

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISCELLANEOUS LAND APPLICATION NO. 664 OF 2015
(Original Miscellaneous Land Case No. 14 of 2015)**

**ROSEBAY ELTON MWAKABULI.....APPLICANT
VERSUS
HARUNA MOHAMED KITELEBU.....RESPONDENT**

RULING

26/3/2018 & 27/4/2018

MZUNA, J.:

Rosebay has filed application for extension of time within which to file application for issuance of certificate on point of law involved on the intended appeal against the judgment of this court delivered on 4.09.2015, Hon Ndika, J (as he then was). **Haruna** strongly objected this application which is supported by the affidavit of one Rosebay Elton Mwakabuli. The application has been preferred under section 11(1) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002, Rules 10, 45(a) (b), 47 and 49(1) of the Tanzania Court of Appeal Rules, 2009.

Hearing proceeded by way of written submission. Ms. Mareale, the learned counsel appeared for the applicant while the respondent was unrepresented.

The main issue for determination is whether the applicant has established sufficient reasons for the delay for the court to exercise its discretionary powers in granting the application?

It is the learned counsel submission that the delay of filling the application for certification of point of law was not caused by the mistake committed by her previous advocate. To support her argument she cited the case of **Rwabinumi v. Baimbisomwe** (2010) I.E. 337 where it was held that:-

"It would be a grave injustice to deny an applicant such as this one pursue his right of appeal simply because of the blunder of his lawyer when it is well settled that an error of counsel should not necessarily be visited on his client".

She therefore prayed for the court to be pleased to extend time within which the applicant can file her application for issuance of certificate on point of law which is involved.

In reply counsel for the respondent strongly objected the applicant's reasons for delay and argued that the advanced reason is unfounded as the applicant is trying to mislead the court because the failure of the party's advocate to check the law is not sufficient reason for extension of time. He referred to the case of **Calico Textile Industries Ltd (1983) v. Pyaraliesmail Premji** [1983] TLR 28. He therefore argued that the application has no merit and entertaining it would be wasting the precious time of the court and delay justice to the respondent.

It is not disputed that the decision which is intended to be appealed against was delivered on 4.9.2015 and the present application was filed on 6th November, 2015 vides ERV No. 8194419.

Section 11 (1) of the Appellate Jurisdiction Act, cap 141 RE 2002, to which this application relates, reads: -

*"(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 judgment 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 or making the application has already expired.**"*

(Emphasis mine).

Prima facie, that provision entails that this court is enjoined to exercise its discretionary powers. The term discretionary powers is not defined under the CPC. However, in the case of **Mwita Mhere v. R** [2005] TLR 107 the Court of Appeal defined it by citing **Black's Law Dictionary**, 6th edition, and held that:

"Judicial discretion is the exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law...the court has to

demonstrate, however briefly, how the discretion has been exercised to reach the decision it takes..”

From decided cases a number of factors have to be taken into account, including whether or not the application has been brought promptly; the absence of any or valid explanation for the delay; lack of diligence on the part of the applicant (See; **Dar es Salaam City Council v. Jayantilal P. Rajani** - CAT Civil Application No. 27 of 1987 (unreported), and **Tanga Cement Company Limited v. Jumanne D. Masangwa and Amos A. Mwalwanda** - Civil Application NO. 6 of 2001 (unreported)).

It was held in the case of **Royal Insurance Tanzania Limited vs. Kiwengwa Strand Hotel Limited**, Civil Application No. 116 of 2008, cited with approval in the case of **Sebastian Ndaula vs. Grace Rwamafa (Legal Personal Representative of Joshwa Rwamafa)**, Civil Application No. 4 of 2014, CAT, unreported that:

“It is trite law that an application 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 had been brought in good faith.”

In other words, in a situation like this, a party must account of each day of the delay in order to show there is good cause. In the case of **Royal Insurance Tanzania Limited vs. Kiwengwa Strand Hotel Limited**, (supra), the court was dealing with a situation where a party sought to convince court that there was sufficient cause for the delay upon one advocate terminating services. However, a party never disclosed when such

advocate terminated service before obtaining services of the current advocate.

Reading from the filed affidavit the main reason for the delay is stated in paragraph 5 of the affidavit. It is alleged that:-

"That my counsel one Semgalawe filed an application for issuance of certificate on point of law but it was not admitted due to quoting wrong provision of the law, this (sic) by the time correction were made, the application was already time barred as it was supposed to be filed within two weeks from the date of judgment, whence this application."

That would mean the original application was filed well within time, however some necessary corrections after it was struck out made it to be out of time. Filing an application under wrong provision of the law it is argued is negligence on the part of the advocate, however the other party contends that such fault should not be used to punish the innocent applicant.

The respondent has submitted further that "sympathy" should not override the law of limitation and that the applicant is employing a delaying tactic.

I have keenly followed the submissions. However, in view of what was stated in the case of **Fortunatus Masha v. William Shija and Another** [1997] TLR 154 (CA) the delay where the original action is struck out is described as mere "technical delay" in that negligence would apply in filing

of an incompetent appeal (which would also cover the application). The court held further that:

"The filing of an incompetent appeal having been duly penalised by striking it out, the same cannot be used yet again to determine the timeousness of applying for filing the fresh appeal..."

That means since the original application was filed well on time the alleged negligence from the case law cited by the respondent is distinguishable.

Generally speaking, an error made by an advocate through negligence or lack of diligence is not sufficient cause for extension of time. For instance, in the case of **Calico Textile Industries Ltd Vs. Pyraliesmail Premji** [1983] TLR 28, the court struck out the notice of appeal after it had found that *"failure to check the requirements of the law properly...cannot be sufficient reason for allowing Appellant, who is represented by a learned Advocate, to file his appeal so much out of time..."*

However that is also subject to its limitations and exceptions. In the case of **Michael Lessani Kweka v. John Eliafye** [1997] TLR 152, the Court of Appeal observed that:-


"Although generally speaking a plea of inadvertence is not sufficient, nevertheless I think that extension of time may be granted upon such plea in certain cases, for example, where the party putting forward such plea is shown to have acted reasonably diligently to discover the omission and upon such discovery, he acted promptly to seek remedy for it."

In the light of the above, I hold that this case falls within the exception. The delay being technical, I find the applicant acted diligently and with honest.

For the above stated reasons, I allow the application and extend the time within which to apply for issuance of certification on point of law. **Fourteen days' (14) period** is accordingly given from the date of the decision as the time within which such application should be filed.

Application is granted with no order for costs.




M. G. MZUNA,
JUDGE. 27/4/2018

Date: 27/04/2018

Coram: Hon. J. C. Tiganga DR

For Applicant:

For Respondent:


C/C: Bukuku

MR. JOSEPH ASENDA ADVOCATE FOR MR. RWEYONGEZA ADV

The matter is for ruling, we are ready.

ORDER: Ruling delivered in open chambers, in the presence of the parties as per coram.




J. C. Tiganga
DEPUTY REGISTRAR
27/04/2018

Date: 27/04/2018

Coram: Hon. J. C. Tiganga DR

For Applicant:

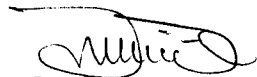
For Respondent:

C/C: Bukuku

MR. JOSEPH ASENGA ADVOCATE FOR MR. RWEYONGEZA ADV

The matter is for ruling, we are ready.

ORDER: Ruling delivered in open chambers, in the presence of the parties as per coram.



J. C. Tiganga
DEPUTY REGISTRAR
27/04/2018

