IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 450/17 OF 2021

ALLY SALUM SAID (Administrator of the

Estate of the late ANTAR SAID KLEB).....APPLICANT

VERSUS

IDDI ATHUMANI NDAKI.....RESPONDENT

(Application for Extension of time to apply for leave to appeal to the Court of Appeal against the Judgment and Decree of the High Court of Tanzania at Dar es Salaam)

(Maige, J.)

dated the 28th August, 202

in

Land Appeal No. 208 of 2016

.....

RULING

16th March & 19th April, 2023.

FIKIRINI, J.A.:

The applicant moved this Court under rules 10 and 45 A (1) (b) and 45 (b) of the Court of Appeal Rules, 2009 (the Rules) seeking two orders: (i) for extension of time within which to apply for leave to appeal to the Court of Appeal and, (ii) once the time is extended for grant of leave to appeal to the Court of Appeal. The following six grounds are contained in the notice of motion:

(i) The impugned High Court judgment and decree in Land Appeal No. 208 of 2016 is tainted with illegality in that it emanated from a time barred appeal, and it upheld an appeal from a tribunal that acted without the requisite pecuniary jurisdiction.

(ii) The impugned High Court judgment and decree in Land Case No. 208 of 2016 is tainted with illegality for failure to afford the applicant the right to be heard on the issue of capacity to contract on which the Court based its judgment.

(iii) The impugned High Court judgment and decree raises seriously triable points of law on whether an appellate court having found missing record of the whole testimony and exhibits of PW1 on record ought to have proceeded with determining the appeal on merit or order the trial de novo.

(iv) The impugned High Court judgment and decree raises seriously triable points of law on whether there could be proper evaluation of evidence on record by the appellate Court in the absence of the whole testimony of PW1 and his exhibits.

(v) The impugned appellate judgment and decree raises seriously triable points of law on holding that ***Anter Salum Said*** *and*

Anter Said Kleb *is one and the same person while these are entirely two different persons and the resultant effect thereof.*

(vi) The applicant applied for extension of time to apply for leave to appeal to the Court of Appeal and subject to the grant of extension of time, for leave to appeal to the Court of Appeal in the High Court Miscellaneous Application No. 718 of 2020 and was refused.

The application is supported by an affirmed affidavit of Ally Salum Said and a list of authorities relied on during oral submission. Contesting the application, the respondent though did not file an affidavit in reply or written submission, through his advocate argued on points of law.

During the hearing, Mr. Odhiambo Kobas learned advocate appeared for the applicant, while Mr. Mohamed Tibanyendera, learned advocate appeared for the respondent. Commencing his submission, Mr. Kobas started by first adopting the notice of motion and affidavit affirmed in support of the application, and second, declaring citation of rule 10 of the Rules to be superfluous as the application for extension of time on a

second bite, was timely lodged under rules 45 A (1) and 45 (b) of the Rules.

After abandoning the first ground on the notice of motion, Mr. Kobas proceeded submitting on the second ground that the High Court judgment and decree in Land Appeal No. 208 of 2016 is tainted with illegality for failure to give the applicant the right to be heard on the issue of capacity to contract on which the Court based its judgment. Referring to page 9 of the impugned High Court decision, he contended that the Judge brought up the issue of age while it was never an issue or a ground of appeal and the trial court proceeded to determine it without hearing the parties. On that account, he implored me to find that the applicant was denied the right to be heard on that issue.

Deducing from documents tendered before the tribunal, the Judge came up with the issue raised *suo motu*. Had the applicant been heard, he could have come up with sufficient explanation to the contrary. Buttressing his stance, Mr. Kobas referred me to the case of the **Principle Secretary, Ministry of Defence & National Service v. Devram Valambhia** [1992] T. L. R. 185 at 188. He underscored the principle that a failure to

afford a party an opportunity to be heard renders, the decision arrived a nullity. He thus implored me to follow suit and allow extension of time to enable the applicant to appeal to the Court of Appeal, on that ground. Mr. Kobas also, invited me to be guided by the case of **M.B Business Ltd v. Amos David Kasanda & 2 Others**, Civil Appeal No. 48/17/2018.

The same issue was raised when application for leave was lodged before the High Court. The Judge handling the application at page 14 of the ruling admitted that the applicant was not heard. Mr. Kobas emphasizing on this point argued that having observed that the applicant was not heard, which is an illegality and fundamental breach of the right to be heard, which in itself was sufficient to grant extension of time for the applicant to apply for leave to appeal to the Court of Appeal, yet the Judge declined to grant the application.

On the third and fourth grounds which were argued together, although the Judge was aware that the recorded evidence of PW1 was missing on the record and despite being aware of the way forward, he went on determining the appeal, instead of ordering a retrial. This means the Judge did not have the opportunity of the reading through the applicant's testimony. According to Mr. Kobas, the Judge's re-evaluation of

the evidence on record could not be sufficiently and accurately done to enable him to set aside the decision of the Ward Tribunal which was in favour of the applicant in the absence of PW1's testimony and exhibits.

Mr. Kobas urged me to consider the irregularity as a serious retriable point of law and of sufficient importance to warrant the Court to exercise its discretion and grant extension of time as the applicant has been prejudiced.

On the fifth and sixth grounds (the second limb of the application) preferred under rule 45 (b) of the Rules, Mr. Kobas implored that, should the Court find that the applicant has shown good cause to deserve granting of extension of time, it should then be pleased to grant the applicant leave to appeal on the following points of law: (a) the right to be heard, (b) what should the appellate Court do when reviewing the record and find that the entire recorded evidence of a witness and exhibits are not in the record or missing, and (c) whether there could be a proper re-evaluation of evidence by the appellate Court in the absence of the evidence of a witness and the exhibits.

Mr. Kobas concluded his submission by urging the Court to grant the application with costs.

On his part Mr. Tibanyendera, challenged the application arguing that it was omnibus, since prayers in the notice of motion can only be granted by two different Courts. He went on explaining that similar points were raised before the High Court, referring to page 12 of the ruling.

Mr. Tibanyendera further submitted that only extension of time can be granted by this Court, as leave on land matters is regulated by its own procedure under the Land Disputes Courts Act, No. 216 R.E. 2002 [now R.E. 2019] (the Land Disputes Act). He went on to argue that the Judge declined to grant an application for extension of time as the applicant failed to account for the delay. Expounding on rule 45 A (1) of the Rules, he contended that the provision governs the application for extension of time for leave to appeal only. Otherwise, leave to appeal *per se* is governed by the Land Disputes Act on issues of this nature. He thus prayed the Court to find the second prayer superfluous and could not be entertained by the Court.

On the application for extension of time, Mr. Tibanyendera urged the Court not to grant the application based on the same reasons advanced by the High Court. In addition, he argued that in his perusal of the affidavit affirmed by Ally Said, there was no accounting of the days of the delay made disclosing why the applicant failed to apply for leave timely. Moreover, the learned advocate representing the applicant in this application was the one who lodged a notice of appeal and requested to be furnished with certified copies of the judgment, decree, and proceedings timely, wondering why the applicant's counsel could not do the same to the application for leave to appeal. Or, in the alternative, he could apply for leave informally as the counsel was present when the judgment was delivered.

Mr. Tibanyendera considered the delay to have been caused by a laxity on the applicant's part, and an extension of time could not be made simply because of alleged illegality. For a point of illegality to be considered, which is not the case in the present application, he stressed that it has to be apparent on the face of the record.

On the cited cases of **Valambhia** and **M. B. Business** (supra), he argued that those decisions had seriously illustrated that, there is no hard

and fast rule and each case should be examined on its peculiarity. Mr. Tibanyendera dismissed the assertion that there was a failure in dispensing justice which would pass for a grant of extension of time. On the right to be heard complained about, he opposed Mr. Kobas' argument that parties were not heard on whether **Antar Said Kleb** or **Antar Salum** existed or not, stating that it was one of the issues and was also featured in the fourth and sixth grounds of appeal before the High Court. Parties, therefore, had an opportunity to address the issue in their respective written submissions. He said that the issue was discussed on page 8 of the High Court judgment, and had those submissions been attached to the present application; this Court would have found that parties were heard. Extending his submission on that point, he argued that the High Court correctly addressed the issue and concluded that Antar Said Kleb referred to in exhibit P1, was not yet born at the time. With such information, there was thus no need to call parties to address the issue of age, which was pleaded before the trial tribunal. And that there was sufficient information on the record allowing the High Court Judge to re-evaluate the evidence, giving an example of the knowledge of the existence of death which

occurred on 16th May, 2007 at the age of twenty-three, which was gathered from the tribunal record.

Augmenting his position, Mr. Tibanyendera explained that parties thoroughly deliberated on the above point on appeal. Therefore, the Court's analysis and conclusion were correct. Maintaining that cases should end, Mr. Tibanyendera contended that whatever argument the parties could muse could not have changed the final outcome. And if there was any evidence, then it could be on record.

Taking up on the issue of the missing record, he submitted that the Judge could not be faulted because apart from the missing records, there were other sources where the information could be found. This includes the summary provided in the tribunal decision, which the Judge relied on. He went on to argue that, the circumstances of the case before the High Court justified its determination rather than ordering a retrial as done by the High Court Judge who was aware of the information and the way forward in dealing with the appeal before him. Opposing the grant of this application, Mr. Tibanyendera contended that, if this application is allowed, the record of appeal will be defective as the evidence of PW1 would be missing. He thus urged that this application be dismissed with costs.

Rejoining, Mr. Kobas elaborated that the alleged omnibus application contained two prayers: (i) for extension of time and (ii) for leave to appeal to the Court of Appeal. Dismissing Mr. Tibanyendera's submission that the second prayer was superfluous, Mr. Kobas argued that both applications were refused because the second prayer automatically collapsed after the first prayer was declined. One of the prayers was made under the Land Courts Disputes Act, and the second prayer in the present application was, according to his submission, not superfluous. Despite the above submission, he was nonetheless quick to invite the Court that if it finds the second prayer superfluous, the Court should ignore the prayer and proceed to determine the application for extension of time.

On the submission that the applicant has failed to account for each day of the delay, Mr. Kobas was of the contention that where the application on extension of time is premised on the ground of illegality, the Court should overlook the delay and focus more on illegality as a result of which an extension of time could be granted. And that this Court, in its numerous decisions, has held and found illegality once successfully pleaded and shown, it is by itself, constituting a sufficient cause to warrant

extension of time. Reinforcing his proposition, he referred to the case of **Valambhia** (supra).

The illegality pinpointed in the present application, as per Mr. Kobas' submission, is on the right to be heard on the capacity to contract. The point is of sufficient importance to warrant this Court to exercise its discretion and grant the application. According to him, the illegality was apparent on the face of the record if one reads through the judgment. The capacity to contract was never an issue before the trial tribunal and later the High Court. On grounds four and five of the appeal, what is contained was whether **Antar Salum Said** and **Antar Said Kleb** were the same person and not that the age or capacity to contract to purchase the land was at issue.

In his further submission, Mr. Kobas acknowledged Mr. Tibanyendera's submission that each case should be examined separately. Referring to the present application, he argued that the facts showed clearly that the right to be heard was stifled, rendering the decision a nullity. This is regardless of whether the outcome would have been the same had the parties been heard.

Concerning Mr. Tibanyendera's submission that the parties were each given ample opportunity to state their case, Mr. Kobas disputed that contention saying that the parties did not argue on the point of capacity to contract. He maintained that had they been given that opportunity; the Judge would have arrived at a different decision. On the submission that the circumstances of the case necessitated the final determination of the appeal rather than ordering a retrial, Mr. Kobas responded by disputing the assertion, contending that a retrial would have been a just and fair remedy after the Court had found out that the entire recorded PW1's testimony and exhibits were missing from the record. The summary of evidence on the tribunal's decision merely summarized what issue was before the tribunal, and it could not touch on what was not the issue before the tribunal. The possibility of leaving out vital testimony of PW1 on the capacity issue could have been left out because that was not an issue. Without PW1's testimony, re-evaluating the evidence would not have been proper.

On the reason as to why the application for leave was not timely lodged, Mr. Kobas argued that at the time when the judgment was pronounced, reasonable and meaningful observation could not be made. It was after the applicant was availed with a copy of the judgment that the

intention to appeal was conceived. On reflection, Mr. Kobas admitted it was an oversight. He thought it was a right for leave to be granted and hence did not even consider making an informal application for leave, although a notice of appeal was timely filed.

Countering submission on the two documents, the death certificate, and deed of transfer, Mr. Kobas stated that sufficient explanation would have been obtained had the parties been allowed to be heard on the capacity to contract issue. That was denied hence the present application.

Maintaining that there is illegality in the impugned decision, which is good cause to allow the application for extension of time, he implored that this Court grants the application and extend time as requested.

I have thoroughly followed up and weighed the rival submissions made by the learned advocates and read through the notice of motion and the affidavit affirmed by Ally Salum Said in support of the application.

Before I proceed with the determination of this application, I wish to point out two things: *one,* that, as a matter of general principle granting or refusing to grant an application for extension of time is entirely at the discretion of the Court. However, that discretion is judicial and must be

exercised according to the rules of reason and justice. Several cases have articulated the principle well, including **Mbogo v. Shah** [1968] E. A the defunct Court of Appeal for Eastern Africa held thus:-

> *"All relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reason for the delay, whether there is an arguable case on the appeal, and the degree of prejudice to the defendant if time is extended."*

The list is not exhaustive. However, it is now settled that the Court must consider certain factors depending on the peculiarity of each case placed before the Court. In the case of **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), the Court listed some of the factors to be considered which include: (a) account for all the period for the delay, (b) that the delay should not be inordinate, (c) the applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take; and (d) if the Court feels that there are other sufficient reasons such as the illegality of the decision sought to be challenged.

In this application, the applicant has based his application for extension of time on the illegality of the decision sought to be appealed against. In considering whether or not extension of time may be granted on that ground, it is instructive, at this stage, to determine the propriety or otherwise of the second limb of the application, the leave to appeal. It is a legal position that, the applications made under rules 45 A (1) and 45 (b) of the Rules cannot be lumped in one application as in the present one. The reason is that these two applications fall under different spheres. Whereas a Single Justice is obligated to entertain an application under Rule 45 A (1), the situation is dissimilar when it comes to the application under rule 45 (b) of the Rules, as it is only the Court that can entertain the application for leave to appeal under the rule.

Initially, Mr. Kobas beseeched for both prayers to be granted. Still, on reflection, when rejoining, he invited the Court, if pleased, to only deal with the application for extension of time. He was echoing Mr. Tibanyendera's submission that the two prayers cannot be made in the same application as they were to be dealt with by two different Courts, and one is dependent upon the other. I entirely agree with Mr. Tibanyendera's position and am pleased that Mr. Kobas admitted the irregularity. In the circumstances, I

decline to entertain the application's second limb preferred under rule 45 (b) of the Rules and struck it out.

Accounting for each day of the delay is a backbone of the application for extension of time. As well illustrated in the **Lyamuya Construction Company Ltd** (supra). The delay even of one day must be explained as underscored in the case of **Bushiri Hassan v. Latifa Lukio Mashayo,** Civil Application No. 3 of 2007 (unreported).

In the present application the applicant won in the decision in the District Land and Housing Tribunal in Land Application No. 83 of 2011. Aggrieved the respondent appealed to the High Court in Land Appeal No. 203 of 2016 and won.

Dissatisfied with the outcome, the applicant despite filing a notice of appeal and request for supply of the necessary documents was never bothered to file for leave to appeal to the Court of Appeal. On 27th October, 2020 the applicant was supplied with the requested documents except for the copy of proceedings as averred in paragraph 6 of the applicant's affidavit. The applicant was already out of time, when supplied with the requested documents. He thus promptly lodged for an application

for extension of time subject to the present application. The Miscellaneous Land Application No. 718 of 2020 was dismissed on 31st August, 2021, for failure to timely and without good cause apply for leave. The ruling prompted for lodgment of the present application on 30th September, 2021 after securing the necessary documents and the certificate of delay issued on 17th September, 2021 in that regard.

The applicant in my view has completely failed to account for the delay. Neither in the affidavit in support nor in the submissions by the learned counsel there was an account of the delay from when the decision was made on 28th August, 2020 up to when Miscellaneous Land Case Application No. 718 of 2020 was conceived. Mr. Kobas particularly in his submission downplayed that fact by saying he considered an appeal as a matter of right. He further, contended since the present application was largely premised on illegality, therefore it was not necessary to account for each of the delayed days. While I agree that illegality can constitute sufficient cause but it does not mean accounting for each day of the delay was not required. I thus agree with Mr. Tibanyendera's submission that the applicant has failed to account for the delay.

Coming back to the first limb of the application, it is trite law that where there is an allegation of illegality in the decision sought to be appealed against, the Court has a duty, even if it means extending the time to enable the alleged illegality to be ascertained and corrected to put the record straight. In the **Valambhia** case (supra), the Court had an opportunity to consider the issue of illegality and held thus:-

> *"We think that where, as here,* the *point of law at issue is the illegality or otherwise of the decision being challenged, that is sufficient importance to constitute sufficient reason within the meaning of rule 8 [now rule 10) of the Rules for extending time. To hold otherwise would amount to permitting a decision, which in law might not exist, to stand."*

The Court went on to state that:

> *"In our view, when the point at issue* ***is one alleging the 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."* [Emphasis added].

The Court restated the position in the case of **Vodacom Tanzania Limited v. Innocent Daniel Njau**, Civil Appeal No. 60 of 2019 (unreported), echoing its position in the **Principal Secretary, Ministry of Defence and National Services** (supra), underlined this:-

> "*We are of the considered opinion that the learned Judge ought to have exercised his discretion judiciously to* ***consider even the ground of illegality which was also pleaded by the appellant because "sufficient reason" does not only entail reasons of delay, but also sound reasons for extending time.*** *In particular, whether the ground of illegality raised by the appellant was worth consideration in determining whether or not to grant the application....*" [Emphasis added]

This Court in its recent decision in **Attorney General v. Emmanuel Marangakisi** (*as Attorney of Anastansious Anagnostou*) **& 3 Others**, Civil Application No. 138 of 2019 (unreported), again echoed the position, that despite failing to account for the delay, the Court can exercise its discretion and extend time applied, once there is illegality claimed, that is a sufficient cause to warrant the grant of the application.

Now applying the stated principles to the situation, my first port of call is the notice of motion, where the applicant has stated the grounds of illegalities complained about. I have specifically considered grounds two, three, and four on the right to be heard, missing PW1's records of testimony and exhibits tendered through the witness.

On page 9 of the High Court judgment, the Judge admitted that the entire recorded testimony of PW1 and the exhibits tendered through him were missing. While debating whether to order a retrial or an order for the reconstruction of the record, the Judge ultimately opted to proceed to determine the appeal based on the reasons stated in the judgment. The question to be asked is whether, in the absence of PW1's testimony and exhibits, which the trial tribunal used to determine the matter, the High Court could determine the appeal before it justifiably. There is also the issue of the capacity to contract, raised by the Judge and determined without the parties' input. In my considered view, the points of illegalities raised in the notice of motion, affidavit, and expounded on in the rival oral submissions constitute good cause for the Court to exercise its discretion to grant extension of time so that they can be determined in the intended appeal.

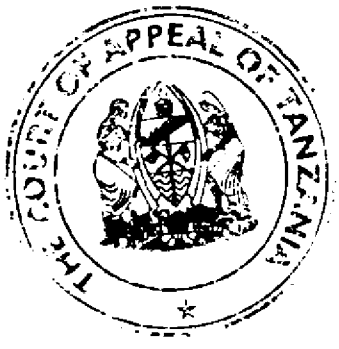
Given the above, I find and hold that the applicant has established sufficient reason warranting the Court to exercise its discretion to grant extension of the time sought by the applicant. The application is granted and the applicant is given a period of thirty days to apply for leave to appeal to the Court of Appeal

Costs in due cause.

DATED at **DAR ES SALAAM** this 18th day of April, 2023.

P. S. FIKIRINI.
JUSTICE OF APPEAL

The Ruling delivered this 19th day of April, 2023 in the presence of Ms. Lulu Mbinga, learned counsel for the applicant, who also took brief for Mr. Mohamed Tibanyendera, learned counsel for the respondent, is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL