

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

MISC CIVIL APPLICATION NO. 332 OF 2022

(Arising from the Judgment and Decree on this Court, Hon Abood, J in Civil Case No. 69 of 2000 dated 29th day of May 2013)

NYANYA MOHAMED..... APPLICANT

VERSUS

MUDRI A. MBELEKO.....1st RESPONDENT

ABDALLAH JUMA SEI2nd RESPONDENT

EX-PARTE RULING

4th April & 28th April 2023

MKWIZU, J:

The applicant Nyanya Mohamed, through the services of Mr. Deogratus Ogunde, learned advocate, has filed a chamber summons seeking an extension of time to lodge a notice of intention to appeal to the Court of Appeal and a letter applying for copies of the Judgment, Decree, and proceedings against the judgment and decree of this court (Hon. Abood, J) dated on 29th day of May 2013 in civil case No. 69 of 2000. The application is made under section 11(1) of the Appellate Jurisdiction Act, [Cap 141 R: E 2019]. It is accompanied by an affidavit sworn by Nyanya Mohamed, the applicant.

The applicant's affidavit associates the delay in obtaining certified copies of the judgment and decree of this court with the delay in taking necessary steps to appeal to the Court of Appeal.

It is deciphered from the records that, the applicant successfully sued the respondents for inter alia a declaration that he is a lawful purchase and owner of farmland measuring 30 acres with a letter of offer, Ref No. KIB/785 of 4/8/986 with Title Deed No. 44883. Through an *ex-parte* judgment dated the 29th day of May 2013, this court (Hon Abood, J) decreed the applicant, owner of 23 acres out of the 30 acres in controversy, and the 2nd respondent was decreed owner of the remaining seven acres. 1st respondent was also ordered to pay the applicant general damages to the tune of 2000,000/= plus the costs of the suit.

It is from the applicant's submissions that his advocate, by then Thomas Massawe informed him that she was declared the lawful owner of the entire 30-acre farm, just to realize that she was only granted 23 acres out of the 30 acres claimed after she got a copy of the judgment. Aggrieved, she resorted to appealing processes to the Court of Appeal, but she had at that moment missed the statutory time. Hence the present application for an extension of time.

The respondent was not traced for physical service of the summons and his attendance was not procured even after service of the notice of hearing through publication in Nipashe Newspaper dated 18/3/2023 hence this *ex-parte* ruling.

Restating the principles on granting an extension of time, the Applicant's counsel said, it is at the discretion of the court to grant an extension of time. But that discretion is judicial and so it must be exercised according to the rules of reason and justice and not according to private opinion or arbitrarily by considering factors enumerated in the decision of **Lyamuya**

Construction Company Ltd Vs Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010, Court of Appeal of Tanzania at Arusha(unreported)

In accounting for the delay, the applicant's counsel said, the applicant counsel wrote to the registrar of this court on 03rd June 2013 requesting to be supplied with copies of the judgment and decree, and she made follow-up in the court to be supplied with the judgment and decree to no avail until 11 May 2022, when she was supplied with the said documents.

The applicant went back to her erstwhile counsel for a conversation over the variance between what she was told in 2013 and what is written in the judgment without an answer, the situation that compelled her to engage another advocate. These actions were taken between 30th May 2022 to 15th July 2022. And that the period between 15th July 2022 to 10th August 2022 when this application was physically filed in court was used for preparation, filing, and admission process on the JSDS2 Case Management System and lodging hard copies in court.

He insisted that the delay was not inordinate but rather technical. He contended that the applicant showed diligence in pursuing her case on acting bona fide by relying on the statement of her former advocate just to be awakened by the actual declarations in the decision of the court which she came to read on 29th MAY 2022. He said any inaction, sloth, or negligence of the applicant's former advocate should not be inflicted on the applicant, and a case of **Ghania J. Kimambi Vs Shedrack Ruben Ng'ambi**, Miscellaneous Application No.6892 of 2018, High Court of Tanzania(Labour Division)

The applicant's affidavit also raises an issue of illegalities in the impugned decision. It was submitted that the decision of this court sought to be challenged exhibit illegality, namely lack of jurisdiction of the trial judge to rely on the annexures to the Written Statement of Defence which was not admitted in evidence, that denied the applicant a right to be heard over the purported documents. He lastly prayed for the court to grant the application.

I have objectively considered the affidavit and applicants' submissions. It is trite law that an application for an extension of time is entirely in the discretion of the court to grant or refuse it, and that extension of time may only be granted where it has been sufficiently established that the delay was with sufficient cause. In the case of **Haidar Thabit Kombo and others vs Abbas Khatib Haji and two others**, Civil Application No 2 of 2006 (unreported), this Court stated as follows: -

"Before this Court grant an application for extension of time. What was needed were reasons to explain away the delay satisfactorily. Such reasons would be evidential and would have to appear in the supporting affidavit",

This position of the law was appropriately summarized in **Eliya Anderson v. R.**, Criminal application No. 2 of 2013 (unreported) where a good cause was said to be "factual" or "other reasons", which could include illegality of the decision sought to be impugned. And as rightly submitted by the applicant's counsel, following the case of **Lyamuya Construction Company Limited v. Board of Trustees of Young Women Christian Association of Tanzania**, (supra), the determination of an application for an extension of time is now guided by the following factors:

- i. *An account for all the periods of delay.*
- ii. *Period of the delay, that the delay should not be inordinate.*
- iii. *Exhibition of diligence/and not apathy' negligence or sloppiness in the prosecution of the action that he intends to take.*
- iv. *And any other reasons/such as the existence of a point of law of sufficient importance/such as the illegality of the decision sought to be challenged."*

It is common ground that in the instant matter, the ruling, subject of the intended appeal was handed down on 29th May 2013. In terms of Rule 83 of the Court of Appeal Rules, the intended appeal should have been lodged within thirty (30) days of the decision but none was filed. Both the affidavit and submissions of the applicants have extensively explained three reasons which made the applicant delay in filing her appeal, namely her former advocate's negligence; delay in being supplied with the judgment and decree, and lastly, illegality on the impugned decision.

It is a settled law that a ground alleging illegality constitutes good cause for an extension of time provided that it is discernible on the face of the records as stated in **Principal Secretary Ministry of Defence and National Service vs Devram Valambhia** (supra) where the Court held *inter alia* that:

"In our view when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty even if it means extending the time for the purpose to ascertain the

point and if the alleged illegality is established to take appropriate measures to put the matter and the record right"

And in **Lyamuya Construction Company** (supra) the Court said:

*"Since every party intending to appeal seeks to challenge the decision either on points of law or facts, it cannot in my view, be said that in Valambhia's case, the court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted an extension of time if he applies for one. **The Court there emphasized that such a point of law must be of sufficient importance and, I would add that it must also be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by a long-drawn argument or process**".*

(Emphasis added)

In Paragraph 20 of the applicant's affidavit applicant raises six points. However, all raised points are factual issues that do not qualify illegalities for purposes of extension of time. This reason is therefore without merit.

The next reason relied upon by the applicant is the negligence of the applicant's advocate -Mr. Thomas Masawe. She blames her former counsel for having told her that the judge had granted her the 30 acres claimed just to learn later in 2022 that she was awarded 23 acres only out of the 30 acres. He contended that the applicant should not be blamed for the negligence of his former counsel.

I have considered the applicant's affidavit. It is affirmed that the applicant was in Civil case no 69 of 2000 represented by a lawyer, Mr. Thomas

Masawe. And that on 29th May 2013 Advocate Marielle was in attendance in court holding the brief of Mr. Thomas Masawe when this court rendered its decision that awarded the applicant 23 acres out of the 30 acres claimed. In 3/6/2013 a letter was written by Mr. Masawe's advocate requesting copies of the judgment and that the same were not supplied to the applicant despite several follow-ups until 11th May 2022 when the applicant now became aware of the fact that she was only awarded 23 acres and not the entire claimed land.

The point of concern lies in the assertions in paragraphs 7, 8, and 9 of the affidavit in which Mr. Thomas Masawe and Marielle are mentioned as the source of the confusion that caused the delay. The paragraphs read:

"7. On the 29th day of May 2013 judgment and decree in civil case No 69 of 2000 was delivered by this Court. About Judge), while my advocate, Mr. Thomas Joseph Masawe was absent and had traveled to Moshi on family problems

8. further that the said Advocate Masawe assigned his brief in this case to one, Adv. Marielle, to hold brief and appear on his behalf on the date of delivery of the judgment on the 29th day of May 2013

9. According to a note written by one Adv. Marielle, who was present in the Court, when the expert judgment of this court was delivered by Hon Aboud J on the 29th Day of May 2013, I won the Case and declared, among other things that I was the Lawful owner of Farmland in dispute measuring 30 acres.
..."

I doubt the credibility of these statements. In the three paragraphs quoted above, Applicant mentions Mr. Thomas Masawe and Adv Marriale to have caused the mess, and my perusal of the entire affidavit has failed to find an affidavit by the mentioned persons to support the information deposed in the affidavit rendering the information deposed hearsay, incapable of supporting the application. This is more so because even in her verification clause, the applicant disowns the information in the three paragraphs above. Her verification clause party reads:

"... paragraphs 7,8,9...is according to information and advice were given to me by advocates..."

And worse, the affidavit is silent on how, when, and from whom the applicant got the alleged misleading information.

I have as well perused the note attached to paragraph 9 of the affidavit allegedly written by one Marrielle advocate who held the brief of Mr. Thomas Masawe's advocate in connection with the information deposed in paragraph 13 of the affidavit, I don't see how the applicant came about the attachment. The rule is, to authenticate the second-hand information of the named individuals in the affidavit, there was required an affidavit of named persons. Thus, in the absence of affidavits from Advocate Marrielle and Thomas Masawe explaining the alleged anomalies, the applicant's assertions remain hearsay. I am on this fortified by the decision of **Benedict Kimwaga V. Principle Secretary Ministry of Health**, Civil Application No, 31 of 2000 (unreported) where it was held that:-

"If an affidavit mentions another person, then that other person has to swear an affidavit. However, I would add that

that is so where the information of that other person is material evidence because, without the other affidavit, it would be hearsay. Where the information is unnecessary, as is the case here, or where it can be expunged, then there is no need to have the other affidavit or affidavits."

The same position was taken in **NBC Ltd V. Superdoll Trailer Manufacturing Co. Ltd.** Civil Application No. 13 of 2002, (Supra) the Court of Appeal held that:-

An affidavit that mentions another person is hearsay unless that other person swears as Well. One Mr. Mkongwa, advocate, asserted that he commenced and prosecuted this suit on the instructions of Dr. Nkini who in turn had been authorized or instructed by NBC (1997) Ltd to commence the proceedings.....Dr. Nkini however, did not file an affidavit in reply to confirm the averment by Mr. Mkongwa. Therefore, Mr. Mkongwa's averment was dearly hearsay, and it could not be relied on as proof of the assertion that the proceedings and this judgment were given, with the knowledge of the applicant Bank'''.

I as well do not find merit in this point.

The last ground is the delay by the court in supplying the applicant with the necessary documents despite timely requests and reminders. The decision of this court was delivered way back on 29th May 2013. The affidavit reveals that the letter requesting copies of the judgment and decree was written on 3rd June 2013 just three days after the decision, but copies were supplied to the applicant on 11th May 2022, almost nine

years after the delivery of the impugned decision. I have perused the application, though the copy of the judgment attached to the affidavit was ready, and the decree was extracted on 17th December 2014, the certification was done on 11/5/2022 the date on which the applicant received her copy from the court. I do not find anything on the records to query the days up to the time the applicant received the certified copies of the judgment and therefore the days between 29th May 2013 to 11th May 2022 are excusable.

And according to paragraphs 14 to 17 of the affidavit, having obtained the said copies, the applicant reported back to her lawyer who was not forthcoming. She engaged another lawyer, Brotherhood Attorneys. And spent three weeks studying the matter, preparing, and filing this application in court on 10/8/2022. Having no antithetical evidence given against the depositions in paragraphs 14 to 17 of the applicant's affidavit, this court is convinced that the applicant has managed to account for the period of the delay from when she first applied for the copies of the decision to the date of filling this application in court.

The application is for that reason allowed. The applicant is given thirty (30) days from the date of this ruling within which to file the intended appeal. No order as to costs.

Order accordingly

Dated at Dar es Salaam this 28th day of APRIL 2023



E.Y. MKWIZU
JUDGE
28/4/2023