the motion and enjoined the Court to exercise its discretion in granting extension of time.

In a bid to substantiate the grounds of motion, he cited four decisions of this Court: **Regional Manager Tanroads Kagera v. Ruaha Concrete Co. Limited**, Civil Application No. 96 of 2007; **Alfred Fundi v. Geled Mango & 2 others**, Civil Appeal No. 49 of 2017; **Anthony Ngoo, Davis Anthony Ngoo v. Kitinda Kimaro**, Civil Appeal No. 25 of 2014; and **Mohamed Salum Nahdi v. Elizabeth Jeremiah**, Civil Reference No. 14 of 2017 (all unreported).

The learned State Attorney submitted that the intended appeal is arguable as it seeks to challenge the manner in which the trial court arrived at its judgment. On a further note, he contended that the impugned decision is founded on illegalities on the face of the record particularly on the award of damages in sheer disregard to legal dictates.

He restated the principles that guide courts when dealing with applications for extension of time and asserted that an explanation for the delay in the filing of an appeal has been offered by the applicants.

On his part, Mr. Maeda holds the view that the delay in filing the appeal was deliberate and caused by the applicants' negligence. This, he argues, was because the counsel who represented the applicants in the High Court were aware of the impugned judgment but took no reasonable steps to prefer an appeal.

He submitted that, the applicants failed to account for the period of delay in filing an appeal and cited two decisions of this Court: **Airtel (Tanzania) Limited v. Mr. Light Electrical Installation Company Limited & Another**, Civil Application No. 3 of 2017 and **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (both unreported).

The respondent's counsel faulted the applicants for omission to disclose names of the State Attorneys who handled the case after Ms. Rugimbana left the first applicant's employment, and on that rationale, he submitted that no sufficient reason was given for the delay.

In rejoinder, Mr. Musalama reiterated his earlier submissions and moved the Court to grant the application.

I have given due consideration to the notice of motion and its supporting affidavit as well as the affidavit in reply. The issue for determination is whether the applicants' prayer for extension of time is supported by a good cause.

The mandate on the application is derived from rule 10 of the Rules which allows the Court, upon good cause shown, to extend the time, whether before or after the expiration of the stated time.

The factors to be considered when determining an application for extension of time are found in various decisions of this Court. In **Allison Sila V. Tanzania Harbours Authority**, Civil Reference No. 14 of 1998 (unreported), this Court held that it is settled law that where the time limited by the rules has expired, sufficient reason should be shown for the delay.

In **Caritas Kigoma v. K.G Lewis Limited**, Civil Appeal No. 69 of 1999 (unreported), the Court took the view that in considering the application for extension of time, what was relevant and important for consideration was whether sufficient cause had been shown by the appellant.

In **Regional Manager Tanroads Kagera** (supra), the Court observed that what constitutes sufficient reason cannot be laid down by

any hard and fast rules and pointed out that the same must be determined by reference to all the circumstances of each particular case.

In **Lyamuya Construction Company Limited V Board of Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), principles to be scrutinized in extension of time were enumerated by this Court, thus:

- "1. The applicant must account for all the period of delay*
- 2. The delay should not be inordinate*
- 3. The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take*
- 4. If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged."*

In **Fortunatus Masha v. William Shija & Another [1997] T.L.R. 154**, an aspect of technical delay was considered, thus:

"... 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..."

The above reasoning was followed in **the Director General LAPF Pensions Fund v. Pascal Ngalo**, Civil Application No. 76/08 of 2018 (unreported), wherein the Court ruled that:

*"The applicant's main explanation for the delay is that time was lost when she was pursuing matters in court. This, I think, constitutes what is known as technical delay, developed by case law from **Fortunatus Masha v. William Shija and Another** (supra) by a single Justice, to **Salvant K.A Rwegasira v. China Henan***

***International Group Co. Ltd, Civil Reference
No. 18 of 2006 (unreported) by the Court..."***

In light of the above principles that guide this Court in the exercise of its discretionary jurisdiction when determining an application for extension of time, I am obliged to resolve the question on whether the applicants presented sufficient explanation for the delay in filing the appeal.

The impugned judgment was delivered on 5th December, 2016 and a notice of appeal was issued on 19th day of December, 2016. According to annexure OSG-2 to the affidavit in support of the application, on 16th December, 2016 the applicants through the Attorney General, wrote to the Deputy Registrar of the High Court requesting for certified copies of the proceedings, judgment, decree and certificate of delay for purposes of lodging an appeal.

The certificate of delay was issued on 6th day of June, 2017 excluding a total of 166 days required for the preparation and delivery of copies of the proceedings and other documents applied by the applicants. On 22nd September, 2017 the High Court, vide Miscellaneous Application No. 233 of 2016 filed by the applicants, granted leave to appeal to this Court.

It is on record that, on 21st December, 2017 the applicants filed in this Court an application for extension of time to file the record of appeal on the ground that the State Attorney who was assigned to conduct the matter on behalf of the applicants had resigned from employment and the case file had to be re-assigned to another counsel.

Further supporting the said application, it was averred that: the applicants took urgent measures to read the file and get acquainted with the relevant issues in preparation of the record of appeal; despite efforts to read the file, the applicants were not able to timely file the record of appeal because the state attorney who took over the case was not conversant with the facts and issues involved; and, that there is an illegality in the High Court decision such that the applicants have overwhelming chances of success.

The above named application for extension of time was subsequently registered as Civil Application No. 575/17 of 2018, but struck out by the Court on 22nd November, 2021 on account of failure to serve the notice of motion on the respondents within 14 days as per rule 55(1) of the Rules. The present application was lodged on 3rd February, 2022.

In these circumstances, a technical delay resulting from this Court's decision to strike out the applicants' application for extension of time on 22nd November 2021, crops up. Admittedly, there is a gap of about two months between the date of striking out the application to the date of filing this application. This gap was attributed to the transition period during which the Attorney General's office was being restructured.

It is not disputed that during the period in contest, the Government of Tanzania through the office of the Attorney General (Re – structure) Order, 2018 (Government Notice No. 48 of 2018), restructured the Office of the Attorney General for purposes of assuming mandates stipulated under article 59 of the Constitution of the United Republic of Tanzania, 1977 (the Constitution). As part of the process, the office of the Solicitor General was established with supervisory powers over all civil litigation and arbitration matters.

It is in public domain that as a result of the restructuring, civil litigation and arbitration proceedings moved from the Office of the Attorney General and placed under the direct control of the Solicitor General, the fact which, I take judicial notice of.

It was asserted that the restructuring intended to attain the objectives stated under clause 3 of the Restructuring Order, which is to improve efficiency and strengthening capacity of the law officers working in the public service. It was further asserted that, the restructuring process was indefinite and affected the *modus operandi* of the relevant offices. As this assertion was not contradicted, I have no reason to discard it.

Assessing from the parties' depositions and the documents on record, the applicants' officials cannot be said to have been apathetic because they followed up the matter with the courts and took appropriate steps, despite the limitations caused by the transition. It would have been different had the applicants not taken any step to pursue the appeal after delivery of the impugned judgment.

It was established that Ms. Doscar Rugimbana, then learned State Attorney, was assigned to pursue the appeal on behalf of the applicants and while in the process, she suddenly resigned from employment before lodging the record of appeal. Thereafter, several steps were taken by the applicants to rescue the situation as demonstrated herein before.

In my view, the explanation given by the applicants is plausible and sufficient considering the several steps taken to keep pace with the appeal process. Additionally, I note that the delay was beyond the applicants' control and they cannot be blamed for it. Without evidence to the contrary, I am unable to find negligence on part of the applicants hence the explanation offered for the delay is sufficient.

Parties equally made rival contentions on the merits or otherwise of the intended appeal. I refrain from addressing that ground for the obvious reasons, it is not timely. That notwithstanding, upon reading the impugned decision, on the face of it, it is evident that reasons for awarding special and general damages were unrevealed. This in my view, is a legal issue that draws attention of the Court. In this regard, the Court has a duty to extend time for purposes of ascertaining that point as scored in the case of **Principal Secretary, Ministry of Defence and National Service V. D. Valambhia** [1992] T.L.R. 387.

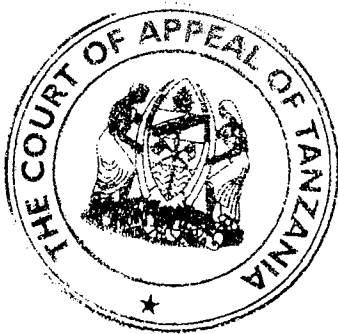
I have also considered that if the order sought is given, the respondents will not be prejudiced in any way. The interest of justice demands that a party is accorded every reasonable and available opportunity to ventilate their grievances within the available ranks in the judicial hierarchy. That is what the applicants seek to do.

In light of the reasons stated above, the applicants are hereby granted leave to file the appeal within sixty (60) days from the date of delivery of this ruling. The costs of this application shall abide the final outcome of the appeal.

DATED at ARUSHA this 1st day of September, 2023.

A. S. KHAMIS
JUSTICE OF APPEAL

The ruling delivered this 1st day of September, 2023 in the presence of Mr. Leyan Mbise, learned State Attorney for the applicants and Mr. Elibariki Maeda, learned advocate for the respondents, is hereby certified as a true copy of the original.




C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL