

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

AT DAR ES SALAAM

MISC LAND APPLICATION NO 133 OF 2021

(Arising from the decision of the District Land and Housing Tribunal for
Kilombero District in Land Application No. 56 of 2013)

SHOMARI Y. MAHANGIRA APPLICANT

VS

- 1. IFAKARA TOWN COUNCIL**
- 2. ZAIDANI HASSAN**
- 3. MOHAMED HASSAN**
- 4. RAMADHAN MALOKELA**
- 5. BETODI MANGWENJA**

..... RESPONDENTS

RULING

Date of last order: 19. 11.2021

Date of Ruling: 26.11.2021

S.M. KALUNDE, J.:

This is an application for extension of time to file appeal out of time against decision of District Land and Housing Tribunal for Kilombero District at Ifakara (**the tribunal**) in land application no **56 of 2013** delivered on 18th November 2020. The application is made under section **41 (2) of the Land Disputes Courts Act [Cap 216 R.E. 2019]** and any other enabling provision of the law; and is being supported by an affidavit deposed by, SHOMARI Y. MAHANGIRA, the applicant.

Upon being served the 2nd and 3rd respondents filed a joint counter affidavit objecting the application. Similarly, the 1st, 4th and 5th respondents filed separate counter affidavits also counterattacking the application.

On 16th September 2021, with the consent of the parties, the court ordered the application to be disposed of by way of written submission. Submissions of the applicant were drawn and filed by **Ms. Donatila Teendwa** Antoni learned advocate and those of the 1st respondent were drafted and filed by **Ms. Salma Mangara** learned State Attorney. Unrepresented, the 2nd, 3rd and 4th respondent filed their joint reply submissions. The fifth respondent also fended himself. Submissions in chief and reply submissions were filed in accordance with the schedule ordered by the Court. For some reasons, the applicant did file his rejoinder submissions.

I have carefully gone through the Chamber Summons and its supporting affidavit as well as the counter affidavits filed by the respondents. I have also considered the rival submissions made by the parties; upon such consideration I think the question for my determination is whether the application is merited.

According to the affidavit filed in support of the application, the applicant failure in filling the appeal on time was occasioned by delay in being supplied with certified copies of judgement and decree of the tribunal. He also contended the appeal had great

chances of success. The two grounds are to be found under paragraphs 7 and 8 respectively, which reads:

"7. That, the delay to lodge the petition of appeal was not intentional but happened only because of delaying to be issued a copy of judgment by the Kilombero District Land and Housing Tribunal.

8. That, the intended appeal has great chances of success since the decision of the tribunal did not observe ambits of justice by ignoring some material evidences, poor reasoning, assessment and evaluation of evidences adduced before it by the applicant."

In support of the application Ms. Teendwa submitted that whether to grant the application was in the discretion of the Court. However, in exercise of such discretion the Court is enjoined to consider several factors including length of delay, the reasons for the delay, chances of success and degree of prejudice. To support the contention, she cited the case of **Henry Muyanga vs. TTCL**, Application No. 8 of 2011 (unreported). The decision was, however, not appended. The counsel went on to argue that delay in filing the appeal was not the applicants' fault as he was late in being supplied with copies of the judgement and decree of the tribunal. It was narrated that

the impugned decision was delivered on 18th November 2020, and immediately on the same day he applied to be supplied with copies of the judgment and decree. However, he was supplied with the same on 18th January 2021 when he was already out of time and hence the present application. The counsel argued that the present application was initially filed on 1st March, 2021 and finally admitted on 17th March, 2021 when the relevant fees were paid. in view of the above the counsel prayed that the application be granted.

The counsel for the applicant added that respondents will not be prejudiced by the grant of the application. In addition to that she contended that there were great chances of success in the appeal as decision of the tribunal was delivered almost eight years without sufficient reasons being shown. In view of the above arguments, the counsel insisted that the application be granted as applicant has demonstrated good cause in accordance with the considerations enunciated in **Lyamuya Construction Company Ltd. vs. Board of Registered Trustees of Young Women's Christian Association Tanzania**, Civil Application No. 2 of 2010 (Unreported).

In their reply submissions the 2nd, 3rd and 4th argued that having filed the present application on 17th March, 2021, the applicant was late by more than 116 days from the date of the decision and 56 days since the day they allegedly collected copies of the impugned decision. They contended that in both instances

the applicant has failed to account for each day of the delay. In support of the position, they cited the decision of this Court in **John Sebastiana Cosmas and Fred Aman Madala vs. Consolidated Tourist & Hotels and Investment Limited** (Labour Revision No 15 of 2020) [1970] TZHC 1976; (26 October 2020 TANZLII) and **Deonatus Bunyoga vs. Orica Tanzania Limited** (Labour Application NO 08 OF 2020) [2021] TZHC 2719; (19 March 2021 TANZLII).

On the question of prejudice, the 2nd, 3rd and 4th argued that if the application is granted, they will be prejudiced beyond repair as their rights over the disputed land would be affected. They also argued that the applicant had misconceived the authority in **Henry Muyanga vs. TTCL** (supra) and submitted that prejudice is not to be considered on the part of the applicant but rather on the part on the respondents. In bolstering their position, they cited the case of **Wambele Mtumwa Shahame vs Mohamed Hamis** (Civil Reference No.8 Of 2016) [2018] TZCA 39; (06 August 2018 TANZLII) where the Court of Appeal held:


"As regards the prejudice to both applicant and the other party if the application is granted, we think, the applicant is bringing a new innovation. The principle as it now stands and as was quoted by Oriyo J.A., does not provide for the prejudice on ... the .part of the applicant."

On the argument that the appeal had greater chances of success the 2nd, 3rd and 4th respondents submitted that

overwhelming chances of success was not a criterion for extension of time. All the applicant was supposed to was to show good cause. To support their case, they cited the case of **Wambele Mtumwa Shahame vs Mohamed Hamis** (supra). As to allegations of illegality the counsel submitted that the same were baseless for not being canvassed on the affidavit and not being substantiated by the available records before the Court. On the basis of the foregoing submissions and authorities, the 2nd, 3rd and 4th respondents prayed that the application be dismissed with costs.

On her part, relying on factors enumerated in **Lyamuya Construction Company Ltd** (Supra), the counsel for the 1st respondent submitted that the applicant has failed to account for the delay or demonstrate good cause sufficient for the Court to grant the orders sought. As for allegations of illegality the counsel cited the case of **Ngao Godwin Losero vs. Julius Mwarabu**, Civil Application No. 10 of 2015, CAT at Arusha (unreported) for the argument that for allegations of illegality to amount to sufficient cause they must be apparent on the face of records. The counsel added that under paragraph 7 of the affidavit the applicant has listed several complaints which do not amount to any points of law worth of consideration as allegations of illegality.

I have gone through the submissions of the 5th respondent and noticed that, with the exception for the fact that the former



made reference to a group of respondents and the later by individual; and the signatories thereto, they are a verbatim duplicate of the 2nd, 3rd and 4th respondents' submissions. That is more so considering the fact that the 2nd, 3rd and 4th respondents filed their submissions on 13th October, 2021 and the 5th respondent filed his on 15th October, 2021. For that reason, I will not endeavour into reproducing the same here. Suffice to note that the same has been considered in the composition of the present ruling.

I have dispassionately considered and weighed the rival submissions and authorities from both parties. I think the next question for my determination is whether the application is merited. However, before delving into resolution of the merit or otherwise of the application, I find it instructive to examine the provisions of section 41(2) of Cap. 216 which states:

"(2) An appeal under subsection may be lodged within forty five days after the date of the decision or order:

Provided that, the High Court may, for the good cause, extend the time for filing an appeal either before or after the expiration of such period of forty five days."

Firstly, as rightly submitted by both parties, in terms of the above section whether to grant or refuse an application for extension of time is entirely in the discretion of the court and the discretion has to be exercised judiciously; and that extension of time may only be granted where it is established that the delay

was with sufficient cause. This is what has stated in several cases including in **Benedict Mumello vs Bank of Tanzania**, [2006] 1 EA 227; **Bertha Bwire vs. Alex Maganga**, (Civil Reference No.7 of 2016) [2017] TZCA 133; (20 November 2017); **Zuberi Mussa v. Shinyanga town Council**, TBR Civil Application No. 3 of 2007 (unreported). In **Bertha Bwire vs. Alex Maganga**, (Supra) the Court of Appeal held that:

*"...It is trite that extension of time is a matter of discretion on the part of the Court and that **such discretion must be exercised judiciously and flexibly with regard to the relevant facts of the particular case.***

Secondly, the term "good cause" or "sufficient cause" has not been defined, therefore, while having in mind the scope of exercising the discretion courts have construed good cause depending on the circumstances of each case. In **Abdallah Salanga & 63 Others vs Tanzania Harbours Authority**, Civil Application No. 4 of 2001 (unreported), the Court of Appeal (**Mroso, J.A.**) stated:

"This court in a number of cases has accepted certain reasons as amounting to sufficient reasons. But no particular reason or reasons have been set out as standard sufficient reasons. It all depends on the particular circumstances of each application."

Expounding the factors to be looked at in considering whether there is good cause or not the Court of Appeal (**Massati, J.A.**) in **Lyamuya Construction** (Supra) said:

"As a matter of general principle, it is in the discretion of the Court to grant extension of time. But that discretion is judicial, and so it must be exercised according to the rules of reason and justice, and not according to private opinion or arbitrary. On the authorities however, the following guidelines may be formulated: -

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

Also see **Bertha Bwire vs. Alex Maganga** (supra); **Julius Francis Kessy & 2 Others vs Tanzania Commission for Science and Technology**, Civil Application No. 59/17 of 2018, CAT at Dar es Salaam (unreported); and **Republic vs. Yona Kaponde & 9 Others** [1985] T.L.R 84.

Thirdly, it is also a settled position of law that, through the affidavit filed in support of the application, the applicant has

a duty to provide sufficient materials for the court to exercise its discretion. This view is supported by the decision in **Kalunga and Co. Advocates v National Bank of Commerce Ltd** (124 of 2005) [2006] TZCA 87; (24 April 2006); **The Registered Trustees of the Archdiocese of Dar es Salaam vs. The Chairman Bunju Village Government & 11 Others**, Civil Appeal No. 147 of 2006, CAT at DSM (unreported); **Ludger Bernad Nyoni vs National Housing Corporation** (Civil Appl No.372/01 of 2018) [2019] TZCA 154; (06 May 2019 TANZLII) and **Bushiri Hassan vs. Latifa Mashayo**, Civil Application No. 2 of 2007.

In **The Registered Trustees of the Archdiocese of Dar es Salaam vs. The Chairman Bunju Village Government & 11 Others** (supra) the Court of Appeal held:

"...reason for failure to appeal on time must be given on affidavit not on submission because submission are not evidence."

Also, in **Zuberi Nassor Mod'd vs. Mkurugenzi Mkuu Shirika la Bandari Zanzibar** (supra) the Court of Appeal was considering an application for extension of time to lodge a notice of appeal out of time. In accordance with the affidavit filed in support of the application and oral submissions in Court, it appeared that delay in filing the notice was attributable to the fact that the applicants' bicycle which had carried the plastic bag containing the documents relevant for the filing of the notice of

appeal was stolen. However, no police loss report was produced to that effect, allegedly for lack of trust to the police. Thereafter, the applicant contended that he contacted a court clerk who would assist him in getting another set of documents required for lodging the application. The Court (**Mkuye, J.A.**) observed that:

"However, I agree with Mr. Rajab that a mere statement from the bar without substantiation that, indeed the bicycle was stolen with some documents, cannot constitute a sufficient reason. In my view, the applicant was expected to produce a police lost report relating to the allegedly stolen bicycle and the documents which were very crucial in the appeal process. Otherwise, failure by the applicant to report on the lost bicycle which was his means of transport by sheer belief of not recovering it, leaves a lot to be desired."

In relation to allegations that the applicant contacted a court clerk, the Court observed that:

"Besides that, the applicant's account that he had to find a court clerk to supply him with another set of documents is not supported by any evidence."

Mindful of the above key guiding principles, I will now turn my attention to the merits of the application. It is common ground that the impugned decision was delivered on 18th November, 2020. It is also undisputed that on the same day he applied to be supplied with copies of the judgment and decree. To support his allegation, he appended a letter submitted to the

tribunal. Further to that, in accordance with the affidavit and submissions filed herein, the applicant was supplied with the copies of the judgment and decree on 18th January, 2021. However, besides his mere allegations there was no evidence in his affidavit so substantiate the fact that he was indeed supplied with the decision on 18th January, 2021. Not even a receipt from the tribunal. The 2nd and 3rd respondents appended their receipt in their counter affidavit. There was, therefore, no reason why the applicant would not append the same in his affidavit or reply to counter affidavit for that matter. The evidence was crucial given that the impugned decision was signed and stamped on 18th November, 2020, the applicant was expected to produce evidence that the decision was supplied on him on 18th January, 2021. Given the circumstances, I must state that, at any rate holding back on that piece of evidence did really help much the applicant as it deprived the Court of the very essential piece of evidence upon which the Court would gauge whether the applicant was diligence in prosecuting his case. In absence of concrete evidence to support the assertion all I have are mere allegations which leaves the delayed period unaccounted. See **Zuberi Nassor Mod'd vs. Mkurugenzi Mkuu Shirika la Bandari Zanzibar** (supra).

Even assuming that, for argument's sake which it is not, the copies of judgment and decree were supplied to him on 18th January, 2021. The applicant has failed to account for the more than fifty days between the date of receipt of the impugned

decision and 17th March, 2021 when the present application was filed. The law is well settled that for the court to condone the delay a full detailed and accurate account of the causes of the delay and its effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility of the applicant in the entire process. See **Ludger Bernad Nyoni vs National Housing Corporation** (supra).

Similarly, in **Wambele Mtumwa Shahame vs Mohamed Hamis** (supra) the Court of Appeal (**Mkuye, J.A.**) remarked that:

*"It is already a well settled rule since more than ten years ago in unbroken chain of this Court's decisions to the effect that in the application of this nature the applicant is obliged to account for the delay for everyday within the prescribed period. (See for example, **Bushfire Hassan vs. Mohamed Raze** (supra); **Bariki Israel vs. The Republic**, Criminal Application No.4 of 2011; **Sebastian Ndaula vs. Grace Rwamafa (Legal Representative of Joshwa Rwamafa)**, Civil Application No. 4 of 2014; and **Bushiri Hassan vs. Latifa Mashayo**, Civil Application No. 3 of 2007 (All unreported)."*

In the instant case the applicant had not provided any explanation why she could not prosecute the matter promptly upon obtaining the copy of judgment and decree on 18th January, 2021. The counsel for the applicant contended that the application was filed through JSDS on 01st March, 2021 and was issued with control number on 17th March, 2021 and cleared the

bill on the same day. However, there was no evidence in his supporting affidavit to support that contention. The available receipt show that the same was filed on 17th March, 2021. From the records, it is evident that the applicant delayed for almost two months from the receipt of the copies of the impugned decision to filing the present application. No explanation was provided to explain the inability to file the application on time. In my view, this was a clear demonstration of lack of diligence and sloppiness on the part of the applicant and his advocate.

Next for consideration is an argument relating to the degree of prejudice. In his submissions, the applicant contended that if the application is not granted the applicant's rights which are shortened by the trial tribunal shall be vanished totally. My understanding on this issue is that the applicant was supposed to demonstrate that no prejudice will be occasioned to the respondents if the application is granted, and not the other way round. On this, I am supported by the Court of Appeal decision in **Wambele Mtumwa Shahame vs Mohamed Hamis** (supra) **Mkuye, J.A** stated that:

"As regards the prejudice to both applicant and the other party if the application is granted, we think, the applicant is bringing a new innovation. The principle as it now stands and as was quoted by Oriyo J.A., does not provide for the prejudice on ... the part of the applicant..."

Considering the above authority, I agree with the respondents that the applicant misconceived principle. The

above authority is clear that the applicant has to demonstrate that no prejudice will be occasioned on the respondents and not to him or her. In view of that, I am satisfied that the applicant has failed establish that the degree of prejudice to the respondent would be low if time is extended.

As regards to the issue of greater chances of success, the law is now settled that in an application for extension of time the requirement is to show good cause and not over whelming chances of success. This view was stated in **Wambele Mtumwa Shahame vs Mohamed Hamis** (supra) where the Court of Appeal (**Mkuye, J.A**) held that:

"The notable criteria in applications for extension of time is to show a good cause and not over whelming chances of success. In any case, that would amount to considering the appeal's merits."

For the forgoing reasons, his ground lacks merits and it is accordingly dismissed.

On another limb, the applicant raised a complaint of illegality in the decision sought to be challenged. However, the allegations were canvassed in his submissions and had not been pleaded in his affidavit filed in support of the application. The position of law, as stated above, is very settled that the reasons for failure to appeal or take an action on time must be stated in the affidavit not in the submissions as submissions are not evidence. For that reason, I shall not consider the complaint.

That said, and considering all the pleadings and submissions, I am unable to make a finding that the applicant has demonstrated good cause for this Court to exercise its discretion in extending time as prayed. Consequently, I dismiss the application with cost.

It is so ordered.

DATED at **MOROGORO** this **26th** day of **NOVEMBER,**
2021.




S.M. KALUNDE

JUDGE