

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 590/17 OF 2021

HAMIS HASSAN MKALAKALA (Administrator of the Estate

Of the late SAID SELEMAN MKALAKALAAPPLICANT

VERSUS

PAULO MUSHIRESPONDENT

(Originating from the decision of the High Court of Tanzania

(Dar es Salaam Land Division)

(Hon. Nchimbi, J)

Dated 20th Day of April, 2016

in

Land Appeal No. 26 of 2015

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RULING

10th & 22nd May, 2023

MAIGE, J.A.:

The applicant has brought the instant application as the administrator of the estate of the late Said Seleman Mkalakala ("the deceased"). He is seeking an extension of time to lodge a notice of appeal and to apply for leave to appeal to the Court against the decision of the District Land and Housing Tribunal for Temeke (the trial tribunal). In the said case, the applicant's predecessor administrator one Ally Mohamed Marjeb lost a claim, against the respondent herein, for ownership of what was described by the

trial tribunal as “the piece of land in dispute”. The respondent was declared as the rightful owner of the same.

Aggrieved, the applicant appealed to the High Court. One of the grounds of appeal was that, the trial court erred for failure to ascertain the description of the suit property. The appeal was dismissed and the decision of the trial court confirmed. The High declined to determine the issue of description of the suit property because it was not raised by pleadings.

The applicant was once again aggrieved. As he was already time barred, he lodged an application like this at the High Court which was dismissed for want of merit. Still aggrieved, he has, through the current successor administrator, attempted a second bite to the Court. He has solely relied on illegality as a ground for the application. From the notice of motion, affidavit and its annexures, there is no doubt that the application is well within time.

Both parties filed written submissions for and against the motion as per rules 106 and 107 of the Rules. In his oral submissions, the applicant who appeared in person, adopted the notice of motion, affidavit and written submissions with some elaborations on the points of illegality. He recapitulated on two points. **First**, the decision of the trial tribunal which was confirmed by the High Court was illegal as assessors did not give

opinions as the law requires. **Two**, the decision does not describe the size of the suit property while the evidence in the proceedings indicate that the total size of the land was eight acres while that in dispute was only five acres.

On his part, Mr. Lusajo Willy who appeared for the respondent adopted both the affidavit in reply and written submissions in reply to form part of his oral argument. Though he was in agreement with the applicant that illegality can, in view of the principle in **Principia Secretary, Ministry of Defence and National Service v. Devran Valambia** [1992] TLR 185 suffice as a ground for extension of time, it was his submissions that neither of the two grounds amount to illegality. They are in his view mere irregularity which does not render the judgment of the trial tribunal illegal. In any event, he submitted, the complaint as to the opinions of assessors cannot be a ground in the intended appeal because it was not raised in the first appeal. He prayed, therefore that, the application be dismissed with costs.

Having heard the rival submissions in line with the notice of motion and the affidavits, it is desirable that I consider if sufficient cause for extension of time has been shown. It is trite law and the parties are in agreement that, illegality can *ipso facto* be a good cause for extension of time. This is according to the principle in **Valambia** (*supra*). I have to add

that, for illegality to amount as such, it has, in view of the principle in **Lyamuya Construction Company Limited v. the Board of Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) be apparent on the face of the record and "of sufficient importance."

"point of law, must be that "of sufficient importance" and I would add that, it must also be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by a long-drawn argument or process."

The first element of illegality relied upon by the applicant is that, the gentle assessors did not give opinions. The complaint was not raised in the first appeal. At the last page of the judgment however, it is express that, the trial chairperson considered the opinions of assessors. The applicant submits that, the requirement is not reflected in the proceedings. Be what as it may, the alleged error does not in any way feature out in the judgment of the trial tribunal. Thus, there being an expression in the judgment of the trial court that, opinions of assessors were considered, the error, if any, cannot be said to be apparent on the face of the record. For, it cannot, as the rule in **Lyamuya Construction Limited** (*supra*) requires, be discovered other than "*by a long-drawn argument or process.*" It is for that reason that, I dismiss the first element of illegality.

The second element is omission to give description of the suit property. My quick reading of the judgment of the trial tribunal could not lead to discovery of any description of the suit property. Whether a decree which does not describe the suit property can stand, is a question which goes to the legality of the decision. On that account, the application has merit and it is granted. The notice of appeal should be lodged within 14 days from the date hereof while the application for leave to appeal within 30 days from the date hereof. In the circumstance, I will not give an order as to costs.

It is so ordered.

DATED at DAR ES SALAAM this 10th day of May, 2023.

I. J. MAIGE
JUSTICE OF APPEAL

The Ruling delivered this 22nd day of May, 2023 in the absence of the applicant, though dully notified through Ahmed Faraji and Mr. Lusajo Willy, learned counsel for the Respondent, is hereby certified as a true copy of the original.




R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL