

**IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA**

MISC. LAND APPLICATION NO.05 OF 2020

(Arising from HC Land Case No. 48 of 2012 Hon. Makaramba, J dated
06.10.2017)

HAMIS PASCHAL APPLICANT

VERSUS

SISI KWA SISI PANEL BEATING

AND ENTERPRISES LIMITED 1ST RESPONDENT

MWASEMA BAKARI OMARI 2ND RESPONDENT

MWANZA CITY COUNCIL 3RD RESPONDENT

RULING

Date of last Order: 24.05.2021

Date of Ruling: 28.05.2021

A.Z.MGEYEKWA, J

I am called upon in this matter to decide whether this court should exercise its discretion under section 11 (1) of the Appellate Jurisdiction Act, Cap. 341 Cap.141 [R.E 2019] and section 14 (1) of the Law of Limitation Act, Cap.89 [R.E 2019] to extend time within the applicant to

Nevertheless, Mr. Gilla, the learned counsel for the applicant has also accounted for each day of delay. The applicant, in his supplementary affidavit specifically paragraphs 14 and 15, has accounted for the days of delay. Opposing the application, Mr. Emmanuel, learned counsel for the 1st respondent in his submission claimed that the applicant was negligent. As stated above, it is clear that neither the applicant nor his Advocate was negligent. I am in accord with Mr. Gilla that the applicant's negligence was at the time when he filed an application before the Court of Appeal of Tanzania on which the same cannot be said that the applicant was negligent in filing the instant application since the Application was struck out on the technicalities ground. Therefore, examining closely, the instant application is on technical delay. With the above observation, I restrain myself to discuss the ground of illegality because this ground suffices to allow the applicant's application.

Having fleetingly reviewed the depositions in the affidavit and the submissions made by the applicant's learned counsel and the 3rd respondent learned counsel, I am convinced that this case fits in the mould of cases for which extension of time on the ground of actual delay may be granted. Circumstances of this case reveal sufficient cause capable of exercising the Court's discretion and extend the time within

lodge a Notice of Appeal to the Court of Appeal of Tanzania against the decision of this court in Land Case No.48 of 2012 dated 06th October, 2017. The application is supported by an affidavit and supplementary affidavit deposed by Hamis Paschal, the applicant. The respondents resisted the application and have demonstrated their resistance by filing counter affidavits. The first respondent filed a counter affidavit deposed by Mr. Mussa Omari Mwinduchi, Managing director of the first respondent. The second respondent's counter affidavit was deposed by Mr. Mwasema Bakari Omari, the second respondent. The third respondent's counter affidavit was deposed by Mr. Joseph Richard Vungwa, the learned Solicitor.

When the matter was called for hearing on 10th May, 2021, the appellant enjoyed the legal service of Mr. Kassim Gilla, learned counsel, the 1st respondent had the legal service of Mr. Emmanuel John. Mr. Obedi, learned counsel represented the second respondent, and Mr. Joseph Vungwa, learned Solicitor represented the third respondent.

By the court order, the application was argued by way of written submission whereas, the applicant filed his submission in chief on 17th May, 2021 and the respondents filed their reply on 24th May, 2021. The ruling was scheduled on 28th May, 2021.

In the written submissions in support of the appeal, Mr. Gilla stated that the applicant seeks extension of time to file a Notice of Appeal to the Court of Appeal of Tanzania against the decision of this court in Land Case No. 48 of 2012. He avers that consequent to the delivery of the decision of this court, the applicant timely lodged a Notice of Appeal and applied for copies of the judgment, proceedings, decree, and exhibits for the appeal purpose and further applied for leave to appeal to the Court of Appeal of Tanzania. He went on to state that Hon. Maige, J (as he then was) granted the applicant's application for leave to appeal to the Court of Appeal of Tanzania in Misc. Land Application No.226 of 2017. Bar subsequent proceeding on the same application.

Mr. Gilla continued to state that after obtaining leave to appeal to the Court of Appeal of Tanzania the application was registered as Civil Appeal No. 165 of 2018 but on 17th December, 2020 the Court of Appeal struck it out on the ground that there was a non-joinder of the second respondent who was the necessary party. He added that the applicant was supplied with copies of the ruling and drawn order on Friday, 18th December, 2020 immediately on Tuesday the applicant filed the instant application on 22nd December, 2020 since the days 19th and 20th December, 2020 were weekdays.

The learned counsel for the applicant went on to state that the aspect of technical delay and promptness in taking action after the former appeal had been struck out by the Court of Appeal of Tanzania. Mr. Gilla fortified his submission by referring this court to the case of **Fortunatus Msha v William Shija and Another** [1997] TLR 154. Mr. Gilla valiantly opposed the respondents' claims as stated in their counter affidavit that the applicant's application was struck out because the applicant was negligent in processing his appeal to the Court of Appeal of Tanzania. He stated that the delay involved was merely technical there is no any negligence from the applicant's party. To bolster his submission he cited the case of **the Director General LAPF Pension Fund v Pascal Ngalo**, Civil Application No. 76/08 of 2018. The Court of Appeal of Tanzania held that:-

"In the view of the account made by the applicant's counsel, the delay involved in this case was merely technical, and if there was negligence as submitted by the respondent, the applicant was penalized for it by having the matters decided against her."

Mr. Gilla stated that based on the above position by the Court of Appeal of Tanzania, if at all there were negligence on the part of the applicant in processing the Civil Appeal No. 165 of 2018 then the same was penalized

by the Court of Appeal of Tanzania by striking out the appeal on 17th December, 2020 thus he cannot be penalized at this stage.

Mr. Gilla did not end there he continued to state that the applicant on paragraphs 9 and 10 of his affidavit has raised a point of illegality. To support his submission he referred this court to the cases of **Principal Secretary, Ministry of Defence and National Service v Devram Valambia** [1992] TLR 185, **Hamisi Mohamed (as the Administrator of Estate of the late Risasi Ngawe) v Mtumwa Moshi (as the Administrator of Estate of the late Moshi Abdallah)**, Civil Application No. 407/17 of 2019 (unreported). He stated that the applicant is still desirous of contesting the trial court's decision in Land Case No. 48 of 2012.

It was Mr. Gilla's contention that the applicant's application is meritorious and he has adduced sufficient reasons for the grant of the craved orders as it was held in the case of **Wambura N. J Waryuba v The Principal Secretary Ministry of Finance and the Attorney General**, Civil Application No. 320/01 of 2020 CAT at Dar es salaam (unreported).

On the strength of the above submission, Mr. Gilla beckoned upon this court to grant the applicant's application with costs.

Objecting to the application, in his written submission, Mr. Emmanuel John, learned counsel for the first respondent stated that the applicant admitted that he acted negligently because if he had exercised his duties well the said blunder could not have arisen. Mr. Emmanuel went on to submit that the failure of a party's advocate to check the law is not sufficient ground for allowing the appeal. He was on his view that since the applicant admitted to the blunder then his application needs to be collapsed. To bolster his submission he referred this court to the case of **Calico Textile Industries Ltd Vs Pyaraesmail Premji**, Civil Appeal No.16/1993 the Court of Appeal of Tanzania at Dar Es Salaam (1993) T.L.R 28.

The learned counsel for the 1st respondent went on to submit that the applicant has tried to support his negligence or blunder vide the case of **Fortunatus Masha** (supra), its position differs from the Court of Appeal position in the case of **Tanzania Rent a Car v Peter Kimuhu**, Civil Application No. 22/01 of 2017, which is a recent case. He insisted that in accordance to the law the current decision prevails over the former and this court is bounded to their decision as it was from the Court of Appeal of Tanzania.

Regarding the ground of illegality, Mr. Emmanuel submitted that a difference should be made between illegality and error in the decision while the former amounts to good cause the latter does not. To support his submission he referred this court to the case of **Lyamuya Construction Company Ltd v Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No.2 of 2010. Mr. Emmanuel claimed that the illegality ground is not a point of law. He referred this court to paragraph 9 of the applicant's affidavit.

On the strength of the above submission, Mr. Emmanuel John valiantly argued that all the conditions for extension of time have not been met. He beckoned upon this court to dismiss the application with costs.

Opposing the instant application, Mr. Obedi, learned counsel for the second respondent submitted that the applicant's delay was not a technical delay but an actual delay. He stated that the judgment which the applicant intends to challenge was delivered on 06th October, 2017 and the instant application was filed on 29th December, 2020. In his view, it is a delay of three years. To support his submission he referred this court to section 21 (1) of the Law of Limitation Act, Cap.89 [R.E 2019]. Mr. Obedi went on to submit that the ground of delay can only be granted

if the aforesaid intended appeal was prosecuted diligently. He argued that the applicant was not diligent. He added that failure for the applicant to serve the copies of the intended appeal and non-joinder of the second respondent renders the applicant's appeal incompetent.

Concerning the ground of illegality, Mr. Obedi stated that there is no proof of illegality on the face of the record. Mr. Obedi fortified his submission by referring this court to paragraph 9 of the applicant's affidavit that the applicant has failed to disclose the points of illegalities on the face of the record. To support his position he cited the cases of **Lyamuya Construction** (supra).

In conclusion, Mr. Obedi submitted that the applicant has failed to adduce good reasons for his delay to move this court to exercise its discretionary power of extending time. He urged this court to dismiss the applicant's application with costs.

In his written submission, Mr. Vungwe, learned Solicitor conceded to the application. He was very brief and straight to the point. He stated that after reading the affidavit and the annexure attached in support of the application and the applicant's submission, they realized that there is a technical delay. Mr. Vungwe fortified his submission by referring this court to the case of **Boniface Mwakapasa v Board of Trustees of PSSF**,

Misc. Application No. 05 of 2020, High Court of Tanzania at Mbeya (unreported).

Having carefully considered the submissions made by the learned counsels in their written submission and examined the affidavits and counter affidavits, the issue for our determination is ***whether the applicant is meritorious.***

I have keenly followed the grounds contained in the applicant's affidavit and the respondent's counter affidavit with relevant authorities. The position of the law is settled and clear that an application for extension of time is entirely the discretion of the Court. But, that discretion is judicial and so it must be exercised according to the rules of reason and justice as it was observed in the case of **Mbogo and Another v Shah** [1968] EALR 93.

Additionally, the Court will exercise its discretion in favour of an applicant only upon showing good cause for the delay. The term "good cause" having not been defined by the Rules, cannot be laid by any hard and fast rules but is dependent upon the facts obtained in each particular case. This stance has been taken by the Court of Appeal in a number of its decision, in the cases of **Regional Manager, TANROADS Kagera v Ruaha Concrete Company Ltd**, Civil Application No.96 of 2007, **Tanga**

Cement Company Ltd v Jumanne D. Massanga and another, Civil Application No. 6 of 2001, **Vodacom Foundation v Commissioner General (TRA)**, Civil Application No. 107/20 of 2017 (all unreported). To mention a few.

As amply submitted by Mr. Gilla, he has convinced this Court to find that the applicant's delay falls under technical delay which is explicable and excusable as stated in the case of **Fortunatus Masha** (supra). Since the learned counsels for the applicant and learned counsels for the first and second respondents are in unison with respect to technical delay, I find it proper to determine the issue whether the delay in the instant application qualifies as a technical delay.

Needless to say, the Court has interpreted and distinguish categories of delay between real delay and technical delay for purposes of determining whether the application for extension of time merits granting or not. Technical delay is explicable and excusable in the cases of **Salvand K.A Rwegasira v China Henan International Group Co. Ltd**, Civil Reference No. 18 of 2006, **Bank of Tanzania Ltd v Enock Mwakyusa** Civil Application No. 520/18 of 2017 (unreported), **Zahara Kitindi & Another v Juma Swalehe & 9 others**, Civil Application No. 4/05 of 2017, **Yara Tanzania Limited v DB Shapriya and Co.**

Limited, Civil Application No. 498/16 of 2016, and **Samwel Kobelo Muhulo v. National Housing Corporation**, Civil Application No. 302/17 of 2017 (all unreported) and the landmark case of **Fortunatus Masha v William Shija & Another** (supra) in which the Court of Appeal of Tanzania held that:-

*"A distinction had to be drawn between cases involving real or actual delays and those such as the present one which only involved **technical delays in the sense that the original appeal was lodged in time but has been found to be incompetent for one or another reason and a fresh appeal had to be instituted.** In the present application, the applicant had acted immediately after the pronouncement of the ruling of the Court striking out the first appeal. In these circumstances, an extension of time ought to be granted."*
[Emphasis added].

Applying the above position of the law, it is crystal clear that the applicant's delay was a technical delay contrary to the observation of Mr. Obedi, learned counsel for the 2nd respondent. I have gone through the applicant's affidavit and found that the applicant has demonstrated his technical delay on paragraphs 2,3, 4, 5, 6, and 7 of his affidavit.

I am not in accord with Mr. Obedi, learned counsel for the 2nd respondent that the extension of time on the ground of technical delay

can only be granted if the aforesaid intended appeal was prosecuted diligently. The technical delay is well elaborated in the above cited case of **Fortunatus Masha** (supra) that the technical delay is in the sense that the original appeal was lodged in time but the same was found incompetent thus fresh appeal has to be instituted. Therefore the cited section 21 (1) of the Law of Limitation Act Cap. 89 [R.E 2019] does not apply in this application.

For the avoidance of doubt, I have read the case of **Tanzania Rent a Car** (supra) In **Tanzania Rent's** case the issue for discussion was the applicant did not state a good cause for the delay. The main reason for the delay that comes out in the applicant's affidavit is that the applicant's counsel filed an application in the High Court instead of applying for review in the Court and the Court of Appeal of Tanzania was not ready to accept the said excuse which was based on ignorance of procedure. This cited case is distinguishable from the instant case. In the instant case, unlike the cited case of **Tanzania Rent** (supra), the issue is on purely technical delay; the original appeal was lodged on time however the same was strike out for being incompetent, he did not include the second respondent as a party to the appeal. The issue of ignorance of procedure was not the issue for discussion in the instant application.

Nevertheless, Mr. Gilla, the learned counsel for the applicant has also accounted for each day of delay. The applicant, in his supplementary affidavit specifically paragraphs 14 and 15, has accounted for the days of delay. Opposing the application, Mr. Emmanuel, learned counsel for the 1st respondent in his submission claimed that the applicant was negligent. As stated above, it is clear that neither the applicant nor his Advocate was negligent. I am in accord with Mr. Gilla that the applicant's negligence was at the time when he filed an application before the Court of Appeal of Tanzania on which the same cannot be said that the applicant was negligent in filing the instant application since the Application was struck out on the technicalities ground. Therefore, examining closely, the instant application is on technical delay. With the above observation, I restrain myself to discuss the ground of illegality because this ground suffices to allow the applicant's application.

Having unfleetingly reviewed the depositions in the affidavit and the submissions made by the applicant's learned counsel and the 3rd respondent learned counsel, I am convinced that this case fits in the mould of cases for which extension of time on the ground of actual delay may be granted. Circumstances of this case reveal sufficient cause capable of exercising the Court's discretion and extend the time within

which to file an application to lodge a Notice of Appeal to appeal to the Court of Appeal of Tanzania. Therefore, I proceed to grant the applicant's application to lodge a Notice of Appeal to appeal to the Court of Appeal of Tanzania within 21 days from today. Costs to be in the cause.

Order accordingly.

Dated at Mwanza this date 28th May, 2021.




A.Z.MGEYEKWA

JUDGE

28.05.2021

Ruling delivered on 28th May, 2021 via audio teleconference, whereas Mr. Gilla, learned counsel for the applicant also holding brief for Mr. Vungwa, learned Solicitor for the 3rd respondent, Mr. Mwanaupanga, learned counsel for the 1st respondent, and Mr. Obedi, learned counsel for the 2nd respondent were remotely present.


A.Z.MGEYEKWA

JUDGE

28.05.2021