

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

MISC. LAND APP. NO. 152 OF 2023

*(Arising from the judgement of the High Court of Tanzania, Land
Division at Dar es salaam Hon. L.E Mgonya, J dated 31st May 2019, in
Land Case No.231/2015)*

GABRIEL MAKENYA MABULAAPPLICANT

VERSUS

ZAHORO MOSES.....1ST RESPONDENT

KASHINDYE KULWA.....2ND RESPONDENT

RULING

*Date of last Order:09/02/2024,21/02/2024
Date of Judgment:22/02/2024*

S.D. MWAIPOPO, J.

This is an Application for extension of time within which an Applicant can lodge a Notice of Appeal to appeal to the Court of Appeal out of it time. The Application is made by way of Chamber Summons preferred under Section 11(1) of the Appellate Jurisdiction Act Cap 141, RE 2019 the (AJA) and supported by the sworn Affidavit of Sakina H. Sinda, an Advocate acting for the Applicant. Upon being served with the Chamber Summons and Affidavit, the first Respondent filed Counter Affidavit sworn by Mr. Emmanuel William Kessy, an Advocate of the High Court and the second Respondent filed Counter Affidavit sworn by

himself, Kashindye Kulwa. The Application was argued by way of written submission as per the timetable ordered by the Court. The Applicant's written submissions in chief were prepared by learned Advocate Godfrey Kizito, while the 1st Respondent's Reply to written submissions was prepared by learned Advocate Anindumi Jonas Semu and the 2nd Respondent fended for himself.

Submitting in support of the Application, the learned Counsel for the Applicant contended that the Applicant was a Plaintiff in Land case No. 231/2015 in which he lost on the 31st of May 2019 before Mgonya, J as she then was. The Court decided in favour of the 1st and 2nd Respondents who were the 2nd and 4th Defendants therein. The Applicant being aggrieved with the decision of this Court, decided to engage the services of the learned Advocate Rose Suleiman of Simbangwilimi and Advocates Company located at Kahama Shinyanga Region, to assist in drawing the Notice of Appeal to the Court of Appeal of Tanzania. The Said Advocate complied with instructions of just drawing the Notice of Appeal and a letter applying for certified copies of records on 24th of June 2019 then gave it to the Applicant for filling in Court in Dar es Salaam. The Applicant proceeded to Dar es Salaam to file the time and on 26th of June 2019 he managed to file to said letter applying for records and on 27th of June 2019, the Notice of Appeal was

signed by the Registrar of the High Court, at the High Court of Tanzania, Land Division at Dar es salaam.

The Counsel submitted that, the Applicant was not well informed about the mode of service of the letter applying for copies of records and Notice to all the Respondents and being a lay person, after filing the said letter and lodging of the Notice of Appeal, he proceeded to serve those documents to the Respondent without proof of service except for 2nd Respondent who signed a Notice of Appeal alone. That by that time he was within time to file the Notice of Appeal as well as to apply for certified copies of records as per the requirements of the law. That the 2nd Respondent's Advocate through Makoa Law Chambers on 22nd day of July 2019 lodged a Notice as to address for service despite the fact that there was no proof of service of service neither in the Applicant's copy of Notice of Appeal nor in the Applicant's letter applying for certified copies of records. The Applicant then filed his Appeal at the Court of Appeal on 28th of April 2020, after getting all the relevant documents and certificate of delay from the Registrar of the High Court on 9th day of March, 2020, the Appeal was registered as Civil Appeal No. 102/2020. When the matter was fixed for hearing before the Court of Appeal the Applicant found out or discovered that the Appeal was incompetent before the Court for not complying with the requirement of effecting

service of letter applying for certified copies of records. The said letter must show proof of service. Since the Applicant did not have such a proof, he decided to withdraw the Appeal and the Court granted the prayer hence the Applicant filed this Application for extension of time. In support of his application, the Applicant has cited the case of **Lyamuya Construction Company Ltd Versus Board of Registered Trustees of Young Women's Christian Association of Tanzania Civil Application No. 2 of 2010** to confirm that, the Court has discretion to grant extension of time but that discretion is judicial and must be exercised according to rules of reason and justice and not according to the private opinion or arbitrarily by the authorities. The Applicant cited the guidelines developed in the case of **Lyamuya (Supra)**, which are to the effect that;

- i) **The Applicant must account for all the period of delay.**
- ii) **The delay should not be inordinate.**
- iii) **The Applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.**
- iv) **If the Court feels 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.

With regard to the cited case of **Lyamuya** Construction (supra) the Applicant cited the issue of illegality contained in the Judgement of Mgonya, J as she then was, contending that the said Judgement was made in favour of the Respondents without considering that the purported sale was illegal and contrary to the requirement of the law and that it was made in favor of the Respondents while there was no evidence as to the transfer of the money to the Appellant. The Applicant cited the cases of **Ally Salum Said Versus Idd Athumani Ndaki (HCT)** and **VIP Engineering and Marketing Ltd and 2 and two others VS. Citibank Tanzania Ltd, Civil Reference No. 6, 7 and 8 of 2006** unreported to drive point home that, whenever there is illegality to be addressed, then the Court has to extend time.

Lastly in his submission in chief, the Applicant emphasized that he has shown high level of diligence based on paragraphs 3,4,5,6,8 and 9 of the Affidavit by engaging Advocates in different phases, requesting for records of the case, lodging the Notice of Appeal and that he was not negligent at any point. The technical delay was caused by his Advocate's negligence thus he should not be punished for the fault of the Advocate.

Submitting in rebuttal, the learned counsel for the first Respondent the opposed the prayers sought by the Applicant in his Chamber Summons and prayed to adopt the Counter Affidavit of Emmanuel William Kessy to form part of his submissions.

As to whether the Applicant submitted sufficient cause for the delay, the learned counsel submitted before the Court that Civil Appeal No. 102/2020 was marked withdrawn on 15th of March 2023 for failure of the Applicant to serve the Respondent with a letter applying for proceedings, Judgement and Decree which is the requirement under Rule 90 (3) of the Tanzania Court of Appeal Rules RE 2019, the omission which he found fatal and cannot be cured by the High Court as it emanates from the Court of Appeal Rules. It was his submission that the Applicant has not advanced sufficient reasons for curing the omission, which led to the withdrawal of the Appeal and sufficient reasons for lodging extension of time to lodge the Notice of Appeal as ignorance of the law is not a good cause for extension of time. He referred the Court to the case of **Wambele Mtumwa Shahame VS. Mohamed Hamis Civil Reference no. 08/2016** by Oriyo, J.

With regard to the issue of illegality, the 1st Respondent contended that the Applicant has not stated any illegality found in the decision of Hon. Mgonya J. but also the illegality must be apparent on the face of the

record, not one that will require a long drawn argument or process. He referred the Court to the case of **Ngao Godwin Losero VS. Julius Mwarabu Civil Application No. 10 of 2015** by Hon. Mussa J.A. The 1st Respondent finally prayed for the Application for extension of time to be dismissed with costs.

Arguing against the Application for extension of time was also the 2nd Respondent. He began his submissions by citing the principle that, in application for extension of time, the Applicant must advance sufficient reasons for delay and in case of alleged illegality the same must be apparent on the face of the record.

With regard to the point of ignorance of the procedure for service cited by the Applicant, the 2nd Respondent argued that the Applicant engaged the services of Rose Simbangwilimi and Co. Advocates to service his appeal to the Court of Appeal against the impugned decision in Land Case No.231/2015 but he managed to serve the 2nd Respondent with proof of service and the appeal was found incompetent at the Court of Appeal. The 2nd Respondent asserted in his submissions that, Advocates are considered familiar with the legal procedures and once the Applicant engages the services of an Advocate he cannot plead to be a layman as a result of delaying. He argued that it was expected for his Advocate to ensure that the whole process is serviced with care and diligence as it is

his duty to his client. The situation could have been different if he did not have an advocate at all. The 2nd Respondent referred the Court to the case of **Lyamuya Construction** (supra) to prove his point that the Applicant together with his Counsel had contributory negligence which resulted to the filing of an incompetent appeal to the Court of Appeal and ultimately the argued delay.

Regarding the ground of illegality cited by the Applicant, the 2nd Respondent stated that the Applicant has pleaded illegality stating that it was due to illegal sale. He contended that the law is very clear for one to succeed on illegality it must be rightly on the face of the records. However, with impugned decision one has to go deep into the evidence in order to find out whether the sale was legal or not. He referred the Court to the case of **Principal Secretary Ministry of Defence and National Service Vs Devram Valambhia (1991) TLR 387** to drive his point home that an illegality must be apparent on the face of the Record.

In addition to the above ground the 2nd Respondent submitted that Applicant has not accounted for all the days of delay from June 2019 when the Applicant first filed the incompetent Notice of Appeal to May 2023 when he filed this Application which is a lapse of more than three years. He submitted that the principle of accounting for each day of

delay was stated in the case of **Elius Mwakalinga VS. Domina Kagaruki and 5 others, Civil Application No.120/7 of 2018, (unreported)**.

Finally, the 2nd Respondent prayed for the dismissal of the Application with costs.

There was no any rejoinder on the part of the Applicant.

Having gone through the submissions of the parties above, the pertinent question for consideration is whether the Applicant has assigned good cause for this Court to exercise its discretionary power of extending time under section 11 of AJA. The provisions of section 11 do not specify the factors to be considered by the Court in determining whether or not to extend the time, however, from decided cases, some factors provide guidance on whether or not good cause has been established by the Applicant. The case of **Lyamuya Construction Company Ltd (supra)** 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 stated 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.**

Reverting to the case at hand, the Applicant has advanced the ground of ignorance on his part to effect service and or secure proof of service in the course of filing and servicing his appeal to the Court of Appeal. He has also linked it with negligence on the part of his first Advocate who did not inform him well about service of the letter applying for copies of records and Notice to all the Respondents, whereby being a lay person after filing the letter and lodging the Notice of Appeal, he then proceeded to save those documents to the Respondents without securing proof of service except for 2nd Respondent who signed on the Notice of Appeal alone. That when the matter was fixed for hearing on 13th of March and adjourned to 15th day of March 2023, the Applicant and her new counsel discovered that the Appeal was incompetent before

the Court for not complying with the requirements of proof of service on the letter which applied for certified copies of records, they prayed for the withdrawal of the matter and the Court of Appeal granted the prayer hence this Application.

This Court has discretion to grant extension of time upon sufficient cause being shown. What amounts to good cause is not defined. It is based on the discretion of the Court which in most cases depends on the circumstances of the case which are to be determined judiciously. Thus, 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."

See also the case of **Lyamuya Construction** (supra). In the case of **Bushiri Hassan Vs. Latifa Lujio Mashajo, Civil Application No. 3 of 2007** (unreported) the requirement of accounting for even a single day was emphasized.

In the case at hand, the Applicant has given the history of the steps he had taken after the decision in Land case No. 231/2015 was handed down. That after the said decision, the Applicant among other things, engaged Advocate Rose Suleiman of Simbangwilimi & Advocates Company in Kahama Shinyanga who assisted him to draw the Notice of Appeal within the time required and then gave it to the Applicant to file the same in Dar es salaam, whereby he managed to file it within time, i.e. that is on 27th of June 2019. However, the Applicant being a lay person was not well informed about the procedures for service of the letter applying for copies of records, whereby after filing the same he proceeded to serve the documents to the Respondents without proof of service and by that time he was within the time required by law as he managed to file his Appeal at the court of Appeal on 28th of April 2020 after getting all the relevant documents from the Registrar in March 2020 whereby the Appeal was registered as Civil Appeal No. 102/2020. It was then fixed for hearing on 13th and 15th of March 2023 whereby the Applicant and his counsel found the appeal was incompetent before the Court for not complying with the requirement of proof of service of the letter applying for certified copies of records, since the said letter must show proof of service while the Applicant did not have that proof.

Then the Applicant and his counsel decided to withdraw the Appeal and the Court granted the prayer hence this Application.

I have dispassionately considered the reasons for the delay in filing the Notice of Appeal whose time for filing is sought to be extended as stated in the Affidavit as well as the submissions of the parties. The records which form part of the Affidavit supporting the Chamber summons indicate the facts relating to the matter. The record shows that the Applicant was a Plaintiff in Land case No. 231/2015 which was decided against his favour as on 31st day of May 2019 before Hon. Mgonya, J. as she then was. Aggrieved with the decision of the Court he decided to engage the services of learned Advocate Rose Sulemani of Simbangwilimi & Advocates Company located at Kahama Shinyanga Region to assist in drawing of a Notice of Appeal to the Court of Appeal. The Advocate complied with instructions of just drawing the Notice of Appeal and preparing the letter for applying for certified copies of records on 24th of June, 2019 then save it to the Applicant for filing it in Court in Dar es Salaam. The Applicant proceeded to file the same and on 26th June, 2019 and on 27th day of June 2019 the Notice of Appeal was signed by the Registrar of the High Court at the High Court of Tanzania, Land Division at Dar es Salaam. However, according to para 6 of his Affidavit, the Applicant was not well informed about the modality

or procedure for effecting service of the letter applying for copies of records and Notice to the Respondents and being a lay person after filing the said letter and lodging the Notice of appeal he proceeded to save those documents to the Respondents without securing proof of service except for the 2nd Respondent who signed on the Notice of Appeal alone. Further the Applicant has asserted that, by that time he was within time to file the Notice of Appeal as well as apply for the certified copies of record as per the requirements of the law. The 2nd Respondent through the services of Makoa Law Chambers responded by lodging Notice of address for service despite the fact that there was no proof of service. The Applicant then filed his Notice of Appeal on 28th day of April, 2020 after getting all the relevant documents and Certificate of Delay from the Registrar of the High Court which was obtained on 9th day of March 2020, whereby the Appeal was registered as Civil Appeal No. 102/2020 immediately thereafter. When the Appeal was fixed for hearing on 13th day of March 2023 then adjourned to 15th day of March 2023, at the Court of Appeal, the Applicant and his 2nd Advocate noticed technically that the Appeal was incompetent before the Court for not complying with the requirements of service of the letter applying for certified copies of records, since the said letter must show proof of service while the Applicant did not have that proof. The

Applicant's counsel, Ms. Sakina Hussein Sinda prayed for the withdrawal of the Appeal whereby the Court granted the same hence they filed this Application on 22nd March 2023, within a period of one week.

It is my position that, the foregoing steps taken by the Applicants since the decision in the Land case was delivered and the speed thereof of filing the notice of Appeal within less than 30 days required by the law as well as the letter requesting for copies of records and the filing of the Appeal within the statutory time thereof after getting all the necessary documents and similarly, the steps taken after the withdrawal of the matter at the Court of Appeal of Tanzania on 15th March 2023, of filing this Application within a period of one week i.e. 22nd of March 2024, and the speed thereof, suggest that the Applicant, acted with promptness in taking steps to pursue his intended appeal and more specifically to remedy the defect that led to the withdrawal of his matter at the Court of Appeal.

Based on the history of the matter, I am of the position that there was no laxity on the part of the Applicant. Applying the test in the case of **Lyamuya construction**, I find that the Applicant was not negligent or sloppy in the prosecution of his appeal and that he acted in good faith and diligently. Further the Applicant also accounted on every step he took since the decision of the High Court in the Land case decided by

Hon. Mgonya J as she then was. I have also observed that the delay was not inordinate given his promptness to file the very initial appeal and the instant application.

This period of pursuing his matter since the filing of the initial notice to its withdrawal before Court of Appeal of Tanzania as well as the filing of the instant Application for extension of time can technically be termed as "technical delay."

In the case of **Fortunatus Masha Vs. William Shija and Another (1997) TLR 154** the CAT at page 155 observed that:

"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 technical delay 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 not the delay in filing it. The filing of an incompetent appeal having

been duly penalised by striking it out, the same can not be used yet again to determine the timeousness of applying for filling the fresh appeal. In fact in the present case, the Applicant acted immediately after the pronouncement of the ruling of this court striking out the first appeal”

It is thus my considered view that the Applicant has explained away the delay to my satisfaction in the light of **Fortunatus Masha case** (supra), the filing Civil Appeal No.102/2022 without having complied with procedures for securing proof of service of the letter applying for certified copies of records, having been withdrawn from the Court for being incompetent, cannot be used yet again to determine the timorousness of applying for filing the fresh Notice of Appeal out of time. It is no gainsaying that the Applicant acted immediately after the pronouncement of the decision of the CAT of withdrawing the matter. Therefore the argument and cases cited by the Respondents that the Applicant acted negligently, has not provided sufficient reasons and thus he cannot shelter on ignorance are irrelevant in the circumstances of this matter and distinguishable so to speak in the light of the case of **Fortunatus Masha** which has also been cited with approval in the case of **Zahara Kitindi and other VS. Juma Swalehe and other Misc.**

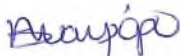
Civil Application No. 9 of 2016 CAT Arusha decided by Mwambesele J. A. The Applicant has been able to prove before this court that he has delayed based on technical delay and not actual delay further that he never rested in pursuing his matter as he has been in Court corridors ever since the time he travelled from Shinyanga on 26th of June 2019 to date. (See the case of **Wambele Mtumwa Shahame Vs. Mohamed Hamis Civil Refence No. 8/2016.**

The foregoing said and done, I am satisfied that the Applicant has advanced before this Court sufficient reasons as to why he should be granted extension of time to file a fresh Notice of Appeal out of time and I would in the premise, grant the prayer for extension of time sought in the Chamber Application. The reasons advanced on technical delay are enough to dispose the Application. I will not labour on the second ground of illegality.

In the upshot, the present Application is allowed. The Applicant should file the intended Notice of Appeal within 30 days of delivery of this ruling. The circumstances of this case are such that there should be made no order as to costs. I therefore make no order as to costs.

It is so ordered.

DATED at Dar Salaam this 22nd day of February 2024.


S. D. MWAIPOPO
JUDGE
22/02/2024



The Ruling delivered this 22nd day of February 2024 in the presence of Learned Advocate Godfrey Kizito for the Applicant also holding brief for the learned Advocate for the 1st Respondent and in the absence of the 2nd Respondent, is hereby certified as a true copy of the original.


S.D. MWAIPOPO
JUDGE
22/02/2024

