

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND APPLICATION NO. 358 OF 2020**

**MARRY AGNES MPELUMBE (as administratrix  
of the estate of ISAYA SIMON MPELUMBE) .....APPLICANT**

**VERSUS**

**SHEKHA NASSER HAMAD .....RESPONDENT**

**RULING**

**MAIGE, J**

This application has been preferred under section 11(1) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019. It is for extension of time to lodge a notice of intention to appeal against the decision of this Court as per Hon. Nchimbi (retired) in Land Case No. 89 of 2008. The Decision under discussion was delivered by my learned sister justice Moshi, on 28<sup>th</sup> November, 2013. In the said decision, the suit by the applicant's predecessor in title as against the respondent herein was dismissed for being devoid of any merit.

Being aggrieved, the applicant timely lodged a notice of appeal and subsequently filed Civil Appeal No. 85 of 2017 ("the initial appeal"). While the said appeal was still pending, the applicant's predecessor in title

passed on and hence the succession of the proceedings by the current applicant.

On 23<sup>rd</sup> June 2020, the initial appeal was struck out for being constructively time barred in that, the applicant had omitted to serve on the respondent a letter requesting for certified copies of judgment, decree and proceedings. On 3<sup>rd</sup> day of July, 2020 being hardly ten days from the date of the striking out of the initial appeal, the applicant initiated the instant application.

The applicant has deposed an affidavit in support of the application which has been opposed by the counter affidavit in support of the application which has been opposed by the counter affidavit of Gasper Nyika for and on behalf of the respondent. On top of that, the respondent raised a notice of Preliminary objection that, the earlier appeal by the applicant having been struck out for being time barred, the instant application cannot be maintained.

The merit or otherwise of the application and the legal point raised was argued by way of written submissions. Mr. Edwin Shibuda, learned advocate, presented the submissions for the applicant whereas Mr. Nyika also learned advocate for the respondent. I recommend the counsel for their

very instructive submissions. They have been given due consideration in this ruling.

As the law requires, I am expected to consider the legal issue first. Mr. Nyika submits, basing on the authority of the Court of Appeal in **HASHIM MADONGO & 2 OTHERS VS. MINISTER OF INDUSTRY AND TRADE AND OTHERS, CIVIL APPEAL NO. 27 OF 2003 (CAT – DSM - UNREPORTED)** that; since the earlier appeal was struck out by the Court of Appeal, it is not open to the applicant to go come back to this Court and file an application for extension of time to file a fresh appeal. I have read the authority and with all respects, I cannot agree with such submission. In the said authority, the subject matter was a decision of the High Court dismissing a suit under section 3(1) of the Law of Limitation Act. The Court of Appeal was saying that, since under section 3 of the Law of Limitation Act, the effect of an action being time barred is to have it dismissed, the applicant is barred, after dismissal, from filing a fresh action.

In this matter, the initial appeal was not dismissed. It was instead struck out for being incompetent. The position of law on the effect of an action being struck out is very clear. Unlike dismissal, such an order does not render the controversy finalized as to bar subsequent re- initiation of the same. This position is stated in the case of **Ngoni Matengo Cooperative Marketing Union Ltd. Vs. Alimahomed Osman (1959) EA 577** where it was observed that while the word dismissal implies that "*an incompetent appeal has been disposed of*" the word strike out implies that "*there was no proper appeal capable of being disposed of*".

Mr. Nyika appears to understand the authority in **HASHIMU MADONGO** as establishing a general principle that; once a matter is held to be time barred, the claimant is barred from reinstituting the same. I doubt if the counsel has read the judgment between lines. The rule stated in the said decision, it would appear to me, was based on the proposition that, under section 3 of the Law of Limitation Act read together with section 46 and 19(2) thereof, a time barred matter must be dismissed and not struck out. on this, the Court of Appeal remarked at page 9 of the judgment as follows:-

*"Under section 3 of the Law of Limitation Act, a proceeding which is instituted after the prescribed period has to be dismissed. Therefore, reading Section 3 together with section 46 thereof, and Section 19(3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, it occurs to us that Kalegeya, J. ought to have dismissed the application after he was satisfied that it was time barred. It was not open to him to strike out the application as it happened in this case.*

In view of the foregoing discussions, I find the preliminary objection without merit. It is accordingly overruled.

This now takes me to the substantive application. The position of law on the grant of extension of time is not unsettled. As of law, whether

to grant or not, is within the discretion of the Court. The discretion however cannot be exercised arbitrarily. It must be exercised judiciously on sound judicial principles. The guiding criteria being; whether sufficient cause has been established. However, what amount to sufficient cause and what is not, has always been a question fact. Case law has nevertheless provided some pertinent guidelines to be considered for determination of same. For instance, **IN LYAMUYA CONSTRUCTION COMPANY LIMITED VS. THE BOARD OF THE REGISTERED TRUSTEES OF YOUNG WOMEN'S CHRISTIAN ASSOCIATION**, CIVIL APPLICATION NO. 2 OF 2010, the CAT outlined the following four factors to be considered: -

- (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 are other sufficient reasons, such as existence of a point of law of sufficient reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged.*

In accordance with the factual depositions in the affidavit, the applicant has relied on two grounds to justify her application namely;

prosecution an appeal to the Court of Appeal and illegality involved in the impugned decision.

I have considered the rival submissions in line with the affidavit and counter affidavit. Guided with the principles aforestated, I will not direct my mind on the first ground. The submissions by Mr. Shibuda, learned advocate for the applicant is that, the delay under discussion was caused by prosecution of various proceedings, including the dismissed appeal at the Court of Appeal. He has placed reliance on the facts in the affidavit. In his humble view, the said prosecutions are by themselves sufficient cause for extension of time. He has placed reliance on the decision in **M.B. BUSINESS LIMITED VS. AMOS DAVID KASANDA AND TWO OTHERS, CIVIL APPLICATION NO. 48/17/2018, CAT. DSM** where it was held (UPRA) where His Lordship Ndika, J.A. remarked as follows:-

*"It is further on the record that, the applicant's initial application for revision was barren of fruit; the Court struck it out on 7<sup>th</sup> February, 2018 due to incompetence that arose from the record of certain core documents. The resulting delay following the aforesaid of the revision certainly amounts to excusable delay."*

In his submissions in rebuttal, Mr. Nyika, learned advocate for the respondent, contends that, the applicant cannot place reliance on the prosecution of the said appeal because the same was struck out for the reason of the omission on the part of the applicant to include core documents in his record of appeal. In his view therefore, that amounts to

negligence which cannot by itself be a ground for extension of time. Referece was made in **LYAMUYA CONSTRUCTION CASE (SUPRA)**.

Having examined the affidavit and considered the counsel submissions, it is appropriate that I determine the issue. The justification for the delay in essence is prosecution of the struck out appeal. While Mr. Nyika appears not to be in dispute on the relevancy of prosecution of previous proceedings, he is of the opinion that, the principle cannot apply in the instant matter because the said prosecutions exhibit elements of negligence on the part of the applicant in that he omitted to include in his record of appeal core-documents.

The decision, the subject of this discussion, was delivered on 28<sup>th</sup> November 2013. On 3<sup>rd</sup> December 2013, the applicant lodged a notice of intention to appeal. Soon thereafter, he lodged an application for leave to appeal to the Court of Appeal which was granted on 11<sup>th</sup> August 2014. On 29<sup>th</sup> May 2017, the applicant lodged the relevant appeal to the Court of Appeal having procured a certificate of delay. The striking out of the appeal was on 23<sup>rd</sup> June 2020. This application has been filed on 1<sup>st</sup> July 2020. It is after the expiry of about seven days.

From the above irrefutable facts, its is apparent that, the instant delay is not an actual delay. It is a constructive delay or rather technical delay in the sense that, the applicant had initially filed an appeal within time but it was subsequently struck out for being incompetent. As I understand the law, in determining whether the to extend time, the test involved in an actual delay and technical delay is quite different. In tenichical delay,

the test involved is whether the applicant acted promptly when the incompetent proceeding was terminated. This opinion is in line with the decision of the Court of Appeal in **FORTUNATUS MASHA VS. WILLIAM SHIJA AND ANOTHER, 1997, TLR NO. 154** where it was held:-

*" A distinction has to be drawn between cases involving real or actual delays and those such as the present one which clearly only involve 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 the pronouncement of the ruling of the court striking out the first appeal. In these circumstances an extension of time ought to be granted"*

In this case, there is no doubt that, the initial appeal and the preliminary actions taken prior thereto, including the lodging of the notice of appeal, were well within time. The order striking out the said appeal was issued on 27.06.2020. This application has been filed on 1<sup>st</sup> July 2020. It is just seven days from the date of the last order. If I can apply the principle in **FORTUNATUS MASHA VS. WILLIAM SHIJA AND ANOTHER (supra)**, I will have no hesitation to hold that, the applicant acted very promptly in taking further necessary steps to rescue their intended appeal. This is by itself a sufficient cause for extension of time. I find it unnecessary to consider the issue of illegality in the intended appeal.



I have however not ignored the submission for the respondent that, negligence to follow the procedure does not amount to a good cause. I have duly taken it into account before making this decision. More importantly, I have considered carefully the binding authority in **LYAMULYA'S CASE**. I have established that the same does not support the alleged proposition. The negligence considered in the said authority was in relation taking necessary action to rescue the struck out action. This is discussed in paragraphs 7 and 8 of the judgment which for clarity I will reproduce hereunder:-

*"According to paragraph 5, the ruling now sought to be challenged was delivered on 1/6/2005. The applicant then filed an application for review. He did not file any notice of appeal. The application for review was filed on 28/7/2005 and was dismissed on 7/6/2006. He obtained a copy of ruling on 10/7/2006. He advised the applicant to file an application for extension of time in which to file a Notice of Appeal and he filed it on 25/7/2006, which was about two weeks from the determined until 26/2/2020. **For the benefit of the applicant, the period between 25/7/2006 and 26/2/2020 should be excluded.** According to paragraph 13 he obtained a copy of the ruling on the application for extension of time on 12/3/2010. The present application was filed on 23<sup>rd</sup> of March 2010, which is 11 days later from the date of collecting the copy of the ruling. From this explanation, there is not a single paragraph to account for the two weeks of between obtaining the copy of the*

*decision/ruling on review and filing of the application for extension of time in the High Court. But there is also no explanation for the delay of the 11 days, between the date of obtaining a copy of the ruling dismissing the application for extension of time by the High Court, and the day the present application was filed. This, in my reckoning, makes a total of 25 days un-accounted for, and I cannot ignore it. **The applicant's negligence is therefore called in question; but the conclusion that the applicant has not fully accounted for all the period of delay is inescapable.***

From what is reflected above, I can say without any uncertainty that, even if the principle in the above case was to be applied, it would not change this position. For, the applicant took just 7 days from the date of the striking out of the appeal to initiate the instant application. Any reasonable tribunal would not in the circumstance of this case treat the seven days taken to initiate this application unreasonable.

In my view therefore, this application has merit. It is accordingly granted with costs. The intended notice of appeal should be filed within 30 days from today. I will not give an order as to costs in the circumstance.

A handwritten signature in black ink, appearing to read 'I. Maige', with a stylized flourish at the end.

**I. Maige,  
JUDGE,  
26/2/2020.**

Date 26/ 2/2021

Coram: Hon. A. Chugulu - DR.

Applicant: Mr. Edwin Shibuda, advocate

Respondent: Ms. Athonia Agapit, Advocate

RMA: Bukuku

**COURT:** Ruling delivered this 26<sup>th</sup> day of February, 2021 in the Presence of Mr. Edwin Shibuda, learned counsel for applicant and Ms. Antonia Agapit, learned counsel for respondent.



A handwritten signature in blue ink, which appears to read "A. Chugulu", is written over the printed name.

**A. Chugulu,**

**DEPUTY REGISTRAR**

**26/2/2021**