IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
TABORA SUB-REGISTRY
AT TABORA
MISC. CIVIL APPLICATION NO. 41 OF 2023
(Arising from Civil Case No. 03 of 2005 in the High Court of Tanzania at Tabora)

GRACE LUMELEZI ..... APPLICANT

VERSUS

THE BOARD OF TRUSTEES OF
NATIONAL SOCIAL SECURITY FUND ..... RESPONDENT

RULING

Date of Last Order: 20/02/2024
Date of Ruling: 16/04/2024

KADILU, J.

The applicant is seeking an extension of time to lodge the notice of intention to appeal to the Court of Appeal of Tanzania against the decision of this court in Civil Case No. 03 of 2005. The application is brought under Section 11 (1) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2002], supported by the affidavits of the applicant and that of her Advocate, Mr. Mtaki Mugaya Kaitila. She is praying for the following orders:

i. *That, this honourable court be pleased to grant an extension of time for her to give a notice of intention to appeal to the Court of Appeal of Tanzania,*
ii. *Costs of the application,*
iii. *Any other relief that this honourable court deems fit and equitable to grant.*

On the other side, the respondent filed a counter affidavit sworn by Mr. Gureni Nzinyangwa Mapande, a State Attorney for the respondent. The

dispute's brief background is that in 2004, the respondent advertised for sale by way of tender, a house built on Plot No. 03, Block 'A' situated along Jamhuri Street in Tabora Municipality. The applicant got interested in the property and applied for its purchase. The respondent informed her in writing that she had emerged as a successful bidder. She allegedly paid for the purchase price as required by the respondent. Thereafter, the respondent changed their mind and cancelled the tender.

It did not, however, refund the applicant the money she paid for the purchase of the property. Aggrieved, the applicant filed Civil Case No. 03 of 2005 in this court which was decided in favour of the respondent on 10th December 2013. Though the applicant was dissatisfied with the court's decision in that case, she could not appeal immediately to the Court of Appeal. Since the time within which she could prefer an appeal had already expired, she made numerous attempts including filing six (6) applications in pursuing her right further. Her futile latest attempt was Civil Appeal No. 236 of 2022 which was struck out by the Court of Appeal on 22/09/2023 after was found to be filed out of the prescribed time.

Thereafter, she filed the present application for an extension of time within which she could file a notice of appeal to challenge the decision of this court as highlighted above. The hearing of this application proceeded by written submissions. I am grateful to the learned Counsel for both sides for their vigilance in prosecuting this case. The applicant filed her written submission under the representation of Mr. Mtaki Mugaya Kaitila, the learned

Advocate. Supporting the application, the applicant advanced numerous grounds including technical delay and illegality on the face of the record. Starting with technical delay, the applicant narrated a long history of this case and submitted that her delay was technical because the first notice of appeal was filed promptly and the appeal was lodged in time, only that the subsequent proceedings suffered a technical delay which also affected the notice filed earlier.

To support this position, Mr. Mtaki cited the case of ***Fortunatus Masha v William Shija & Another***, [1997] TLR. 154 and argued that technical delay is a ground for an extension of time to be granted. He outlined six (6) points that he considers as amounting to irregularities and illegalities in the impugned decision of the High Court and which are worth considering by the Court of Appeal. The key points include, that the High Court acted improperly by treating the dispute between the parties as a civil case instead of a land dispute. That, the trial court did not resolve a crucial issue about the breach of contract by the respondent, that it was improper for the trial Judge to rule that the applicant did not pay the full purchase price, and that the Judge acted improperly by declining to award damages to the applicant after having held that the applicant was injured by the respondent's change of mind.

Relying on the cases of ***Principal Secretary, Ministry of Defense and National Service v Devram Valambhia*** [1992] TLR 85 and ***VIP Engineering and Marketing Ltd & 2 Others v CitiBank Tanzania Ltd***,

Consolidated Civil Reference No. 67 & 68 of 2006, Mr. Mtaki implored this court to find that there are illegalities and irregularities apparent on the record of the High Court that occasioned injustice to the applicant.

The submission met a harsh resistance from Mr. Gureni Mapande, the learned State Attorney who argued that the so-called technical delay was nothing, but laxity, inaction, and sheer negligence on the part of the applicant and her Counsel. He cited the case of ***A H Muhimbira & 2 Others v John K. Mwanguku***, Civil Application No. 13 of 2005, in which the Court of Appeal of Tanzania at Mbeya held that the applicant's inadvertence or laxity and negligence on the part of his/her Counsel do not constitute sufficient reason for extending time.

Mr. Gureni argued that illegality is neither a panacea nor a permission slip for negligence, laxity, and inaction of the parties. He referred to the case of ***Catherine Singundali v Salima Amir***, Misc. Land Application No. 375 of 2020, High Court of Tanzania, Land Division. He added that in the matter at hand, the trial court treated the case as a civil suit in the way it was instituted by the applicant. For that reason, Mr. Gureni opined that the applicant cannot be heard now complaining that the dispute was not a civil case. Mr. Gureni refuted the allegation that the High Court did not resolve some crucial issues in its judgment.

He concluded that there is no point of law of sufficient importance justifying this court to grant an extension of time to the applicant so, the

application deserves to be dismissed. To buttress his stance, he relied on the cases of ***Zawadi Msemakweli v NMB PLC***, Misc. Civil Application No. 221 of 2018, Court of Appeal of Tanzania at Dar es Salaam and ***Hamisi Mohamed (administrator of the estate of the late Risasi Ngawe) v Mtumwa Moshi (administratrix of the estate of the late Moshi Abdallah),*** Civil Application No. 407 of 2019, Court of Appeal of Tanzania at Dar es Salaam. The learned State Attorney argued that the alleged irregularities do not fall within the ambit of the law as the same are not apparent on the face of the court's record.

In rejoinder, the applicant reiterated largely what has been stated in the submission in chief maintaining that the application is meritorious. I thus find no reason to reproduce it here for the avoidance of repetition. After consideration of the submissions from the parties, the main issue for me to determine is *whether the applicant has adduced sufficient and good cause for the delay for this court to exercise its discretion in granting her an extension of time.* It is settled that granting an extension of time is purely on the discretion of the court, but which should be exercised judiciously.

As a matter of law, for the application for an extension of time to be granted, there are factors to be considered by the court. The factors are firstly, the applicant should account for all the days of delay, secondly, the delay should not be inordinate, thirdly, the applicant should show diligence and not apathy, negligence, or sloppiness in the action that he intends to take; and fourthly, if the court feels that there are other reasons such as

existence of the point of law of sufficient importance or illegality in the decision being challenged, it may grant the extension of time.

In addressing the issue, this court finds it worth considering all the reasons advanced by the applicant in her application regarding the extension of time. Applying the above factors to the instant application, the first question is whether or not the applicant has managed to account for all days of delay. It is on record that the impugned decision was delivered in 2013. The applicant's delay is for more than ten (10) years computed from when the judgment in Civil Case No. 03 of 2005 was delivered. Given that the law requires the delay of even a single day to be accounted for, I find it almost impracticable for the applicant to account for each day of delay for the entire ten years that have lapsed.

As to whether or not the delay in this application is an inordinate one, I should hasten to rule out in affirmative because, under any circumstances, a delay of ten years cannot be termed as a usual or proportionate delay. More so because the applicant had several applications instituted in the trial-and-error style which have led to a protracted delay that cannot be easily justified. Next, is whether the applicant showed diligence and not apathy, negligence, or sloppiness in the action that she intends to take. The record is clear that the applicant was all the time in courts' corridors searching for justice. As can be discerned from the case file, most of the applicant's actions that delayed her to take an appropriate step were caused by ignorance of proper legal procedures.

Without much ado, I find that being in court corridors in one's uninterrupted willingness due to ignorance of laws and procedures to be followed cannot justify the grant of an extension of time. The applicant has strongly moved the court to find that in the matter at hand, there is a point of law of sufficient importance or illegality in the decision being challenged. For that matter, she claims that the delay was not actual, but rather technical, and that, there is an illegality on the face of the records. Focusing on the technical delay, the deponent in her affidavit stated that the delay resulted from procedural issues that emerged when she was trying to pursue her right of appeal.

She further averred that she continued to pursue her matter up to 22nd September 2023 when her appeal was struck out by the Court of Appeal for being preferred out of the prescribed time. Therefore, she is of the view that such a delay was just technical and not actual. In answering this question, the applicable provision is Rule 83 (2) of the Tanzania Court of Appeal Rules, 2009 which directs that he who intends to appeal to the Court, should issue a Notice of Intention to Appeal within 30 days of the date of the decision against which it is desired to appeal. That means the applicant was also supposed to be supplied with all appeal documents within 30 days from the date of the decision.

However, under Section 19 (2) of the Law of Limitation Act [Cap. 89 R.E. 2019], the day on which the impugned decision was delivered and the period spent in obtaining documents necessary for appeal are excluded in

computing the limitation period prescribed for an appeal. As hinted, the applicant herein elaborated on how she was following up on appeal documents in different steps including the request for a certificate of delay from the Deputy Registrar of the High Court. Nonetheless, considering that the delay is for about ten years, even after the exclusion of the days spent in obtaining appeal documents, the applicant has not managed to account for all the remaining days.

For the principle of technical delay to stand or to be applied, the applicant should file the first application in time, as was discussed in the case of ***Fortunatas Masha v William Shija & Anothers*** (1997) TLR 154 in which it was held that:

> *"A distinction has to be drawn between cases involving real or actual delays and those such as the present one which only involved technical delays in the sense that the original appeal was lodged in time but is incompetent for one or another reason and a fresh appeal had to be instituted. In the present case, the applicant had acted immediately after the pronouncement of the ruling of the court striking out the first appeal. In these circumstances, an extension of time ought to be granted."*

The above-cited authority gives a basis under which technical delay may be applied. By filing the matter in court without compliance with the law, the technical delay cannot stand as the applicant opted to gamble on what was to be done correctly. The technicality of the reason is not acquired by trying different fruitless remedies, but by pursuing a proper remedy,

though for some technical reasons, it fails to end on merits. Thus, the ten years of remedy gambling in my view, does not constitute technical delay in the context it was set out in the case of ***Principal Secretary, Ministry of Defence and National Services v Devram P. Valambhia*** [1992] TLR 387.

Regarding illegality and/or irregularity, it is well-known that the point of illegality is sufficient ground for an extension of time. However, the respective illegality has to be sufficient in content and apparent on the face of the record as it was held in the case of ***Stephen B.K Mhauka v The District Executive Director, Morogoro District Council & 2 Others,*** Civil Application No. 68 of 2019, Court of Appeal of Tanzania, at Dar Es Salaam. It is noteworthy that although illegality may be a good cause for an extension of time, it does not apply to every pleaded illegality.

In the case of ***Kabula Azaria Ng'ondi & Others v Maria Francis Zumba & Another,*** Civil Appeal No. 174 of 2020, it was observed that:

> *"... for a decision to be attacked on the ground of illegality, one has to successfully argue that the court acted illegally for want of jurisdiction, or for denial of the right to be heard, or that the matter was time-barred."*

Having gone through the records, I find the applicant has alleged a jurisdictional issue by contending that the trial court was not supposed to treat the dispute as a civil claim. In our jurisdiction, the law is settled that the first question that needs to be determined in any adjudication is whether or not the court or tribunal is vested with the requisite jurisdiction. In the

case of ***Fanuel Mantiri Ng'unda v Herman Mantiri Ng'unda and 20 Others***, [1995] TLR 155, it was held that:

> *"The question of jurisdiction for any court is basic. It goes to the very root of the authority of the court to adjudicate upon cases of different nature. The question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial. It is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case."*

I am mindful that even where the applicant has failed to establish all other factors for the extension of time if the court feels that there are other reasons such as the existence of the point of law of sufficient importance, it becomes duty-bound to extend the time so that the matter can be looked into by the Court of Appeal. *See* the case of ***Principal Secretary, Ministry of Defence and National Services v Devram P. Valambhia*** (supra), in which it was held that:

> *"We think that where, as here, the point of law at issue is the illegality or otherwise of the decision being challenged, that is of sufficient importance to constitute 'sufficient reason' within the meaning of rule 8 of the Rules ... for extending time. To hold otherwise would amount to permitting a decision, which in law might not exist to stand."*

In the premises, and persuaded by the authorities cited, this court finds that the applicant has demonstrated legal issues that require the attention of the Court of Appeal. Therefore, I hereby grant the extension of time to the applicant to file a notice of appeal within thirty (30) days from the date

hereof. Given the history of this matter and the outcome of the application, each party shall bear its own costs.

It is so ordered.

KADILU, M.J.
JUDGE
16/04/2024.

The ruling delivered in chamber on the 16th Day of April, 2024 in the presence of Mr. Akram Mgoti, Advocate for the applicant, and Mr. Gureni Mapande, State Attorney for the respondent.

THE HIGH COURT OF TANZANIA

KADILU, M.J.,
JUDGE
16/04/2024.