

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC LAND APPLICATION NO. 99 OF 2012

(Arising from High Court (Land Division) in Land Case No. 201 of 2004)

FATMA MUKANGARA.....1ST APPLICANT

SAIDI OMARY MWAKITOSI.....2ND APPLICANT

VERSUS

THE ADMINISTRATOR GENERAL.....RESPONDENT

RULING

I. MAIGE, J

The application at hand is an *omnibus*. It is a combination of three applications. The first and second applications which are for extension of time to file a notice of intention to appeal and application for leave to appeal to the Court of Appeal, respectively, have been preferred under section 11(1) of the Appellate Jurisdiction Act. The third one which is for stay of execution pending determination of the first two substantive applications, is made under section 95 of the **CPC**.

For the reason of non-appearance by the respondent, the applicants were allowed to proceed with the application *ex parte* by way of written submissions. On 27th November 2015, my learned brother Judge Nchimbi (as he then was), dismissed the application for want of prosecution on account of failure of the applicants and their counsel to file written submissions.

Believing that the decision arose from an oversight on the part of the presiding Judge, the applicants filed Misc. Land Application No. 494 of 2019 inviting the Court to review its decision for the reason of an error apparent on the face of the record. Their claim which was confirmed in the review proceeding was that, contrary to the inadvertent finding of the presiding Judge, the applicants filed, through their advocate, the written submissions in due compliance with the court order. The ruling dismissing the application was therefore, set aside and replaced with an order that the matter be placed before a successor judge for fixing a date of judgment.

With those remarks, I think it may be appropriate to consider the merit or otherwise of the application. As I said above, this application has combined three prayers. I have however noted from the applicants' written

submissions through their advocate ASYLA ATTORNEYS that, the third prayer has been abandoned for being overtaken by events. It is so marked.

With the abandonment of the last prayer, I remain with two prayers. For obvious reason, I will start with the second prayer which is for extension of time to apply for leave to appeal to the Court of Appeal. It is apparent that, in 2012 when the application was being filed, leave was an essential ingredient for an appeal to the Court of Appeal in matters originating from the High Court, Land Division. The position has however now changed. For, in accordance with the amendment brought by Act No. 8 of 2018, an appeal against such a decision is automatic and does not require leave.

The amendment under discuss affects procedural aspect of the law and not substantive one. In view of the authority in **BENBROS MOTORS TANGANYIKA LTD VS. PATEL (1968) E.A.247** the amendment in so far as it pertains to procedural rule, operates retrospectively. For that reason therefore, the respective prayer is redundant. It has been overtaken by events. It is accordingly is struck out.

This now takes me to the first element of the application which is for extension of time to lodge a notice of appeal. The decision intended to be appealed against was delivered 11/09/2007. The instant application was filed in 2012. It is after the lapse of hardly five years. In accordance with facts in the affidavit, the applicants justify the delay on account of *bonafide* prosecutions of various proceedings portrayed in the affidavit.

It is deposed that, after being aggrieved by the decision of this Court, the applicants timely lodged a notice of appeal and thereafter an application for leave to appeal to the Court of Appeal. It is further deposed that, on 18th June 2012, the notice of appeal was struck out, for the reason of variance between the judgment and decree. As the time within which to file the intended appeal had already expired, it is further in the affidavit, the applicants lodged the instant application.

In their submissions, the counsel for the applicants adopted the facts in the affidavit and contended, relying on the authority in **CITIBANK TANZANIA LIMITED VS. TANZANIA TELECOMMUNICATION COMPANY LIMITED AND 4 OTHERS, CIVIL APPLICATION NO. 103 OF 2005** that, "*the delay did not occur because the applicant sat on the fence or*

remained idle" but on account of prosecutions of various relevant proceedings as disclosed in the affidavit. They prayed therefore that, the application be granted with costs.

I have taken time to thoroughly study the affidavit and the written submissions in support of the application. I am in full subscription with the counsel for the applicants that, prosecution of other proceedings related with the subject of the dispute may amount to sufficient cause for extension of time where the same was done *bonafide* and without negligence. This is in essence the principle in case of **CITIBANK** relied upon by the applicants. It was also dealt with in **INSURANCE TANZANIA LIMITED VERSUS KIWENGWA STRAND HOTEL LIMITED, CIVIL APPLICATION NO. 111 OF 2009**. I will therefore, in dealing with this application, be guided by the said principle.

I have no doubt from the affidavit and its annexures that, prior to the filing of the instant application, the applicants had lodged a notice of appeal and an application for leave to appeal to the Court of Appeal. I am persuaded into so opining by the copies of a notice of appeal and chamber summons attached in the affidavit as **FS-2** and **FS-4**, respectively.

It would appear from the affidavit and submissions that, the applicants could not prosecute the application for leave to appeal nor take further steps in the intended appeal, for the reason that, the notice of appeal in **FS-2** was struck out, on 18th June 2012, for there being a variance between the date of the notice and of the decree. Quite unusually, no copy of the order of the Court of Appeal striking out the notice of appeal has been attached in the affidavit. More so, it is not clear if the striking out of the same was upon application or *suo motu*. In the absence of such a document from the Court of Appeal, this Court is left with no factual basis upon which to ascertain if and when the said notice of appeal was struck out.

The copy of judgement attached in the affidavit suggests that, the Judgment was delivered on 11th September 2007. The notice of appeal on the face of it appears to have been lodged on 1st November 2007. This is more than 40 days from the date of the judgment while the time within which to file a notice of appeal by then was 14 days from the date of the decision. Therefore, the notice of appeal having been filed hopelessly out of time, the applicants cannot, according to the authority in **INSURANCE TANZANIA LIMITED VERSUS KIWENGWA STRAND HOTEL LIMITED** (*supra*),

place reliance on *bonafide* prosecution of other proceedings as a ground for extension of time. The same applies for the application for leave to appeal.

In their written submissions, the counsel for the applicants have urged me to take judicial note that, the Judgment was delivered on 24th October 2007.

With respect, I cannot fall into such a trap. The date of the delivery being express in the judgment and assuming that, the notice of appeal was struck out on the same ground, this Court cannot take the proposed judicial note without offending the law. If at all the applicants believed that, the Judgment and decree were wrongly dated, he would have applied for correction of the same under section 96 of the **CPC**.

In my opinion therefore, the application is devoid of any merit. It is accordingly dismissed.



I. Maige

JUDGE

07/05/2021

Date 07/05/2021

Coram: Hon. S.H. Simfukwe - DR.

For the 1st Applicant: Ms. Raheli Salumbo advocate holding brief for L.

Peter advocate

For the 2nd Applicant:

For the Respondent: Absent

RMA: Bukuku

COURT:

Ruling delivered this 07th day of May, 2021.


S.H. Simfukwe
DEPUTY REGISTRAR
07/05/2021