

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOROGORO SUB-REGISTRY

[AT MOROGORO]

MISC. LAND APPLICATION NO. 43 OF 2023

(Originating from Land Appeal No. 46 of 2018)

HAMISI ALLY KWEMBE APPLICANT

VERSUS

SIAMINI MARKUS KOMBA..... 1ST RESPONDENT

MOROGORO MUNICIPAL COUNCIL..... 2ND RESPONDENT

ATTORNEY GENERAL..... 3RD RESPONDENT

RULING

29/02/2024 & 25/03/2024

KINYAKA, J.:

The present application traces its origin from the decision of the High Court of Tanzania, Land Division at Dar es Salaam in Land Appeal No. 46 of 2018 dated 20th March 2019. In that appeal, the applicant sought to challenge the decision of the District Land and Housing Tribunal for Morogoro (hereinafter, the "Tribunal") in Land Application No. 140 of 2015 that was decided in the favour of the respondents.

Aggrieved, the applicant unsuccessfully preferred Misc. Application No. 32 of 2022 for restoration of the land appeal, which was withdrawn with leave to refile after the applicant joined the 3rd respondent herein. After complying

with the said legal requirement, the applicant still being adamant to seek the court's indulgence to set aside the impugned dismissal order, lodged Misc Application No. 6 of 2023. However, the application was also withdrawn for being misconceived as the same ought to have been predicated under Order XXXIX Rule 9 of the Civil Procedure Code, Cap. 33 R.E. 2019 (hereinafter, the "CPC") providing for re-admission of appeal dismissed for want of prosecution.

Upon realizing that he failed to apply for the re-admission of the appeal within the prescribed period under the law, the applicant knocked the doors of this court through the present application beseeching the court to grant him an extension of time to file an application for re-admission of the impugned appeal.

The application has been taken under the provision of section 14(1) of the Law of Limitation Act, Cap. 89 R.E 2019 (hereinafter, the "LLA") accompanied by the affidavit duly affirmed by Hamis Ally Kwembe, the applicant herein.


On the date of hearing of the application, the applicant had the legal services of Ms. Levina Mtweve, learned counsel. The 2nd and 3rd respondents were represented by Mr. Nzumbe Eliackim Machunda learned State Attorney,



whereas the 1st respondent didn't enter appearance despite being served with both ordinary court summons and through substituted service. The matter proceeded *ex parte* as against the 1st respondent.

In expounding the reasons for the delay, Ms. Levina referred this court to the medical report dated 12th April 2022 annexed in support of the instant application, and submitted that the applicant was suffering from serious illness and had developed Stroke from February 2019 until April 2022 hence his delay was not due to negligence. She relied on the case of **Alasai Josiah (Suing by His Attorney Oscar Sawuka) v. Lotus Valley Ltd, Civil Application No. 498/12 of 2019** (unreported) to support her assertion.

Insisting on the grant of the application, the learned counsel cited the cases of **Secretary, Ministry of Defense and National Service v. Devram Valambia (1992) TLR 182** and that of **Power and Network Backup LTD v. Olafsson Sequeira, Civil Application No 307/18 of 2021** (unreported) and submitted further that, the intended appeal seeks to challenge the decision of the Tribunal in Land Application No 140/2015 which according to her, the same is tainted with illegalities to wit, *res judicata* due to the fact that there was another case on the same plot which was determined to its finality.



Relying on the authorities cited above, Ms. Mtweve pressed that the intended appeal aims not only to bring justice on the applicant's part but also to correct the court's record regarding the decision of the Tribunal in Land Application No 140/2015. She substantiated that, if the applicant's intended appeal won't be readmitted, he is likely to suffer irreparable loss due to the fact that the damage he suffered from the 1st respondent's actions was severe and too much to handle, whereas on the other hand, in her views, the respondents herein shall not suffer any loss if the prayers sought herein are granted.

In conclusion, the learned counsel beseeched this Court to grant the applicant's prayers in the chamber summons considering that the applicant was desirous and eager to fight for his rights but unfortunately, the illness he suffered was out of his control amounting to his delay in filing the application for readmission of the dismissed appeal.

Opposing the application, the learned state attorney referred the Court to the cases of **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010 CAT** (unreported) on page 8, and **Hassan Bushiri v. Latifa Lukio Mashayo, Civil Application No. 3**



of 2007 CAT (unreported) and contended that the applicant had a duty to count each day of delay and not making general explanation that he was sick without specifying dates and reasons thereof.

He said, the applicant's medical report covers the period from 16th February 2019 to April 2022 but surprisingly he was present in Court on 20th March 2019 when the dismissal order was given by the Court hence leaving a lot of doubt as to when exactly the applicant herein became incapacitated due to sickness. He stated further that, from the said medical report, it is clear that the applicant had gotten some relief at a certain point, therefore it was expected that he could have taken some initiatives to handle his case within the prescribed time.

Demonstrating the applicant's negligence and sloppiness in the prosecution of his case, the learned counsel upon being fortified by the case of **Attorney General v. Tanzania Ports Authority and Another, Civil Application No. 87 of 2016 CAT** (unreported) and **Ramadhan J. Kihwani v. TAZARA, Civil Application No. 401/18 of 2018 CAT** (unreported) averred that, as the medical report shows that it was prepared and endorsed by the signature of Medical Officer In charge on 12th April 2022, the



applicant had to account for each day effectively from 13th April 2022 until when he filed the present application in Court.

While admitting that that sickness can be ground for extension of time, Mr. Machunda opined that the alleged sickness must be evident enough to show how it attributed to the applicant's delay to take legal action within time. He referred the court to what was held in case of **Masalu Kazinza v. Christina Boniphace (Administratrix of the Estate of the Late Boniphace Sanyenge) Misc. Civil Application No. 90 of 2021** that it is not enough for the applicant to prove that he was sick but also that his sickness happened at the time when he was required by law to take action in respect of the matter which he seeks extension of time. Fortified with the above authority, the learned state attorney asserted that the applicant herein had not shown how the alleged sickness avoided him to file this application for extension of time timely.

Illustrating further on the applicant's failure to account for each day of delay, Mr. Machunda said, the applicant failed to demonstrate as to when Civil Application No. 32 of 2022 for re-admission of Land Appeal No 46/2018 was filed and when the same was exactly withdrawn. He added that, the 90 days' notice to join the Attorney General in his application was issued on



24/08/2022 and the same was received on 29/08/2022, therefore the 90 days expired on 29/11/2022. However he said, the applicant waited until the year 2023 to institute Misc. Application No. 6 of 2023. According to him, the applicant ought to have accounted for the delay from 29/11/2022 until the time of instituting the application in 2023.

Mr. Machunda added further that, even after withdrawing Misc. Application No. 6 of 2023 on 28th March 2023, it took the applicant 85 days in to file the present application on 20th June 2023, the same being not accounted for. He faulted the applicant's excuse that he was waiting to be supplied with copies of proceedings of the application as according to him, there is no such statutory requirement which could bar the applicant from filing the present application. Nonetheless, Mr. Machunda contended that, the applicant had not demonstrated as to when the said copies were served upon him, as he was liable to account on each of the delayed day as per the holding in **Jehangir Aziz Abdulrasul and Others v. Balozi Ibrahim Abubakar and Another, Civil Application No 265/01 of 2016, CAT at Dar es Salaam** (unreported) and **Tanzania Coffee Board v. Rombo Millers Ltd, Civil Application No. 13 of 2015, CAT at Arusha** (unreported), where



in both cases it was emphasized that the applicant cannot hide under the umbrella of technical delay when he fails to count each day of delay.

Attacking the issue of illegality as a ground supporting the applicant's prayer for extension of extension of time, he argued that the same was not raised in the affidavit supporting the application, and that the same is misconceived and misplaced, specifically on the reasons that, the present application entail extension of time within which the applicant may file an application for re-admission of Land Appeal No. 46 of 2018 so as to continue with fresh hearing of the same and not a new case on challenging the decision of the Tribunal in Land Application 140/2015. He added that the applicant failed to establish the ingredients of the said *res-judicata* in Land Appeal No. 46 of 2018; and if at all there was illegality, the same ought to have been challenged in the dismissed Land Appeal No. 46 of 2018 and not at this stage where the applicant is seeking extension of time for re-admission of the appeal.

Buttressed by the case of **Omari Ibrahim v. Ndege Commercial Services Ltd, Civil Application No. 83/01 of 2020, CAT at Dar es Salaam (unreported)**, **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010 at CAT (unreported)**, and



Ngao Godwin Losero v. Julius Mwarab, Civil Application No. 10 Of 2015, CAT At Arusha, the learned counsel submitted that all the same, the determination of the said Illegality raised by the Applicant needs long drawn process and has failed to meet the test of sufficient importance, which is contrary to the settled position of law that illegality must be on face of record and need not long drawn process.

In winding up, based on the fact that nearly 5 years had passed after delivering of the impugned dismissal order, and that the demolition of applicant's structures as well as development of new structures have been made in the disputed area by the 1st respondent, Mr. Machunda reminded the Court of the cherished Judicial Policy that "*Litigations must come to an end*" and that litigants must enjoy the fruits of the judgement. The state counsel urged this Court to dismiss with costs the application for want of legal merit.

Rejoining, the applicant's counsel elaborated that, the intended appeal for re-admission was dismissed on the 20th March 2019 in the presence of the applicant but according to her, prior to the dismissal, the applicant was already feeling uneasy from 16th day of February 2019 and thereafter he was



on medications for a very long period until the 12th day of April 2022 with on and off admissions.

She explained that, soon after he was discharged and somehow recovered, the applicant managed to institute the Misc. Application No. 32 /2022 on 15th July 2022 which was withdrawn with leave to refile, so that the 3rd respondent would be added on 19/08/2022. She added that, four days later on 24th day of August 2022 the applicant managed to issue a 90 days' notice as required by law which was received on 29th August 2019 and expected to lapse on 29th November 2022.

Demonstrating the applicant's diligence, Ms. Mtweve told the Court that, regardless his poor health condition and the fact that it was the holiday season, the applicant successful managed to institute the Misc. Application No. 6 of 2023 on the 17th January 2023 which was withdrawn on the 28th March 2023.

On the delay of the applicant to file the present application, the learned counsel elucidated that provided that the Misc. Application No. 6/2023 was withdrawn by leave of the court, the applicant could not file a new application without attaching the copy of the said order which was later on procured on 29th May 2023.



She stated that on the 1st June 2023, the applicant unsuccessfully submitted his application online due to technical problems and that it was until on 20th June 2023 when he submitted another application which was admitted and received. All the same, Ms. Mtweve insisted that applicant's disease has been happening time to time and even in the meantime the applicant has not fully recovered though he is trying to fight tooth and nail for his rights even in his present condition.

As regards to what she termed as "correction of court records", the learned advocate said that the same does not need a long-drawn process and that it is on the face of record wherefore the intended re-admission of land appeal No. 46 of 2018 aims at challenging those illegalities. In the end, Ms. Mtweve pressed for the prayers sought by the applicant in the chamber summons be granted with costs.

I have carefully examined the chamber summons, the affidavit in support of the application as well as the written submissions by the parties. I agree with the learned counsels from both sides that, the issue calling for my determination is whether there is sufficient reason for extension of time to file an application for readmission of Land Appeal No. 46 of 2018.



Before delving into the merit of the application, I wish to restate the law governing applications of this nature that the grant of the same is entirely in the discretion of the Court. The discretion which is exercised judiciously according to the rules of reasoning and justice, upon the applicant showing sufficient cause for delay. [see **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania(Supra) on page 6**]

In the present application, Ms. Mtweve presented two reasons for his clients' delay, the same being sickness, and technical delays. I will start with the ground of sickness. From the pleadings and submissions of both parties, it is undisputed that the applicant as per medical report endorsed by Morogoro Referral Hospital dated 12th April 2022 has been sick suffering from severe blood pressure since 12th February 2019 and discharged on May 2019, and that according to the said letter, the applicant had since then experienced on and off admissions and that at the time the letter was endorsed, the applicant had developed stroke. For the proper determination of this ground, I have found it apt to reproduce an extract of the said letter as shown hereunder;

"..Ref.No.DC.122/175/01G/04 12th April, 2022
TO WHOM IT MAY CONCERN



REF: MEDICAL REPORT OF HAMIS ALLY KWEMBE 57 YEARS OLD MALE

Kindly consider the named above individual he is our client since on 16th February, 2019, where attended at our patient department, came with stremely severe headache, Palpitation and blurred vision. On examination patient was ill-looking, a febrile, not pale, not jaundiced, no oral thrush and Lymph nude were not enlarged, HIV tested Negative. Blood pressure was profound Higher. Worked Diagnosis was severe Blood pressure. Investigation done (X-ray result-Cardiomegaly, abdomen USS-normal finding ECG and ECHO were abnormal. Patient discharged on May 2019. Since then the patient had on and off admission. Meanwhile patient has developed STROKE (haemorrhagic). Has paralysis of Lf side of the body. No power to the Lt side he is on medication and physiotherapy, he can walk with difficulties and talk with poor speech.

Sgd

Dr. T.M Fimbo

**FOR MEDICAL OFFICER IN CHARGE
MOROGORO REGION REFERRAL HOSPITAL"**

From the above letter the main contentious issue between the rival sides was as to whether the said sickness precluded the applicant herein from taking the legal action he was required to take within the prescribed period of time.

As rightly submitted by the learned counsels, sickness amounts to a good cause for extension of time. However, I am alive to the fact that, the same must be accompanied by proof that indeed the applicant was sick at the time

he was supposed to take the legal action. On my part, from my scanning of the impugned letter it is apparent to me that, the medical report therein covered the sickness of the applicant from 16th February, 2019 when he was admitted at Morogoro Medical Hospital up to 12th April 2022 when the letter was endorsed. It follows that, through the above letter, the applicant was able to justify his delay of lodging before this court an application for re-admission of Land Appeal No. 46 of 2018 which ought to have preferred 30 days after the impugned order, that is, on or before 19th April 2019.

Admittedly, at the last paragraph of the letter it has been indicated that at that time the applicant had developed stroke and thus he was walking with difficulties with poor speech. In my view it cannot be said that, the said explanation was enough to cover the wellbeing of the applicant from 12th April 2022 to the 15th day of July 2022 when he lodged Misc Application No. 32 of 2022 which was withdrawn for being incompetent. Nothing has been indicated as to what transpired in between as far as the health of the applicant was concerned. This court was faced with much similar situation in **Masalu Kazinza Versus Christina Boniphace (Administratrix of the Estate of the Late BONIPHACE SANYENGE) Misc Civil Application No. 90 of 2021** where the applicant failed to bring any evidence to prove



his sickness at the time prescribed for appeal. Under the circumstance the court held;

"This Court is aware that sickness is a good ground for extension of time however, it has to be proved by evidence establishing not only that the Applicant was sick but also that his sickness happened at a time when he is required by law to take action in respect of the matter which he seeks extension of time for. That said, I find this ground to be wanting in terms of evidence and therefore lacks merit."

Similarly in my view, in the present application, the applicant ought to have presented the recent medical reports showing his health status at the time of filing Misc. Application No. 32 of 2022. It follows that the omission to furnish the court with the same amount to his failure to account for each day of delay as the law demands. In **Elias Mwakalinga vs Domina Kagaruki & Others, Civil Application 120 of 2018** (unreported) on page 10, the Court of Appeal of Tanzania emphasized on the requirement of accounting for each day of delay upon fortified by the case of **Bushiri Hassan vs. Latifa Lukio Mashayo Civil Application No.3 of 200 (Unreported)** where it was observed;

5

"a delay of even a single day has to be accounted for otherwise there should be no point of having rules prescribing periods within which certain steps have to be taken."

From the above authority, it is my firm conclusion that the applicant herein has failed to account for the delayed days from 12th April 2022 when his medical report was endorsed to 15th day of July 2022 when he lodged Misc. Application No. 32 of 2022.

As for the period from when the Misc. Application No. 32 of 2022 was withdrawn, up to the time Misc. Application No. 6 of 2023 was filed and withdrawn, to the filing of the present application, it was Ms. Mtwewe's justification that the delay was not caused by the applicant's negligence but rather reason beyond his control. While I agree that the two applications that were withdrawn could have been a sufficient reason for the delay in filing the proper application before the court, as held in the cases of **Fortunatus Masha v. William Shija and Another [1997] TLR 154** and **Eliakim Swai and Another v. Thobias Karawa Shoo, Civil Application No. 2 of 2016 (unreported)**, again it was the duty of the applicant to account for each day for delay from the day when one application was withdrawn and re-filled, up to the filing of the present application. This is for



a reason that the incompetent filed applications were not at first lodged within the prescribed time of limitation.

In the present application as long as the first application for re-admission of the present appeal vide Misc. Application No. 32 of 2022 filed on 15th July 2022 was brought before this Court out of time which was unaccounted for, I hold that the applicant cannot seek refuge in the withdrawal of the incompetent applications based on technical delay.

On the applicant's claim that he was delayed to be supplied with copies with the ruling in Misc. Application No. 6 of 2023 as a reason delaying the lodgement of the instant application, I won't allow myself delayed on that aspect. It has now been established that for a litigant to enjoy automatic exclusion under section 19(2) and (3) of the LLA, he has to provide proof of records of dates of critical events for the reckoning of the prescribed limitation of period. Amplifying the said section, the Court of Appeal had the following to say in the case of **Alex Senkoro & Others vs Eliambuya Lyimo, Criminal Appeal 16 of 2017** (unreported) on page 12;

"We need to stress what we stated in the above case that the exclusion is automatic as long as there is proof on the record of the dates of the critic events for the reckoning of the prescribed



limitation period. For the purpose of section 19 (2) and (3) of the LLA, these dates are the date of the impugned decision, the date on which a copy of the decree or judgment was requested and the date of the supply of the requested document."

Owing to the above authority, so long as the affidavit and the records are silent as to the date on which the copy of the said order in Misc. Application No. 6 of 2023 was requested but it is only stated in the applicant's rejoinder submissions that the same were supplied to him on 29th June 2023 without any proof to that effect, the applicant cannot enjoy the automatic exclusion. It follows that he was duty bound to account for the days from the date the said order was issued, to 1st June 2023 when he unsuccessfully attempted to file the instant application online but due to technical issues, the same was filed on 20th June 2023.

As for the ground of illegality and chances of success of the intended appeal, I will not determine the same as they were not deponed in the applicant's affidavit in the present application making them merely statements from the bar. **[see the case of Alliance One Tobacco Tanzania Ltd and Another v. Mwajuma Hamisi and Another Misc. Civil Application 803 of 2018 (unreported) on page 7]**. Nonetheless even if I was to determine the said



ground, I agree with Mr. Machunda that the same is misplaced. As a matter of law, the illegality complained of must be on the face of records of the order/judgment/ruling against which the prayer for extension of time is sought, which in this case is Land Appeal No. 46 of 2018. **[See the case of Ngao Godwin Losero vs Julius Mwarabu, Civil Application 10 of 2015 (Unreported) at page 7-8].**

On page 4 of the applicant's submission in chief, Ms. Mtwewe failed to point out the illegalities apparent on face of record in Land Appeal No. 46 of 2018. But she complained that Land Application No. 140 of 2015 was tainted with illegality to wit *res judicata* due to the fact that there was another case on the same plot that was determined to its finality and therefore at the trial tribunal, the 1st respondent herein ought to have lodged an appeal instead of instituting a new case, the Land Application No 140 of 2015. Be it as it may, in my scrutiny of the impugned dismissal order, I have noted nothing on the said order suggesting that there was illegality justifying the Court's exercise of its discretionary powers to enlarge time on the ground of illegality.

As for the ground of overwhelming chances of success, the same cannot be determined at this stage as the same will pre-empt the intended appeal. It



is now a settled law that chances of success can be meaningfully assessed in the intended appeal. [**See Tanzania Posts & Telecommunications Corporation v. M/s H. S. Henritta Supplies (1997) TLR 141** on page 144 cited with approval in the case of **Amon Mulotwa Mwalupindi v. The Director of Public Prosecutions, Criminal Application 09/06 of 2020 (unreported) on page 12**].

For the foregoing analysis, it is apparent that the applicant herein failed to justify this Court's discretion to grant an order for extension of time in his favour. In the event, the application lacks merit and I accordingly dismiss the same with no order as to costs.

It is so ordered.

DATED at **MOROGORO** this 25th day of March 2024.



H. A. KINYAKA

JUDGE

25/03/2024



Court:

Ruling delivered in this 25th day of March, 2024 in the presence of the Ms. Elifrida Mutashobya, State Attorney for the 2nd and 3rd Respondents, Ms. Levina Mtweve for the Applicant and in the absence of the 3rd Respondent.



S.P. Kihawa

DEPUTY REGISTRAR

25/03/2024



Court:

Right of the parties to appeal to the Court of Appeal of Tanzania fully explained.



S.P. Kihawa

DEPUTY REGISTRAR

25/03/2024

