

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISCELLANEOUS LAND APPLICATION NO. 279 OF 2019

*(Arising from the Judgement and Decree of the District Land and Housing Tribunal
for Kibaha at Kibaha in Land Application No. 18 of 2017)*

**HADIJA MWARABU.....1ST APPLICANT
SALAMA MOHMED MWARABU (Administrator of estate of the late
Mohamed Omary Chuma)2ND APPLICANT**

VERSUS

**ATHUMAN MWINYIMKUU NCHUMA..... 1ST RESPONDENT
SALUMU OMARY GABRIEL.....2ND RESPONDENT
DEWJI ZUKHER.....3RD RESPONDENT**

RULING

Dated 21st & 24th June, 2021

J.M. KARAYEMAH, J.

This Court is being moved under section 14 (2) proviso 4 (Misc. Written Laws Amendment No. 2 Act 2016 and section 14 of the Law of Limitation Act, [Cap. 89 R. E. 2019] to grant orders for: -

1. *Extension of time in order to file appeal out of time.*
2. *Costs follow events.*

The application is brought by way of a Chamber Summons supported by affidavits affirmed by Hadija Mwarabu the 1st applicant and sworn by Christopher B. Makunja advocate respectively which give the background of this matter.

On 7th December, 2018 the District Land and Housing Tribunal for Kibaha dismissed Land Application No. 18 of 2017 which was filed by the Applicants with costs. Aggrieved by the said decision, the Applicants requested to be supplied with copy of the Judgment for purposes of appealing to the High Court. They were supplied with the requisite copy on 4th March, 2019 but were already time barred. After noting that they were out of time, in the middle of April, 2019 the 2nd applicant who is now a deceased, engaged an advocate in order to pursue the intended appeal. The advocate filed in the High Court Land Division an application for extension of time within which to file an appeal out of time.

The respondent filed a counter affidavit sworn by Dewji Zukhel, in which the conduct of the applicant was put on spotlight. He averred that prayers and reliefs sought in the chamber summons are vexatious and frivolous because there are no justifiable and tenable reasons for the Honourable court to grant the orders prayed by the applicant.

At the hearing, Ms. Aneth Nyangóko Christopher advocate appeared for the applicants and Mr. Sindilo Lyimo advocate represented the respondents.

On taking the floor, Ms. Aneth submitted adopting the reasons deposed in the affidavits. She added that the Applicants delayed to lodge their appeal because the supply of a copy of judgment, which is a vital document for making a sound appeal, was delayed by the trial Tribunal. She submitted that the Applicants received the said copy of judgment on 7/3/2019. Realising that they were time barred they engaged the advocate, hence this application for extension of time to lodge their appeal out of time.

The Respondent in his reply submissions contested the application. He further submitted that the Applicants have not managed to establish sufficient cause for the extension of time sought. He remarked that the copy of judgment was ready and available for collection within 30 days but the applicants out of negligence did not collect it in time. The reason they give is that after the Applicants were duly supplied with the requisite copies of the judgment and the decree they didn't appeal in time as time for their appeal elapsed on 02/12/2019. The learned counsel remarked that the appellants had to prove by producing a letter they wrote as an application for judgment. He added that they had to produce receipt for paying in receipt of their letter.

Rejoining Ms. Aneth reiterated what she submitted on in submission in chief. She however stated that the applicants lost the letter they wrote to apply for the copy of judgment.

I have earnestly gone through the rival submissions by the counsels, the chamber summons, affidavit, counter affidavit and the records of this matter. I am of the view that the issue to be determined is whether applicants has established sufficient cause to enable this court exercise its discretionary powers to extend the time within which the applicants to file appeal out of time.

The trite position is that a prayer for extension of time is an equitable discretion, exercised judiciously and on a proper analysis of the facts, and application of law to facts. Discretion for its grant is exercised upon satisfying the court, through presentation of a credible case. Exercise of this discretion requires, as well, that the applicant should also act equitably. This position was emphasized by the supreme court of Kenya

in ***Nicholous Kiptoo Arap Korir Salat v. IEBC & 7 others***, Sup. Ct. Application 16 of 2014, thus:

"Extension of time being a creature of equity, one can only enjoy it if [one] acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that [one] was not at fault so as to let time lapse. Extension of time is not a right of a litigant against a Court, but a discretionary power of courts which litigants have to lay a basis [for], where they seek [grant of it]."

The same Court was presented with another glorious opportunity through which key guiding principles for application of the Court's discretion propounded. This was in the case of ***Aviation & Allied Workers Union of Kenya v. Kenya Airways Ltd, Minister for Transport, Minister for Labour & Human Resource Development, Attorney General***, Application No. 50 of 2014. It held:

"...We derive the following as the underlying principles that a court should consider in exercise of such discretion:

1. *Extension of time is not a right of a party; it is an equitable remedy that is only available to a deserving party at the discretion of the court;*
2. *A party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;*
3. *Whether the court should exercise the discretion to extend time, I a consideration to be made on a case-to-case basis;*

4. *Where there is [good] reason for the delay, the delay should be explained to the satisfaction of the Court;*
5. *Whether there will be any prejudice suffered by the respondents if extension is granted; and*
6. *Whether the application has been brought without undue delay."*

The court of Appeal of Tanzania has also ventured and travelled in similar position. In ***Hanspaui Automechs Limited v RSA Limited***, (supra) the Court of Appeal observed thus:

"Extension of time is a matter of discretion of the court and that the applicant must put material before the court which will persuade it to exercise its discretion in favour of an extension of time"

Again, in ***Ngao Godwin Losero v Julius Mwarabu***, Civil Application No. 10 of 2015, the Court of Appeal laid down guidelines for the grant of extension of time repeating its decision in the case of ***Lyamuya Construction Company Limited v Board of Registered Trustees of Young Women's Christian Association of Tanzania***, Civil Application No. 2 of 2010 thus:

- a) *The applicant must account for all the 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 the action that he intends to take.*
- d) *If the court feels that there other sufficient reasons, such as the existence of a point of law sufficient*

importance; such as the illegality of the decision sought to be challenged”

The rationale for imposing this stringent condition is to ensure that court orders do not benefit a party who is at fault. This is the reasoning distilled by the defunct East African court of Appeal in ***KIG Bar Grocery & Restaurant Ltd v. Gabaraki & Another*** (1972) E.A. 503 in which it was held that:

“...no court will aid a man to drive from his own wrong.”

While ensuring that undeserving parties are put on check, it is also intended that the applicant of the enlargement of time is not denied the right of demanding his costs, unless circumstances of his delay in acting are inexcusable and his or her opponent was prejudiced by it (see ***Isadru v. Aroma & Others***, Civil Appeal No. 0033 of 2014 [2018] UGHCLD 3).

In applications for extension of time, sufficient cause or lack of it is gathered from affidavits filed in support of the applications. This wisdom takes into consideration the fact that affidavits are evidence, unlike submissions from the bar which serve as narrations that complement the evidence deposited on oath (***The Registered Trustees of the Archdiocese of Dar es Salaam v. The chairman Bunju Village and 11 Others***, Civil Appeal No. 147 of 2006). Adequacy of the reasons for the applicant’s failure to take steps, at a particular time, is gauged through these depositions.

When all said to the guiding principles, I shall right away accept the explanation that the applicants delayed to file their appeal within time because the trial tribunal delayed to supply them. i am not alone on this

position. In the case of Mary ***Kimaro v Khalfan Mohamed***, [1995] TLR 202 the court made it clear that a delay in appealing caused by the applicant's delay in getting copies of documents to enable him or her to appeal, constitutes a good cause when it comes to extension of time.

In her affidavit Hadija Mwarabu (1st applicant) averred that after the judgment was delivered on 7/12/2018 they applied for the copy of judgment immediately but the same was supplied on 4/3/2019. It is discerned from the copy of judgment that the copy of judgment was ready for collection on 8/2/2019 when it was certified. Moreover, under section 19(2) of the Law of Limitation Act, in reckoning of the time within which to appeal, the period for obtaining the copies of the judgment and decree which the intended appeal challenges is excluded. By this legal position two months and one day must be excluded.

In view of the foregoing, therefore, the delay was for period well over 24 days only. The applicants had to account for the delay for every single day. The requirement of accounting for every day of delay has been stressed by the Court of Appeal in numerous decisions, examples, are such case of ***Bushiri Hassan v Latifa Lukio, Mashayo***, Civil Application No. 3 of 2007 (Unreported), ***Karibu Textile Mills v Commissioner General (TRA)***, Civil Application No 192/20 of 2016 and ***FINCA (T) Limited and Another v Boniface Mwalukisa***, Civil Application No. 589/12 of 2018 (Unreported). In the case of ***Bushiri Hassan***, it was stated that:

"Delay, of even a single day, has to be accounted for otherwise there would be no proof of having rules

prescribing periods within which certain steps have to be taken."

From the reasons above, I am settled that the application has a day in court. After the applicant had applied for the copy of judgment and left, in my view, they had no means to know that it was ready for collection. It would be undeserving for the applicants to stick in the registry waiting to be supplied with a copy of judgement while they were not told when it would be ready for collection. Given the fact that they were not given the exact day, it was the tribunal's duty to notify parties of the availability of the copies for collection. Today technology has prevailed. It is, therefore, my humble observation that in the today's world of technology parties would be notified through mobile phones by text messages or even calls that copies were ready for collection. In my considered opinion, we cannot separate court/tribunal activities with the increase usage of technology which has pierced deep in the administration of justice. To fasten justice and to do full justice there is a need to use technology to connect litigants with the tribunal in situations like this where copies of judgments, rulings, decrees or proceedings are not ready for supply on the date when the judgment is delivered. That not being done, the applicants took initiatives to return to the Tribunal and got supplied copies on 4/3/2019. Mr. Lyimo submitted that applicants were negligent because copies of judgment were ready for collection in 30 days. His position defers completely with the dates on the judgment itself. While the judgment was delivered given the circumstances of this matter I don't see where negligence can be proclaimed.

In line with the foregoing, it is settled law that sufficient cause to be demonstrated depends on deliberations of various factors some of which

revolve around the nature of actions taken by the applicant immediately before or after becoming aware that the delay is imminent or might occur.

That being the position, having considered what is before this court, in the present matter, in terms of the submissions and affidavit evidence, it is my considered opinion that reasons elucidated herein hold water. Applicants made follow-up to get the copy of judgment fearing to be time barred. After the copy was supplied, they immediately engaged an advocate to pursue the appeal. Noting that the matter was already time barred the advocate lodged the current application without undue delay. It goes without saying therefore that applicants took quick actions immediately before and after becoming aware that the delay was imminent or might occur or has occurred.

A glance at the affidavit that supports the application takes me to the same conclusion as that of the applicant which has advance good and sufficient cause.

I, thus, find a lot of commitment and seriousness in the applicants' contention and reasoning of the Court of Appeal in ***Ngao Godwin Losero's case***, and hold that the application is sufficiently supported to trigger the Court's discretion.

Consequently, and on the basis of the foregoing, I hold that the applicant has spectacularly succeeded to convince me that delays in lodging the appeal were caused by any sounding reasons that fall in the realm of sufficient case. In view thereof, I allow the applicants' application. This court extends the time within which applicants may file their appeal. The

applicant should file the appeal within 30 days from the date of this ruling.

It is so ordered.




J.M. KARAYEMAH

JUDGE

24/06/2021