IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

CIVIL APPLICATION NO. 353/03 OF 2022

MAULID MUSSA KIBAI ..... 1ST APPLICANT

SELEMANI HASSAN MIKINDO ..... 2ND APPLICANT

MONIKA ILOTI ..... 3RD APPLICANT

KABULULE MAZENGO ILOTI ..... 4TH APPLICANT

EMIL KUSAJA ..... 5TH APPLICANT

AUDAX MTEMBA ..... 6TH APPLICANT

VERSUS

IMMAM TAQWA MOSQUE ..... RESPONDENT

(Application for Extension of Time to Serve the Respondent with a Letter Applying for a Copy of Proceedings and Memorandum and Record of Appeal from the Decision of the Court of Resident Magistrate of Dodoma at Dodoma)

(Dudu, PRM Ext. Jur.)

dated the 28th day of August, 2020
in
Extended Jurisdiction Land Appeal No. 11 of 2020

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RULING

27th April & 4th May, 2023

KWARIKO, J.A.:

The applicants have preferred this application by a notice of motion taken under rules 10, 90 (3) and 97 (1) of the Tanzania Court of Appeal Rules, 2009 (henceforth the Rules). They are seeking for an order of the Court for extension of time to serve the respondent with a letter applying for a copy of proceedings in the Court of Resident Magistrate of Dodoma exercising extended jurisdiction (the first appellate court) and

memorandum and record of appeal already filed in this Court (the documents). The notice of motion is supported by the affidavit of Mr. Leonard Mwanamonga Haule, learned advocate for the applicants.

It has been deponed in the affidavit that, the discovery that the said documents were not served on the respondents was made on 20th February, 2022 when Mr. Haule was engaged by the applicants to represent them. Further, that the impugned decision is tainted with illegality hence good cause for extension of time sought. The alleged illegality is of two folds, **one,** the first appellate court erred to hold that a granted right of occupancy supersedes a customary right of occupancy. **Two,** that the first appellate court failed its duty to hold that the change of assessors and non-taking of their opinion were fatal to the proceedings.

On the adversary side, the respondents opposed this application through an affidavit in reply sworn by Mr. Elias Michael Machibya, learned advocate for the respondents. He averred that the applicants have not accounted for each day of the delay and the alleged illegalities were not raised in the appeal before the first appellate court.

A brief background to this matter as can be deduced from the court record goes as follows: The applicants were the appellants in Land Appeal No. 11 of 2020 before the Court of Resident Magistrate of Dodoma at Dodoma (the first appellate court) (Dudu, PRM with Extended Jurisdiction)

and the judgment was delivered on 28th August, 2020 in favour of the respondent. Aggrieved by that decision, on 9th September, 2020, the applicants filed a notice of appeal to the Court and also applied for a copy of proceedings of that court for appeal purposes.

The applicants were also granted leave to appeal to the Court on 25th February, 2021, vide Misc. Land Application No. 68 of 2020. The applicants were issued with a Certificate of Delay by the Deputy Registrar of the High Court on 2nd December, 2021. On 27th January, 2022 they lodged their appeal to the Court. However, the applicants did not serve the letter applying for a copy of proceedings in the first appellate court and the memorandum and record of appeal to this Court within the time prescribed by the law, hence this application to do so.

During the hearing of the application, Messrs. Haule and Machibya represented the applicants and the respondent, respectively.

Upon taking the stage to argue the application, Mr. Haule first adopted the notice of motion and the supporting affidavit to form part of his oral submission. He submitted that the omission to serve the respondent with the said documents was just inadvertence or human error on the part of the applicants and it was not for their ignorance of the law or negligence. He reiterated the issue of illegality and urged the Court to grant the application as the applicants have shown good cause in that

regard. He contended that as there is no definition of the term good cause, this application should be decided on its own peculiar circumstances. He fortified his arguments with the Court's decisions of **Zuberi Nassor Mohamed v. Mkurugenzi Mkuu Shirika la Bandari Zanzibar,** Civil Application No. 93/15 of 2018 and **TANESCO v. Mufungo Leonard Majura & Fifteen Others,** Civil Application No. 94 of 2016 (both unreported). Basing on his submission, the learned counsel urged the Court to grant this application.

On his part, opposing the application, Mr. Machibya started by adopting the affidavit in reply. He argued that the applicants have not given any reason for the delay and the issue of inadvertence has not been covered in the affidavit in support of the application but has come from the advocate during hearing. The advocate did not say if he was informed by the applicants of this matter and there is no affidavit from them in that regard. The learned counsel contended that the applicants have not accounted for the delay.

As regards the allegation of illegality, Mr. Machibya argued that the points raised do not fit to be an illegality referring the Court's decision in the case of **Charles Richard Kombe v. Kinondoni Municipal Council,** Civil Application No. 13 of 2019 (unreported). He went on to argue that the first appellate court did not make comparison between granted right

of occupancy and customary right of occupancy but at page 12 of the impugned decision, it was stated that the customary holders were compensated before the land was acquired. He contended that even if there is such allegation, it is not an illegality but an error of law. The learned counsel argued further that the issue of assessors was not covered in the impugned decision.

In rejoinder, Mr. Haule argued that each case should be decided on its own peculiar circumstances and thus the case of **Charles Richard** (supra) cannot be used to stop the Court to consider other issues of illegality. He added that the analysis by the first appellate court in relation to ownership of the disputed land was geared to distinguish between granted and customary right of occupancy.

Having given due consideration to the submissions by the learned counsel for the parties, the crucial issue which calls for the Court's determination is whether the applicant has given good cause for the delay to serve the said documents. It is a settled law in our jurisdiction that, a party seeking the Court to exercise its judicial discretion to grant the application for extension of time to do a particular action, must show good cause for extension of time by either stating the reasons for the delay or by showing the illegality. For ease of reference, Rule 10 of the Rules provides as follows:

> *The Court may, upon good cause shown, extend the time limited by these Rules or by any decision of the High Court or tribunal, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to that time as so extended.*

The said discretion by the Court to grant or refuse extension of time to do a certain action, however, has to be exercised judicially, the main consideration being good cause shown by the applicant for doing so. Though, what amounts to good cause has not been defined but there are certain factors which must be shown by the applicant for consideration by the Court. These include; an account for the delay, whether the application has been brought promptly, the exercise of diligence on the part of the applicant and any other sufficient reasons according to the particular circumstances of the case such as the illegality of the impugned decision. See for example the decisions in **Yusufu Same and Another v. Hadija Yusufu,** Civil Application No. 1 of 2002, **Lyamuya Construction Company Ltd v. Board of Trustees of Young Women's Christian Association of Tanzania,** Civil Application No. 2 of 2010 (both unreported). For instance, in the case of **Yusufu Same and Another** (supra), the Court said thus:

"An application for extension of time is entirely in the discretion of the Court to grant or refuse it. This discretion however has to be exercised judicially and the overriding consideration is that there must be sufficient cause for doing so."

The question which flows from the above exposition is whether the applicant has shown good cause upon which the Court can grant this application. In this case firstly, the applicants were supposed to serve the letter to the respondent within thirty days from 9th September, 2020 when they applied for a copy of proceedings in the first appellate court and the memorandum and record of appeal within seven days from the date it was lodged in Court on 27th January, 2022 to the date this application was filed on 8th March, 2022. In the affidavit in support of the application the applicants have not stated any reason for the delay. It was during the hearing when their counsel stated that he discovered the omission on 20th February, 2022 upon being engaged by the applicants. He was of the contention that the omission was inadvertence or human error on the part of the applicants. However, the applicants themselves have not filed affidavit(s) to show that the omission was inadvertence or human error. Even if this ground is considered, the same would not succeed; since inadvertence is not sufficient cause for enlargement of time to do a certain action under rule 10 of the Rules unless the applicant has shown diligence

and promptness in remedying the situation soon upon discovery of the omission. In the case of **Michael Kweka v. John Eliafye** [1997] T.L.R. 152, when faced with an akin situation, the Court stated at page 153 thus:

> *"Although generally speaking a plea of inadvertence is not sufficient, nevertheless I think that extension of time may be granted upon such plea in certain cases, for example, where the party putting forward such plea is shown to have acted reasonably diligently to discover the omission and upon such discovery, he acted promptly to seek remedy for it."*

See also: **Standard Chartered Bank (Tanzania) Ltd v. Bata Shoe Company (T) Limited,** Civil Application No. 101 of 2006 (unreported).

Following these decisions, it is my considered opinion that the applicants have not shown if they acted reasonably and diligently to remedy the anomaly. This is so because it took them almost eighteen months to discover that they had not served the letter applying for a copy of proceedings and twenty-four days from filing the memorandum and record of appeal to the date they took action to remedy it. Even after the alleged discovery of the omission by their advocate, fifteen days passed from 20th February, 2022 to 8th March, 2022 when this application was filed. This period has not been accounted for.

In the totality of the foregoing, the applicants have failed to account for each day of the delay consistent with the decision of the Court in the case of **Hassan Bushiri v. Latifa Lukio Mashayo,** Civil Application No. 3 of 2007 (unreported), where the Court observed that:

> *"Delay, of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken".*

For the foregoing therefore, the first limb on the grounds for the delay fails.

In the second limb, the applicants have raised the issue of illegality in the decision of the first appellate court as a ground for the grant of this application. It is settled law that where a party pleads an illegality of the impugned decision, the court has to grant the application so that the appellate court can consider it. See; **The Principal Secretary, Ministry of Defence and National Service v. Devram P. Valambhia** [1992] T.L.R. 387 and **Lyamuya Construction Company Ltd** (supra). The issue that follows is whether the applicants have succeeded in showing the illegality in the impugned decision. They have raised two points in that regard. **One;** that the first appellate court erred to hold that the granted right of occupancy supersedes customary right of occupancy. Having perused the impugned decision, I agree with Mr. Machibya that there is

no observation made therein as to the comparison between granted right of occupancy and customary right of occupancy. Therefore, the alleged illegality is not apparent on the face of the record. However, even if there was such comparison it would not amount to an illegality but an error of law.

Two; I further agree with Mr. Machibya that the issue of assessors was not at all raised and determined in the decision of the first appellate court. This ground also fails.

In the result, the applicants have not presented good cause for the Court to exercise its discretion under rule 10 of the Rules to extend time as prayed. This application is found without merit and it is hereby dismissed with costs.

DATED at **DODOMA** this 3rd day of May, 2023.

M. A. KWARIKO
JUSTICE OF APPEAL

The Ruling delivered on 4th day of May, 2023 in the presence of the Ms. Salma Sadick, holding brief Mr. Leonard Haule learned counsel for the applicants and Ms. Magreth Mbasha, learned counsel for the respondent is hereby certified as a true copy of the original.

S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL