

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

MISC. LAND APPLICATION NO. 28008 OF 2023

(Arising from Land Case No. 24 of 2004)

**ABDULKADIR SULEIMAN MBEO (Administrator of the estate of the late
SUWED SADIQ) APPLICANT**

VERSUS

1. RAYMOND ANGAUFOON LEIYA.....1ST RESPONDENT

2. ANGAUFOON A. L. NKYA2ND RESPONDENT

3. NATIONAL BANK OF COMMERCE LTD.....3RD RESPONDENT

RULING

Date of last Order: 01/03/2024

Date of Judgement: 14/03/2024

MWAIPOPO, J

The Applicant herein filed an Application under Section 11 (1) of the Appellate Jurisdiction Act Cap 141 RE 2019 for purpose of moving this Honourable court to grant him the following reliefs:

- a. That the Applicant be granted extension of time within which to file a Notice of Appeal against the ruling and drawn order of this court.*
- b. That cost of the Application be provided for.*

The Chamber Application is supported by an Affidavit and reply Counter Affidavit of the Applicant namely Abdul Kadir Suleiman Mbeo, the Administrator of the estate of the late Suwed Sadiq affirmed on the 14th day of December 2023.

The same is opposed by the Counter affidavit of the 3rd Respondents', sworn by Dickson Ikingura, learned Advocate of the High Court of Tanzania and Courts subordinate thereto currently employed as he Legal Counsel in the Legal and Company Secretary Directorate of the 3rd Respondent, and consequently the Principal Officer of the 3rd Respondent. The 1st and 2nd Respondents did not file their Counter Affidavit to oppose the Application.

The hearing of the Application proceeded by way of written submissions as per timetable ordered by the Court and all the parties complied with the schedule including the 1st and 2nd Respondents' who never filed their Counter Affidavits. My analysis on this part will be done later in the course of judicial consideration of the matter.

With regard to representation, all parties in the Application were also represented whereby the Applicant enjoyed the services of the learned Advocate Rutabingwa, the third Applicant enjoyed the services of the learned advocate Makarios, J Tairo and the 1st and 2nd Respondents' were represented by learned advocate Sylvester Shayo.

Submitting in support of the Application, the learned counsel for the Applicant stated that they have filed an Application for extension of time within which to file a Notice of Appeal against the Ruling and Order of this Court (Hon. Kileo J as she then was dated 2nd December 2005 in Land Case no 24/2004 dismissing the said suit following Preliminary Objections raised by the Respondents, then the Defendants. The learned Counsel prayed to adopt the contents of Affidavit and reply to Counter Affidavit filed by the Applicant as part of their submissions. He also intimidated to the Court that the first and second Respondents were duly served with the Application through their Advocates M/S Sylvester Shayo and Co. Advocates on 29th December 2023 but no Counter Affidavit has been filed.

Consequently, in view of that scenarios, the Application stands unopposed by the first and second Respondents. The 3rd Respondents filed their Counter Affidavit as stated above.

In submitting on the extension of time, the learned Counsel cited Section 11(1) of the Appellate Jurisdiction Act Cap 141 RE 2019 to drive his point home that the High Court is empowered to extend time for giving Notice of Appeal notwithstanding the expiry of the time within which to file a Notice of Appeal, as long as the Applicant accounts for the delay. He contended that the Applicant under paragraph 5-17 of the Affidavit has given an account of the delay up to the time of lodging the third Appeal namely the Civil Appeal No. 90 of 2021 following the ruling of Honorable justice Opiyo, in Miscellaneous Land Application No. 518 of 2019, delivered on 9th October 2020, which affirmed their reasons for delay. The learned Advocate urged this Court to follow the stance of the said decision, which facilitated them to lodge Civil Appeal no. 90 of 2021 before the CAT on 29th March 2021. The above mentioned Appeal was listed for hearing on 6th November 2023 before the Court of Appeal and on that date the Court of Appeal suo motto invited the parties to address the Court first on whether the Appeal was filed within 60 days of the date when the notice was logged in Court and secondly whether the Notice of Appeal was valid. He referred the Court to the attached Ruling and para 19 of the Affidavit of the Applicant. After hearing the submissions of the counsel for the parties the Court of Appeal in their ruling page 13-14 concluded that the Appeal was time barred contrary to the requirement of Rule 90 (1) of the Rules for the reason that the Appeal was lodged beyond the time of 60 days following the lodgement of the notice of appeal. The Court never dealt on the propriety of the Notice of Appeal.

Submitting on the delay in lodging the Appeal, the learned Counsel contended that the Notice of Appeal was filed on 21st October 2020 but the extracted and properly endorsed ruling of Hon. Kileo, J as corrected was supplied to the Applicants counsel on 11th February 2021 as per para 14,17 and 20 of the Affidavit and as per the Letter of the Deputy Registrar in Land Case No. 24 of 2004 dated 11th February 2021 attached as Annex J.

That was followed by an extracted Certificate of Delay dated 18th February 2021 which had excluded the period of up to 11th February 2021 although the Appeal could not have been lodged without a properly corrected ruling of the trial Judge Hon. Kileo, J which was supplied on 11th February 2021. The Applicant had reasonably believed that the sixty days were to run from that date i.e. 11th February 2021 hence the lodging of the Appeal on 29th March 2021. Therefore, the Deputy Registrar of the High Court Land Division had therefore wrongly issued the letter and Certificate of Delay which as per the finding of the CAT could not save the period to be excluded the period to be excluded and could not be corrected hence the striking out of the Appeal. The Ruling of the CAT in Civil Appeal No. 90 of 2021 was pronounced on 7th December 2023 and as per paragraph 22 of the Affidavit of the Applicant, that ruling was received and or supplied to his Advocate on 10th December 2023. The Application at hand was then prepared and submitted to the Court for admission and was duly filed on 19th of December 2023. He contended that the Applicant has indeed been aggressive throughout and acted fast in filing this Application following the decision of the Court of Appeal.

Arguing on the point of negligence raised by the third Respondent, the Learned Counsel for the Applicant stated that, paragraph 13 of the Affidavit in reply of the Applicant affirmed on 8th of February 2024 is quite clear and gives an account of the days. He argued that the Application was ready on 14th December



2023, presented in Court on the 15th of December 2023 which was a Friday and 16th and 17th December 2023 were Saturday and Sunday and therefore non working days. Monday was 18th of December 2023 when the admission process was finalised and filing was done on 19th December 2023. He contended that the days were therefore properly accounted for and as submitted earlier on, the Appeal could not have been lodged within 60 days of the notice as ascertained by the Court of Appeal without a properly corrected Ruling and Drawn Order of Hon. Kileo, J which were supplied on 11th February 2021.

He asserted that the Counter Affidavit of the third Respondent has largely dealt with the matters which were considered by the CAT on the sixty days of lodging the Appeal hence cannot be brought up again. Therefore, the Applicant has not been negligent and what has happened to a greater extent is what constitute technical delay and the blame cannot be placed on the Applicant and his advocate.

With regard to the issues which are the subject of the CAT appeal, the Learned Counsel alluded that, if allowed to pursue the Appeal upon being granted extension of time to lodge the Notice of Appeal, the Applicant intends to raise the issue of Applicability of res judicata as per draft Memorandum of Appeal attached as to the Affidavit.

The learned Counsel for the Applicant concluded his submissions by inviting the Court to take inspiration to the case of **Lyamuya Construction Co. Ltd vs Board of Registered Trustees of Young Women's Christians Association of Tanzania, Civil Application No. 2 of 2010** and **Osward Masatu Mwizarubi vs. Tanzania Fish processing Ltd Civil Application No. 13 of 2010**, to drive point home that the Applicant has been diligent throughout and there is good cause to grant the Application. He prayed for the Court to exercise

its discretion and grant the Applicant extension of time to lodge the Notice of Appeal with a view of appealing against the Ruling of this Court, (Kileo, J) in Land Case No. 24 of 2004.

Submitting in rebuttal was the counsel for the 1st and 2nd Respondents. However, I will skip their submissions and proceed with the submissions of the third Respondent because they did not file their Counter Affidavit while they were duly represented by an Advocate when the Order of the Court was delivered in the presence of the same Advocate.

It is my settled position that by failing to file their Counter Affidavit they forfeited their right to bring their defence and thus they cannot be allowed to unceremoniously and suddenly appear in Court by way of filing their Written submissions which are not even supported by the leave of the Court. Therefore, this ruling will proceed based on the judicial consideration of the submissions of the Applicant and the 3rd Respondent. As I will proceed hereunder.

The Learned Counsel for the third Respondent began their submissions by praying to adopt the contents of Counter Affidavit sworn by Dickson Ikingura, learned Advocate to form part of their submissions. He advanced the following reasons to oppose the Application and submission filed by the Applicant;

One, the Applicant has not provided proof that he served the 1st and 2nd Respondents instead of condemning them that they had not opposed the Application.

Two, The Applicant has cited the provisions of Section 11 (1) of Appellate Jurisdiction Act contending that the Court had discretion to grant extension of time but has not analysed how the Court can exercise its discretion based on the guidelines issued in the case of **Lyamuya Construction co. Ltd** (supra. He

contended that the Applicant has not advanced any reasons to the satisfaction of the court.

Three, the Applicant has not accounted for each day of delay since October 2005 to December 2023 when he filed the present Application as per the narrations contained in the Affidavit.

Four, the Applicant has inordinately delayed in bringing the Application for more than 18 years i.e. from 2nd October 2005 to 19th December 2023 when he filed the present Application. He also wrongly imported the concept of technical delay, in his submissions, something which amounts to submissions from the bar.

Moreover, The Applicant has been negligent for failure to account for each day of delay, for failure to file competent Appeals and various documents before Court therefore he cannot shelter on the discretionary power of the court.

Furthermore, the Applicant has not cited any illegality or point of law of sufficient importance in his Affidavit.

Similarly, the Applicant's reliance on the incompetent Certificate of Delay which had been already ruled out the CAT by the CAT which he found un acceptable.

Lastly, the Learned Counsel prayed for the dismissal of the Application with costs since it has not demonstrated any good cause for delay. He termed it as frivolous, baseless, vexatious and unjustifiable.

In rejoinder the learned Counsel for the Applicant reiterated his submissions in chief while responding to the issues raised by the learned counsel for the 3rd Respondent. The submissions shall not be reproduced but will be referred by the Court as appropriate.

Having gone through the relatively lengthy submissions of the Learned Counsel, I now turn to determine whether this Application has merit as follows;

Section 11 (1) of Appellate Jurisdiction Act Cap 141 RE 2019, grants this court with power to grant extension of time. The said section reads:

“11(1) subject to subsection (2), the High Court or where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned may, extend the time for giving notice of intention to appeal from a judgement of the High court or of the subordinate court concerned, for making an Application for leave to appeal or for a certificate that the case is a fit case for appeal , notwithstanding that the time for giving the notice has or making the Application has already expired”.

However, the said section does not provide for guidelines on how court can exercise its discretion in granting extension of time. Therefore, reasons for extension of time vary from one case to another depending on the circumstances of each case. There is no a fixed list on the reasons for extension of time. However, through case law Courts have established some guidelines for Courts to consider while exercising their discretion judiciously. See for instance the case of **Lyamuya Construction Ltd (supra)** which has set out the following factors;

- 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 the intends to take and**

d) If the court feels that there are other 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.

The above factors were also restated in the case of **Damas Assey and Another Vs. Raymond Mgonda Daula and others, Civil Application No. 232 of 208 CAT at DSM** (unreported) see also the case of **Maro Wambura Vs. Chacha Nyamahemba, Misc. Land Application No. 25 of 2021 MCT Musoma.**

Similarly, in the case of **Tanga Cement Company Ltd Vs. Jumanne Massanga and Another Civil Application No. 6 of 2001** (unreported) the Court had this today;

"What amounts to sufficient cause has not been defined from decided cases a number of factors have been taken into account including whether or not the Application has been brought promptly, the absence of any valid explanation for delay, lack of diligence negligence on the part of the Applicant

Coming back to the instant Application, the Applicant has stated various reasons that led to his delay in filing his Appeal prior to December 2023 when he filed instant Application and has termed it as technical delay. He has narrated the period since the decision was rendered in 2005 when the impugned decision was delivered in 2005 by Hon. Kileo, J and the efforts taken to have the same corrected before filing the record of Appeal in 2009, the three (3) Appeals which were struck out in between including the last one which was struck out on the 7th of December 2023.

That is Civil Appeal no 27/2006 which was struck for lack of a Decree, Civil Appeal No. 6/2014 which was withdrawn for not including another party to the case (NBC) and Civil Appeal no. 90/2021 which was also struck out for being lodged out of 60 days. Further the Applicant has also narrated the manner in which he instantly filed the present Application within a period of one week from the date when the decision was given on the 7th of December 2023. In his Application and submissions, he has termed this period of pursuing his rights as amounting to technical delay.

The Court of Appeal, in the case of **Zahara Kitundi and another vs. Juma Swalehe and other Misc. Civil Application No. 9 of 2016 CAT Arusha** while citing with approval the case of **Fortunatus Masha vs William Shija and another 1997 TLR 154** had an opportunity of differentiating between actual and technical delay and thereby provided guidance on how to confront these type of cases in which the Applicant pleads technical delay. The CAT stated in that case, and I quote;

"A distinction should be made between cases involving real or actual delays and those like the present one which only involve what can be called as technical delays in the sense that the original Appeal was lodged in time but the present situation arose only because the original Appeal for one reason or another has been found to be incompetent and a fresh Appeal has to be instituted.

In the circumstances, the negligence if any, really refers to the filing of an incompetent Appeal and not the delay in filling it.

The filling of an incompetent Appeal having been dully penalised by striking it out, the same cannot be used yet again to determine the timeousness of applying for filing the fresh appeal. In fact, in the present Appeal, the Applicant acted immediately after the pronouncement of the Ruling of this Court striking out the first Appeal.”

See also the case of **Farhia** where the Court of Appeal affirmed the position that once it is established that the Applicant has been in court pursuing his rights consistently then the Court can consider granting him extension of time.

Based on the quotation and the cases cited above, above and the submissions of the parties. It is my considered view that the Applicant has explained away delay to my satisfaction. Therefore, based on the submissions presented by the Applicant, I am of the firm position that, the period that the Applicant was pursuing his rights in Court can be termed as technical delay. There is ample evidence that the Applicant never rested and has been in Court corridors constantly since 2004. The reasons based on the negligence cited by the 3rd Respondent cannot hold water, as the Applicant has already been punished thrice by having his Appeals thrown out, struck out and withdrawn. All the incompetent Appeals received the wrath that they deserved. The Applicant cannot be punished again for such incompetent Appeals by way of citing negligence on his part. Further the delay in time spent in filing those Appeals cannot be brought again at this juncture (See the case of Zahra **Kitindi (Supra)**).

Similarly, after the incompetent Appeal was struck out last year in December 2023, the Applicant immediately took steps within a period of one week or less than ten days to file this instant Application.

Therefore, in my settled position he has advanced good cause for his technical delay, that the delay has not been inordinate (See the case of **Lyamuya Construction (supra)** and in view of the decisions of the CAT, in all his previous Appeals he cannot be punished again based on negligence.

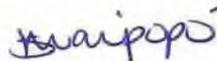
Further, the reasons advanced by the 3rd Respondent cannot hold water in this regard, and also in light of the decision of my learned sister Hon. Opiyo, J attached to the Affidavit and as contended by Applicant, this similar Court cannot re open the already closed up issues which were determined before by my sister Opiyo, J.

That done and said, this ground alone is sufficient to dispose this Application I will not belabour on the ground of res judicata as a ground for Appeal, as advanced by the Applicant.

In the Upshot I proceed to grant this Application since I have found it to be meritorious. The Applicant is ordered to file his intended Notice of Appeal within 30 days from the date of this ruling. The circumstances of this matter are such there should be made no order as to costs therefore each party shall bear its own costs.

It is so ordered.

DATED at DAR ES SALAAM this 27th day of March, 2024



S. D. MWAIPOPO

JUDGE

27/3/2024

The Ruling delivered this 27th day of March, 2024 in the presence of Mr. Denis Musimwa and Ms. Hamisa Nkya learned Advocates for the Applicant and 3rd Respondents respectively and in the absence of the 1st and 2nd Respondents.



Mwaiipo

S.D. MWAIPOPO

JUDGE

27/3/2024