IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

MISC. CIVIL APPLICATION NO. 168 OF 2018

(Arising from Land Appeal No. 100/2017 of District Land and Housing Tribunal)

ABDALLAH HAMIS ABDALLAH ..... APPLICANT

VERSUS

ZAGALUU RAJABU ..... RESPONDENT

RULING

28th April, & 18th June, 2020

ISMAIL, J.

This is a ruling in respect of an application in which the Court is moved to grant an extension of time within which to institute an appeal against the decision of the District Land and Housing Tribunal (DLHT) for Mwanza, in Appeal No. 100 of 2017. The DLHT quashed the trial proceedings conducted by the Ward Tribunal on account of several irregularities. Feeling hard done, the applicant preferred an appeal to this

Court but the same became stillborn, when the Court (Hon. Matupa, J.,) struck it out owing to the irregularities which were patent on the appeal.

This application is, therefore, the applicant's second attempt that will, hopefully, put his quest for justice back on course. The application is preferred under the provisions of Section 41 (2) of the Land Disputes Courts, Cap. 216 R.E. 2002. Supporting the application is the affidavit of Baraka Makowe, the applicant's counsel, setting out grounds on which the prayer for extension of time is based.

The applicant has, rather painstakingly, given an account of what happened in DLHT when his defence of the trial Tribunal's decision fell through and the steps he took to challenge the DLHT's decision. With respect to the appeal to this Court, the applicant averred that while an appeal against the DLHT was filed timeously, the same was struck out on 4th July, 2018, due to a technical error and that re-institution of a new appeal required that an extension of time be sought through the instant application. The error that nipped the appeal in the bud was in relation to the appropriate naming of the parties in the appeal.

The application has encountered an opposition from the respondent, presented through an affidavit affirmed by the respondent himself. He contended that material on which to make a decision, as laid by the applicant is flimsy and deserving no consideration.

When the parties virtually attended to the proceedings on 28th of April, a schedule was drawn for the filing of written submissions which would dispose of the application. Credit to the counsel, the submissions were filed timeously and in conformity to the schedule.

Kicking the first ball was Mr. Baraka Makowe, learned counsel, who represented the applicant. His contention is that it is incompetency that is to blame for the striking out of the appeal and that, after that, all subsequent efforts had to begin with applying for this Court's extension to file an appeal. This is because the statutory time prescription had expired. To buttress his argument, Mr. Makowe cited the decision in ***Oden Msongela & 5 Others v. Republic***, CAT-Criminal Appeal No. 417 of 2015 (Mbeya-unreported). He submitted that the irregularity in the DLHT's decision can only be remedied through instituting an appeal whose filing is being resisted by the respondent. He prayed that this application be granted.

Mr. Paul Kipeja, learned advocate represented the respondent in these proceedings. While exhibiting his unreserved opposition to the application, he began by laying the basic principle for grant of an application for extension of time, as propounded in a multitude of court decisions. He contended that it requires an applicant to account for each day of delay. The learned counsel cited the decisions of the Court of Appeal in ***Bushiri Hassan v. Latifa Lukio Mashayo***, CAT-Civil Application No. 3 of 2007; ***Karibu Textile Mills v. Commissioner General (TRA)***, CAT-Civil Application No. 192/20 of 2016; and ***Finca (T) Limited and Kipondogoro Auction Mart v. Boniface Mwaiukisa***, CAT-Civil Application No. 589/12 of 2018 (all unreported). Mr. Kipeja contended that, in the instant application, the applicant has not accounted for the five month-delay in instituting the appeal.

Punching holes on the reasons for the applicant's delay in taking action, Mr. Kipeja held the view that the reason advanced by the applicant has no bearing on the current application. He felt that the same does not constitute good cause for extension of time, either. The learned counsel's contention was premised on what he considers as the applicant's able representation at the DLHT, where an objection would be raised on the

anomaly and get it addressed at that stage of the proceedings. He was of the view that raising it at this stage renders the contention a mere afterthought which should not be allowed to sail. Mr. Kipeja further contended that the applicant has failed to show how he had been prejudiced by the anomaly as to constitute good cause for his quest for extension of time.

Inspired by the decision in ***Finca (T) Ltd*** (supra), Mr. Kipeja argued that, while an illegality is accepted as a ground for extension of time, in the instant case such illegality has not been explained. On this, he cited the decision of the superior Bench 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). He held the view that an illegality does not exist in the instant case. Shrugging off the relevance of the decision of ***Oden Msongela*** (supra), the learned counsel contended that the said case related to an appeal which had nothing to do with title of the parties which is the subject of contention in the matter that bred this application. In consequence, he prayed that the application be dismissed with costs.

The applicant's rejoinder was a reiteration of his submission in chief. Underscoring the importance of competence of the parties, the learned counsel for the applicant cited the decision in ***Chacha Nyakirato v. Mwita Issanga*** [1971] HCD No. 321 in which it was concluded that an award or order cannot be executed against an incompetent party. He maintained that the appeal in the DLHT lacked competence owing to impropriety in the description of the parties.

Explaining out the days of delay, the learned counsel highlighted steps that he took from the time the matter at the DLHT was decided to the time the appeal was struck out by the Court. By his reckoning, this account of facts constituted amounted to accounting the delay and that sufficient cause had been established.

From these rival submissions, the Court's profound task is to pronounce itself on whether a case has been made out to warrant exercise of its discretion and grant an extension of time. I preface my analysis by stating the uncontroverted fact is that the applicant filed his appeal to this Court on 16th February, 2018, barely a week after the decision of the DLHT. This means that the appeal was filed timeously. It is this appeal which was struck out six months later *i.e.* 16th August, 2018. The instant

application was filed 49 days later. The respondent's contention is that up until 4th September, 2018, when the applicant instituted the present application, seven months had elapsed. The respondent's contention is that this delay has not been explained out. If the basis for contesting the application is the delay in filing the instant application, after the previous one had been struck out, then such contention is utterly flawed. I shall explain this in due course.

Having settled this nascent issue, I now revert to the critical substance of the parties' contention. This relates to sufficiency or otherwise of the reason for the applicant's delay in filing an appeal to challenge the decision of the DLHT. It is incontrovertible, yet again, that after the appeal had been struck out on 16th August, 2018, any subsequent effort by the applicant to have the appeal resurrected had to have this Court's discretion called into question. This is so because such action would have to be taken after expiry of the time prescription set for appeals to the Court. This would be done through an application for enlargement of time and it is why the present application has been preferred.

It is common knowledge that applications for extension of time are grantable at the discretion of the Court, and upon satisfaction that the

applicant thereof has presented a case which is nothing short of credible. It also requires, that such applicant should act in an equitable manner. The rationale for this is not hard to discern. It is simply as accentuated in reasoning by the Supreme Court of Kenya in ***Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others***, Sup. Ct. Application 16 of 2014. The Kenyan apex Court propounded the following persuasive position:

> *"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].***"

The foregoing reasoning mirrors the incisive position elucidated by the Court of Appeal of Tanzania in ***Lyamuya Construction Company Limited*** (supra), wherein key conditions that should guide a court in considering to grant or not to grant an application for extension of time were laid down. 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."*

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 (Supreme Court of Kenya).

The dominant message distilled from these conditions is that the applicant of extension of time should not have his the right of appeal impeded or scuppered, save where circumstances of his delay are inexcusable and his or her opponent was prejudiced by it (see ***Isadru v. Aroma & Others***, Civil Appeal No. 0033 of 2014 [2018] UGHCLD 3. Both counsel are unanimous that in applications for extension of time, the condition precedent for the party's success is, as underscored by authorities cited, demonstration of reasonable or sufficient cause from which the Court will gauge the applicant's action. Exhibition of sufficient cause serves to weed out applications submitted by parties who are at fault and are all out to benefit from their own inaction. The wisdom is consistent with 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 the term **sufficient cause** derives no definite terms, courts have come up with circumstances which, if they prevail, are considered to constitute sufficient cause. These include those contained in the ***Lyamuya Construction Case*** (supra). In ***The Registered Trustees of the Archdiocese of Dar es Salaam*** (supra), the Court of Appeal held thus:

> *"It is difficult to attempt to define the meaning of the words "sufficient cause". It is generally accepted however, that the words should receive liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bonafides, is imputable to the appellant."*

The principle in the foregoing decision was adopted from the holding in ***Dephane Parry v. Murray Alexander Carson*** [1963] EA 546 in which it was held thus:

> *"Though the court should no doubt give a liberal interpretation to the words "sufficient cause", its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant."*

See also: Gibson Petro v. Veneranda Bachuya, HC- Civil Revision No. 10 of 2018 (Mwanza-unreported); and ***Idrisa Suleman v. Kresensia Athanas***, HC- Misc. Land Application No. 39 of 2017 (Mwanza-unreported).

Deducing from the parties' sworn depositions and counsel's submissions, it is clear that the contention revolves around two grounds that the applicant considers as sufficient cause for the delay in lodging the appeal. These are; a claim of illegality; and pursuit of the appeal and application both of which were taken off the Court record on grounds of irregularity.

Whilst the law is clear that whenever illegality is cited and proved the same serves as a ground for granting extension of time, such illegality will only bear significance if the same is of a disturbing nature which, if not dealt with, has the potential of occasioning a miscarriage of justice to one or both of the parties to the proceedings. It, therefore, requires that the party's application should demonstrate peculiar circumstances under which such extension should be granted (see: ***John Tilito Kisoka v. Aloyce Abdul Mlnja***, Civil Application No. 3 of 2008).

My scrupulous review of the affidavit supporting the application, the applicant's submission and the record of the previous proceedings does not give me the impression that any of the previous proceedings were shrouded in any illegality, of whatever magnitude, as to constitute the basis for allowing an appeal which would cure such malady. Thus, even if we assume that errors existed in any of the previous proceedings, I would need to be convinced that the same had a hand in delaying the filing of the appeal. It is my unflustered view that circumstances of this case do not call for application of illegality as a ground for extension of time.

Having surmounted this hurdle, I revert to what I intimated above. It entails determining the other aspect of the delay which the respondent's counsel has spoken nothing or very little about. This relates to the six-month spell during which the appeal was in this Court, before it was thrown out for errors which were patent on it. The view taken by the respondent's counsel is that the error cited by the applicant ought to have been brought up by his counsel when the matter was in DLHT. Having failed to do so at that stage, the applicant has missed the "bus" and cannot raise it now as a sufficient cause.

It is a trite position that delays that emanate from pursuit, by the applicant, of a matter which turns out to be defective or untenable, are excusable. They are what are referred, in legal parlance, as technical delays, and they are acceptable and constitute a sufficient cause for enlargement of time within which to institute an appeal. This significant point of departure from the 'norm' was lucidly espoused in ***Fortunatus Masha v. William Shija*** [1997] TLR 154. It received an acclaim in the later decision of the superior Bench in ***Amani Girls Home v. Isack Charles Kanela***, CAT-Civil Application No. 325/08 of 2019 (Mwanza – unreported). In the latter, it was held that a diligent pursuit of the appeal through unsuccessful applications was deemed to be sufficient to warrant extension of time. Circumstances of the instant appeal mirror what transpired in the ***Amani Girls Home*** (supra).

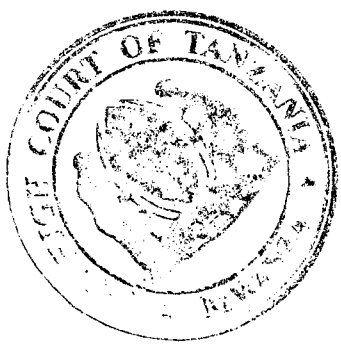
See also: **Victor Rweyemamu Binamungu V. Geofrey Kabaka & Another**, CAT – Civil Application No. 602/08 of 2017 (Mwanza – unreported; and **Kabdeco V. Watco Limited,** CAT- Civil Application No. 526/11 of 2017 (unreported). A horrendous error committed by the applicant in the appeal which was struck out by the Court (Hon. Matupa, J) on 16th August, 2018, does not have the effect of denying the applicant of

taking a 'second bite' in his challenge against what he considers to be a flawed conduct of the proceedings in the DLHT. Inspired by the astute reasoning of the superior Court in the cited decisions, I hold the view that the applicant has not exhibited any sense of loathness in dealing with, and I find that he has done enough to trigger Court's discretion.

In the upshot, I hold that the applicant has passed the legal threshold set for extension of time. Accordingly, I grant the application. Costs to be in the cause.

Order accordingly.

DATED at **MWANZA** this 18th day of June, 2020.



M.K. ISMAIL

JUDGE

Date: 18/06/2020

Coram: Hon. F. H. Mahimbali, DR

Applicant: Baraka Makowe, Advocate

Respondent: Paul Kipeja, Advocate

B/C: B. France

Order:

Ruling delivered.

F. H. Mahimbali

DEPUTY REGISTRAR

At Mwanza

18th June, 2020