

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(ARUSHA DISTRICT REGISTRY)**

**AT ARUSHA**

**MISC. LAND APPLICATION NO. 45 OF 2021**

**(C/F District Land and Housing Tribunal at Arusha, Land Appeal No. 84 of  
2016, originally from Sombetini Ward Tribunal Application No.  
BR/SOMB/KS/76/2016)**

**MORRIS SHEPEA.....APPLICANT**

**Versus**

**RAFAEL LENESIRA MOLLEL..... RESPONDENT**

**RULING**

11/10/2021 & 29/11/2021

**KAMUZORA, J.**

This is an application for extension of time to appeal against the decision of the District Land and Housing Tribunal (DLHT) delivered on 16/05/2017. The application was brought by way of chamber summons supported by the affidavit sworn by the applicant Morris Shepea. The respondent is Raphael Lenesira Mollel. The hearing was through oral submissions whereby the applicant was represented by S. J. Lawena, learned Advocate and the respondent enjoyed the service of Mr. Dismass Philipo Lume, learned counsel. Both counsels adopted the affidavits to form part of their submissions.

Briefly, the parties had a dispute over 15 paces of piece of land. Before Sombetini ward tribunal, the respondent successfully sued the applicant for encroachment over the said piece of land. Dissatisfied with the decision, the applicant unsuccessfully appealed to the DLHT of Arusha vide, Land Appeal No. 84 of 2016. Still being aggrieved, the applicant filed an appeal to this Court vide Misc. Land Appeal No. 7 of 2018 which was struck out for being lodged out of time. The applicant then lodged Misc. Land Application No. 85 of 2019 which was also struck out for being preferred under wrong provision of the law. This IS the second application for extension of time to appeal against the decision of DLHT.

Mr. Lawena submitting in support of the application contended that, the judgement of the DLHT was delivered in the absence of the applicant. That, after the applicant received the information, he wrote a letter requesting for copies of judgment and the proceedings for purpose of appeal but by the time the copies were supplied the time for appeal was already lapsed.

Mr. Lawena further submitted that, considering section 38 (1) of the Land Disputes Courts Act, the applicant was supposed to file an appeal within 60 days from the date of judgment. He explained that,

after the applicant had filed the appeal on 11/08/2017 before the DLHT, the records show that, the tribunal forwarded the same to the High Court in January 2018 only the applicant to find that the time for appeal had already lapsed and the appeal was struck out for being filed out of time on 28<sup>th</sup> November 2019. He submitted that on 04/11/2019, the applicant filed a fresh application for extension of time to file appeal in the High Court which was also struck out for being preferred under wrong provision of the law and then the present application was filed. Mr. Lawena further explained that the delay to file the appeal as per affidavit is due to the delay in obtaining necessary copies from the Tribunal.

This application was also paged on the point of illegalities which to him could be resolved only when the application is granted to appeal out of time. Mr Lawena contended that, the law requires the Court to grant extension of time upon being satisfied that there is a reasonable cause for the applicant's failure to file his appeal on time. That, the sufficient cause is not defined under the law rather in the decision of the court referring the decision of the Court of appeal of Tanzania in, **Zahara Kitindi & another Vs Juma Salehe and 9 others**, Civil Application

No. 4/05/2017 (unreported) specifically at pages 16 to 17 where the Court explained about good/sufficient cause.

Mr. Lawena maintained that, the delay by the applicant to lodge his appeal was due to the delay in obtaining necessary copies from the DLHT for appeal purposes. That, as the suit started at the ward tribunal it could not be easy to appeal without necessary documents. To support his argument, he referred to the case of **Lyamuya Construction** cited in the case of **Zahara Kitindi** (supra) where the Court said that illegality is a good cause to extend time to appeal. The outlined illegalities being that, the suit was hopelessly time barred and that, the DLHT during hearing of an appeal did not involve a set of assessors in its decision which is legally fatal.

~~In reply, Mr. Lume submitted that, the law requires the~~  
discretionary powers of the Court to extend time for appealing out of time to be exercised when the applicant has established sufficient cause for his failure to appeal on time. To brace his argument, he cited the case of **Registered Trustees of the Archdiocese of Dar es salaam Vs the Chairman Bunju Village Government and Others, Civil Appeal No 147/2006, CAT** at DSM (unreported) particularly page 9. Mr. Lume argued further that, the appeal before the DLHT was delivered

on 16/05/2017 and the present application was filed on 09/07/2021 praying for extension of time to appeal against the decision of the DLHT. That, from 16/05/2017 to 09/07/2021 is almost four years and two months. To him, he considers such time to have been so long not reasonable to warrant this Court to exercise its discretion in granting the application.

On the issue of accounting for delay, Mr. Lume argued that it is the requirement of the law that the applicant must account to the court each day of delay. Fortifying his argument, he referred to the case of **Tanzania Coffee Board Vs Rombo Millars Ltd, Civil Application No. 13 of 2015** (unreported) which imposed the requirement for the applicant to account for each day of delay. He insisted that the applicant has failed to account each day of delay.

On the ground of delay to obtain the copy of judgment he submitted that, that argument is baseless because under section 38 (1) of Cap 2016, there is procedures for appeals against the decision for the matter originating from the Ward Tribunal. That, the reasons for copies of judgment are not sound reasons for delay in appeal and that is why the law prescribe 60 days of appeal. That, the provision does not give room for the appeal dates to be counted from the date the copy of the

decision is supplied. He also added that, for the decision which commenced at the ward tribunal there is no legal requirement to attach copies of judgment or decree before filing an appeal to the High Court. That, the only requirement is to file an appeal within 60 days from the date of the decision. Owing to that he says, that's why the appeal is to be filed at the DLHT and not at the High court. He cited the case of **Elizabeth Dallan Vs Baran Lawe, Misc. Land Appeal No. 42 of 2012** (unreported), to support his argument.

On the argument that the applicant was not present at the time the decision was made by the DLHT Mr. Lume submitted that, such argument is an afterthought as such fact was not deposed in the applicant's affidavit. He contended that, the applicant was aware that ~~the matter was set for the decision by the DLHT.~~ That, there are no reasons put in the affidavit indicating why the applicant and his advocate did not appear while they were the one who lodged the appeal before the DLHT.

Mr. Lume contended further that, during the whole period of this case, the applicant was represented by Mr. Lawena who knows procedures and the laws. That, Mr. Lawena being a lawyer was negligent in filing the appeal 81 days after the decision of the DLHT

while knowing that the appeal was supposed to be filed within 60 days from the date of the decision. He cited the cases of **Method Kimomogoro Vs Board of Trustees TANAPA, Civil Application No. 1 of 2005** (unreported) and **William Shija Vs Fortunas Masha**, (1997) TLR 213, to insist that, an error of not following the procedures by advocate in filing matter in court cannot be a reason to file any matter out of time. Mr. Lume insisted that, the advocate sloppiness cannot be used as a reason to grant application for extension of time.

On the issue of illegality, Mr. Lume was of the view that such issue was an afterthought as the applicant's affidavit did not feature the issue of illegality. He added that, the said argument can only be relied upon in the intended petition of appeal and not in the application for extension of time.

He concluded that, there are circumstances under which the DLHT can hear cases without sitting with assessors. He therefore prayed for this court to dismiss the application with costs as it does not encompass any technical delay to warrant extension as argued by Mr. Lawena.

In his rejoinder, Mr. Lawena reiterated his submission in chief and added that, even though the issue of illegality does not feature in the affidavit still it appears on the intended petition of appeal annexed to

the affidavit and therefore it forms part of it. On technical delay he added that, the fact that the application was filled and struck out twice amounts to technical delay. Mr. Lawena contended that, even though the law does not impose a requirement to obtain copy of judgment in order to initiate the appeal process, it would be illogical to expect the applicant whom the judgment was delivered in his absence to construct the grounds of appeal without the copy of judgement.

Mr. Lawena reiterated his submission in chief and added that, after the appeal was struck out, he took immediate action to ensure his appeal is heard. That, all time the applicant was struggling to file applications to ensure that his appeal is heard and therefore, he cannot be blamed of being negligent in making follow up of his appeal.

Having heard the submissions from both parties and the affidavit for and against the application, it is now necessary to determine whether the applicant has convincingly adduced sufficient reasons to warrant the grant for extension of time. The applicant has raised technical delay and illegality as reasons justifying extension of time.

Regarding the reasons based on technical delay, I am aware of the decisions which justified that technical delay is among the grounds under which the Court can extend time for appeal. See the cases of;

**Joseph Lugata versus The Republic**, Criminal Application No. 86/11/2021 **Zahara Kitindi & Another v. Juma Swalehe & 9 others**, Civil Application No. 4/05/2017; **Yara Tanzania Limited v. D B Shapriya and Co. Limited**, Civil Application No. 498/16 of 2016; **Vodacom Foundation v. Commissioner General (TRA)**, Civil Application No. 107/20/2017; **Samwel Kobelo Muhulo v. National Housing Corporation**, Civil Application No. 302/17/2017; and **Bharya Engineering & Contracting Co. Ltd. v. Hamoud Ahmed Nassor**, Civil Application No. 342/01/2017 (all unreported). In **Lyamuya Construction Company LTD Vs Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, the following were set as conditions to be satisfied by the applicant for the court to grant extension of time: -

- 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 that he intends to take.*

In the present matter, the judgment of the DLHT in Land Appeal No. 84 of 2016 was delivered on 16<sup>th</sup> May 2017. On 25<sup>th</sup> May 2017, the applicant wrote a letter to the tribunal requesting for copies of judgment and the same were certified and supplied to the applicant 18<sup>th</sup> July 2017.

On 11<sup>th</sup> August he lodged his appeal with the DLHT which was later brought before this court and registered as Misc. Land Appeal No. 7 of 2018. The same was struck out on 29<sup>th</sup> October 2019 for being out of time. The applicant opted to file an application for extension of time, Misc. Land Application No. 85 of 2019 that was filed in court on 4<sup>th</sup> November 2019 five days after the appeal was struck out. It is unfortunate that the said application was also struck out for being preferred under the wrong provisions of the law on 25<sup>th</sup> June 2021. Then, the present application was filed on 9<sup>th</sup> July 2021 almost 13 days from the date the first application was struck out.

In my view, filing this application after 13 days from the date the ruling was delivered in the first application may not be inordinate delay, but the applicant is not discharged from the obligation of accounting for each day of delay. Going through the affidavit of the applicant and the submission in support of the application, the applicant was able to account for all days of delay from the date the decision of the DLHT was made to 25<sup>th</sup> June 2021 when the first application for extension of time was struck out (Misc. Land Application No. 85 of 2019). It is unfortunate that no explanation was made to justify the 13 days delay before the present application could be filed. In my view, the applicant was unable

to account for each day of delay within the meaning elucidated by the Court of Appeal in the case of **Lyamuya Construction** (supra).

Regarding the point of illegality Mr. Lawena contended that the impugned judgment is tainted with illegalities because it exempted the seating of assessors which is fatal and that it was time barred. On the other hand, Mr. Lume faulted the argument on account that, even if the DLHT would have been side-lined the inclusion of Assessors still, there are certain circumstances whereby the DLHT is legally justified to proceed with hearing without assessors. Unfortunately, he did not outline such circumstances.

The counsel for the respondent added that, the issue of illegality was not pleaded in the affidavit in support of the application. This was ~~not contested by the counsel for the appellant who however insisted~~ that, the same was pleaded in the intended grounds of appeal attached to the application. That, the intended grounds of appeal form part of the affidavit in support of application thus the court cannot ignore its existence. That, with the intended grounds of appeal, one could draw a point that the appeal is centred on the illegality of the proceedings before the lower tribunals.

It has been several times held by the Court that illegality in the decision sought to be challenged must be visible. See the case of **The Principal Secretary Ministry of Defence and National Service v. Devram Valambia** [1991] TLR 387) and **Ngao Godwin v. Julius Mwarabu**, Civil Application No. 10 of 2015 (Unreported).

While I am sceptical not to be trapped within the web of determining the appeal which is not the case in this application, only by passing through the impugned judgment, the same refers to the opinion of assessors and their involvement. The question as to whether the procedure was duly complied with or not draws a long determination process and which this court cannot deliberate upon at this stage. Regarding the contention that the suit was time bared, Mr. Lawena very briefly mentioned that the Ward Tribunal and the DLHT failed to consider important issues that the suit was hopelessly time bared. To him the judgment did not comply to the law thus tainted with illegalities. That was also indicated in the intended grounds of appeal which form part of the affidavit in support of this application.

Being guided by the cases above, particularly that of **Ngao Godwin v. Julius Mwarabu** (supra) I am of the settled view that, although the point of illegality was not specifically pleaded in the

affidavit supporting the application, paragraph 11 of the affidavit referred to the intended grounds of appeal that was attached in the affidavit. Going through the intended grounds of appeal, they establish illegality in form of jurisdiction and non-compliance of legal requirement as submitted by Mr Lawena. Much as the intended grounds of appeal are part of the affidavit, they cannot be ignored. The illegality point raised by Mr. Lawena on the issue of jurisdiction and procedures meet the test and pass the threshold of being crystal clear to warrant extension of time.

The Court of Appeal of Tanzania in the case of **Kambona Charles (as administrator of the estate of the late Charles Pangani) v. Elizabeth Charles, Civil Application No. 529/17 of 2019** (unreported) held that: -

*"Some considerations that have consistently been taken into account by the Court in determining if 'good cause' has been disclosed include the cause of the delay involved; the length of the delay; the degree of prejudice, if any, that each party stands to suffer depending on how the Court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favor against the interests of a party who has a constitutionally underpinned right of appeal; whether there is a point of law of sufficient*

*importance such as the illegality of the decision sought to be challenged..."*

In my view, the above considerations as pointed out by the Court of Appeal are not applied in an incremental or cumulative manner; rather proof of one or a few of them is sufficient to warrant extension of time. In the present application, the applicant was unable to account each day of delay but clearly established a point of illegality. There is no inordinate delay as there was no time the applicant spent long time without taking any action meaning that, he was still determined to challenge the decision. In other words, the conduct of the appellant indicate that he tried in many ways to pursue his right to appeal but encountered legal obstacles. The trend shows that the applicant was persistent in pursuing his right to appeal only that, legal issues pulled him back.

It was contended by the counsel for the respondent that since the matter was being handled by the advocate with a clear knowledge to the requirement of the law, filing defective document or filing an appeal out of time was a clear negligence which cannot be condoned in granting the extension of time. He insisted that, it was not necessary to obtain copies of judgment for the applicant to lodge an appeal to the High Court.

It is without doubt that at the time when the judgment was delivered neither the applicant himself nor his advocate was present the facts which is not even disputed by Mr. Lume. With that in mind, no one could have expected the appellant to prepare sound grounds of appeal without a copy of the judgment from the DLHT. However, after receiving a copy, the applicant immediately filed an appeal that was struck out for being time bared. After the land appeal No. 84 of 2016 was struck out the appellant undertook to file application for extension of time and the same was struck out for being incompetent and the present application was filed. The appellants conduct demonstrates that all the time he was trying to find a way for his appeal to be heard. In my view, filing a defective document or filing a document out of time cannot be regarded as apathy or sloppiness on the side of the advocate unless such conduct is proved to be unreasonably repetitive.

For that reason, I find necessary to invoke this court's powers in granting the application for the applicant to pursue his right to appeal as this will balance the interests of the respondent and the applicant who has a constitutional right of appeal.

I therefore grant the application for extension of time to file an appeal out of time. The applicant should file his appeal within 14 days from the date of this ruling. No order for costs is made.

Order accordingly.

**DATED** at **ARUSHA** this 29<sup>th</sup> Day of November 2021.



  
D.C. KAMUZORA

JUDGE