

**IN THE HIGH COURT OF TANZANIA
AT TABORA**

MISCELLANEOUS LAND CASE APPLICATION NO. 74 OF 2018

(Arising from Land Application No. 8/2014 of the District Land and Housing
Tribunal of Kigoma at Kigoma)

JUDITH EMMANUEL LUSOHOKA APPLICANT

Versus

**1. PASTORY BINYURA MLEKULE
2. CRDB BANK PUBLIC LIABILITY CO.
3. COMRADE AUCTION MART
AND COURT BROKERS**

..... RESPONDENTS

Date of the last order: 30/04/2019

Date of Ruling: 30/04/2019

RULING

MATUMA, J.

The applicant Judith Emmanuel Lusohoka is seeking extension of time within which to appeal against the decision in Land Application No. 8 of 2018 of the District Land and Housing Tribunal for Kigoma. The application has been brought under section 41 (2) of the Land Dispute Courts Act, Cap. 216 as amended by the Written Laws (Miscellaneous Amendments) Act, No. 2 of 2016.

At the hearing of this application, Mr. Keneth Nangawe learned advocate appeared for the applicant while Mr. Mgaya Mtaki learned advocate appeared for 2nd respondent holding brief of advocate Tumaini.

The learned advocate for the applicant had no much to say but reiterating what has been deposed in the applicant's affidavit which was earlier on filed in this court.

Mr. Mtaki learned advocate for the 2nd respondent opposed the application and submitted that the grounds set out in the applicant's affidavit as well as the submission of his advocate does not constitute good cause for the extension of time.

He also drew the attention of this court to the effect that the application has been misconceived because it has been brought under the provisions which relates to extension of time for appeals which comes in the high court but in the instant case so long as the decision sought to be challenged was dismissed by this honourable court Madame Justice Mgonya Judge on 11/11/2016 the right cause for the applicant was to appeal to the court of appeal.

I would start with the concern of Mr. Mtaki learned advocate that this application has been misconceived by being brought under the provisions which relates to appeals to the High Court instead of using the provisions relating to extension of time for appeal to the court of appeal because the appeal in the high court was dismissed.

Technically Mr. Mtaki learned advocate was putting into motion a preliminary objection. I am not prepared to entertain that objection at this moment because the respondent had enough time to do so if felt that it was a serious issue of concern.

I hold that view because they should have raised it earlier on by filing the necessary documents to that affect which would put the applicant into the position to prepare herself for arguing the same. The objection sought to be raised at this juncture in the cause of hearing the application was not pleaded in the pleadings filed by both parties in this court. In the case of

Ex B. 8356 S/Sgt Sylvester S. Nyanda Versus The Inspector General of Police and the Attorney General, Civil appeal No. 64 of 2014 the court of appeal held that;-

"... the essence of pleadings is to compel the parties to define accurately and precisely the issues upon which the case between them is to be fought to avoid the elements of surprise by either party."

The court also remarked;

"It also guides the parties to give evidence within the scope of the pleaded facts."

In the light of the above cited case, the applicant herein was not obliged to prepare himself for arguing on a legal preliminary issue and the learned advocate could not in fact comment anything on the issue, for having been brought to him as a surprise. I am not prepared to blame him.

Again in the case of ***Farrel Versus Secretary of state*** (1980) 1. All E.R 166 which was adopted into our domestic cases Supra put it clear that the primary purpose of pleadings is;-

"to define the issue and thereby to inform the parties in advance of the case they have to meet and to enable to take steps to deal with it."

In the instant case, not only the applicant was not made aware of the issues to have her prepared to argue against it but also the court was denied in its preparation to put into account that a preliminary issue shall be raised.

Not only that but also even if I was to entertain the objection, the same would fall because it is couched on technicality merely because my learned sister Mgonya Judge dismissed the suit for being brought out of time instead of striking it out.

I am not the judge of technicality but of substantive justice.

The appeal by the applicant faced objection for being brought out of time. Madame Justice, Mgonya Judge found the objection with merit and remarked;

"I am of the considered view that the Preliminary point of objection raised has merit. The appeal is therefore dismissed with costs under section 3 of the Law of Limitation Act, Cap 89 R.E 2002."

The contention of the respondent is that since the suit was dismissed, it is superfluous to extent time for the same to be refiled in this court because it is to be appealed to the court of appeal and therefore the provisions for extension of time and appeal to the court of appeal should have been cited.

Applying the purposive approach, my learned sister Mgonya was not to mean that the rights of the parties have been fully determined and therefore whoever aggrieved should go to the court of appeal. She merely sustained preliminary issue that the appeal was filed out of time. I thus hold that the use of the word dismiss instead of struck out is not fatal in the circumstances of this matter as the rights of the parties were not substantially determined.

In the application of section 3 A (1) (2), 3 B (1) (a) and (e) of the Civil Procedure Code, Cap. 33 R.E. 2002 as amended by section 6 of the Written

Laws (Miscellaneous Amendment) Act No. 8 of 2018 which requires courts of Law to apply the Civil Procedure Code for the purposes of facilitating the just, expeditious, proportionate and affordable resolutions of all matters governed by the Act, I find out that it is against such law to cause the application to undergo a long route to the court of appeal which would only set aside the word "dismiss" and substitute for it "struck out" and then the applicant to come back to this court. That is not the intention of the law and I dismiss that technical objection.

Now back to the application on merit, the decision sought to be challenged was delivered on the 9th September, 2014. The applicant avers that she applied for the copy of the Judgment but she was not supplied with the same until when she got sick and admitted to hospital.

She decided to engage an advocate (George Magoti) to process the appeal, who later informed her that the appeal has already been filed. She relaxed but later came to be informed that her appeal was dismissed for having been filed out of time. She is complaining in this application that her advocate did not disclose the dismissal order to her but kept informing her to await the appeal is in process while in fact the same was already dismissed.

She engaged another advocate Stella Thomas to file an application for extension of time. The application was filed No. 18/2017 but on the 7th August, 2018 the same was necessitated to be withdrawn for being filed incompetently. She engaged another advocate Flavia Francis who filed the instant application.

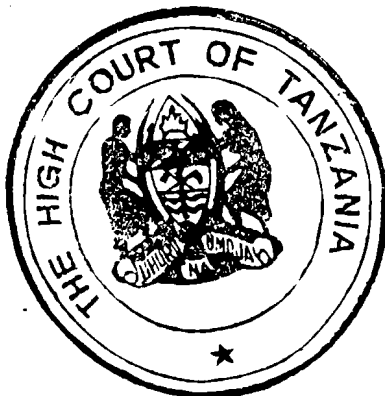
Then respondents' counter affidavit sworn by Tumaini Andrew Dunduri Msechu, advocate of the respondents contended at paragraph 5 that the applicant is fully bound by the actions of her lawyer.

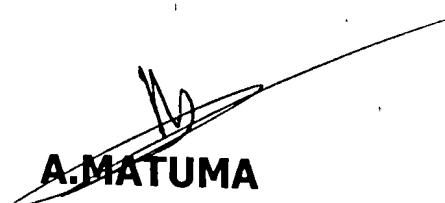
On my party I think this matter should not detain me much. I have considered the relevant documents, affidavit and counter affidavit as well as the oral submission of the parties. I have formed an opinion that the applicant has shown good cause because she entrusted her advocate and therefore was not to blame for negligence acts or incompetences of those Lawyers whom she believed to be legal practitioners. I find that effective actions by the applicant to persue her appeal as it was in this case where we have seen the lay person engaging various advocates to take actions in her behalf but being let down by negligence or incompetence of those lawyers by filing documents contrary to the requirements of the law and some other documents incompetently filed constitutes good cause for extension of time.

I consequently grant the extension of time for forty days (40 days) within which the applicant to lodge her appeal.

I take this opportunity to remind advocates that they have duty of care to their clients, to act in their behalf diligently and competently failure of which might subject them to disciplinary measures.

It is so ordered.




A. MATUMA
JUDGE
30/04/2019