

**IN THE HIGH COURT OF TANZANIA  
(IN THE DISTRICT REGISTRY)**

**AT MWANZA**

**MISC. LAND APPLICATION NO.08 OF 2020**

*(Originating from Land Case Appeal No. 53 of 2010 in the High Court of  
Tanzania at Mwanza )*

**THE REGISTERED TRUSTEES OF  
CATHOLIC DIOCESE OF MUSOMA ..... APPLICANT**

**VERSUS**

**JOHN NYAKIMWI ..... RESPONDENT**

**RULING**

*Last Order: 03.04.2020*

*Ruling Date: 13.05.2020*

**A.Z.MGEYEKWA, J**

This is an omnibus application, whereas the application is brought under Section 11 (1) and 5 (1),(c) of the Appellate Jurisdiction act Cap.141 [RE: 2019]. The order sought is for an extension of time to file a notice of

intention to appeal out of time and an application for leave to appeal to the court of appeal against the Judgement of this Court in Land Appeal No. 53 of 2010 which was delivered on 7<sup>th</sup> January, 2014. The application is supported by an affidavit deponed by Rev. Father Aristaric Bahati, who is the trustee of the applicant.

The respondent challenged the application by filing a Counter-Affidavit deponed by Mr. John Nyakimwi, who is the respondent.

In support of his application, the learned counsel for the applicant submitted that the application origin is in Land Appeal No. 53 of 2010 before this court whereas this court granted a leave to appeal to the Court of Appeal in its ruling dated 17<sup>th</sup> August, 2015. He added that the notice of appeal was struck out by the Court of Appeal of Tanzania on 3<sup>rd</sup> December, 2019. The applicant's Advocate contention is that the appeal was on track had it not been rendered incompetent following the striking out of the notice of appeal.

Mr. Nasimire further submitted that the application of the present nature the applicant has to exhibit two things: one, he must show that

there are reasonable and sufficient reasons for the delay in making the application and two, that there is a point of law and fact which require determination of the Court of Appeal of Tanzania. To support his submission he cited the case of Saida Said v Said Mohamed (1989) TLR 206. He went on to submit that the delay was caused by technical delay and the same amounts to a good cause, he referred this court to the case of **Bank M (Tanzania) Ltd v Enock Mwakyusa** Civil Application No. 520/18 of 2017 CAT (unreported) and the case of **William Shija v Fortunatus Masha**(1997) TLR 213.

It was Mr. Nasimire further submission that the judgment was delivered on the 7<sup>th</sup> January, 2014 in the absence of the parties and parties were not served with the notice of delivery of the judgment contrary to the mandatory provision of Order XX Rule 1 of the Civil Procedure Code Cap.33 [R.E 2019]. To support his submission he cited the case of Cosmas Construction Co. Ltd v Arrow Garments the Court of Appeal held that *inter alia*:-

*" A party who fails to enter appearance disables himself from participating where the proceedings are consequently made ex parte,*

*but has to be told when the judgment is delivered so that he may, if he so wishes attend to take it and certain consequences may follow."*

Mr. Nasimire went on to submit that from the circumstances of the instant application the applicant cannot be blamed for the delay in filing the present application because he was not notified of the date of delivery of the judgment which this application originates. He refers this court to paragraph 5 and 8 of the applicant's affidavit, the applicant has set out points of law and fact in respect to leave to appeal to the Court of Appeal is ought. He mentioned the first point is that the appellate Judge held that the doctrine of adverse possession is applicable to the facts of this case there is no evidence on record to support the findings of this court. The second point is that the respondent is not the owner of the suit land because the purported sale agreement of the same between one Marko Marunguri and the respondent does not confer and title on the respondent. He added that the purported sale agreement was executed after the Kyoruba Village Council had already allocated the suit land to the applicant. he went on stating that the third point is featured in paragraph 8 of the applicant application which relates to the title to the suit land that the sale agreement between him and one Marko Marunguri is illegal for want of

stamp duty. Mr. Nasimir fortified his argumentation by referring this court to the case of *Zakaria Barie v Maria John Mabira* (1995) TLR 211.

Mr. Nasimire also raised an issue of illegality and referred this court to the case of **Principal Secretary Ministry of Defence and National v Devraw Valammhia** (1992) TLR 185. He concluded by praying this court to grant the applicant's application since the applicant has advanced sufficient grounds upon which this court can exercise its discretion power.

Objecting to the application, the respondent faulted the Omnibus application, he submitted that this is an omnibus application for extension of time to file a notice to appeal to the Court of Appeal and applying for leave to appeal to the Court of Appeal. Further, the applicant opposed the application for leave to appeal to the Court of Appeal by stating that the applicant was required to cite section 47 (2) of the Land Disputes Courts Act No.3 of 2018.

The respondent argued that the applicant's counsel has not come up with any valid explanation for delay to file the application within time. He said that there is no explanation where he was from 3<sup>rd</sup> December, 2019 to

21<sup>st</sup> January, 2020 when the present application was filed. He added that the applicant delayed to file the present application for 48 days without giving any valid explanation for the delay to file the said application. The respondent faulted the application for failure to file the notice of appeal and blamed the applicant's Advocate for being negligent to follow a proper procedure.

In conclusion, the respondent prays this court to dismiss the application with costs.

In his brief rejoinder, the learned counsel for the applicant lamented that the respondent has raised a point which was already been discussed by this court when determining the preliminary objection the same cannot be raised at this juncture.

On the chance of success on the intended appeal, Mr. Nasimire contended that the applicant has stated sufficient reasons for his delay and has also raised an issue of illegality pertaining to the sale agreement from which the applicant draws title to the suit land. He reiterated his submission in chief that a claim of the illegality of the decision sought to be

impugned is sufficient reason for extension of time. He urged this court to grant the application as prayed.

I have considered the learned arguments for and against the application. The applicant has filed Misc. Land Application No. 08 of 2020. The applicant is seeking the following orders:-

- (1) *Extension of time within which to file a notice of intention to appeal to the Court of Appeal of Tanzania.*
- (2) *Extension of time to file an application for leave to appeal to the Court of Appeal of Tanzania.*

In determining the prayers of the applicant, I want to state that this court can determine the combination as stated in the case of **Tanzania Knitwear Ltd v Shamshu Esmail** (1989) TLR 48, Mapigano, J (as he then was) held that:

*" In my opinion, the combination of the two applications is not bad in law. I know of no law that forbids such a course. Courts of the law abhor the multiplicity of proceedings. Courts of law encourage the opposite."*

Guided by the above authority, I find that the two prayers are properly before this court as they are not diametrically opposed to each other, but one easily follows the other. Once the extension of time to file a notice of appeal is granted, then an application for leave follows, as it was held in the case of **MIC Tanzania Ltd v the Ministry for Labour and Youth Development and the Attorney General** Civil Appeal No. 103 of 2004 Dar es Salaam (unreported) delivered in December, 2006. Therefore, I proceed to determine both prayers and find out if the applicant has adduced sufficient evidence to move this court to grant what he is sought.

In addressing the application at hand, which relates to extension of time to file a notice of appeal and making an application for leave the central issue for consideration and determination is whether sufficient reasons have been advanced to warrant the extension of time to file the notice of appeal sought by the applicant. In the case of **Samson Kishosha Gabba v Charles Kingongo Gabba** (1990) TLR 133, the Court decisively held that:

*"In determining whether or not to allow an application for leave to appeal out of time, the court must consider reasons for the delay as well as the likelihood of success of the intended appeal."*



After taking in consideration what has been stated in the affidavit filed by the applicants and the applicants' advocate submission I would like to observe that the applicants' grounds for seeking an extension of time to file a notice of appeal before the Court of Appeal have not based on reasons for the delay as to the submission of the learned counsel for the respondent have said. Nevertheless, in paragraphs 5 of the applicants' affidavit, the applicant's advocate has raised two points of law, one, that the learned appellate judge misdirected himself on the point of law and fact in deciding that the doctrine of adverse possession was applicable in this case. Two, the point of law relates to ownership of land that the disputed land was surrendered to the Village Government by the former owner.

In my view, I have found that paragraph 5 of the affidavit is centered on legal issue the same draws the attention of the Court of Appeal to determine the illegalities involved in the said decision of this Court. There are several authorities regarding the application for extension of time when it consists of a point of law. In the case of **Ramadhani v M.N.Haule and Company Advocate** Civil Appeal No. 29 of 1990 and the **Principal**

**Secretary, Ministry of Defence and National Service v Devram**

**Valambhia** [1999] TLR 182 and the case of, it was stated as under:-

*" In our view when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record right."*

Similarly, in the case of **Attorney General v Consolidated Holding Corporation and Another**, Civil Application No.26 of 2014 it was held that:-

*" With regard to the last point, contentions as to illegality or otherwise of the challenges decision have now been accepted as a good cause for extension of time."*

In view of the fact that there is alleged illegality, I find appropriate under the circumstances to allow the application based on this point so that the issue may be considered.

In the upshot, the application for extension of time to file a notice of intention to appeal to the Court of Appeal and for making an application for leave to appeal to the Court of Appeal is hereby granted. The applicant to

file a notice of intention to appeal to the Court of Appeal an application for leave to appeal to the Court of Appeal within 30 days from the date of this Ruling. No order as to costs.

Order accordingly.

DATED at Mwanza this 13<sup>th</sup> May, 2020.



  
A.Z.MGEYEKWA  
**JUDGE**  
13.05.2020

Ruling delivered on the 13<sup>th</sup> May, 2020 via audio teleconference, and both parties were remotely present.

  
A.Z.MGEYEKWA  
**JUDGE**  
13.05.2020