

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**CIVIL APPLICATION NO. 146 OF 2016**

**OMARY SHABANI NYAMBU ..... APPLICANT**

**VERSUS**

**DODOMA WATER AND SEWERAGE AUTHORITY ..... RESPONDENT**

**(Application for Extension of Time within which the applicant to lodge Notice of Appeal to Court of Appeal. From the High Court of Tanzania at Dar es Salaam)**

**(Chinguwile, J.)**

**dated the 11<sup>th</sup> day of October, 2013**

**in**

**Land Case No. 180 of 2007**

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**RULING**

13<sup>th</sup> September, & 13<sup>th</sup> October, 2016

**MMILLA, JA.:**

In this application Omari Shaban Nyambu (the applicant), is seeking an order for extension of time in which to file a notice of appeal against the decision of the High Court at Dar es Salaam (Land Division) dated 11.10.2010 in Land Case No. 180 of 2007. The notice of motion is made under Rule 10 of the Court of Appeal Rules, 2009 (the Rules). It is supported by an affidavit affirmed by the applicant.

The application has raised two main grounds; **one** that the applicant delayed to file the appeal in time because he was not aware of the deliverance of the judgment of the High Court which is the subject of the intended appeal; and **two** that there are errors apparent on the face of the record in the judgment of the High Court resulting in the miscarriage of justice to the applicant, deserving the consideration of the Court. Before me, the applicant was represented by Mr. Mohamed Tibayendera, learned advocate.

On the other hand, the respondent, Dodoma Water and Sewerage Authority is resisting the application. Mr. Deus Nyabiri, the learned advocate who represents her, filed an affidavit in reply in which he is pressing the Court to dismiss the application because the applicant has failed to show good cause for the delay as envisaged by Rule 10 of the Rules.

In his submission in support of the application, Mr. Tibayendera submitted firstly that the applicant delayed to file the notice of appeal because he was not in court on 11.10.2013 when the judgment was delivered, and that he became aware of that decision on 27.11.2013 when the time to file the notice to appeal had elapsed.

When he was probed by the Court regarding the time the applicant wasted in filing the application for review which was subsequently withdrawn, Mr. Tibayendera contended that the applicant was misled by his then advocates. He conceded however, that it was a misdirection and it amounted to negligence, which factor does not constitute good cause for the delay.

On another point, Mr. Tibayendera forcefully submitted that there are material errors in the judgment and proceedings of the High Court affecting the merits of the case which need to be dealt with by the Court, including the trial court's wrong application of the Law of Limitation and its failure to determine the issue of ownership which was among those which were framed. He also intimated that given such fact, if the application is allowed and time is extended, the intended appeal stands overwhelming chances of success. He urged the Court to grant the application.

In response to that submission, Mr. Nyabiri was firm that the applicant did not show good cause for the delay. He was particular that the applicant did not give reasons why he was not in court on 11.10.2013 when the judgment, the subject of the intended appeal, was delivered. He also submitted that the applicant's allegation that his then advocates

misled him is nothing else but negligence, which is a lame excuse for the delay.

On another point, apart from his contention that there are no errors on the face of the record, Mr. Nyabiri contended that the allegations in grounds "d", "e" and "f" were not submitted upon. He also stated that at page 3, the judgment of the High Court clearly talked about compensation for tort which, he added, has a limitation period. He added that it is unfounded to allege that failure to discuss them constituted an error apparent on the face of the record. He stressed that the High Court properly found that *prima facie*, the suit hinged on the remedy in tort, hence that there were no errors on the face of the record.

Mr. Nyabiri challenged further that even where the Court was to grant the application, it is obvious that the appeal does not stand overwhelming chances of success as purported. He urged the Court to dismiss this application with costs.

In a brief rejoinder, Mr. Tibayendera submitted that Rule 10 of the Rules does not define what amounts to good cause; therefore the Court has discretion to take into consideration the factors advanced in each case and determine whether or not they constituted good cause.

Also, apart from asserting that the details in respect of the errors in grounds “d”, “e” and “f” have been given in the accompanying affidavit, Mr. Tibayendera submitted as well that the issue of ownership of the land in dispute was not decided by the trial court. He cited page 5 of that court’s judgment at which the issues framed for determination were that **“who is the lawful owner of the suit land; whether there was trespass; and lastly to what reliefs are the parties entitled.”** He contended that the omission to determine the issue of ownership of that land amounted to an error apparent on the face of the record. He repeated his prayer for the Court to grant the application.

I begin by stating the obvious that the discretion of the Court to extend time under Rule 10 of the Rules is upon the applicant party advancing good reasons for his/her failure to do what ought to have been done within the time set forth by the law. This has been stressed in a number of cases, including those of **Oswald Masatu Mwizarubi v. Tanzania Fish Processing Ltd.**, Civil Application No. 13 of 2010, CAT and **Victoria Real Estate Development Ltd. v. Tanzania investment Bank & 3 Others**, Civil Application No. 225 of 2014, CAT (both unreported).

However, it is significant to emphasize that the Court's discretion in deciding whether or not to extend time must be exercised judicially and not arbitrarily or capriciously, nor should it be exercised on the basis of sentiments or sympathy. Fundamentally, the said discretion must aim at avoiding injustice or hardships resulting from accidental inadvertence or excusable mistake or error, but should not be designed at assisting a person who may have deliberately sought it in order to evade or otherwise to obstruct the cause of justice – See **Shah v. Mbogo and another** [1967] E.A. 116.

It is also the right opportune to reaffirm that although what amounts to sufficient cause has not been defined, the Court has intermittently stated that a number of factors have to be take into account. They include whether or not the application has been brought promptly; the absence of any or valid explanation for the delay; and lack of diligence on the part of the applicant – See the case of **Tanga Cement Company Limited v. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001, CAT (unreported).

As already pointed out, two grounds have been advanced by the applicant in our present application. The first ground is that the applicant

was not in court on the day the judgment sought to be impugned was delivered.

As submitted by Mr. Nyabiri however, one would have expected to hear from the applicant that it was not his fault that the said judgment was delivered in his absence. Strangely however, he did not assign any reasons why the judgment was delivered in his absence. His affidavit in support of the application is very silent on the point, so also Mr. Tibayendera's submission.

Also, after the applicant became aware of that decision, he opted to apply for review which he subsequently withdrew. His allegation that he was misled by his previous advocates from Human Right Centre cannot avail him because *ipso facto*, that was negligence. As often stated by the Court, negligence or inaction on the part of counsel does not constitute sufficient reason for extending time – See the case of **Hashim Madongo and 2 Others v. The Minister for Trade and Industries and the Attorney General**, Civil Application No. 13 of 1999, CAT (unreported). In fact, Mr. Tibayendera conceded this point. Thus, this ground is baseless.

Next for consideration is the ground alleging that that there are errors apparent on the face of the record in the judgment of the High

Court resulting in miscarriage of justice to the applicant, thus deserving the consideration of the Court. The immediate issue is whether such errors may constitute sufficient cause for the delay, attracting the Court to grant orders for extension of time.

Perhaps I should begin by pointing out that while it is the position that **illegality** may constitute sufficient cause for extending time in which to appeal - See the cases of **Principal Secretary of Defence and National Service v. Devram Valambhia** [1992] T.L.R 185 and **VIP Engineering and Marketing Limited and Three Others v Citibank Tanzania Limited**, Consolidated Civil Reference No. 6,7 and 8 of 2006 CAT (unreported); I am not convinced that there being **errors on the face of record may likewise constitute sufficient cause for the delay**. At most, that is a strong point in an application for review. Thus, this ground too is baseless.

On the other hand however, reason for the delay is not the only factor to be considered in applications for extension of time. This is because no particular reason, or reasons have been set out as standard sufficient reasons. It all depends on the particular circumstances of each



application - See the case of **Abdalla Salanga & 63 Others v. Tanzania Harbours Authority**, Civil Application No. 4 of 2001 (unreported) and the case of Republic **v. Yona Kaponda & 9 Others** [1985] T.L. R. 84. In **Republic v. Yona Kaponda & 9 Others** the Court was clear that:-

*"In deciding whether or not to extend time I have to consider whether or not there is 'sufficient reasons'. As I understand it, 'Sufficient reasons' here does not refer only, and is not confined, to the delay. Rather, it is 'sufficient reason' for extending time, and for this I have to take into account also the decision intended to be appealed against, the surrounding circumstances, and the weight and implications of the issue or issues involved."*

In this Court's opinion, the fact of there being overwhelming chances of success is amongst those factors which may be considered, a position which has been affirmed in a couple of cases See the cases of **Henry Muyaga v. Tanzania Telecommunication Company Limited**, Civil Application No. 8 of 2011, CAT and **GIBB Eastern Africa Limited v. SYSCON Builders Ltd & 2 Others**, Civil Application No 5 of 2005, CAT (both unreported).

In the present application, it has been submitted that the trial court did not determine the question of ownership of the land in dispute; hence Mr. Tibayendera's urge that it will be fair if the applicant is given the opportunity to pursue this point in the higher court.

After going through the judgment of the High Court, I have noted that ownership of the land in dispute was in issue before the High Court, but it was not determined. This being the case, it is obvious that the assertion that the appeal stands overwhelming chances of success cannot be ignored.


Consequently, the application is granted. Time is extended in which to file a notice of appeal. The applicant is given 30 days within which to file the notice of appeal. I make no order as to costs.

**DATED at DAR ES SALAAM** this 6<sup>th</sup> day of October, 2016.

B. M. MMILLA  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.



  
E.Y. MKWIZU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**