IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

CIVIL APPLICATION NO. 328/11 OF 2022

SUBIRA HUSSEIN ..... 1ST APPLICANT
EMMANUEL DAUDI ..... 2ND APPLICANT
KHALFANI SHABAN ..... 3RD APPLICANT
ESTER BUNDALA ..... 4TH APPLICANT
SAIDI MANENO ..... 5TH APPLICANT
SHABANI KILALIKA ..... 6TH APPLICANT
LUCAS ELIAS ..... 7TH APPLICANT
MTORO IBRAHIM ..... 8TH APPLICANT
GETRUDA J. SWEDI ..... 9TH APPLICANT
EDWARD ADILIANO ..... 10TH APPLICANT
ABBUBAKARI LUDANGA ..... 11TH APPLICANT
EZEKIEL VOMO ..... 12TH APPLICANT
PHILIMON MAYENGO ..... 13TH APPLICANT
SIMON F. MUSHI ..... 14TH APPLICANT
SOFIA HENRY MAHUNDI ..... 15TH APPLICANT

VERSUS

DOTTO YUSUFU @ MZUZU ..... RESPONDENT

[Application for Extension of time to appeal to the Court of Appeal of Tanzania against the Judgment of the High Court of Tanzania at Tabora]

(Rumanyika, J.)

dated the 30th day of November, 2017

in

Land Case No. 4 of 2016

.....

RULING

22nd September, & 3rd October, 2023

KAIRO, J.A.:

Before me is a notice of motion lodged on 4th April, 2022 wherein the applicants above listed, are seeking for an extension of time within which to lodge an appeal to the Court so as to challenge the decision of the High Court in Land Case No. 4 of 2016 dated 30th November, 2017. The application is premised under rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules). The notice of motion is supported by an affidavit affirmed by Musa Kassim, an advocate who previously represented the applicants.

The factual background that culminated to this application is that; after being aggrieved by the decision of the High Court as above stated, the applicants promptly lodged the notice of appeal to the Court on 11th December, 2017. As per the legal requirement applicable by then, the applicants applied for leave to appeal to the Court in Application No. 132 of 2017 at the High Court of Tabora which was refused on 18th February, 2018. Aggrieved by the said refusal, the applicants approached the Court vide Civil Appeal No. 108 of 2018 seeking to challenge the High Court's decision. However, before the determination of the said appeal by the

Court, the procedural requirement obligating the intended applicants to first obtain leave from the High Court before lodging the intended appeal to the Court for land cases tried by the High Court as a Court of first instance, was removed vide the amendment of section 47 (1) of the Land Disputes Court Act by Act No. 8 of 2018. The changes forced the applicants to withdraw the appeal on 22nd March, 2022 as the same was rendered redundant. By that time, the applicants were out of time to lodge the intended appeal. Hence, this application basing on two grounds which can be summarized as technical delay and illegality.

When the application was called on for hearing Mr. Kelvin Kayaga, learned advocate appeared for the applicants. Besides, the 1st and 14th respondents were also present in Court. The respondent on the other hand appeared in person, unrepresented.

Amplifying the ground on technical delay, Mr. Kayaga recapitulated what was stated above in the backgrounds, as such, I will not repeat the same to avoid tautology. He went on to submit that, the withdrawal order in respect of Civil Appeal No. 108 of 2018 was supplied to the applicants on Monday, the 28th March, 2022 and the advocate straight away started to prepare this application for extension of time to appeal to the Court out of time. Mr. Kagaya went on submitting that, the preparation was finalized

on Friday 1st April, 2022 and the application was filed on Monday 4th April, 2022 that is the 7th day since the withdrawal order was availed to the applicants. He also pleaded with the Court to consider the two days (1st and 2nd April, 2022) to have been accounted for as the days were weekend. On that account, Mr. Kayaga concluded that, the applicants had throughout, since when the decision of the High Court was delivered, managed to account for the delay.

As regards the second ground based on illegality, Mr. Kayaga submitted that, the suit intended to be challenged was determined based on the ground of non-joinder of the parties. He argued that, the issue was raised *suo moto* by the trial Judge in the course of composing the judgment without according the parties a right to be herd on the issue. He thus prayed the Court to find the ground sufficient as well to warrant the extension of time.

Reacting on the 1st ground, the respondent stated that, since the legal requirement for leave was overtaken by event due to procedural changes, then it was proper on the part of the applicants to withdraw the appeal and thus, he had no qualms with the withdraw. However, he refuted the applicants' contention that they accounted for all the days of delay. It was his contention that the applicants' advocate was not diligent

enough in pursuing the intended appeal. According to him, the advocate, being conversant with the legal procedures was expected to lodge proper action in Court to avoid the eventuality that resulted to the withdrawal of the appeal.

The respondent further refuted Mr. Kayaga's assertion that the applicants accounted for all the period of delay. Instead, he contended that the applicants have failed to account for the days from 22nd March, 2022 when the withdraw order of the appeal in Civil Appeal No. 108 of 2018 was delivered to 28th March, 2022 when the copy of the order was given to them. He went on to submit that, there was also no accounting for 29th, 30th and 31st March, 2022 as well up to when this application was filed on 4th April, 2022. The respondent thus prayed the Court to find that the applicants have not advanced good cause to entitle them the grant of the extension sought due to their failure to account for the days as stated above.

Refuting the issue of illegality as submitted by Mr. Kayaga, the respondent argued that, the parties were given equal opportunity to present their cases as such, the alleged denial of the right to be heard to the parties is not true.

In his rejoinder, Mr. Kayaga insisted that the aspect of non-joinder was never an issue before the court and at no point in time, were the parties invited to speak over it. He argued that is where the illegality lies.

As for the applicants' failure to account for the days from when the withdrawal order was delivered to when this application was lodged, Mr. Kayaga repeated what he had submitted in chief adding that even the documents for the application filed in Court show to have been attested on 1st April, 2022. According to him, the period is not inordinate considering the activities done. He thus reiterated his prayer to have this application granted.

Having dispassionately heard the rival arguments of the parties and going through the record of this application, the central issue for the Court's determination is whether the applicants have advanced sufficient cause to make the Court exercise its discretion and grant the extension of time sought.

I will start with technical delay. As a general rule, technical delay is sufficient cause for extension of time. There is a string of decisions to that effect. In **Hamisi Mohamed (as the Administrator of the Estate of the late Risasi Ngawe vs. Mtumba Moshi (as the Administratix**

of the Estate of the Late Moshi Abdallah, Civil Application No. 407/17/ of 2019 (unreported) the Court held as follows: -

> *"...As such the time taken by the applicant in seeking leave, that is counting from the time the applicant's initial application for leave was struck out to the time when the application for leave was found to be overtaken by operation of the law is in fact, a technical delay which is inexplicable and excusable"*

In the matter under consideration Mr. Kayaga submitted that time to appeal lapsed when the applicants were pursuing the application for leave at the High Court which was the legal requirement by then, but refused. Later, they had to lodge Civil Appeal No. 108 of 2018 to the Court so as to challenge the decision of the High Court refusing leave. However, the appeal was withdrawn on 22nd March, 2022 following the changes in the said procedural requirement. The applicants contended that the withdraw order was supplied to them on 28th March, 2022. By that time the period within which to file the intended appeal had already lapsed considering the notice of appeal had been lodged on 11th December, 2017.

Looking at the narrated facts, the technical delay; being the time when the applicants were in various courts in pursuit of their rights can be considered to be from the time when the applicant lodged the notice

of appeal on 11th December, 2017 up to when the appeal was withdrawn on 22nd March, 2022. Otherwise, the following days up to when this application was filed on 4th April, 2022, about 11 days does not fall under technical delay. As such, the days were required to be accounted for.

I am aware that the applicants stated that they were supplied with the withdrawal order on 28th March, 2022 that is six days later but there is no proof to that effect. I am therefore inclined to agree with the respondent's argument that the applicants have failed to account for the six days which in my view cannot be ignored, and therefore their diligence is called in question.

It is a settled principle of law that, despite the presence of technical delay, the applicant still has the duty to account for each day delayed. [See: **Mathew I. Kitambala vs. Rabson Crayson and Another,** Criminal Application No. 339 of 2018 (unreported)].

On that account therefore, the conclusion that the applicants have failed to account for all the period of delay is inescapable.

Regarding the ground of illegality, I am with firm conviction that the same is apparent on the face of the record of the judgment intended to be appealed against at pages 17-18 of the record of application. It is not disputed that non-rejoinder of parties was not among the issues framed

for determination by the High Court as can vividly be seen at page 9 of the record of the application where the issues for determination of the case were framed. However, the record of application shows that the issue of non-joinder of parties was raised at page 17 when the High Court was in the process of writing the Judgment. The High Court then went ahead to give its decision basing on it which, apart from not being among the issues framed, the parties were also not afforded with a right to be heard, thus contrary to the fundamental principles of natural justice as correctly argued by Mr. Kayaga. Though the respondent refuted the contention arguing that the parties were given the opportunity to be heard, with much respect, that is not correct as per record.

The law is long settled that illegality of the decision sough to be challenged constitutes sufficient reason for extension of time even where the applicant has failed to account for the days of delay. There is a plethora of authorities to in this regard [See: **VIP Engineering and Marketing Limited and Two Others vs. Citibank Tanzania Limited, Consolidated** Civil Reference No. 6, 7 and 8 of 2006] (unreported). A similar stance was also taken in **TANESCO vs. Mufungo Leonard Majura and 15 Others**, Civil Application No. 94 of 2016 (unreported) wherein the court stated:

"Notwithstanding the fact that, the applicant in the instant application has failed to sufficiently account for the delay in lodging the application, the fact that there is a complaint of illegality in the decision intended to be impugned.... suffice to move the Court to grant extension of time so that the alleged illegality can be addressed by the court"

Applying the above legal principle to the facts of the application under consideration, I am convinced that the application has merit based on the ground of illegality and I accordingly grant it.

No costs is awarded as the flaw was caused by the trial court.

It is so ordered.

DATED at **TABORA** this 3rd day of October, 2023.

L. G. KAIRO
JUSTICE OF APPEAL

Ruling delivered this 3rd day of October, 2023 in the presence of Mr. Kelvin Kayaga, the learned Counsel for the Applicants and the Respondent in person is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL