

IN THE HIGH COURT OF TANZANIA
MWANZA DISTRICT REGISTRY
AT MWANZA

MISC. LAND APPLICATION NO. 89 OF 2019

(Arising from Land Appeal No. 42/2018 of Mwanza High Court dated on 25th day of October, 2018 before Hon. A.Z. Mgeyekwa, J., originating from the Land Application No. 22/2016 of Chato District Land and Housing Tribunal.)

PAULO KATO APPLICANT

VERSUS

JOSEPHAT MSAFIRI RESPONDENT

Date of the last Order: 16/04/2020

Date of Ruling: 24/04/2020

RULING

ISMAIL, J.

By way of a Chamber Summons, preferred under the provisions of **Sections 5 (1) (c), 11 (1)** of the Appellate Jurisdiction Act, Cap. 141 (as amended); **Rule 45 (a)** of the Court of Appeal Rules, 2009 (as amended); and **section 47 (1)** of the Land Dispute Courts Act, Cap. 216 [R.E. 2002] (as amended), the applicant is seeking the Court's discretion to grant the following prayers:

- “1. *That the Honourable Court be pleased to grant extension of time to the Applicant to file an Application for leave to appeal to the Court of Appeal against the decision of the Court, Hon. A.Z. Mgeyekwa Judge dated 25th day of October 2018 in Land Appeal No. 42 of 2018.*
2. *That subject to the grant of the prayer above, the Court be pleased to grant leave to the applicant to appeal to the Court of Appeal of Tanzania against the decision of the Court, Hon. A.Z. Mgeyekwa Judge dated 25th day of October 2018 in Land Appeal No. 42 of 2018.*
3. *Cost of this application is paid by the Respondent.*
4. *Any other order as the Honorable Court may deem it just to grant.”*

Supporting the application is the applicant himself, through an affidavit which sets out grounds on which the prayer for extension of time is based. Depositing in the support of the application, the applicant has given an account of what transpired from the time the judgment of this Court was pronounced to the date on which the present application was filed. The applicant's main contention is that time prescription worked against him because of his involvement in an accident that fractured his arm, as a result of which he was confined to a hospital bed. He contended that he did not recover early enough to institute his appeal within time, notwithstanding the

fact that he filed his notice of intention to appeal timely. To give credence to his averment, the applicant has attached copies of a discharge card and an ex-ray print out. The applicant further avers that the intended appeal has a chance of success as it raises important points of law worth of consideration by the Court of Appeal.

The respondent's counter-affidavit was quite categorical in its opposition to the application. Imputing loathness on the applicant, the respondent averred that the applicant sat on the matter for almost a year, until the time he became aware of the respondent's efforts to execute the decision of the District Land and Housing Tribunal. Controverting the applicant's contention that he was involved in an accident that prevented him from taking steps, the respondent attached a copy of what he alleged to be a patient register book which showed that the applicant was attended to in March, 2019, and not in December, 2018. He held the view that nothing justifies a year-long inaction demonstrated by the applicant.

He argued that this Court can only give extension of time if good cause and sufficient reasons are established. It was his view that the application is lacking those qualities.

At the hearing of the application, both of the parties appeared in person and fended for themselves. Submitting in support of the application, the applicant contended that he was supplied with a copy of the decision two weeks after its delivery, and before he filed his notice of intention to appeal. He asserted that he prepared the petition of appeal but on presentation, a court clerk, whose name he could not apparently recall, told him that he could not file them together. He submitted that the clerk told him to await a call that would tell him when to submit his appeal. No call, he recalls, was made. It was in the course of waiting for that promised call that he was involved in a road accident which confined him to a hospital bed from 2nd to 11th December, 2018, the latter being the date on which he was discharged. This is the reason that he attributes the delay to.

The respondent could hear none of the applicant's contention. He submitted that the applicant was injured 8th March, 2019, and he was taken to the theatre, for operation, on 10th March, 2019. He slammed the applicant's contention that he was involved in an accident in December, 2018. He submitted that the applicant was seen performing his activities normally, though he was still on a Plaster of Paris (PoP). The respondent contended that reasons advanced are a fabrication, arguing that the application should be dismissed with costs for not being meritorious.

In his short rejoinder, the applicant did not have anything useful to submit, other than reiterating his contention in submission in chief, and urged the Court to grant the application.

Having gone through the rival submissions, the question that arises is whether this application presents a fit case for grant of enlargement of time within which to file an application for leave to appeal to the Court of Appeal.

It is a settled position that enlargement of time is a discretion which must be exercised judiciously, on proper analysis of the facts

and application of law to facts. It is given on a case by case basis, not as a matter of right, and a party must satisfy the court by placing some material before the court upon which such discretion may be exercised. In the same vein, it would be wrong to shut an applicant out of court and deny him the right of appeal, unless it can fairly be said that his or her action was, in the circumstances, inexcusable and his or her opponent was prejudiced by it (see **Isadru v. Aroma & Others**, Civil Appeal No. 0033 of 2014 [2018] UGHCLD 3).

The Court's discretion is called into action not only where the only presents a credible case but also when he acts equitably. This requirement was underscored by the Supreme Court of Kenya in **Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others**, Sup. Ct. Application 16 of 2014, in which it was held:

*"Extension of time being a creature of equity, **one can only enjoy it if [one] acts equitably**: he who seeks equity must do equity. Hence, one has to lay a basis that [one] was not at fault so as to let time lapse. Extension of time is not a right of a litigant against a Court, **but a discretionary power of courts which litigants have to lay a basis [for], where they seek [grant of it]**." [Emphasis is supplied]*

What is referred to as the basis for grant in the just cited decision requires a party to demonstrate existence of **reasonable or sufficient cause**. Failure to do so negates the exercise of such discretion by the Court. Sufficient cause must relate to inability or failure to take particular steps in time. As to what constitutes a sufficient cause, a plethora of the decisions of the Court of Appeal have provided an invaluable guidance. In ***The Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman Bunju Village and 11 Others***, CAT-Civil Appeal No. 147 of 2006 (unreported), it was held as follows:

"It is difficult to attempt to define the meaning of the words "sufficient cause". It is generally accepted however, that the words should receive liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bonafides, is imputable to the appellant."

The superior Court took inspiration from the holding in ***Dephane Parry v. Murray Alexander Carson*** (1963) EA 546, in which the predecessor appeal bench had the following observation:

"Though the court should no doubt give a liberal interpretation to the words "sufficient cause", its interpretation must be in accordance with judicial principles. If the appellant has a good

case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant."

In our jurisdiction, the ground breaking position was propounded in the case of ***Lyamuya Construction Company Limited v. Board of Trustees of YWCA***, CAT-Civil Application No. 2 of 2010 (unreported). In this case, key principles for ascertaining sufficient cause were enunciated. These are:

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

See: ***Henry Leonard Maeda and Another v. Ms. John Anael Mongi*** CAT-Civil Application No. 31 of 2013 (at page 19); ***Mang'ehe t/a Bukine Traders v. Bajuta***, CAT-Civil Application No. 8 of 2016 [2016] TZCA 8; and ***Aviation & Allied Workers Union of Kenya v. Kenya Airways Ltd, Minister for Transport, Minister for Labour & Human***

Resource Development, Attorney General, SC-Application No. 50 of 2014 (Supreme Court of Kenya).

The applicant's reason for the delay in this matter is, as amply demonstrated in the affidavit and submissions made in support, indisposition due to his involvement in a road accident that injured his arm. It is also down to what he contends as instructions served upon him, by a court clerk, to the effect that he would be informed of the date for filing the appeal. The respondent is of a different view. He views the applicant as a negligent litigant who has demonstrated lack of urgency at every step of the proceedings, and this has really prejudiced him. He has taken a serious exception to contention that he was injured and hospitalized in December 2018, and that he woke up in slumber and hurriedly took action after the respondent had embarked on an execution process.

To be able to make a conclusion on sufficiency of the reasons advanced by the applicant, the question that needs to be resolved is whether a combination of involvement in an accident and being put in abeyance by a court clerk, constitutes a cause sufficient

enough to make a case for extension. For sure, ailment of a party is a reason plausible enough to constitute a sufficient cause, if such ailment occurs during the period in which he is required to take steps in certain proceedings. In this case, where the cause to be taken is to file an appeal against the decision he felt aggrieved by. The applicant has argued that he was hospitalized on 2nd December through to 11th December, 2018. Assuming that this contention represents a true account of facts, no cogent explanation has been given on why the appeal was not filed before the applicant was involved in the accident. This observation gains credence through the applicant's own submission that, when he filed a notice of appeal he was already in possession of the copy of the judgment. In fact, he had already prepared his grounds of appeal that he intended to file alongside the notice of appeal. If we assume that the clerk told him not to mix the two, he would still go back to court after a couple of days and file it within time, and before he got involved in the unfortunate incident that caused a bodily harm. That would have spared him of the agony that he finds himself in. Even more confounding, is the fact that after discharge from hospital, he

took a whopping five months to have his application find its way in this Court and nothing resonating has been put forward as the reason for this dilatory conduct. The only credible assertion would appear to be the respondent's contention, that the applicant went slumber and was awakened by the execution proceedings instituted by the respondent.

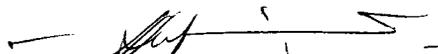
The applicant apportions part of the blemish to the unnamed court clerk who misadvised him on when he should file his appeal. This would be considered as a ground falling in the realm of sufficient cause if the anonymous clerk swore or affirmed an affidavit which would support the application, in line with the trite position emphasized in a plethora of decisions of the Court of Appeal (see: **John Chuwa v. Anthony Ciza** [1992] TLR 233; **Isaack Sebegele v. Tanzania Portland Cement Co. Ltd**, CAT-Civil Reference No. 26 of 2004; and **Tanzania Breweries Limited v. Herman Bildad Minja**, CAT (DSM)-Civil Application No. 11/18 of 2019 (both unreported). In both of these decisions, lack of such depositions amounted to a failure to account for the days of delay. I would take the same stance in respect of this matter.

In view of the foregoing, I find the reasons cited for the applicant's dilatoriness underwhelming and lacking in some material on which this Court can exercise its discretion. I, therefore, subscribe to the respondent's submission and hold that sufficient cause has not been established in this case.

Consequently, I hold, without any demur, that the applicant has failed to meet the legal threshold set for extension of time. Accordingly, I dismiss this application with costs.

It is so ordered.

DATED at **MWANZA** this 24th day of April, 2020.



M.K. ISMAIL

JUDGE

Date: 24/04/2020

Coram: Hon. M. K. Ismail, J

Applicant: Present online – Mob. No. 0769 043 504

Respondent: Present online – Mob. No. 0769 056 680

B/C: B. France.

Court:

Now that following the global outbreak of COVID 19 pandemic and pursuant to the order of 16.04.2020 parties are present online, the application is heard by way of Audio Teleconference.

Sgd: M. K. Ismail

JUDGE

24.04.2020

Court:

Ruling delivered in chamber, in the physical absence of the parties but present on line through their mobile phones, and in the presence of Ms. Beatrice B/C this 24th April, 2020.



M. K. Ismail

JUDGE

At Mwanza

24th April, 2020