

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
ARUSHA SUB-REGISTRY
AT ARUSHA**

MISC. CIVIL APPLICATION NO. 3 OF 2023

(C/F High Court of Tanzania at Arusha (PC) Civil Appeal No. 54 of 2005; Arusha District Court at Arusha Civil Appeal No. 29 of 2009; Original Enaboishu Primary Court Civil Case No. 255 of 2001)

**OMARY ENDESHI MLAVI (Legal Representative
of Endeshi Laton – deceased)APPLICANT**

VERSUS

**FRANK LUCAS (Legal representative
of the late NAISIEKU LUKAS..... RESPONDENT**

RULING

6/02/2024 and 5/03/2024

NDUMBARO, J

The matter before this court is an application for an extension of time to file notice of appeal to the Court of Appeal of Tanzania brought through Chamber Summons supported with an affidavit duly sworn by the applicant. The application is brought under the provision of section 11 (1) of Appellate Jurisdiction Act Cap 141 RE 2019, seeking the following reliefs;

- i) Extension of the time within which to file a notice of appeal against the decision in Civil Appeal No. 54 of 2005 delivered on 21st April 2009 by Honourable Madam Justice Sheikh

- ii) cost of this application be in the course
- iii) Any other relief that this court may deem fit to grant

During the hearing of the application, the applicant enjoyed legal service of Beatrice Mboya Advocate and the respondent was presented by Advocate Ezra Mwaluko.

Submitting in support of the application, Ms. Beatrice argued that section 11(1) of the Appellate Jurisdiction Act Cap 141 gives this court jurisdiction to extend time to file notice to appeal before the Court of Appeal of Tanzania. She went further to state that even though no standards are set to be considered by the court on the grant of extension of time, but the applicant is required to show good cause for the delay. She supported her contention with the case of **Kalinga and Company Advocates vs National Bank of Commerce Ltd** 2006 TLR 235.

The applicant in this case, presented good cause for delay in paragraphs 8,9, 10, 11 and 12 of his affidavit that, he made a follow-up for the copy of the decree and proceedings of the trial court but he was never informed that the said copy was ready for collection. On 11/4/2009 he received an application for striking out the notice of appeal which he had initially filed.

The respondent herein was the one who moved the Court of Appeal of Tanzania to strike out the said notice. Subsequently, on 30th December 2022, the applicant received the copy of the ruling and order striking out his notice of appeal to the Court of Appeal. It is the further allegation of the applicant that at the time the Court of Appeal of Tanzania was hearing the application to strike out his notice, it was unfortunate that he was not issued with the summons as the same was served to an advocate who was not in conduct of his case at the particular time. The above having transpired, the applicant sought for legal advice, and hence the present application.

The applicant counsel also submitted that there is illegality in the high court decision in Civil Appeal No. 54/2005 which needs to be determined by the Court of Appeal. More so, the applicant stated that there is a need to determine whether the respondent was the mere licensee and whether adverse possession could be invoked where the occupier of the disputed land is the licensee.

In reply, Mr Mwaluko argued that, the reasons argued by the applicant were not sufficient to warrant a grant of extension of time, as the case was decided since 23/09/2009. The letter requesting necessary documents

(judgment, decree and proceedings) was not properly received by the court, as it was not stamped. In support of his argument, he cited the case of **Bharani Vs Muntazir Mohamed Raza Devendra and Shani Patel**, civil Application No. 2/02/ of 2016 (Unreported), whereby the matter was withdrawn because the respondent was not served with a letter. He further argued that if the Court of Appeal withdrew a matter because no letter was served to the respondent, how about if the court document is not stamped, according to him it is considered as if it was not filed before the court.

Further argued, the applicant herein is barred from filing this application for extension of time. Therefore, the intended appeal is useless time-bared. The application could be of value only if the document was stamped. Therefore, he prayed this application be rejected.

In rejoinder, Ms Beatrice argued that, there is illegality in the high court decision which needs to be determined by the Court of Appeal as it was stated in the case of **James Antony Ifadi (supra)**, she thus prayed for this honourable court to grant an extension.

Having gone through the application and the rival submissions of the parties' counsel, next for consideration by this court is whether the applicant

has advanced sufficient reasons to warrant this court to grant extension of time as sought.

As a matter of general principle that whether to grant or refuse an application for extension of time is entirely in the discretion of the Court. But that discretion is judicial and so it must be exercised according to the rules of reason and justice and the overriding consideration is that there must be sufficient cause for doing so. **See Yusuph Same & Another vs. Hadija Yusuph**, Civil Appeal No. 1 of 2002 (Unreported).

Applications of this nature are also decided depending on the circumstances of each case as there are no hard or fast rules on what amounts to sufficient cause. However, from a number of decided cases a number of factors have to be taken into consideration including whether or not the application has been brought promptly, length of the delay, degree of prejudice to the respondent and the legality of the decision intended to be challenged. In the case of **Mbogo Vs. Shah** [1968] EA the defunct Court of Appeal for Eastern Africa held thus: -

"All relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reason

for the delay, whether there is an arguable case on the appeal and the degree of prejudice to the defendant if time is extended."

With respect to the above guiding principles, I am of the considered view that in the instance case the delay is a technical one and not an ordinary delay where the original notice of appeal was filed within time. Reference is made to the case of **Fortunatus Masha v. William Shija & another**, [1997] TLR 154 where a distinction was made between actual delays and technical delays. The records show that the applicant had initially filed his notice of appeal to the Court of Appeal of Tanzania within time, never the less on 5th December 2022 the notice of appeal was strike out by the Court of Appeal of Tanzania on failure of the applicant to take essential steps.

As stated above, applications of this nature are decided depending on the circumstances of each case suffice to say that, each case is decided according to its own set of facts. Following the bestowed powers of this Court in granting extension of time I am of the considered view that the applicant has shown good cause to that effect. I have also considered the time spent by the applicant from when the notice of appeal was strike out to the time of filing of this application and I am persuaded that the applicant acted diligently and expeditiously in filing this application. It is also my observation

that the respondent will not be prejudiced if this application is granted than the applicant if the grant is withheld.

Accordingly, I grant the application and order that the applicant to file his notice to appeal to the Court of Appeal of Tanzania within 21 days from the date of delivery of this ruling. Each party to bear his/her own costs.

It is so ordered

DATED at ARUSHA This 5th day of March 2024




D. D. N DUMBARO

JUDGE