

**IN THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**HIGH COURT OF TANZANIA**

**MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**MISCELLANEOUS CIVIL APPLICATION NO. 11 OF 2023**

*(C/F Land Case No. 03 of 200, High Court of Tanzania (Land Division) at  
Moshi)*

**BERTHA URASSA.....APPLICANT**

**VERSUS**

<b>1. GUINNESS KISANGA</b>	}	<b>.....RESPONDENTS</b>
<b>2. FRANK STEPHEN MSHANA</b> (As personal representative of the late Betty Lyamuya)		
<b>3. ROGATHE KISANGA</b>		
<b>4. ABSALUM BENJAMEN</b>		
<b>5. ANSELA SHIRIMA</b>		

**RULING**

Date of Last Order: 31.08.2023  
Date of Ruling : 06.10.2023

**MONGELLA, J.**

The applicant herein has filed this application under **Section 11(1) of the Appellate Jurisdiction Act** [Cap 141 RE 2019] seeking for this court to grant her extension of time to file her notice of intention to appeal against the decision of this court in Land Case No. 3 of 2005. She supported her affidavit with her sworn application.

In her sworn affidavit, the applicant advanced several reasons to move this court to grant her the extension of time sought. First, she pleaded technical delay whereby she averred that upon the Ruling in Land Case No. 3 of 2005 being delivered on 17.04. 2013, she filed her notice of appeal on 25.04.2013 and requested to be availed with copies of decree, Ruling and proceedings of the court so she could process her appeal before the Court of Appeal. She was supplied with proceedings on 05.08.2014 thereby having to file an application for extension of time to file leave to appeal. She filed the application vide Civil Application No. 08 of 2014 in the Court of Appeal, but the same was struck out on 06.07.2015. She thereafter, filed Misc. Application No. 52 of 2015 in the High Court seeking extension of time to lodge an application for leave to appeal to the Court of appeal and later filed Civil Application No. 07/05 of 2016 before the Court of Appeal seeking again for leave to appeal to the Court of Appeal. The one filed in the High Court was dismissed and the one filed in the Court of Appeal was struck out. However, she did not mention the dates both applications were dismissed/struck out.

In 2020, the applicant filed an application before the Court of Appeal seeking extension of time to file leave to appeal to the Court of Appeal. The same was filed vide Civil Application No. 513/02 of 2020. However, the application was withdrawn on her request in consideration of the fact that leave to appeal was not a requirement of the law under **Section 47 of the Land Disputes Court**

**Act** [Cap 216 R.E. 2019]. She has now filed this application seeking extension of time to file notice of appeal to the Court of Appeal.

The applicant further advanced the reason of sickness. She averred that due to illness, mainly cardiac problems and diabetes, her medical condition limited her ability to follow up on the proceedings closely. That, she was often admitted in hospital and required to attend clinics from time to time.

The respondents, vide counter affidavit duly filed by the 1<sup>st</sup> respondent who was duly authorized to swear on behalf of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents vehemently disputed the application. He averred that the applicant was never diligent as the necessary documents were readily available for collection since 24.04.2013 and not 05.08.2014 as claimed by the applicant. He disputed the applicant's claim that she was seriously sick contending that the applicant has been negligent in pursuing her appeal for over 10 years.

By order of the court, the parties filed written submissions in arguing the application. The same were drafted by their advocates whereby the submission by the applicant was filed by Ms. Grace Daffa and the one by the respondents by Mr. Martin Kilasara.

Prior to submitting in chief, Ms. Daffa averred that the respondent's affidavit was defective as the same was only signed and verified by the 1<sup>st</sup> respondent instead of all respondents. She considered the

defect contrary to the dictates of the law thereby supporting her argument with the case of **Haidar Thabit Kombo and Ten Others vs. Abbas Khatib Haji and two others**, Civil Application No. 2 of 2006 and that of **NBC Holding Cooperation and Another vs. Agricultural and Industrial Lubricants Supplies Limited and Two Others** Civil Application No. 42 of 2000 (both unreported).

With regard to the application, she averred that the grant of extension of time is in the discretion of the court, but the same should be exercised judicially after the applicant has given sufficient reasons to warrant the court to do so. Explaining what amounts to good cause, she contended that the same is not defined, but depends on peculiar circumstances of the case concerned. She cited the case of **Alliance Insurance Corporation vs. Arusha Art Limited**, Civil Application No. 512/2 of 2016 to support her stance.

On the reasons advanced for the delay, she considered the reasons advanced by the applicant sufficient to warrant this court to reasonably exercise its judicial discretion of extending the time. Cementing on what is averred in the applicant's affidavit, she submitted that the applicant was in court corridors on cases related to the dispute between the parties, such as, Misc. Application No. 8 of 2014, Misc. Application No. 52 of 2015, Misc. Application No. 7/05 of 2016 and Misc. Application No. 513/02 of 2020, which amount to technical delay. Further that, the applicant had been

relatively ill with cardiac issues and diabetes and that her sickness hindered her from taking action on time.

Arguing further on technical delay, Ms. Daffa averred that the applicant tried to pursue her rights in good faith, hence her time to lodge notice of appeal expired in the meantime. She called upon the court to draw a distinction between an actual delay and technical delay arguing that a technical delay of the applicant constitutes sufficient reason for extension of time. She fortified her averment with the case of **Vodacom Tanzania Public Co. T. Ltd vs. Commissioner General TRA** (Civil Application 465 of 2019) [2020] TZCA 64 TANZLII whereby the Court cited the case of **Fortunatus Masha vs. William Shija and Another**, [1997] T.L.R 154. She also cited the case of **Emmanuel Rurihafi & Another vs. Janas Mrema** (Civil Appeal 314 of 2019) [2021] TZCA 332 TANZLII; and **Bharya Engineering & Contracting Co. Ltd vs. Hamoud Ahmed Nassor** (Civil Application 342 of 2017) [2018] TZCA 339 TANZLII.

On the reason of sickness, Ms. Daffa averred that the applicant was sick and is still sick to date as evidenced in the annexures to her affidavit. That, she is suffering from heart disease and diabetes which are deadly diseases and that she attends clinic every now and then. She added that sickness is a good ground for extension of time and it is only the applicant who has experienced the sickness. She supported her stance with the case of **Emmanuel R. Maira vs. The District Executive Director Bunda District Council** (Civil Application 66 of 2010) [2010] TZCA 87 TANZLII and **Murtaza**

**Mohamed Raza Virani & Another vs. Mehboob Hassanali Versi** (Civil Application No. 448 of 2020) [2023] TZCA 6 TANZLII in which the case of **John David Kashekya vs. The Attorney General**, Civil Application No. 1 of 2012 (unreported) was referred to. She thus prayed for this court to judiciously exercise its discretion and grant the applicant enlargement of time so that she can file notice of appeal to the Court of Appeal out of time.

In reply, Mr. Kilasara averred that despite the fact that grant of extension of time is within the discretion of the court there has to be good cause. He said that, unlike in the case of **Alliance Insurance Corporation** (supra), preconditions of granting extension of time have been well articulated in **Lyamuya Construction Co. Ltd vs. Board of Registered of Young Women's Christian Association of Tanzania** (Civil Application 2 of 2010) [2011] TZCA 4 TANZLII. That, in the said case, the factors for weighing “good cause” are listed to include: that the applicant must account for all period of delay; delay should not be inordinate; the applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action he intends to take; if the court feels that there are other reasons, such as, existence of a point of law of sufficient importance such as illegality of decision sought to be challenged.

Mr. Kilasara averred further that the two reasons for extension of time advanced by Ms. Daffa are frivolous, grossly misconceived and without any substance. He averred that the notice of appeal ought to be filed within 30 days from the date of delivery of the

impugned decision in accordance with Rule 83 (1) and (2) of the Tanzania Court of Appeal Rules, 2009 as amended by GN 344 of 2019. He added that there are no prerequisite conditions that the aggrieved party should first obtain the copy of impugned decision and or attached the same when filing the notice. Further, that in terms of Rule 46 (1) of the Court of Appeal Rules, Notice of Appeal has to be lodged within the prescribed time prior to applying for leave to appeal, which was formerly a precondition under **section 47 of the Land Disputes Courts Act**. Further that, the impugned decision was delivered in the presence of both parties on 17.04.2013 and the respondents applied for copies thereof on the same day and they were duly supplied the copies on 19.03.2013, which means they had been available since 19.03.2014 and not 05.08.2014 as averred by the applicant.

In the circumstances, it was his contention that the applicant was never diligent or at all prompt enough to make follow up and pursue her claim. Counting the time, he said that ten years have lapsed from the date of the impugned ruling rendering the delay inordinate.

Mr. Kilasara further challenged the applications allegedly prosecuted by the applicant. He averred that the same were incurably defective and incompetent before respective courts and were on leave to appeal to the Court of Appeal or rather revision. That, none was on filing of the notice to appeal. He thus opposed the purported allegation of there being a technical delay. He

distinguished the case of **Emmanuel Rurihafi** (supra) on the ground that it was inapplicable in the circumstances of this case.

On the ground of sickness, Mr. Kilasara averred that none of the medical reports attached to the applicant's affidavit show that the applicant was seriously sick, admitted in hospital and or bedridden from 17.03.2013 when the impugned decision was delivered. He added that the only report availed on the affidavit was the echocardiogram report from Muhimbili Hospital dated 24.07.2014 and the doctor's assessment was that the applicant's health condition was moderate and not extreme as the applicant insinuates. That, the report was also issued 455 days, that is, one year and three months from the date the impugned Ruling was delivered.

He argued further that the cardio graphic finding from TMJ hospital dates 28.11.2014. That, there is also a medical report dated 20.07.2015 a year later which says that the applicant's health was not that stable in 2013 April, but the report did not state if the applicant was ever hospitalized or admitted and for how long or if the said condition rendered her temporarily incapacitated to act and or travel as she had alleged. Further, he referred to the electrophysiology study dated 13.02.2023 arguing that the same shows that she had back pain, but the said report was however not signed by the alleged doctor. He added that another report dated 30.03.2023 shows she has normal somatosensory which means she was not seriously ill as alleged.



Arguing further, he averred that the medical report dated 20.07.2015 does not correspond with the applicant's Hospital Card No. 088. Explaining further, he said that the card shows that the last time the applicant attended diabetic clinic was on 20.05.2009, four years before the Ruling was delivered. He referred to another document titled 'Prescription' dated 29.06.2014 saying that it was not signed by the alleged Dr. Mohamed and a sheet for prescription can hardly qualify as a medical report.

Mr. Kilasara further averred that even if it is assumed that the applicant was seriously sick, it is questionable as to how she was able to file the series of the applications since April 2013. He contended that the medical reports are frivolous and seeking to justify the relief sought, but they do not correlate and or reflect the correct facts or turn of events. That, the applicant clearly slept on her right and did not act diligently and with reasonable promptitude. He was of view that as held in **Zilaje vs. Feubora** [1972] HCD 3, this court should not interfere to give remedy to a party who sat on his rights or did not act with reasonable promptitude. He insisted that the period of ten years was unnecessarily wasted and cannot be excluded from the period of limitation. He maintained his stance that the delay was inordinate and the applicant should be condemned for being indolent.

He further averred that knowing her medical condition, the applicant could have granted a power of attorney to her relative or friend to prosecute the case on her behalf. That, it was due to

lack of diligence that she never opted for such option and she cannot at this time purport to invoke the discretionary powers of the court to grant the prayer sought. He averred that both, the case of **Emmanuel Maira** (supra) and **Murtaza Mohamed Raza Virani** (supra) are distinguishable and inapplicable in the matter at hand.

Mr. Kilasara added that the applicant did not account for each day of delay from 17.04.2013 when the Ruling was delivered to 25.04.2013 when she applied for necessary copies and thereafter until 05.08.2014 when the copies were allegedly supplied to her. That, this court cannot properly compute the period of limitation and or extent of the delay so as at to exclude the time wasted. In that respect, he found the application bad in law, grossly misconceived and devoid of merits. He concluded by referring the case of **Ibrahim Twahil Kusundwa & Another vs. Epimaki S. Mkoï & Another** (Civil Application 437 of 2022) [2022] TZCA 625 TANZLII and prayed for the application to be dismissed with costs for being devoid of merit.

After considering the submissions of both parties, I shall start deliberating on the legal issue advanced by Ms. Daffa whereby she challenged the counter affidavit by the 1<sup>st</sup> respondent for being defective. The base of her challenge is that the 1<sup>st</sup> respondent solely swore and signed the counter affidavit while it was a joint counter affidavit.

I have observed the counter affidavit and it appears that indeed the 1<sup>st</sup> respondent singly signed the joint counter affidavit. However, under paragraph 2 of the counter affidavit, it is indicated that the 1<sup>st</sup> respondent was duly authorized by the respondents to swear the same on their behalf. It is settled law that one party can swear on behalf of others, but must indicate so in the affidavit. Discussing this position, the Court of Appeal stated in **Mohamed Abdillah Nur & Others vs. Hamad Masauni & Others** (Civil Application 436 of 2022) [2022] TZCA 546 TANZLII, that:

“We must quickly observe that, a **person purporting to swear an affidavit on behalf of another person who is a party to a court proceeding must do so after consultation with and obtaining instructions from the party on whose behalf the affidavit is being sworn. We also hasten here to emphasize that, such instructions and authorisation must be expressly reflected in the relevant affidavit.** Otherwise, nothing must be presumed to the advantage of a party who fails or neglects to file pleadings or affidavits which are of the essence of the matter before a court of law.”

In consideration of the above holding and the fact that the 1<sup>st</sup> respondent, under paragraph 2 of the counter affidavit deponed to be swearing on behalf of the rest of the respondents, Ms. Daffa's contention is found to lack merit and is overruled.

With respect to the main application, Ms. Daffa averred that the applicant was diligent in pursuing multiple applications after the Ruling in Land Case No. 03 of 2005 was delivered on 17.04.2023 and was then hindered by illness which made it difficult to pursue her rights. Mr. Kilasara, on the other hand, was of view that the applicant was not diligent and thus does not qualify for extension of time as the reasons of technical delay and sickness she advanced had not been substantiated.

It is well settled that the grant of extension of time is within the discretion of the court where the applicant discloses a good and sufficient cause for the delay. There are however several factors that need to be considered in exercising such discretion. These include; reason for and length of the delay, explanation accounting for such delay and in appropriate cases, existence of a point of law or illegality of sufficient public importance in the impugned decision.

Such reasons have been well discussed by the Court of Appeal in its several decisions including: **Elias Kahimba Tibenderana vs. Inspector General of Police & Another** (Civil Application No. 388 of 2020) [2022] TZCA 497 TANZLII; **Emmanuel Rurihafi & Another vs. Janas Mrema** (supra); **Bharya Engineering & Contracting Co. Ltd vs. Hamoud Ahmed Nassor** (supra) and; **Lyamuya Construction Co. Ltd vs. Board of Registered of Young Women's Christian Association of Tanzania** (Supra).

On the first reason, the applicant alleged that the delay was partly technical in that she was at that time pursuing other applications before this court and the Court of Appeal to wit; Misc. Land Case Application No. 52 of 2015 in this court determined on 12.07.2016; Civil Application No. 08 of 2014 before the Court of Appeal determined on 13.07.2015; Civil Application No.7/05 of 2016 before the Court of Appeal determined on 05.03.2018 and; Civil Application No. 513/02 of 2020 before the Court of Appeal withdrawn on 21.02.2023.

Given that there are no details as to when the respective cases were filed, if I were to roughly estimate that the applicant had been actively seeking her rights from 25.04.2014 when she was served with necessary copies of the Ruling in Land Case No. 03 of 2005 and subsequently filed applications before the High Court and the Court of Appeal to filing of Civil Application No.7/05 of 2016 before the Court of Appeal which was determined on 05.03.2018; the period in between the filing of the applications up to 05.03.2018 shows that the applicant had been diligently pursuing her rights from 2014 to 2018. This amounts to technical delay.

The Court of Appeal in the case of **Bank M (Tanzania) Limited vs. Enock Mwakyusa**, (Civil Application No. 520/18 of 2017) [2018] TZCA 291 TANZLII in which citing with approval the decision in **Salvant K. A. Rwegasira vs. China Henan International Group Co. Ltd**, Civil Reference No. 18 of 2006 in which the full bench of the Court

subscribed to the decision of the Court in **Fortunatus Masha vs. William Shija and Another** (Supra) held:

“A distinction has to be drawn between cases involving real or actual delays and those, such as the present one in 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 pronouncement of the Ruling of the Court striking out the first appeal. In these circumstances an extension of time ought to be granted.”

I am however, of view that the technical delay does not apply from 05.03.2018 to the date Civil Application No. 513/02 of 2020 before the Court of Appeal was filed. It also does not apply in the period covering the application that was withdrawn on 21.03.2023 as the same was not filed within time.

The applicant further alleged that she was unable to actively seek her rights due to illness. Illness serves as good cause for granting extension of time. See: **Nyanza Roads Works Limited vs. Giovanni Guidon** (Civil Appeal 75 of 2020) [2021] TZCA 396 TANZLII; **Murtaza Mohamed Raza Virani & Another vs. Mehboob Hassanali Versi** (supra) and **Melchiad Peter Kimaro & Another vs. Riziki Samuel** (Civil Application No. 257/05 of 2023) [2023] TZCA 17691 TANZLII.

In observing the applicant's annexed medical reports, I note that on 24.07.2014 she had an echocardiogram examination at Muhimbili Hospital- Cardiovascular Centre. On 28.11.2014, the applicant was diagnosed with hypertensive heart disease by TMJ hospital Ltd. On 20.07.2015, there was a report issued by the Medical Officer in charge of Mwananyamala Referral Hospital one, Dr. Zuberi Mzige, which stated that the applicant had been attending the Diabetic Clinic for treatment since 2002 and that she had hypertension heart disease. There is also a medical report issued on 13.06.2016 which shows a series of tests conducted at Regency Medical Centre Ltd.

There is also an unclear prescription issued on 29.06.2014 that describes that the applicant had been attending treatment at Kinondoni hospital due to hypertension, diabetes and dilated Cardiopathy since 14.06.2014. Another unclear medical report is a (blood sugar) analysis report card issued on 03.12.2014 which belonged to one Yasinta A. Shayo. These reports are found to be doubtful due to the time which collides with the period the applicant supposedly attended treatment in Muhimbili and TMJ hospitals. I shall therefore not consider them.

The initial reports show that the applicant had attended several hospitals between 2014 and 2016 for diabetes and cardiovascular disease. As reasoned by Mr. Kilasara there is however no any sort of documentation signaling that the applicant was either admitted or that her state was such that she was incapable of performing

certain tasks including perhaps, traveling to prosecute her case. However, the dates she claims to have fallen sick are to be excluded in the range of days she was under technical delay.

Further, even assuming that Civil Application No. 513/02 of 2020 was filed before the Court of Appeal in early days of 2020 there are still more than 600 days which cannot be accounted for under technical delay or in the aspect of illness as no medical report has been submitted covering the period from 2018 to 2020. There are also 57 days between 21.02.2023 whereby she withdrew Civil Application No. 513/02 of 2020 before the Court of Appeal and 20.04.2023 when she filed this application. There is a medical report issued by Muhimbili National Hospital on 30.03.2023 showing her results for Somatosensory evoked potentials.

There is also a medical imaging request form by Regency Medical Centre made on 10.02.2023 in which it is indicated below that there would be a 10:00 am test on 23.03.2023 although no signature is appended therein. If the three dates are excluded, there still remains 54 days that unaccounted for. In addition, there is no evidence that the applicant was at any time bedridden nor are there any sufficient details on the nature and extent of her illness to prove that she was unable to act on her rights. It is settled position that without sufficient evidence connected to the delayed days, illness cannot stand as sufficient reason for delay. See: **Shembilu Shefaya vs Omary Ally** [1992] TLR 245.



Further, while the applicant claims she was hindered by sickness from pursuing her rights, it is still questionable as to how she was able to actively prosecute several applications from 2013 to 2018 in which, from the medical reports presented, it is seen she was ill. It is well settled that for sickness to be used as sufficient cause for extension of time it must be a sole reason for the applicant's delay. This was well expounded in **Nyanza Roads Works Limited vs. Giovanni Guidon** (supra) whereby it was stated;

“While there is no dispute on the respondent's heart complications which would ordinarily constitute good cause, **the respondent did not satisfy the CMA that the delay was solely due to sickness.**”

I am thus of the considered view that the applicant's delay has been inordinate and she was not solely hindered by illness from pursuing her rights. The applicant has displayed negligence in exercising her rights. She has slept on her rights, hence the reason she has failed to account for each day of the delay as required. As such, I dismiss the application, with costs.

Dated and delivered at Moshi on this 06<sup>th</sup> day of October 2023.



X

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L. M. MONGELLA  
JUDGE  
Signed by: L. M. MONGELLA