IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

(APPELLATE JURISDICTION)

MISC. LAND APPEAL NO 4 OF 2021

(Arising from Misc. Land Application No. 270 of 2019 of the District Land and Housing Tribunal - Kigoma, Original Land Dispute No. 27 of 2018 Msambara Ward Tribunal)

PIUS S/O JAMES.....APPELLANT

VERSUS

KELESI D/O NKOMATI..... RESPONDENT

JUDGMENT

24th & 24th February, 2021

A. MATUMA, J.

The appellant lost a suit in the trial Ward Tribunal of Msambara vide Land Civil Case No. 27 of 2018. The judgment of the Ward Tribunal was entered and delivered to the parties on 13/02/2018 in which the right of appeal to any aggrieved party was explained to the parties i.e. the time available for them to appeal was forty-five days from the date of such judgment.

The appellant was aggrieved with such judgment but did not appeal within the prescribed time up to 20th September, 2019 when he filed application for extension of time in the District Land and Housing Tribunal for Kigoma

to have time extended to him so that he could lodge his appeal out of time.

Such application in the district Land and Housing Tribunal Misc. Land Application No. 270 of 2019 ended in vain as he lost it for want of sufficient cause for the delay.

It is from that background; the appellant is before this court lamenting that he had sufficient cause for his delay to appeal which ought to have been accepted and extension of time thereof given.

In his Petition of Appeal, the appellant has advanced five grounds of appeal whose essence is to the effect that;

i. *That his application for extension of time was wrongly denied as he had sufficient cause for the delay.*

ii. *That considering the appellant's development on the suit property, extension of time ought to have been given for him to challenge the decision which is likely to cause him suffer irreparable loss.*

iii. *That extension of time ought to have been given as the respondent's suit at the trial tribunal was instituted out of time.*

iv. *That there were material irregularities on the face of record of the trial Ward Tribunal which ought to have warranted the extension of time.*

v. *That the trial tribunal erred in law and fact when it failed to consider the settlement previously reached by the parties on the dispute property.*

At the hearing of this appeal, Mr. Silvester Damas Sogomba learned advocate represented the appellant while the respondent was present in person.

Mr. Sogomba argued the grounds of appeal stressing that his client had sufficient cause for the delay as he was sick at the time he was required to appeal and that even the impugned decision contains material irregularities. Also, that, the suit against his client was instituted out of time and therefore with these cumulative grounds the Hon. Chairperson of the District Land and Housing Tribunal ought to have found that the application constituted sufficient cause for the delay.

The respondent had nothing to argue leaving the court to decide on the matter presumably being a lay woman.

Having heard the parties it is my firm finding that some of the grounds of appeal, are purely grounds of appeal on the substantive dispute which is yet in court for its determination. These are such as; time limitation, irregularities in the trial, failure to take into consideration the settlement reached between the parties and the alleged adverse possession. All there have no room in the instant appeal since they might prejudice the intended appeal if we have to discuss them in details. Even the extension of time which is now being sought would be useless as the substantive decision would be made, taking into consideration that this is a superior court to the District Land and Housing Tribunal whose decision is binding to such tribunal. If we dare to decide; That the suit at the trial Ward Tribunal was time barred, or that the proceedings thereof are a nullity for irregularities, or that the appellant was in a long possession of the dispute property, or that the evidence at the trial ward tribunal was wrongly analysed, then the appellate tribunal would have no room to depart on the decision and that would automatically prejudice either party who would find himself or herself forced into hearing an appeal whose decision is already known.

For instance, if I determine the ground of time limitation in the negative that the suit at the trial tribunal was not time barred, that would automatically prejudice the appellant himself in his intended appeal to the District Land and Housing Tribunal because he would be put into prosecuting the appeal which is going to fail on account of my decision on the same. That also applies to other grounds as I have named them herein. I am aware of some decisions to the effect that irregularity may constitute sufficient cause for extension of time one of them being that of ***Laurent Simon assenga v. Joseph Mogoro & 2 Others, Civil Application no. 50 of 2016*** but that applies to the court itself and not for the parties to be allowed to argue for and against as that would amount to arguing the appeal itself which is not before the court. Or else the decision so reached would prejudice the intended appeal more so when the extension is being sought in the superior Court and the intended appeal is to be determined by the subordinate court thereof as it is in the instant matter. The appellant/applicant's duty is to establish sufficient cause for his delay and not to argue the merits or otherwise of the impugned decision.

In the circumstances, this appeal is only tenable on only one ground as to whether the appellant had sufficient cause for delay which ought to have warranted extension of time for him to appeal out of time.

In his affidavit which was deposed by Silvester Damas Sogomba, the applicant now the appellant advanced one major ground for his delay to appeal in time. The ground is that immediate after the delivery of the impugned judgment, he got supplied with it but unfortunately became sick and necessitated to attend treatment to the Herbalist. This ground was argued in the District Land and Housing Tribunal at the hearing of the application but the same was rejected for want of sufficient evidence to prove it.

Mr. Silvester Damas Sogomba learned advocate reiterated the same ground at the hearing of this appeal arguing that his client was attending treatments to the herbalist where it is difficult to obtain any receipt or patient Register and that we have to look on the fact in its general context.

The respondent a lay woman as I have said had nothing to argue leaving this court to decide on the matter.

I would in the first instant agree with Mr. Sogomba that it is difficult to obtain any documentary evidence in relation to the treatments

obtained from Herbalists. That can only be achieved if one attends to the registered practitioners in traditional and alternatives medicines.

Even through every body is entitled to medical service and choice of the kind of treatment to be administered to him/her including local and alternative medicines. The Laws of the Land recognizes such kind of treatment and in fact we have for that matter,the law in place.

In the current time for instance, the Government through the Ministry of Healthy has encouraged the Citizens to resort into ***'tiba mbadala'*** in a war against Corona Virus. One of such ***tiba mbadala*** is what is commonly known as ***'Kupiga Nyungu'*** or **'Kujifukiza'.**

That is well known and some people have come in Public to witness how they became cured of the Corona Virus through *'tiba mbadala'*

In fact, and as I have said herein above, we have in place ***The Traditional and Alternative Medicines Act, 2002*** meaning that the law recognizes alternative treatments.

That does not however lift up the requirements of the law under section 110 (1) of the Evidence Act, Cap. 6 R.E. 2019 to the effect that whoever alleges existence of certain fact must prove that such fact is really existing or existed.

Again, it is a settled law under the Evidence Act and various decided cases that in proving existence of any fact not only documentary evidence suffices but even oral evidence is as well admissible. See for example the Court of appeal decision in the case of **Loitare Medukenya v. Anna Navaya,** Civil Appeal No. 7 of 1998.

In the instant matter therefore, it was not the issue that the appellant had no documentary evidence to prove that he was in fact sick and had been attending traditional treatments but the District Land and Housing Tribunal found that there was no proof of the alleged sickness without stating that it required documentary proof;

> *'That in his affidavit the applicant states that he has been attending to the herbalist for treatment things which are not true due to the fact that* ***he failed to bring evidence which support his allegation.*** *The absence of proof of applicant's sickness reveals that the applicant has no any justifiable cause for his delay'*

rom such holding there is no any element that the tribunal referred to locumentary evidence as the only evidence required to prove the fact hat the appellant was in fact sick and was on treatment to the herbalist.

low was the Hon. Chairperson right in reaching to such decision? I find es, she was.

First of all, it was not the Applicant himself who deposed the affidavit regarding his sickness. It was Mr. Silvester Damas Sogomba who deposed the affidavit to the effect that the appellant having obtained the impugned judgment became sick and went to attend treatments to the herbalist. Such affidavit contravened the provisions of the Law under Order XIX Rule 3 (1) of the CPC, Cap. 33 R.E. 2002 and or R.E. 2019, which requires an affidavit to be confined on facts which the deponent is able of his own knowledge to prove.

In the instant matter the applicant now the appellant himself did not depose the affidavit nor there is any explanation as to why he did not by himself. What Mr. Sogomba did was to swear on hearsays which is bad in law. The similar circumstances happened in the case of **Augustino Lyatonga Mrema and Others v. Attorney General and Others (1996)** TLR 273 in which three Judges of this court held that an affidavit containing stories obtained from other people allegedly conversant with the facts amount to nothing but hearsay upon which the application has to fail.

I am aware that under the same provisions there is exception to the general rule in which on interlocutory applications, statements of belief may be admitted provided that the grounds thereof are stated.

The affidavit of Mr. Sogomba in the instant matter does not state any ground upon which he believed the story of the applicant if at all he was really told such stories.

Even if we would have to accept the affidavit as being proper, still in itself was not sufficient to establish the alleged fact of sickness. In the circumstances of the allegations in the affidavit, the affidavit of the Herbalist who attended the appellant was so material to support the applicant's story as we could ascertain as from when to when he or she attended the appellant as his or her patient. The kind of decease and the manner it prevented the applicant to take necessary steps in time. The need to have an affidavit of a person so material like the herbalist in this case was stated in the case of **John Chuwa v. Anthony Ciza (1992) TLR 233 (CAT).**

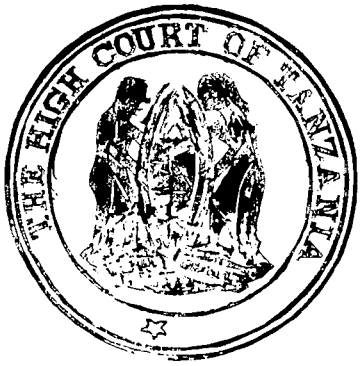
In the circumstances, the Hon. Chairperson of the District Land and Housing Tribunal was right in rejecting the application for it was not established that the applicant was really sick and that he was at the herbalist for treatments. What the appellant did was to give a general allegation of sickness without even stating how the same prevented him to take steps towards his appeal. Sickness in itself is not enough but how the same prevented one to take the necessary action. If we allow and

accepted such general allegations, we shall be setting in place a dangerous precedent to the detriment of justice.

Extension of time is given only when one accounts for each day of the delay, when the delay is not inordinate, and when the applicant shows diligence and not apathy, negligence or sloppiness in the prosecution of the actions which are to be taken. See; **Lyamuya construction Company Ltd. V. Board of Registered Trustees of Young Women's Christian Association of Tanzania,** Civil application No. 2 of 2010. In the instant matter the applicant/appellant has not accounted for each day of the delay as from the date of the impugned Judgment on 13/02/2018 to 20th September, 2019 when he ultimately lodged the application in the District Land and Housing Tribunal. His delay was inordinate as it took almost one year and seven months out of only forty-five days prescribed under the Law for the purpose.

This appeal has therefore been brought without sufficient cause and the same is hereby dismissed in its entirety with costs. Right of further Appeal explained.

It is so ordered.



A. Matuma

Judge

02/03/2021

Court: Judgment delivered in chambers in the presence of the appellant in person and their Advocate Mr. Damas Sogomba and in the presence of the Respondent in person and her advocate Mr. Eliutha Kivyiro.

Sgd: A. Matuma

Judge

02/03/2021