IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

MISC. CIVIL APPLICATION NO. 19 OF 2020

(Arising from the Judgment and Decree of the District Land and Housing Tribunal for Mwanza at Mwanza, Hon. Philip, D. Chairperson, delivered on 24th November, 2017 in Appeal No. 126 of 2016).

MARY JOSEPH ..... APPLICANT

VERSUS

RACHEL ZEPHANIA ..... RESPONDENT

RULING

14th May, & 28th July, 2020

ISMAIL, J.

This a ruling in respect of an application, in which an extension of time is sought, for time within which to institute an appeal against the judgment and decree passed by the District Land and Housing Tribunal for Mwanza at Mwanza in Appeal No. 126 of 2016. The impugned decision was decided *ex-parte* on 24th November, 2017. The application is preferred under section 38 (1) of the Land Disputes Courts Act, Cap. 216, and it is supported by the affidavit of Mary Joseph, the applicant. It sets out

grounds on which the application is based. Grounds advanced by the applicant are as contained in paragraphs 18, 19, 20 and 21 of the affidavit. These are illegality which allegedly arises from the appellate tribunal's decision to dispose of the appeal without affording the applicant the right to a fair hearing; granting of the reliefs which were not sought; failure to record the points of divergence or convergence with assessors; and the Ward Tribunal's decision to preside over the matter over which it had no pecuniary jurisdiction. The other ground is what is known as technical delay which arises from diligent pursuit of wrong remedies.

Simultaneous with opposing the application through a counter-affidavit sworn by the respondent herself, a notice of preliminary objections was filed, challenging the application on the ground that the application is unmaintainable as the suitable course of action is to set aside the *ex-parte* judgment. With respect to the counter-affidavit, the respondent's contention is that the Ward Tribunal was seized with jurisdiction to try the matter, meaning that there was no illegality in respect thereof. On the right to be heard, the respondent averred that this was the applicant's own undoing when she refused to obey a court order. The respondent further averred that the application is an afterthought or a tactic that is intended to delay execution of the order of the tribunal.

On the date that the matter was set for hearing, it was guided that the preliminary objection and the application be argued by way of written submissions in conformity with a schedule which was drawn by the Court. This schedule was fully complied with. The Court's direction guided that both the objection and the application be argued together and decision in respect thereof would be given together.

In her laconic submission the respondent urged the Court to strike out the application on the ground that the decision that is intended to be appealed through the application for extension of time is only appealable if the challenge is on the merits of the application and not the illegality of the decision to proceed ex-parte. In view of this fact, the respondent is of the view that the impugned decision is not appealable. As such, pursuit of extension of time is a futile exercise.

Rebutting to the respondent's contention, the applicant raised an issue which allegedly arises from the respondent's submission. The argument is that it included matters which were not pleaded in the counter-affidavit. The applicant's counsel contended that the respondent's act had gone against the position of the law to the effect that submissions are an elaboration of evidence already tendered in court and not a substitute of the evidence. In this regard, he quoted the decision of the

Court of Appeal in ***Tina & Co. Limited & 2 Others v. Eurafrican Bank (T) Ltd now known as BOA Bank (T) Ltd***, CAT-Civil Application No. 86 of 2015 (unreported).

On whether the exparte judgment is appelable, the applicant held the view that Order IX Rule 13 (1) of the Civil Procedure Code (CPC), Cap. 33 R.E. 2019 that bars appeals on exparte decisions is only applicable where the court or tribunal is exercising original jurisdiction over the matter. He contended that in this case, the applicable provisions are sections 19, 20 and 21 of Cap. 216 which are silent on what should be done when a party is aggrieved by an *ex-parte* decision. He took the view that section 38 (1) of Cap. 216 allows appeals against decisions made by the DLHT while exercising its appellate or revisional powers. The applicant also cited section 70 (2) of the CPC which allows appeals from original decrees passed *ex-parte*.

Maintaining that the intended appeal is on the merits of the decision, the applicant's counsel relied on the decision of ***Advans Tanzania Ltd & Another v. Hance Mali***, HC-Commercial Case No. 2 of 2012 (unreported) in which it was held that appeals may lie against findings of the decision. In this regard, the applicant held the view that circumstances of the present application are different and do not allow application of the

reasoning in ***Pangea Minerals Ltd v. Petrofuel (T) Limited***, CAT-Civil Appeal No. 96 of 2015 (unreported).

With respect to the preliminary objection, the applicant questioned the timing of the objection, arguing that the said objection ought to have awaited filing of the appeal and not this stage at which what is at stake is an application for extension of time to file an appeal. He held that the objection is misconceived and, applying the principle of overriding objective, he urged the Court to overrule it.

Submitting in reply, the counsel for the respondent maintained that the extension of time is intended to waste the Court's time and is an exercise in futility. She submitted that, gathering from the affidavit, it was clear that the applicant's intention is to challenge hearing of the *case ex-parte.*

Submitting on the application, the counsel for the applicant contended in respect of technical delay, that events that led to the delay have been sufficiently covered in paragraph 7 through to 17 of the affidavit. The applicant submitted that these events constituted a technical delay which amounts to a sufficient reason for allowing extension of time. The applicant has relied on the Court of Appeal's decision in ***Mary***

Mchome Mbwambo & Another v. Mbeya Cement Company Ltd, CAT-Civil Application No. 271/01 of 2016; and ***Emmanuel R. Maira v. The District Executive Director, Bunda District Council***, CAT-Civil Application No. 66 of 2016 (both unreported) in both of which delays of this nature were held to constitute sufficient cause. The learned counsel prayed that the manner in which the delay occurred should be deemed to be the reason that is sufficient for extension of time.

With respect to illegality, the counsel for the applicant contended that instances of illegality have been cited in paragraphs 18 and 19 of the affidavit. These are the contention that the value of the subject matter exceeded the Ward Tribunal's pecuniary jurisdiction and; secondly, that the eviction order granted by the DLHT was never sought in the Ward Tribunal, nor was it sought in the petition of appeal to the DLHT. The counsel submitted that the established principle is that whenever illegality is raised as a ground for challenging the decision then the same may constitute the ground for extension of time. On this, the applicant relied on ***Mohamed Salum Nahdi v. Elizabeth Jeremiah***, CAT-Civil Reference No. 14 of 2017 (unreported).

In view of the said grounds, the applicant prayed that the Court should be pleased to grant extension of time within which to prefer an appeal against the decision of the DLHT.

In her rebuttal submission, the respondent's counsel shrugged off the applicant's contention and held that no sufficient cause has been adduced to warrant the extension. She contended that the applicant wasted her time pursuing wrong remedies and this had been acknowledged in the supporting affidavit. The learned counsel argued that the applicant was represented by a competent counsel and that at no time did the applicant complain that she had been ill-advised. Counting time it has taken to file the instant application, the learned counsel submitted that, whereas the decision on review was delivered on 15th October, 2019, the instant application was filed on 6th March, 2020, five months later, and no explanation was given for this latest delay. Fortifying her contention, the learned counsel cited the case of ***Wambele Mtumwa Shahame v. Mohamed Hamis***, CAT-Civil Application No. 197 of 2014 (DSM-unreported), wherein a requirement of accounting for each day of delay was emphasized. The respondent decried what she contended as the applicant's habit of converting the Court into a place of constant and unending testing of techniques. She maintained that this is a court of

justice and not a court of law. She urged the Court to dismiss the application.

In her rejoinder submission, the applicant reiterated what she submitted in chief and maintained that what happened with respect to the dilatory conduct is a technical delay that has been expounded in ***Emmanuel Maira's case*** (supra). On accounting of days of delay, the applicant argued that paragraphs 13, 14, 15, 16 and 17 of the affidavit have provided a sequence of events which account for the delay and that the respondent has admitted to all of the said paragraphs except paragraph 13.

Reacting with respect to ***Wambele Mtumwa Shahame*** (supra) and accounting of days, the applicant contended that where illegality is cited as a ground then the requirement of accounting for days of delay is no longer significant. The applicant maintained that the impugned decision is tainted with illegality and that the intended appeal is aimed at rectifying the alleged illegality. She prayed that the application be granted.

From these rival submissions, the questions for this Court's determination are whether the objection raised is meritorious and; whether sufficient cause has been adduced to warrant exercise of discretion of this

Court to grant extension of time. Let me state from the outset that the objection raised by the respondent is hollow and barren of fruits. Accordingly, I have taken the view that the same ought to be overruled. I shall demonstrate.

As rightly argued by the counsel for the applicant, what is at stake before me is an application for enlargement of time within which to institute an appeal against the decision of the DLHT. At this point in time we are all oblivious to what the grounds of the intended appeal are, though we know that the subject of the intended appeal is the decision of the DLHT which was passed *ex-parte*. While we all know that appeals against *ex-parte* decisions are not without limitations, a party is allowed to mount a challenge if the sole purpose for so doing is to challenge the findings of the said decision. Until we get to that stage and know the applicant's intention, the respondent's contention remains a case of ***"hit and hope"*** affair or akin to wanting to cross the bridge before one gets to the river. It is sheer speculation which cannot be entertained as the basis of stifling the process of determining whether the application is meritorious or otherwise.

In view thereof, I find the objection pre-maturely preferred and, therefore, misconceived. I overrule it.

Coming to the main substance of these proceedings, the law is settled, that an application for extension of time is grantable on satisfying the Court that the application discloses a credible case that merits grant of the extension. Furthermore, the applicant of such extension must clearly demonstrate that he has acted in an equitable manner. This requirement recognizes that extension of time is not a matter of right, it is a creature of equity whose enjoyment is as succinctly laid down in the persuasive holding of the Supreme Court of Kenya in ***Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others***, Sup. Ct. Application 16 of 2014 from which the following excerpt has been extracted:

> *"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].***"

See also: ***Aviation & Allied Workers Union of Kenya v. Kenya Airways Ltd, Minister for Transport, Minister for Labour & Human Resource Development, Attorney General***, Application No. 50 of 2014.

It is a cardinal rule, therefore, that the court's discretion can be properly triggered if the applicant is able to demonstrated sufficient cause that justifies his inability to take necessary action within the time

prescription for that particular action. This requirement is designed to tame applications submitted by parties who are at fault and are all out to benefit from their own inaction. It is intended to conform to the holding in ***KIG Bar Grocery & Restaurant Ltd v. Gabaraki & Another*** (1972) E.A. 503, in which it was held that ***"... no court will aid a man to drive from his own wrong."***

While sufficient cause or reasons may be varied depending on a particular case, the decision in ***Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania***, CAT-Civil Application No. 2 of 2010 (unreported) laid key conditions which, if conformed to, it can be said that sufficient cause has been demonstrated. These are:

> *"(a) The applicant must account for all the period of delay.*
> *(b) The delay should not be inordinate.*
> *(c) The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action he intends to take.*
> *(d) If the Court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as illegality of the decision sought to be challenged."*

In the instant application, both counsel are unanimous that the condition precedent for the party's success in an application for extension of time is demonstration of reasonable or sufficient cause from which the

Court will gauge the applicant's action. The question now is, has the applicant demonstrated any of that?

As stated earlier on, the applicant has advanced twin grounds which she hopes to convince the Court to grant the much needed enlargement of time. These are the technical delay that arises from the time she has spent pursuing applications in this Court (Hon. Madeha, J.) which ended in back to back defeats against the applicant, the last of which was handed down on 15th October, 2019. The respondent contends that the applicant's wrong approach of pursuing wrong remedies should not be considered as sufficient enough a reason to convince the Court to grant an extension.

It is a trite position that delays which arise as a result of pursuing matters which are subsequently adjudged defective or through a procedure that is wrong are excusable. These are delays which are in the mould of what is referred to as a technical delay. These are acceptable and they constitute a sufficient cause for extension of time. This principle was accentuated in ***William Shija v. Fortunatus Masha [1997] TLR 154***. Subsequently, the principle has made giant strides and applied in countless decisions. In ***Amani Girls Home v. Isack Charles Kanela***, CAT-Civil Application No. 325/08 of 2019 (Mwanza – unreported), the Court of Appeal fortified this view and held that a diligent pursuit of the appeal

through unsuccessful applications is a sufficient cause that is enough for grant of extension of time. The most recent subscription of all is in ***Victor Rweyemamu Binamungu v. Geofrey Kabaka & Another***, CAT- Civil Application No. 602/08 of 2017 (Mwanza-unreported), in which the superior Court took this principle a notch higher by holding as follows:

> *"Be it as it, he first applied for revision which was however struck out on 4th December 2017 on account of time limit. This period from the date of the decision intended to be revised to the date of striking out Civil Application for revision No. 26 of 2017, is what has acquired the name of technical delay which cannot be blamed on the applicant. There are many decisions on that position such as* ***Ally Ramadhani Kihiyo v. The Commissioner for Customs and the Commissioner General Tanzania Revenue Authority,*** *Civil Application No. 29/01 of 2018 (unreported),* ***Kabdeco v. Watco Limited,*** *Civil Application No. 526/11 of 2017 (unreported),* ***Salim Lakhani and 2 Others v. Ishfaque Shabir Yusufali (As an Administrator of the Estate of the Late Shabir Yusufali),*** *Civil Application No. 455 of 2019 (unreported)."*

See also: ***Yazid Kassim Makiieki v. CRDB (1996) Ltd Bukoba Branch & Another***, CAT-Civil Application No. 412/04 of 2018 (Bukoba-unreported),

Up a scrupulous review of the instant application and the grounds deposed in the supporting affidavit, I hold an unfleeting view that the circumstances revealed therein are in all fours with the decisions cited by

the counsel for the applicant and the just cited decisions. They all tell of rocky path navigated by the applicant and the setbacks she has encountered in her quest for reversal of the decision of the DLHT. The latest effort is intended to bring that quest on course. In my considered view, these circumstances reveal sufficient cause capable of exercising the Court's discretion and extend time within which to file an appeal to this Court.

The applicant's second ground is illegality that is alleged to exist in the decision of the Ward Tribunal and the decision of the DLHT. The illegality is alleged to reside in the powers exercised by the Ward Tribunal in excess of its pecuniary limit and the DLHT's decision to order eviction which was allegedly never sought.

The legal position, as it currently obtains, is that where illegality exists and is pleaded as a ground, the same may constitute the basis for extension of time. This principle was accentuated in the ***Permanent Secretary Ministry of Defence & National Service v. D.P. Valambhia*** [1992] TLR 185, to be followed by a host of other decisions, including the ***Lyamuya Construction Company Limited*** and ***Citibank (Tanzania) Limited v. T.C.C.L. & Others***, Civil Application No. 97 of 2003 (unreported).

In ***Lyamuya Construction*** (supra), the scope of illegality was taken a notch higher when the Court of Appeal propounded as follows:

> *"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in* ***Valambia's case****, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one.* ***The Court there emphasized that such point of law must be that of sufficient importance and, I would add that it must also be apparent on the face of record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process."***

See also: ***Arunaben Chaggan Mistry v. Naushad Mohamed Hussein & 3 Others***, CAT-Civil Application No. 6 of 2016 (unreported).

As stated earlier on, illegality that has been cited by the applicant touches on jurisdiction and excess of the DLHT's powers by ordering what was not prayed for. In my view, these instances of illegality bear sufficient importance and their discovery does not require any long drawn argument or process. In my considered view, these points of illegality meet the requisite threshold for consideration as the basis for enlargement of time and that they, alone, are weighty enough to constitute sufficient cause for extension of time.

Accordingly, I grant the application. Costs to be in the cause.

It is so ordered.

DATED at **MWANZA** this 28th day of July, 2020.

M.K. ISMAIL

JUDGE

Date: 28/07/2020

Coram: Hon. M. K. Ismail, J

Applicant: Mr. Idrisa Juma, Advocate

Respondent: Present in person

B/C: B. France

Court:

Ruling delivered in chamber, in the presence of Mr. Idrisa Juma, Advocate for the Applicant and the respondent in person, and in the presence of Ms. Beatrice B/C, this 28th July, 2020.

M. K. Ismail

JUDGE

At Mwanza

28th July, 2020