

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISC. LAND APPLICATION NO. 103 OF 2019

(C/F Misc. Land Appeal No. 26 of 2012 in the High Court of the United Republic of Tanzania at Arusha, Land Appeal No. 37 of 2011 in the District Land and Housing Tribunal of Arusha, Original, Application No. 11 of 2009 in the Kisongo Ward Tribunal)

1. MITALAMI LANG'ASANI
2. HASSAN LANG'ASANI
3. ESTA LANG'ASANI

.....APPLICANTS

VERSUS

SAADA IDDI.....RESPONDENT

RULING

08/04/2021 & 04/06/2021

GWAE, J

The applicants above are before this court seeking an indulgence of this court to enlarge time within which to file the notice of appeal, application for leave to appeal to the Court of Appeal of Tanzania and Certificate on points of law out of time. This application is preferred under the provision of section 11 (1) of the Appellate Jurisdiction Act Cap 141 R. E. 2002.

The application is supported by the joint affidavit of the applicants whose reasons for the delay are stated to be that; the applicants had previously filed his appeal to the Court of Appeal of Tanzania which was unfortunately struck out for being incompetent and containing defective drawn order for certificate on points of law. Further to that the applicant stated that the intended appeal has overwhelming chances of success.

The application was strongly opposed by the counter affidavit of the respondent who argued that, the mistake of the applicant's advocate in lodging the incompetent and defective drawn order does not constitute good or sufficient cause for extending time to start the process of appeal afresh.

When the matter came for hearing the applicants were represented by the learned counsel, Mr. John F. Materu whereas the respondent was represented by Mr. Alute L.S. Mughwai, the learned senior advocate. With the leave of the court the application was argued by way of written submission.

Supporting the application Mr. Materu basically reiterated what is in the applicants' affidavit and added that there are illegalities in the judgment intended to be appealed.

On the part of the respondent through his counsel, it was submitted that the applicant has not demonstrated sufficient reasons for the delay to allow this court to grant the sought extension of time. More so, the counsel argued that the

applicants have not accounted for the days of the delay from the time the decision of the High Court was pronounced to the time of filing of this application and in addition to that, Mr. Mughwai also submitted that even the illegalities alleged by the applicants are not apparent on the face of the decision of the High Court as enunciated in the case of Principal Secretary, **Ministry of Defence and National Service vs. Devram Valambhia** [1999] TLR 182. In his rejoinder the counsel for the applicants submitted that the order striking out the applicants' appeal does not bar the applicants from starting the appeal process afresh and that on itself does not preclude them from exercising their right to start the appeal process afresh. More so the counsel was of the view that applications for extension of time are granted at the discretion of the court depending on the facts of each case.

I have dispassionately considered and weighed the rival submissions from both parties. To begin with, I feel it is instructive to reiterate, as a matter of general principle that whether to grant or refuse an application for extension of time is entirely in the discretion of the Court. But that discretion is judicial and so it must be exercised according to the rules of reason and justice and the overriding consideration is that there must be sufficient cause for doing so. **See Yusuph Same & Another vs. Hadija Yusuph**, Civil Appeal No. 1 of 2002 (Unreported).

Applications of this nature are also decided depending on the circumstances of each case as there are no hard or fast rules on what amounts to sufficient cause.

However, from a number of decided cases a number of factors have to be taken into consideration including whether or not the application has been brought promptly, length of the delay, degree of prejudice to the respondent and the legality of the decision intended to be challenged. In the case of **Mbogo Vs. Shah** [1968] EA the defunct Court of Appeal for Eastern Africa held thus:-

"All relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reason for the delay, whether there is an arguable case on the appeal and the degree of prejudice to the defendant if time is extended."

Guided by the principles above the circumstances of the case at hand are such that the applicants had previously filed their appeal to the Court of Appeal of Tanzania within time whereas the appeal was struck out for being incompetent and containing a defective drawn order. The said order was pronounced on 3rd December 2019 while this application was filed on the 12th December 2019. I have noted that the respondent in his submission had complained that the applicants had not accounted for the days of delay from the time the High Court judgment was pronounced to the time of filing this application, that is the time between 10th of April 2013 to 12th December 2019. With due respect, the counsel is misdirected as it has always been the position of the law that the time spent by the applicant

appellant in pursuing an incompetent application / appeal is termed as a technical delay rather than actual delay and the same cannot be used to determine the time or penalize the applicant / appellant in filling a fresh appeal. Reference is made to the case of **Fortunatus Masha vs. William Shija & another** [1997] TLR 154

In relation to the matter at hand, by any way the respondent cannot allege for the account of days of delay at the time the applicants were pursuing their incompetent appeal to the Court of appeal of Tanzania. Basically, the applicants are expected to account for the days of delay from the date the incompetent appeal was struck out (03/12/2019) to the time of filing of this application (12/12/2019) whose approximation is nine (9) days. However, this court is of the considered view that the number of days spent from the time the appeal was struck out to the time this application was struck out the applicants acted diligently and expeditiously in filling the application at hand.

In the case of **Royal Insurance Tanzania Limited Vs. Kiwengwa Strand Hotel Limited**, Civil Application No. 166 of 2008 (Unreported) it was stated that:

"It is trite law that an applicant before the Court must satisfy the Court that since becoming aware of the fact that he is out of time, act very expeditiously and that the application has been brought in good faith."

From the facts deposed, it is evident that it took the applicants nine days to file this application for extension of time. In other words, the applicants were diligent all along in pursuing their rights of filling the appeal afresh. I am accordingly satisfied that the applicants have accounted for the days of delay.

The applicants have also alleged that there are serious illegalities on the impugned judgment. Nevertheless, the same is not reflected in the applicants' affidavit except in the submission. It is worth noting that submissions are not evidence, they are meant to reflect what is in the application. See the case of **Trade Union Congress of Tanzania (TUCTA) vs. Engineering Systems Consultants Ltd & 2 Others**, Civil Appeal No. 51 of 2016 (CAT - Unreported). That being the case this Court is not bound to discuss something which is not reflected in the affidavit of the applicants.

I have also noted that the respondent in his submission pointed out that the applicants in this application have not cured the defect which was addressed by the Court of Appeal of Tanzania when striking out the previous appeal. According to the counsel the appeal was struck out for being incompetent as the applicants did not attach the proceedings of the Ward Tribunal, similarly, in the case at hand the purported Ward Tribunal's proceedings attached to the applicants' joint affidavit are neither signed nor certified by neither the Tribunal Chairman nor the Secretary of the Tribunal.

Perhaps it should be noted that what is before this court is an application for extension of time where the court is only required to see as to whether the applicants have demonstrated sufficient cause for this Court to enlarge time to file notice, leave and certificate on points of law out of time. This court cannot in any way venture discussing on the curability of the defects addressed by the Court of Appeal of Tanzania when striking out the appeal and doing so is as good as pre-empting the intended appeal. In the case of **Regional Manager- TANROADS Lindi Vs. D.B Shapriya and Company Limited**, Civil Application No. 29 of 2012 (Unreported) cited with approval in the case of **Tanzania Breweries Limited vs. Herman Bildad Minja**, Civil Application No. 11/18 of 2019 (Unreported- CAT) it was reiterated that:

"...it is now settled that a Court hearing an application should restrain from considering substantive issues that are to be dealt with by the appellate Court. This is so in order to avoid making decisions on the substantive issue before the appeal itself is heard. Further to prevent a single judge of the Court from hearing an application by sitting or examining issues which are not his/her purviews. "

In view of the above facts, I find merit in this application for extension of time. Consequently, I grant the application as sought. I order the applicants to file notice of the Appeal within ten (10) days from the date of this ruling, equally, the application for leave to appeal to the Court of Appeal and certificate on points of

law are to be filed within fourteen (14) days from the date of this ruling. Costs of this application shall abide by the outcome of an intended appeal.

It is so ordered.



M. R. GWAE

JUDGE

04/06/2021

