IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 1/17 OF 2022

FRANCIS KONASI ..... 1ST APPLICANT

DOTO KONASI ..... 2ND APPLICANT

SARAFINA KONASI ..... 3RD APPLICANT

CHESKO KONASI ..... 4TH APPLICANT

MARGARETH KONASI ..... 5TH APPLICANT

JOHN KONASI ..... 6TH APPLICANT

VERSUS

FELEX SHIRIMA ..... RESPONDENT

(Application for extension of time to file an application for a certificate on point of law on an appeal against the decision of the High Court of Tanzania, Land Division at Dar es Salaam)

(Mkuye, J.)

dated 20th day of November, 2015

in

Miscellaneous Land Appeal No. 65 of 2015

RULING

30th October, & 6th November, 2023

ISMAIL J.A.:

This application is for extension of time within which to file an application for a certificate on point of law. The subject matter of the intended appeal is the decision of the High Court (Land Division) in Dar es Salaam, in Miscellaneous Land Appeal No. 65 of 2015. The decision

reversed the judgment and decree of the District Land and Housing Tribunal (DLHT). The latter sat on appeal and upheld the decision of the Ward Tribunal of Wazo Hill, where Land Complaint No. 284 of 2012 was instituted.

In the High Court, the applicants who featured as respondents lost, as the current respondent did enough to persuade the court that the proceedings that bred the appeal were time barred. The decision was delivered by Mkuye J., (as she then was) on 20th November, 2015.

The instant application, the applicants' latest attempt to re-ignite their journey to this Court, has been preferred under rule 45A (1) (c) of the Tanzania Court of Appeal Rules, 2009 (henceforth "the Rules"). The Notice of Motion that instituted the application is supported by a joint affidavit sworn by the applicants, setting out grounds for their quest. The affidavit is valiantly resisted through an affidavit in reply, sworn by Felex Shirima, the respondent, who has taken the view that the application is not meritorious.

The background of the matter, as will be briefly stated here is straight forward. It began with a claim by the applicants that their three-acre piece of land, located in Tegeta, Dar es Salaam was encroached by

the respondent. While the applicants contend that the alleged trespass was done in 1993, action for recovery of the land was instituted in the Ward Tribunal in 2012. The Ward Tribunal found a purchase in the applicants' contention that the land was theirs, having been allocated to them by the Tegeta Village Council in 1990. Consequently, an eviction of the respondent was ordered, simultaneous with demolition of structures he erected on the land.

The respondent's appeal to the DLHT did not bring the desired results as the decision of the trial tribunal was upheld. It is his journey to the High Court that brought joy to him. The High Court held that the proceedings below it were shrouded in wanton irregularity as their institution in the trial Tribunal violated the time prescription for claims founded on land. In the end, the learned appellate judge (as she then was) nullified the proceedings.

The decision by the High Court started a flurry of activities that saw the applicants file several applications in that court. These included an application for a certificate on point of law, applications for extension of time to file an application for certificate on point of law, and an application for extension of time to file an application for leave to appeal. For this or

that reason these applications fell through. At some point, the applicants filed a notice of appeal, intending to appeal against refusal to extend time. This course was abandoned midway through the process. The latest of the applicants' attempts was through Misc. Land Application No. 467 of 2021. A ruling in respect thereof was delivered on 21st December, 2021. The court (Makani, J) felt that the applicants had not done enough to trigger the court's discretion to grant the extension. It is why the applicants have scaled up their movement to this Court by way of a second bite.

Hearing of the application was preceded by the filing of written submissions, done pursuant to rule 106 of the Rules. Featuring on the applicants' side was Mr. Protace Kato Zake, learned advocate. His submission was predicated on two grounds. **One,** that the delay in filing the application was caused by a Mr. Juma Kimwaga, his predecessor advocate, whose representation was said to be lackluster and it depicted recklessness. He submitted, however, that in law, where recklessness of a counsel deprives a client of the due process, the same is excusable. The learned counsel premised his view on the holdings in **Felix Tumbo Kissima v. Tanzania Telecommunications Company Limited** [1997] T.L.R. 57; **Yusufu Same & Another v. Hadija Yusufu,** Civil Appeal No.

1 of 2002 (unreported); and **Lay Hin v. Court of Appeals** G.R. 1Q1972 Jan. 26, 2015. The blemishes were thrown at Mr. Kimwaga whose handling the matters witnessed successive failures.

Two, Mr. Zake argued that decisions in the lower judicial organs were shrouded in illegality as the question of pecuniary jurisdiction was left unresolved. To butress his contention, Mr. Zake relied on the reasoning in **Gem and Rock Ventures Co. Ltd v. Yona Hamis Mutah**, Civil Reference No. 1 of 2010 (unreported), in which it was held that the question of jurisdiction can be raised at any stage of the proceedings.

Underscoring the importance of adducing sufficient cause, Mr. Zake urged me to be guided by the holdings of this Court, a few of which were **Lyamuya Construction Company Limited v. Board of Registered Trustee of Young Women's Association of Tanzania**, Civil Application No. 2 of 2010; and **Dar es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987 (both unreported).

Regarding lack of jurisdiction, Mr. Zake argued that, section 39 (1) of the Land Disputes Settlement Act, was infracted when the High Court determined the appeal without the aid of assessors. He implored me to follow in the footsteps of our decision in **The Principal Secretary**

Ministry of Defence and Natioanl Service v. Devram Valambhia [1992] TLR 185. He stressed that where illegality is successfully invoked as a ground, the requirement of accounting for days of delay becomes irrelevant. On this, he referred me to the case of **Tanesco v. Mufungo Majura & Others**, Civil Application No. 94 of 2016 (unreported). He added that the settled position, is as was held in **Sabena Technics Dar Limited v. Michael J. Luwunzu**, Civil Application No. 45/18 of 2020 (unreported), that the illegality must be that which was committed by a court against which the appeal is intended.

Mr. Rajabu Mrindoko, learned counsel, preferred a rebuttal submission. His onslaught began by taking a swipe at his rival's arguments by stating that an application for certification on point of law is to be filed within 14 days from the date on which the impugned decision was delivered. In this case, he argued, the impugned decision was delivered seven years ago.

On the ineptness of Mr. Zake's predecessor, Mr. Mrindoko argued that the shift in blemishes is unacceptable as the settled position is that pursuit of improper procedure or ignorance of the law is never an excuse in an application for extension of time. He referred me to **Ngao Godwin**

Losero v. Julius Mwarabu, Civil Application No. 10 of 2015; and **Omari Ibrahim v. Ndege Commercial Services Ltd**, Civil Application No. 83/01 of 2020 (both unreported), in both of which it was held that neither ignorance of the law nor a counsel's mistake would save the day for an applicant. He wondered why an affidavit had not been sworn or affirmed by the said advocate to own up to the alleged mistakes, consistent with our holding in **Sabena Technics** (supra). In its absence, the contention is a mere hearsay.

On illegality, Mr. Mrindoko's take is that, in terms of the decisions in **Valambhia's** case (supra) and **Lyamuya Construction** (supra), the illegality must be clear and visible, which is not the case in this matter. He contended that, pecuniary jurisdiction or omission to sit with assessors was not an issue in the High Court. To the extent that the alleged illegality is not on the impugned decision, the same must be ignored. In his view, the alleged illegalities require long drawn arguments to discover as there were no facts from which the High Court would pronounce itself. He urged me to reject them out of hand.

The counsel's oral submissions were an emphasis of what was already submitted in writing. On the advocate's negligent conduct, the

contention is that the predecessor advocate negligently advised the applicants to take a wrong process, especially in filing an application for leave instead of a certificate on a point of law. He argued that conduct of an advocate is excusable and it cannot be the basis for refusing extension. He referred me to our decision in **Realand Company Limited v. Sign Industries Limited & Another**, Civil Application No. 285 of 2019 (unreported).

Further to that, Mr. Zake urged me to be inspired by the Philippine Supreme Court Jurisprudence in **Henry Ong Lay v. Court of Appeals (2nd Division) & 2 Others**, G.R. No. 191972 of January 26, 2015. In that decision it was held, Mr. Zake argued, that while the general rule is that negligence of counsel binds the client, the exception is that, where recklessness and negligence deprives the client of the due process of the law courts should loosen the grip.

On illegality, Mr. Zake referred me to paragraph 23 of the affidavit which has enumerated instances of illegalities. He urged the Court to strike a balance of interests by looking at the constitutional right and allow the applicants to climb to the apex of the judicial hierarchy.

Mr. Mrindoko's oral submission was premised on the holding in **Lyamuya Construction** (supra). He argued that extension of time is discretionary, granted on good cause. He decried the inaction of seven years saying that it is, by any standard, inordinate and unaccounted for.

While admitting that the applicants were in court corridors for the entirety of that period, he was critical of negligence and lack of diligence that marred the conduct of the matters in court. Mr. Mrindoko contended that, in terms of **Ngao Godwin Losero** (supra), ignorance of an advocate is never a reason for extension of time. Not even change of hands of the matter between advocates would save the day. He drew a distinction between the present application and the decision in **Realand Company Limited** (supra) as, unlike in the latter where inaction of an advocate was immediately acted upon through repossession of the case file, in the instant case the advocate was remarkably ignorant that he had to enlist the advice of Mr. Rweyongeza, learned advocate.

While agreeing that negligence of an advocate can be used in exceptional circumstances, for instance, where there is a gross misconduct and the same has been reported to the Advocates Committee, he implored me to be guided by the decision of the Court in **Mohamed Suleiman**

Ghona v. Mahmoud Mwemus Chotikungu, Civil Reference No. 7 of 2021 (unreported). In that decision, this ground was given a wide berth.

On illegality, his view is that what is stated in the affidavit is the basis for an application for a certificate on point of law and not grounds of illegality. Urging me to follow the path taken by the Court in **The Board of Trustees of the Free Pentecostal Church of Tanzania v. Asha Selemani Chambanda & Another**, Civil Application No. 63/07 of 2023 (unreported), Mr. Mrindoko contended that illegality should not be used as a shield where the delay had not been explained out.

Mr. Zake's brief rejoinder was a reiteration of his earlier position. On accounting the days of delay, he argued that the affidavit has taken care of all of that. He maintained that the applicants were in court corridors all along, believing that instructions were carried out to a good effect.

The rival arguments by both sets of legal counsel distil one singular question. That is as to whether the applicant has shown good cause for granting the application. The question is bred out of the requirement set under rule 10 of the Rules which is to the effect that an application for extension of time should only succeed if the applicant presents a credible case and that he acts equitably. Thus, in **Nicholas Kiptoo Arap Korir**

Salat v. IEBC & 7 Others, Sup. Ct. Application 16 of 2014, the Supreme Court of Kenya observed:

> *"Extension of time being a creature of equity, one can only enjoy it if [one] acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that [one] was not at fault so as to let time lapse. Extension of time is not a right of a litigant against a Court, but a discretionary power of courts which litigants* **have to lay a basis [for], where they seek [grant of it].**"

[Emphasis is added]

The quoted excerpt mirrors the Court's holding in **Allison Xerox Sila v. Tanzania Harbours Authority**, Civil Reference No. 14 of 1998 (unreported). In this decision the Court held:

> *"Rules of limitation are ordained for a purpose. It does not seem just that an applicant who has no valid excuse for failure to utilize the prescribed time, but tardiness, negligence or ineptitude of his counsel, should be extended extra time merely out of sympathy for his cause."*

In other words, what guides the Court in granting or refusing extension of time is the principles of justice, equity and common sense

(See: **Zuberi Mussa v. Shinyanga Town Council** [2009] TZCA 16). Noteworthy, the stringency in the application of the rule, as underscored in all of our decisions, is intended to forestall any abuse or misuse of the remedy by procrastinating parties who are all out to drive from their own wrongs. However, the guard against misuse of this 'window' should ensure that courts have a balancing act to observe, in that the quest for extension of time should not be stifled or the right of appeal denied unless circumstances of his delay are inexcusable, and his adversary was prejudiced by it.

As stated earlier on, the applicants' quest for extension rests on two pillars. One, that the delays were as a result of the negligence exhibited by the applicants' erstwhile counsel, whose actions were laden with pregnant irregularities leading to successive defeats. Mr. Mrindoko considers these gaffes as an exhibit of lack of diligence and negligence from which the applicants cannot extricate themselves. In his view, the faults committed by the advocate are very much theirs and so are the consequences.

From the parties' exchanges a narrow issue arises *i.e.* whether lack of diligence by counsel for the applicants constitutes good cause for

extension. The trite position, as accentuated by this Court often times, is that negligence or lack of diligence by a counsel is not and cannot be considered to be sufficient cause for extension. This position was underscored in the case of **Umoja Garage v. National Bank of Commerce** [1997] T.L.R. 109, in which 'an oversight' by an advocate was held to be inexcusable and led to refusal to grant an extension of time. The approach adopted subsequent thereto is that, in some circumstances, and depending on peculiar facts of each case, time may be enlarged on account of the counsel's irresponsible conduct. Thus, in **Zuberi Mussa v. Shinyanga Town Council** (supra), we held as follows:

> *"On my part, I do not accept Mr. Mtaki's narrow definition of the word "diligence". I think, the word must be given its literary meaning to mean, care and hard work in executing one's duties. In my considered view, this means, in the case of advocates, not only attending court as and when required, but also extends to preparation of documents on behalf of their clients in chambers. So Mr. Muna is right in the sense that preparing defective documents could amount to lack of diligence in some cases. But as demonstrated*

above each case must be taken on its own peculiar facts."

From the foregoing, there comes a question. Do the circumstances of this case present a peculiar situation that can call for granting of an extension of time? My unflustered answer to this question is in the negative. This is one case in which preparation of documents that found their way in court was, to the say the least, awful, not to forget the horrendous decision to institute an appeal against an order that dismissed the application for extension of time instead of going for a second bite. In my view, this is the worse form of ineptness which can hardly be tolerated, and the adverse consequences that come with it cannot let the applicants off the hook. It represents the - *less than careful approach* - taken by the applicants in their choice of legal practitioners to represent them. Thus, in **Mohamed Suleiman Ghona v. Mahmoud Mwemus Chotikungu** (supra) the Court took the view that only in exceptional circumstances would a party be spared from the vagaries of the advocate's negligence. The exceptional circumstances contemplated in the cited decisions are varied but the most common of all is, as was in the just cited case, where the applicant went an extra mile in making necessary follow up and put

the advocate on his toes. In that case, the Court referred to the case of **Nkini & Associates Ltd v. National Housing Corporation**, (Civil Appeal 72 of 2015) [2021] TZCA 73 (12 March 2021), in which the counsel's negligence was considered to be excessively intolerable that he had to be indicted by the Disciplinary Committee. This distinguishes the case from the rest of such incidents of negligence. In other words, the advocate's ineptness in the instant matter was not a one-off event. It was consistent and repetitive.

Mr. Zake has urged me be to be persuaded by the decision in **Henry Ong Lay v. Court of Appeals (2nd Division) & 2 Others** (supra). Part of that decision puts a condition on the client to demonstrate vigilance in respect of his interests in the matter. From where I sit, I find nothing on which to build the impression that the applicants were vigilant enough in holding their advocate accountable. Their silence after their counsel's needless missteps were, in my considered view, a condonation that binds them and legitimately denies them right to the due process of the law.

It is my take that this is one of the fitting circumstances in which the right to the due process of the law has been rightly scuppered by the applicants' inaction against the wayward advocate.

As I turn my attention to the applicants' second limb of contention, I wish to state, at the outset, that where illegality is successfully pleaded as a ground, the resultant consequence is to grant the application, and that the requirement of accounting for each day of delay plays second fiddle (See: **VIP Engineering and Marketing Limited and Three Others v. Citibank Tanzania Limited**, Consolidated Civil Reference No. 6, 7 and 8 of 2006 (unreported).

In the instant matter, the counsel are in unison on the effect that illegality has on an extension of time. They also agree that the common denominator is that such illegality must bear sufficient importance and be apparent on the face of the record. Where parties part ways is on which one is an illegality and which one isn't. Mr. Zake believes that what is in paragraph 23 is what illegality is, while Mr. Mrindoko isn't convinced.

As to what constitutes an illegality, the position is clear and settled. In the case of **Charles Richard Kombe v. Kinondoni Municipal Council**, Civil Reference No. 13 of 2019 (unreported), the Court laid out a definition of illegality. Besides quoting the Black's Law Dictionary, 11th Edition, in which illegality was defined as *"an act that is not authorized by law" or "the state of not being legally authorized"*, it quoted an extract

from the decision of the Supreme Court of India in **Keshardeo Chamria v. Radha Kissen Chamria & Others** AIR 1953 SC 23, 1953 SCR 136. The Indian apex court defined illegality in the following mould:

> *"... the words "illegally" and "material irregularity" do not cover either errors of fact or law. They do not refer to the decision arrived at but to the manner in which it is reached. The errors contemplated relate to material defects of procedure and not to errors of either law or fact after formalities which the law prescribes have been complied with."*

The ultimate conclusion which was drawn by the Court in **Charles Richard Kombe** (supra) was that illegality would only succeed if the impugned decision was made by a court that had no jurisdiction, or where right to be heard was trampled.

Noteworthy, the decision in **Charles Richard Kombe** (supra) was a cornerstone in the subsequent decision of the Court in **Kabula Azaria Ng'ondi & 2 Others v. Maria Francis Zumba & Another**, Civil Appeal No. 174 of 2020 (unreported), in which it held that a mere decisional error not amounting to acting without jurisdiction would not amount to illegality.

Glancing through the submission by the applicants, the contention is that the question of jurisdiction was not determined, yet it was raised by the applicants when the matter was on first appeal. I agree with counsel that this contention featured in the proceedings in the 1st appellate tribunal, but the same was not determined, ostensibly because the grounds of appeal raised by the respondent were all found to be wanting. Noting that the net effect of the consideration of the appeal was to have the appeal dismissed for want of merit, the manner in which the disposal would be arrived at was the least of the Chairman of the 1st appellate tribunal's worries.

While it is appreciated that this was a step out of the cardinal principle which requires that issues relating to jurisdiction be settled first, what is gathered from the record is that this ground was not brought up when the matter went on appeal to the High Court. This means that the High Court was not invited to pronounce itself on it. This does not mean, however, that the court would not, on its own motion, raise it and call upon the parties to address it. But the fact remains that this was not part of the consideration by the High Court.

Thus, while failure to determine the question of jurisdiction may border on illegality, it should not be lost on anybody that the settled position is that illegality may only hold a sway if it shrouds the decision sought to be appealed against and nothing else. This is what would render the court and the decision blameworthy (See: **Sabena Technics** (supra)).

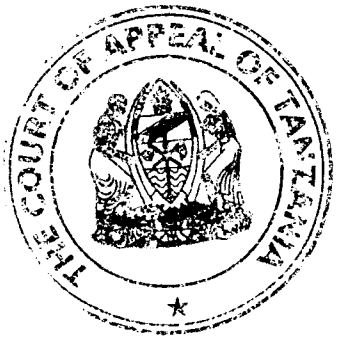
In sum, I hold the view and find that the applicants have not done enough to trigger the court's discretion. The application has not met the threshold for its grant. Accordingly, I dismiss it with costs.

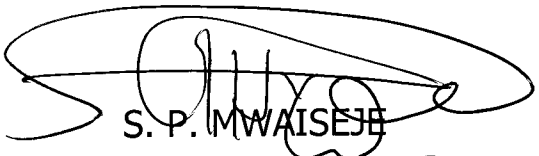
Order accordingly.

DATED at **DAR ES SALAAM** this 3rd day of November, 2023.

M. K. ISMAIL
JUSTICE OF APPEAL

The ruling delivered this 6th day of November, 2023 in the presence of Mr. Protace Kato Zake, learned counsel for the Applicants, also holding brief for Mr. Rajabu Mrindoko, learned counsel for respondent, is hereby certified as a true copy of the original.





S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL