

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (MOROGORO SUB REGISTRY)
AT MOROGORO MISCELLENEOUS LAND APPLICATION NO. 18183 OF 2024 {Arising from iand
appiication No. 189 of2019 in the District Land ad Housing Tribunaifor Morogoro before Hon.M.
Khasim, Chairperson) FELIX KOMBE APPLICANT VERSUS HAMISI SALUM MOSHA 1®^
RESPONDENT SHAFAA YOHANA MWAFAUNGAVO RESPONDENT EMMANUEL CONSTATINE
N3AU 3"^^ RESPONDENT ZAITUNI HASSANI KIAGHANO..^iVii.....^l.;.....4™
RESPONDENT GRACE PETER LYIMO 5™ RESPONDENT MANGACHI H. MWAFAUNGAVO 6^"
RESPONDENT Date of Last Order: 11.02.2025 . : Date of Ruling: 21.02.2025

RULING

MAGOIGA. J. The applicant, FELIX KOMBE being aggrieved by the ex-parte decision of the District Land and Housing Tribunai for Morggoro (the trial Tribunal) before Hon. M. Khasim, Chairperson, at Morogoro in Land Appiication No. 189 of 2019, has brought this application seeking the induigence of this court to extend time within which to file an appeal to this Court. The applicant was respondent in the trial Tribunal and the respondents herein had sued him over piece of iand. The case was heard ex parte after the applicant failed to appear in the trial Tribunal despite fiing defence. As a resuit, the Tribunal delivered an ex parte judgment in favour of the respondents. The applicant claimed he wais unaware of the hearing dates due to illness and other personal circumstances. Following the ex parte judgrrient, the appellant did 'riot immediately apply to set aside the judgment but instead sought td-fie an appeal: However, by the time he received the judgment and consuited a lawyer, the statutory period for lodging the appeal had lapsed, leading to the current application for an extension of time to file the appeal. The application was ^brought by'Way of chamber sUmrnons^ririade under the provisions of section 14(1) of the Law of Limitation Act/ Cap. 89 R.E 2019 (LLA), which grants this court discretion to extend time upon sufficient cause being shown:'The application- was accompanied by affidavit of FELIX KOMBE stating reasons why this application should be granted. When the matter was scheduled for hearing, the applicant was represented by Ms. Levina Leo Mtweve, learned advocate, while the respondents appeared in person. Both parties requested that the matter be disposed of by way of written submissions, and the court duly granted the'TeqUest. m.- - oi ;;:- v.v.-- i .i;-. = v.. Ms. Mtweve arguing the application prayed to adopt the affidavit of her client Felix Kombe, which contain the two/main feasdn;'biie, sickness and two/ late in getting the judgerhent and decree: In the first reason, he attached medical chit from SUA hospital. Citing the case of

Lyamuya Construction Co, Ltd vs Board of Registered Trustees of Young Women's Christian Association of Tanzania {C\y\ Application No. 2 of 2010) the applicant argued that for an extension of time to be granted, the applicant must show good cause, account for the delay, demonstrate that the delay is not inordinate, and show that there was no apathy or negligence in pursuing the matter.

- jvis. Mtwewe further argued that the facts for delay are set out in paragraphs 4 to 11 of the affidavit, constituted sufficient cause. According to the learned advocate, the affidavit of the applicant met the threshold established in the case of Lyamuya Construction Co, Ltd, and similar principles that were highlighted in Juma Shomari v Shani Yahaya {LXsc, Land Application No. 14 of 2022). The learned advocate further cited the case of Samwel Sichome vs Buiebe Harnisi {CWd Application No. 8 of 2015), emphasizing that the court should consider factors such as the length and reasons for delay, the chances of success of the intended appeal, and the degree of prejudice the respondent may suffer if application is granted. Further Ms. Mtwewe submitted that they became aware of the judgment on 29th May, 2024, but the copy of the judgment was not available. They requested a copy on 19th June 2024 and received it on 3rd July 2024, leaving only 11 days to file the appeal. The applicant argued that their delay was further exacerbated by illness, which led to hospitalization until 10th July, 2024. Upon recovering, the applicant sought legal consultation, but the statutory time for lodging the appeal had already lapsed, prompting the need for this application. Ms. Mtwewe submitted that they had diligently pursued the application and accounted for all days of delay. It was the learned advocate for the applicant that the applicant was neither negligent nor sloppy in pursuing the appeal. Ms Mtwewe, concluded by urging this court to exercise its discretion and grant the extension of time. Citing the case of Standard Chartered Bank (T) Ltd vs Bata Shoe Company Ltd {C\M\ Application No. 101 of 2016) in support of their plea for extension of time. In response, the respondents argued that they had reviewed the applicant's submission and understood it but felt it was necessary to outline the background of the case before addressing the substantive issues. According to the respondents, the application stemmed from Land Application No. 189 of 2019, which was determined by Hon. M. Khasim, Chairperson of the Morogoro District Land and Housing Tribunal. The application was heard ex parte against the applicant, resulting in an ex parte judgment. The respondents further contended that it is a well-established legal principle that a respondent cannot appeal against an ex parte judgment but must instead exhaust available remedies to the trial court. They cited Samwel Reteran v. Respiciis Babirigi and Two Others; Land Case Appeal No. 63 of 2021, which was referred to as the 'Case of Kiisla'. Mkamba v. Serikali ya Mia wa Mindu, Misc. Land Appeal No. 96 of 2017, arguing that the proper course of action for the applicant would have been to file an application to set aside the ex parte judgment rather than pursue an appeal. The respondents relied on Pangea - Minerals v. Petrofuel (T) Limited & 2 Others, Civil Appeal cited in the case of Dangote Industries Limited Tanzania v. Warnercom (T) Limited, Civil Appeal No. 13/2021 (CAT). They emphasized that in cases where a defendant seeks to set aside an ex parte judgment, the appropriate remedy is to file an application in the court

where the judgment was issued, rather than directly appealing the decision. , , The respondents also -adopted^ the 'arguments Trdm their supplementary counter-affidavit> specifieaily'addressing whether t applicant should have sought an-appeal'or applied to set aside the ex- parte judgment. They maintained that-the applicant's request for'an extension of time to appeal against the ex-parte judgment cohstituted an abuse of court process, as the proper remedy would have been to seek an extension of time to file an appiiqatlQn to set aside the ex-pdrte

judgment.

The respondents refuted the appiicant's reliance on Section 70(2) of the Civil Procedure Code, [Cap. ^^33 R.E. 2019] which the applicant'had cited to assert a right of app^l. The TespbhderitiS' referred To Trola Nelson v. Lazaro William Halinga, PC Matrimonial Appeal No. 9 of 2022 explaining that whiie Section 70(2) provides an automatic right of appeal against an ex-parte judgment, it does not -exempt the. applicant from first seeking to set aside the judgment where they intend to challenge both the merits and the order to proceed ex-parte. According to the respondents, the Court of Appeal in Dangote Industries Ltd Tanzania V. Wamercom (T) Ltd made it clear that if the defendant intends to challenge both the order to proceed eX parte and the findings of the ex parte judgment/they must first applyto set aside the judgment before challenging its merits. ^ Furthermore, the respondents questioned the credibiity of the applicant's claim of iliness, which was supported by a hospitai discharge summary. They argued that the discharge summai^ contained a name different from that of the appiicant, and no affidavit Had been provided to clarify this discrepancy, thus making the document uhfeliable. On that account, the respondents argued that the application was without merit and should be struck out^ith'cbsts.'They urged this court to dismiss the appiication, emphasizing that the appiicant had ^failed to follow the proper iegal procedure as enumerated. , ; i, t , . • r y- This court after a carefully considered this application for an extension of time, the submissions by both parties, and the relevant authorities cited, it is on record, applicant has invoked -the court's discretion under section 14(1) of the Law of Limitation Act, Cap. 89 R.E. 2019 (LLA) which grants the court power to extend time upon sufficient cause being shown, In determining whether the application has merit or otherwise, the court must cpsider whether the appellant has demonstrated sufficient causp fpr the delay, accounted for^ the delay, and whether the delay was occasioned by negligence or apathy, as enunciated in the case of Lyamuya Construction Co. Ltd vs Board of Registered Trustees of Young Women's Christian Asspciipitioii of Tanzania (Civil Application No. 2 of 2010). The applicant submitted that^the delay was'due to being served late with the judgement and also due to iirhess/ as evidenced by a medical report from a hospital that discharged hirti after treatment.-This court is aware that illness has been accepted^ as sufficient cause-for delay in various cases, including Samwei SicHome vs Buiebe Haitiisi (Civil Application No.8 of 2015).The applicant has^also accounted for the delay from the time the judgment was obtained tp the tirpe the application : , v..: i",. i. \vdS CnJc XO -jKhvAi.l -IvC-: .XS ■ M- ; ■■ -P. - ^ "r -r-p • !: ^ "■ >> V . US ;t, i' "" .,i / .v.: i ; , ; rc : ■ , f." J' ■ 'Li..! ■ was filed, which was further complicated by the need to obtain legal advice after recovering from illness. The respondents

challenged the applicant's application on several grounds, including the argument that the applicant should have first applied to set aside the ex parte judgment rather than file an appeal. They relied on cases such as *Dangote Industries Ltd Tanzania vs Warnercom (T) Ltd/ Civil Appeal No. 13/2021 (CAT)*, which emphasized that an appeal cannot be made directly against an ex parte judgment without first exhausting the available remedy to set it aside. However, the applicant in rejoinder asserted their right to appeal an ex parte judgment under section 41 of the Land Disputes Courts Act, Cap 216 and section 70 of the Civil Procedure Code, [Gap 33 R.E. 2022] which provides an automatic right of appeal. This court concurs with the applicant's submission that the appeal route is legally permissible and need not be preceded by an application to set aside the ex parte judgment. It is my considered opinion that an applicant who does not dispute service to an ex parte decision can appeal directly against the ex parte judgment as provided for under section 70 of the Civil Procedure Code, [Gap 33 R.E. 2022] on merits without necessarily going to set the ex parte judgment aside.

- -r 'Vj-' U. So, the argument that it is irregular to appeal against an ex parte judgement unless and until one has attempted to set aside ex parte judgement - is not only true of the law but will depend on the circumstances of each case. Where the applicant was not served, then, the available remedy is to seek for setting an ex parte judgement but where service is non-starter, one can appeal without necessarily seeking an extension of time. The issue of the name discrepancy in the affidavits raised by the respondents is acknowledged. However, the court finds that the respondents' challenge on the grounds of name discrepancy is a mere technicality, which does not go to the substance of the case. It has been a different situation if it was alleged that Harry Felix Kombe is not the applicant and is doing personation. Which is not the case here. People having three names and being addressed in two names or three names is normal. This court is guided by the principle that justice should not be defeated by technicalities, as emphasized in *Yakobo Magoig Gichere vs Peninah Yusuph/ Civil Appeal No. 55 of 2017 (CAT)*, where the Court of Appeal emphasized that legal proceedings should focus on substantive justice rather than technicalities. The applicant has clarified the discrepancy in the names, and this court is satisfied with the explanation provided. Ultimately, this court finds that the applicant has demonstrated sufficient cause for the delay in filing the appeal and has accounted for each day of the delay. The challenge regarding the name discrepancy is a matter of technicality, which does not affect the merits of the application. This court, therefore, finds that the appeal is meritorious. Consequently, the application for an extension of time is granted and the applicant is to file an appeal within the prescribed time from the date of this ruling. Each party to bear costs at this stage because parties still have a long way to go. It is so ordered. Dated at Morogoro this 21st day of February, 2025. S.M. MAGQIGA V; JUDGE 21.02.2025

- ■ - uarv, 23T 11 iV- l' 'fv COURT: Ruling delivered in chambers at Morogoro in the presence of Ms. Levina Leo Mtwewe Joi-the applicant and the respondents in person on 21^^ day of Feb^bar^,/2025 at Mor^ '0 UliJ! I A' \ I S.K. MAGdiGA JUDGE 21.02.2025 COURT: Right of appeal fully exp neo, VVT Of>- S.M GA /Ao/ /A Vi ■; JUDGE 21.02.2025 < :;.A, 12

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