

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT MOSHI

MISC. LAND APPLICATION NO. 37 OF 2022

*(C/F Application No 230 of 2018 of the District Land and Housing
Tribunal of Moshi at Moshi)*

THABITHA R. MBARUKU..... 1ST APPLICANT

NURU JOHN ROGERS.....2ND APPLICANT

VERSUS

AZANIA BANK LIMITED.....1ST RESPONDENT

MABUNDA AUNCTIONERS MART CO. LTD..... 2ND RESPONDENT

JOHN ROGERS MBARUKU.....3RD RESPONDENT

ROGERS JOHN MBARUKU..... 4TH RESPONDENT

HUSSEIN MURO.....5TH RESPONDENT

RULING

16/3/2023 & 20/3/2023

SIMFUKWE, J.

This application has been filed by way of chamber application under
section 41 (1) and (2) of the Land Disputes Courts Act, Cap 216

R.E 2019 seeking the following orders:

- 1. That, this Honourable Court may be pleased to extend time within which to file appeal out of time in Land Application No. 230 of 2018 of the District Land and Housing Tribunal for Moshi dated 10th June, 2021.*
- 2. That, the costs of this application be in due course.*
- 3. Any other order/relief as shall deem fit and just to grant.*

The affidavit of the 1st applicant Tabitha Mbaruku supported the application. In the said affidavit the 1st applicant advanced the reasons for the delay to be technical delay while prosecuting Land Appeal No. 29 of 2021 which was struck out for being incompetent on 4th March 2022. She accounted for further delay to be late supply of copy of corrected judgment in Land Application No. 230 of 2018 which was supplied on 2nd August 2022. The third reason for granting this application was stated to be illegality in the proceedings of the trial tribunal in the sense that the trial chairman proceeded to determine the application which was initially before another Chairman without adducing reasons for taking over the matter. In their counter affidavits, the 1st and 5th respondents contested the application.

The learned counsel for the applicants prayed to argue the application by way of written submission. His prayer was granted whereas, Mr. Charles Mwanganyi learned counsel argued the application for the applicants, while Mr. Martin James Wanyancha and Mr. Patrick Paul learned counsels opposed the application for the 1st and 5th respondents respectively.

In his written submission in support of the application, Mr. Mwanganyi prayed to adopt the affidavit of the 1st applicant together with its annexures to form part of his submission. The learned counsel gave brief facts which gave rise to this application, which I won't reproduce but may make reference to the same while determining the application. He underscored that, this has been held consistently by this court and the Court of Appeal of Tanzania, that for an application for extension of time to be granted there must be sufficient reasons and the applicant should account each and every day of delay.

Submitting on the merit of the application, Mr. Mwanganyi underscored that it's trite law that when one seeks leave of the court to extend time to file appeal, he must account sufficient reasons for the delay. He referred the case of **Godwin Ndewedi and Karoli Ishengoma vs Tanzania Audit Corporation [1995] TLR 200** in which it was held that:

"The rules of the court must prima facie be obeyed. And in order to justify extending time during which some steps in proceedings to be taken, there must be some material on which the court can exercise its discretion."

Mr. Mwanganyi cited other two cases of **Joseph Paul Kyauka Njau and Another v. Emmanuel Paul Kyauka and Another, Civil Application No. 7 of 2016** in which the Court of Appeal of Tanzania reiterated the principles of granting extension of time as propounded in the case of **Lyamuya Construction Co. Ltd v. Board of Trustees of Young Women's Christian Association, Civil Application No. 2 of 2010**, that:

- a) The applicant must account for all 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 action that he intends to take.*
- d) If the courts feel that there are other reasons, as such the existence of point of law of sufficiency importance, such as illegality of the decision sought to be challenged.”*

In respect of this application, Mr. Mwanganyi stated that under paragraph 3 to 11 of the affidavit in support of the application, the applicants have shown sufficient reasons which warrant the Court to exercise its discretion to grant extension of time to the applicant. He reiterated two reasons for the delay advanced in the affidavit as noted herein above.

In reply Mr. Wanyancha for the 1st respondent prayed to adopt the counter affidavit of the 1st respondent herein in opposing the application. He subscribed to the decisions cited by the learned counsel for the applicants in support of the proposition that for leave for extension of time to be granted, the applicant must give sufficient reasons for the delay and account for each day of delay. However, the learned counsel for the 1st respondent was of the opinion that the applicants had failed to account for each day of delay. Basing on the assertion that the corrected judgment was collected on 02nd August, 2022 and the fact that this application was filed on 4th August 2022, Mr. Wanyancha was of the view that the applicants had failed to account for the two days delay as required by the law. It was stated further by Mr. Wanyancha that it is on record that the corrected judgment was ready for collection since July,

2022 but the applicants decided to collect the same on 2nd August, 2022 which is evidenced by the 5th respondent's Application for Execution No. 158 of 2022 which was filed before the District Tribunal on 22nd July 2022. Thus, the applicants have failed to account for the days which they failed to collect the judgment while it was ready.

Mr. Wanyancha invited this court to be guided by the principle established in the cases of **Elius Mwakalinga v. Domina Kagaruki and 5 Others, Civil Application No. 120/17 of 2018**; and **Ludger Bernard Nyoni v. National Housing Corporation, Civil Application No. 372/02 of 2018** (both unreported); in which it was held that:

"Delay, of even a single day has to be accounted for. Otherwise, there would be no point of having rules prescribing periods within which certain steps have to be taken."

Concerning the applicants' alleged illegality in the decision of the District Tribunal dated 10th June 2021, Mr. Wanyancha replied that the same was not correct and true at all. That, the applicants are trying to use the purported issue of illegality as one of the grounds for extension of time knowing that the court will not have an opportunity to satisfy itself if the alleged illegality exist. That, it is on record that the former Chairperson gave reasons as to why he failed to continue with the case, hence assigned it to Hon. Makwandi for continuation of the hearing. The applicants were given chance to cross examine witnesses of the defendants.

Mr. Patrick Paul replied for the 5th respondent that the application be dismissed with costs as the applicants have failed to prove their

application to the required legal threshold. He prayed this court to adopt the contents of the counter affidavit of the fifth respondent. He went on to submit that the applicants had knowledge of the corrected judgment and decree very early before 02nd August 2022 on the reason that they were served with the Application for execution before the District Land and Housing Tribunal (Misc. Application No. 158 of 2022) attached with a copy of the corrected judgment certified on 27th July 2022. Wherefore, the learned counsel alleged that the corrected copy of judgment was available before 27th July 2022; but the applicants were not vigilant to obtain the same early. Mr. Patrick cemented his argument with the case of **TCCIA Investment Company Limited v. Dr. Gideon H. Kaunda, Civil Appeal No. 310 of 2019**, CAT at Dsm in which the case of **Dr. Ally Shabhay v. Tanga Bahora Jamaat [1997] TLR 305** was cited with approval and the Court stated that:

"...those who come to court must not show unnecessary delay in doing so: they must show great diligence."

Mr. Patrick contended that the applicants have miserably shown unnecessary delay and lack of diligence. Moreover, the learned counsel for the fifth respondent was of the view that the applicants have failed to account for each day of delay. That, out of 420 days of delay if 299 days of prosecuting the appeal are excluded, about 120 remaining days have not been accounted for. He alleged further that Land Appeal No. 29 of 2021 was lodged after lapse of 43 days from the date of judgment. That, the applicants have not mentioned the days between struck out of Land Appeal No. 29 of 2021 and obtaining the corrected judgment; and the period from obtaining the corrected judgment to the date of filling this

application for extension of time.

Mr. Patrick concluded that it is trite law that the decree holder (fifth respondent) should enjoy the benefits of the decree that had been awarded in his favour since 2021. That, the applicants were not holders or registered owners of the suit land as they had no legal interest over the same. They are just abusing the legal machinery by illegally denying the 5th respondent of his right. Mr. Patrick urged this court not to bless the abuse of the process, rather, he requested the court to stand by justice and dismiss this application accordingly.

In their brief rejoinder, the applicants firmly stood by their submission in chief.

On the issue that they were served with an application for execution attached with copy of corrected judgment, the applicants replied that the said submission was frivolous, unfounded and baseless. They made reference to paragraph 10 of the affidavit in support of the application where copy of the corrected judgment was attached to form part of the affidavit. They averred that the 5th respondent did not bother to attach in his counter affidavit copy of the corrected judgment which he stated that was certified on 27th day of July 2022 rendering their averment to be mere statement from the bar which this court should not act upon.

The applicants reiterated that they had adduced sufficient reasons for the delay and prayed the application to be granted with costs.

Having examined the rival submissions of the parties as well as their affidavits, the issue is *whether the applicants have shown good cause for the delay.*

Granting extension of time is the discretion of the court upon the applicant showing reasonable and sufficient cause. There is a plethora of authorities to that effect. In the case of **Brazafric Enterprises Ltd vs Kaderes Peasants Development (PLC), Civil Application No. 421 of 2021 [2022] TZCA 624 (13 October 2022)** [Tanzlii] at page 8 & 9 the Court of Appeal observed that:

*"It is noteworthy that there is no universal definition of the term 'good cause'. Therefore, good cause may mean among other things, **satisfactory reasons of delay or other important factors which need attention of the Court**, once advanced may be considered to extend time within which a certain act may be done."* Emphasis mine

I subscribe to the above definition of the Court of Appeal. In another case of **Fortunatus Masha v. William Shija and Another [1997] TLR 154** it was held that:

"A distinction had to be drawn between cases involving real or actual delays and those such as the present one which clearly only involved technical delays in the sense that the original appeal was lodged in time but had been found to be incompetent for one or another reason and a fresh appeal had to be instituted. In the present case 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."

The scenario in this application is exactly like the scenario in the case of **Fortunatus Masha** (supra). In this application, the first appeal was lodged in time but it was struck out for being incompetent on the reason

that the judgment of the trial tribunal had omitted some names of the respondents. The learned counsels of the 1st and 5th respondents do not dispute the days used to prosecute Land Appeal No. 29/2021. The learned counsel for the 1st respondent disputes two days of delay from 02nd August 2022 when the applicants were supplied with corrected judgment to 04th August 2022 when the instant application was filed. The learned counsel for the 5th respondent was of the view that the applicants have not accounted for the delay between struck out of Land Appeal No. 29/2021 and obtaining the corrected judgment and the period from obtaining the corrected judgment to the date of filing this application for extension of time.

Starting with the assertion of the learned counsel for the 5th respondent, with due respect, the 1st applicant clearly deponed at paragraph 7 to 10 that after delivery of judgment in Land Appeal No. 29/2021 on 4th March 2022, immediately on 07th March 2022 they requested for rectification of clerical errors. On 16th May 2022, the applicants wrote a reminder letter to the trial tribunal. On 18th July 2022 another reminder letter was written to the trial tribunal whereby on 02nd August 2022 the corrected judgment was supplied to the applicants. The 1st applicant annexed to her affidavit the above noted letters which were written to the trial tribunal (Annexures A3 and A4). It is on record that the corrected judgment was certified on 27th July 2022. The record is silent as to when the applicants were informed that the corrected judgment was ready for collection. Having acted promptly after their former appeal was struck out and the presence of annexure A3 and A4 (supra) show that the applicants acted with due diligence in making follow up of correction of the impugned judgment.

Concerning the two days delay after collection of copy of corrected judgment, I am of considered opinion that the same is ordinate and might have been used to prepare the instant application.

In the case of **Michael Lessani Kweka v. John Eliafye [1997] TLR 152** His Lordship Kisanga J.A held that:

"The Court had power to grant an extension of time if sufficient cause had been shown for doing so; in the instant case the Applicant had shown reasonable diligence in correcting the error immediately upon discovery and this conduct warranted consideration for enlarging the time in his favour."

Likewise, in the instant application the applicants have shown reasonable diligence in making follow up of correction of the error in the impugned judgment.

In the event, I hereby grant this application as prayed without costs. The applicants should file their intended appeal within 21 days from the date of being supplied with copy of this ruling.

It is so ordered.

Dated and delivered at Moshi this 20th day of March 2023.



X

S. H. SIMFUKWE
JUDGE

Signed by: S. H. SIMFUKWE

20/03/2023