IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT MOSHI

LAND APPEAL NO. 45 OF 2021

(C/F Misc. Land Application No. 410 of 2021 originating from Land Application No.14/2021 of the District Land and Housing Tribunal for Moshi at Moshi)

EVARIST MUSHI ..... APPELLANT

Versus

EDWARD PETER CHUWA..... RESPONDENT

JUDGMENT

08/7/2022 & 16/8/2022

SIMFUKWE, J.

The respondent herein successfully instituted a land dispute against the appellant herein vide Land application No. 14 of 2021 before the District Land and Housing Tribunal of Moshi. It was alleged by the respondent before the District Tribunal that in December 2020, the appellant trespassed into part of his piece of land measuring about one acre out of the four acres situated at Longuo 'A' Magharibi. It was alleged that the appellant herein had refused to be served. Thus, the matter proceeded ex parte and the respondent herein was declared lawful owner of the disputed land. Aggrieved by the ex parte decision, the appellant filed Misc.

Land Application No. 410 of 2021 seeking extension of time to file an application to set aside ex parte judgment. The trial tribunal found that the said application had no merit and dismissed it. Dissatisfied, the appellant filed the instant appeal on three grounds:

1. *That the Honourable Trial tribunal erred in law and in facts for failure to exercise its discretion properly.*
2. *That the Honourable trial tribunal erred in law and in facts for failure totally to consider the submission made by the appellant herein.*
3. *That the Honourable Trial Tribunal erred in law and in facts for failure to determine on (sic) favour of the appellant basing on the legal principles as were determined by the Court of Appeal.*

The appellant prayed that the appeal be allowed and thereby quash and set aside the ruling of the District Land and Housing Tribunal and further grant the extension of time so that the appellant may file his application before the District Land and Housing Tribunal.

On 08/3/2022 the respondent herein raised preliminary objection on point of law to the effect that:

1. *The Petition of Appeal is an abuse of court process and thus a non-starter as the appellant has, on the same date of filing this Appeal, filed Land Revision No. 6 of 2021 which is pending in court before Honourable Mwenempazi, J. on the same Misc. Land Application No. 410 of 2021 arising from Land Application No. 14 of 2021 together with Applications No. 434 and 409 of 2021.*
2. *That the Appeal is bad in law for omitting to attach the copy of the decision which is being appealed against.*

The respondent had not appeared since 30/12/2021 when the matter was mentioned for the first-time till on 08th April 2022 when he informed the court through a letter dated 06th April 2022 that he was indisposed and prayed the matter to be argued by way of written submissions. The prayer was granted and the matter was ordered to be argued by way of written submissions. Parties filed written submissions arguing both the raised preliminary objection and the appeal. That being the case, I shall consider both, the preliminary objections and the appeal, in case the raised preliminary objections do not dispose of the matter. The appellant enjoyed the service of Ms Magdalena Kaaya learned counsel, while the respondent who is an advocate argued both the preliminary objections and the appeal himself.

Supporting the preliminary objection, Advocate Edward Chuwa (respondent) submitted that from the outset this court has no jurisdiction to grant the prayer mentioned in the Petition of Appeal and that the appeal has to be dismissed. He said that it is a laid down principle that a point of jurisdiction can be raised at any time.

Mr. Chuwa alleged that on the date of filing this appeal the appellant filed Land Revision No. 6 of 2021 against the ruling in Misc. Land Application No. 434 of 2021, No. 409 of 2021 and No. 410 of 2021 delivered on 17th December 2021. He averred that it is a cardinal principle of law that one cannot run two horses at the same time as the same shall amount to forum shopping and an abuse of the court process. That, the appellant is appealing against Misc. Application No. 410 of 2021 which is also subject of the pending Land Revision No. 06 of 2021 on the same subject matter. He was of the opinion that the appeal cannot stand and that it should be dismissed with costs. He subscribed to the case of **Isidory Leka Shirima**

and Another vs The Public Service Social Security Fund (as a successor of PSPF, PPF, LAPF and GEPF) and 3 Others, Civil Application No. 151 of 2016, Court of Appeal of Tanzania at Dar es Salaam (unreported) in which it was held that:

> *"We are of the considered view that even in this case, the confusion that was envisaged in the above cited case should be imminent since the appeal process was actively being pursued it would be improper for the court to allow parties to invoke revisional jurisdiction which would amount to riding two horses at the same time. Looking at the grounds raised in the application for revision it is no doubt that they could be sufficiently dealt with within the appeal as they hinge on the substantive decision not on procedural matters. So, to allow the application even if were not parties in the original matter to prosecute the application for revision while one of its parties has already initiated the appeal process is likely to bring confusion in the administration of justice."*

Mr. Chuwa cited another case of **Registered Trustees of Kanisa la Pentekoste Mbeya vs Lamson Sikazwe and 4 Others, Civil Appeal No. 210 of 2010,** Court of Appeal of Tanzania at Dar es Salaam (unreported), in which it was held that:

> *"As rightly submitted by the learned advocates for the respondents, riding two horses at the same time was an ingenuity and tantamount to forum shopping."*

The learned counsel contended that, this appeal having been filed on the same day as the application for revision on the same matter, is forum shopping and cannot be allowed to stand, it has to be dismissed with costs. He submitted further that, the appellant is asking this court to allow the appeal so that he can appeal to the District Land and Housing Tribunal against the decision of the District Land and Housing Tribunal while this court has no such jurisdiction.

On the 2nd ground of objection of failure to attach the copy of the decision which is being appealed against and leave the court to speculate between Misc. Application No. 410 of 2021 and Land Application No. 14 of 2021; Mr. Chuwa submitted that failure to attach the copy of the decision which is sought to be appealed is fatal and that the appeal should be dismissed forthwith. He referred to **Order XXXIX 1 (1) of the Civil Procedure Code, Cap 33 R.E 2019** which provides that:

> *"Every appeal shall be preferred in the form of memorandum signed by the appellant or his advocate and presented to the High Court (hereinafter in this Order referred to as "the Court) or to such officer as it appoints in this behalf and the memorandum shall be by a copy of the decree appealed from and (unless the Court dispenses therewith) of the judgment on which it is founded."*

In addition, Mr. Chuwa cited the case of **H. J Stanley & Son Limited vs Ally Ramadhani Kunyamale [1988] T.L.R 250,** where it was held that:

1. *It is mandatory that a memorandum of appeal be accompanied by a copy of decree (Order 39, Rule 1 of the Civil Procedure Code)*

2. *Where a memorandum of appeal is not accompanied by a copy of the decree, there is no legal presentation of the appeal at all and so the appeal is incompetent and should be dismissed.*

Mr. Chuwa concluded by stating that the appeal is incompetent and that it should be dismissed with costs.

Opposing the 1st objection Ms Magdalena Kaaya learned counsel submitted that considering that the respondent tabled the same objection in Land Revision No. 6 of 2021 before Hon. Mwenempazi, J and they found it prudent to concede to the objection so as to pave way for justice of this appeal. She argued that on 18/5/2022 Land Revision No. 6/2021 which was before Hon. Mwenempazi J was struck out. With such ruling of striking out the application, it is obvious that the 1st point of objection lacks substance. Ms Magdalena attached the proceedings of Land Revision No.6 of 2021.

In respect of the second objection that the appellant had not attached a copy of the impugned ruling, Ms Magdalena for the appellant submitted that this objection was raised before perusing the court's records. That, when the appeal was filed, a copy of ruling of the District Land and Housing Tribunal was attached and the same is in the records of this case.

The learned counsel for the appellant prayed that the preliminary objections be dismissed with costs.

That marked the end of submissions in respect of the raised preliminary objections.

Submitting in support of the 1st ground of appeal that the trial Tribunal had failed to exercise its discretion properly, Ms. Magdalena submitted

that they are guided by the decision of the case of **Lyamuya Construction Company Ltd vs Board of Registered Trustees of Civil Application No.2 of 2010 CAT** at page 6 where it was held that:

> *"As a matter of general principle, it is in the discretion of the court to grant extension.* ***But that discretion is judicial, and so it must be exercised according to the rules of reason and justice and not according to private opinion or arbitrary.***"
> Emphasis added

From the above authority, the appellant's advocate referred to page 2 of the ruling of the trial Tribunal where it was stated that:

> *"Kuhusu msingi wa maombi haya, mwombaji anasema kuwa alichelewa kwani alitumia muda kutafuta wakili na kutafuta ada ya kumlipa wakili."*

The learned advocate appealed against the above reasoning of the Hon. Chairman that the ruling did not conform with the decision in the case of **Vodacom Tanzania Public Limited** at page 10 where the Court of Appeal held that:

> *"From the foregoing, the underlying question is whether the 9 or even 10 days for the sake of argument are reasonable to prepare such an application and file. I am of the view that the said days are reasonable since they were spent preparing and filing current application. This is in tandem with the decision of the single justice in* ***Patrick Magologozi Mongelia*** *(supra) where 12 days were found to be reasonable in preparation and filling of application for extension of time upon receipt of the necessary documents in pursuit of intended revision."*

From the above authority, it was Ms. Magdalena's opinion that the Honourable Chairman was bound to follow the reasoning of the Court of Appeal in the case of Vodacom Tanzania Public Company Limited, failure of which amount to failure to exercise his discretion properly.

The learned counsel for the appellant, submitted further that, the Ruling by the trial Chairman had violated the rules of private opinion and arbitrariness contrary to the case of **Lyamuya Construction** (supra). She said that from the quoted paragraph of the ruling, the Chairman said that:

"..... Mwombaji amesema kuwa alichelewa kwani alitumia muda mwingi kutafuta wakili ***na kutafuta ada ya kumlipa wakili.***"

Ms Magdalena contended that when reading the submission made by the appellant during the hearing, there was nowhere whereby the applicant stated that the reason for his delay was that he was looking for fees to pay the advocate. The learned advocate argued that it was the private opinion which was used arbitrarily against the appellant. That though finding an advocate and supplying him with relevant documents can be a reason for extending time, but that has to be referred as submitted which is contrary to what the trial Chairman did.

On the second ground of appeal, Ms Magdalena was of the opinion that the Honourable trial Tribunal Chairman was bias in his ruling for failure to consider the substance of submission made by the appellant during the hearing. That, as per page 2 of the said ruling, only paragraph 2,3 and 4 of the whole ruling which touches the submission made by the appellant herein.

The learned counsel referred to paragraph 4 of the page 2 of the ruling of the trial Tribunal where the Hon. Chairman reasoned that:

> *"Hoja zote za sababu za mwombaji sioni kama zina msingi kwani alitakiwa kuonyesha sababu ya kuchelewa kwake kwa kuonyesha ni kwa namna gani siku aliyochelewa kwa kuonyesha kuwa sababu yake iloikuwa nje ya uwezo wake..."*

That, the Hon. Chairman continued to cite the case of **FINCA (T) Limited and Another vs Boniphace Mwarakisa, Civil Application No.589/12 of 2018** which was cited by the respondent. In that respect Ms. Magdalena submitted that the Hon. Chairman had reached into conclusion without considering the submission made by the appellant and improperly cited the case of the respondent without considering the arguments by the appellant.

That, in his application, the appellant had propounded various grounds including illegality, counting some of the days of delay and established whether the degree of lateness was inordinate. However, the Hon. Chairman had based on the case which was not cited by the appellant and denied the authorities cited by appellant giving the reason that the appellant had failed to account all days of delay which was not true.

The learned advocate went on to submit that, according to the submissions made by the appellant during the hearing in the tribunal, he was late for 16 days. Among those 16 days, he accounted for 3th,9th,10th,16th, and 17th day of delay which were Saturdays and Sundays. Also, he accounted for 14th day of October 2021 which was public holiday. That, the applicant also submitted that if those days are deducted, the

remaining days were almost 9 or 10 which as per the case of **Vodacom Tanzania Public Limited Company** (supra), were not inordinate to grant extension. It was stated that though the appellant had demonstrated all that, still the Hon. trial Chairman did not bother to record and consider the submission in his ruling. It was Ms. Magdalena's conclusion that it was apparent that the Hon. Chairman was bias.

On the 3rd ground of appeal that the Hon. Chairman had failed to determine in favour of the appellant basing on the legal principles determined by the Court of Appeal; it was submitted that since the Court of Appeal has established guidelines used to determine sufficient cause for the extension of time, the Hon. Chairman was bound to follow the principles established by the apex Court.

The appellant had submitted that there was illegality particularly on the date of pronouncing the judgment. However, the Chairman held that:

> *"Kuhusu mapungufu ya kisheria kwenye Shauri la msingi, hii siyo hoja ya kuleta hapa kwenye maombi ya kuongezewa muda. Hivyo hoja hii pia inakataliwa. Hoja hii haiwezi kutumiwa kuomba kuongezewa muda wa kutengua maamuzi nje ya muda."*

It was stated that the ruling by the tribunal was to the effect that the appellant had question of issuance of summons to appear. That, according to the appellant he was not served with the summons either personally, his spouse or any member of his family. Also, it was testified that during the pronouncement of judgment he was not served with the summons to attend the judgment day. Ms Magdalena argued that failure to issue notice to appear for judgment by the trial tribunal violated the mandatory

provision **of Order XX Rule 1 of the Civil Procedure Code, Cap 33 R.E 2019** which reads as follows:

> *"1. The court, after the case has been heard, shall pronounce judgment in open court, either at once or on some future day, of which due* ***NOTICE*** ***SHALL*** *be given to the parties or their advocates."* Emphasis added

It is from the above provision that the appellant claims that if he could have been afforded the chance to appear on the date of judgment, he could have applied for setting aside the ex-parte judgment in time.

Moreover, it was also submitted that since the Chairman admitted the illegality as cited from the ruling, he was supposed to grant the extension. on the established principle. That, failure to grant extension of time while he had admitted in his ruling the existence of the same, amount to great violation of laws that renders the court to quash the ruling by the trial Chairman and set aside the same and further grant the extension of time.

The learned counsel reiterated that, before the trial Tribunal the appellant managed to establish sufficient cause for the delay and that he was entitled to be granted extension of time.

Ms Magdalena prayed that the ruling of the trial tribunal in Misc. Land Application No. 410/2021 be quashed and this court grant extension of time so that the appellant file his application for setting aside the ex-parte judgment. He also prayed he costs of this appeal be borne by the respondent.

In his reply, the respondent submitted among other things that the submission by the counsel for the appellant in support of the appeal is

devoid of merit. That the counsel for the appellant submitted randomly and departed from the grounds of appeal. It was stated that the appellant was supposed to limit himself on the grounds and therefore the submissions are superfluous. It was also stated that the matter before the Tribunal proceeded ex parte because the appellant refused summons and the Tribunal was satisfied and there was an affidavit of service to that effect.

The respondent also stated that he failed completely to apprehend what the counsel was trying to address the court and whether the first ground deserves to be a ground of appeal. The respondent observed the following in respect of appellant's submission:

1. That the appellant admits that the power to extend time is a discretionary power.
2. That such power has to be exercised judicially and according to the laid down principles that the applicant in the application for extension of time has to account for each day of the delay.
3. That in the application before the Tribunal, the appellant had delayed for 16 days as the judgment was delivered on 03/09/2021 and was served on 09/10/2021 but filed the application on 20/10/2021.
4. That the days which he wanted the Tribunal to ignore were the 3rd, 9th, 10th, 14th, 16th, and 17th which were Saturdays and Sundays, and that, the 14th of October 2021 was a public holiday. To him this was an account of the delay.

The respondent continued to submit that the Tribunal exercised its discretion judiciously as the respondent had failed to account for each day

of the delay. That, there is no law in this country, and the counsel for the appellant has failed to cite one, that provides that in the computation of time for purposes of time limitation, Saturdays, Sundays and public holidays are excluded.

Regarding the cited case of **Vodacom Tanzania Public Limited Company** (supra) by the appellant, the respondent stated that the same cannot assist him as it is distinguishable. That, in that case, the applicant after applying to be served with the copies of the rulings and other documents from the Tax Revenue Appeals Tribunal was delayed. The application which was before the Court of Appeal of Tanzania arised from the decision of the Tax Objections proceedings before the Commissioner-General, TRA which then went to the Tax Revenue Appeals Board. Then, to the Tax Revenue Appeals Tribunal, and then the Court of Appeal and it included proceedings in Application No. 37 of 2020 before the Tax Revenue Appeals Tribunal. Therefore, the Court of Appeal considered that 9 days was reasonable for the preparation of the application.

In this matter, it was submitted that the argument that the appellant had spent time preparing the application was not before the Tribunal. In the Tribunal, the ground for extension of time contained in the affidavit was that public holidays are excluded and that the appellant was looking for a lawyer and fees. The learned counsel referred to the case of **Halfani Charles vs. Halima S. Makapu and another, Misc. Land Application No. 85 of 2021**, which cited the case of the Court of Appeal of Tanzania of **Haji Seif vs. Republic, Criminal Appeal No. 66 of 2007** which held as follows:

"...Since in our case that was not done, this Court lacks jurisdiction to entertain that ground of appeal. We, therefore, do not find it proper to entertain that new ground of appeal which was raised for the first time before this court..."

In the above case Hon. Mgeyekwa, J held further that:

"Applying the above authority in the instant appeal it is vivid that the first ground which relates to distinguished inherited plots was a new ground that was not raised at the appellate tribunal. Therefore, I am not in a position to entertain a new ground of appeal which was raised for the first time before this court.... I must state at the outset that, I have observed that, in his submission, the appellant's Advocate has raised new grounds which never featured in the grounds of appeal. This is not acceptable in law... the appellant in this appeal is required to stick to his grounds of appeal submitted with the Memorandum of appeal, raising new grounds and issues at the time of submission. The appellant's Advocate was required to obtain leave of the court to add a new ground of appeal instead of submitting the same from the bar. The appellant's Advocate in way (sic) or another prejudiced the respondent, who was taken by surprise...Therefore, the same is an afterthought. As a generally applicable rule, new issues cannot be raised on appeal. As such, all matters submitted by the appellant's Advocate, which are not part of the grounds of appeal, will be disregarded by this Court.

Also, the respondent submitted that for the extension of time to be granted, one should account for each day of the delay.

Responding to the allegation that the appellant advanced the ground of illegality before the tribunal, the respondent referred to paragraph 14 of the affidavit in support of the application for extension of time which reads as follows:

> *14. That the application sought to be challenged was tainted with illegalities.*

From the above quoted paragraph, the respondent argued that the alleged "illegalities" were never disclosed and were not apparent on the face of the decision. He said that a claim of illegality as a ground to grant an order for an extension of time is not automatic. It must meet certain conditions as laid down by the Court of Appeal of Tanzania to wit; first, the alleged illegality must be clearly established and sufficiently explained to deserve an extension of time, and further, the alleged illegality must be on point of law of sufficient importance and apparent on the face of the decision. He cemented his argument by citing the case of **Mrs. Rafiki Hawa Mohamed Sadik vs. Ahmed Mabrouk and others, Civil Application 179/01 of 2018,** CAT which held that:

> *"For determination then, is whether the alleged irregularity or misdirection on the point of law is of sufficient importance and apparent on the face of the record to warrant an extension of time. I am aware that the applicant need not to prove the alleged illegality at this stage but there must be more than mere mention of illegality. Recently, we stated the following in that regard;*

"It must be made clear that in order for the court to rely on the issue of illegality as one of the reasons for seeking extension of time, a party must not only list it as one of the grounds for seeking extension but must also establish it and explain sufficiently to deserve extension of time." (Emphasis supplied)

(See the case of Moses Mchunguzi V Tanzania Cigarette Co. Ltd, Civil Reference No. 3 of 2018 (unreported)).

The respondent also referred to the case of **MZA RTC Trading Co. Limited vs. Export Trading Company Ltd, Civil Application No. 12 of 2015**, CAT (Unreported), which held that:

". . .As I said in Lyamuya Construction Co. Ltd.'s case, not every point of law will necessarily carry the day in an application for extension of time. The point of law must be of such significance as to warrant the attention of the Court of Appeal..."

Moreover, the respondent referred to the case of **Principal Secretary, Ministry of Defense and National Service vs. Devram P. Valambhia (1992) TLR 185**, at page 188 where it was held:

"In other words, the Court refused to extend time because the point of law at issue was not of sufficient importance to justify the extension. The corollary of that is that in some cases a point of law may be of sufficient importance to warrant an extension of time while in others it may not."

Basing on the above authorities, the respondent opined that the appellant failed miserably to meet these conditions and thus the Chairman exercised his discretion judiciously.

Responding to the 2nd ground of appeal that the Chairman did not consider the appellant's submission, the respondent stated that the same has no merit and the submission by the learned counsel is strange. He continued to state that the appellant admitted that on page 2 paragraphs 2, 3, and 4 the Chairman has considered his submission but to him, this was not enough. The respondent claimed that the Chairman considered only the appellant's submission, and nowhere his submission was considered in the ruling.

In addition, it was submitted that the ruling has 3 pages; the first page, the Chairman considered the Preliminary Objection raised by the appellant, and the second page was the analysis of the grounds for extension of time. Further, on the first page, the Chairman said that:

> *"Pande zote zilileta maelezo ya maandishi (written submission) nimepitia maelezo ya pande zote mbili..."*

It was the opinion of the respondent that the Chairman cannot be faulted on this ground as he considered all the submissions and found that the application before him had no merit.

Regarding the 3rd ground of appeal, the respondent submitted that the same is not the ground of appeal as it does not refer to the principle of law that the Chairman had violated. Commenting on the cases of **Finca (T) Limited and another** (supra), **Bushiri Hassan v. Latifa Lukio, Mashayo, Civil Application No. 3 of 2007** (unreported) and **Karibu Textile Mills v. Commissioner-General (TRA), Civil Application**

No. 192/20 of 2016 (unreported) the respondent submitted that the same were authorities of the Court of Appeal of Tanzania which the Chairman referred in denying the application for extension of time. That, in those cases, the Court of Appeal held that the applicant must account for each day of the delay, which in this case, the appellant failed.

Replying to the argument that the appellant was not given a summons for the judgment, it was respondent's comment that such argument was not argued in the submission by the appellant before the Tribunal thus it was impliedly abandoned and the Chairman could not have considered it. Thus, the appellant cannot reopen it now as a ground for faulting the Tribunal's decision. The respondent stated that, even if it was argued, it could not help the appellant as the issue was whether he had accounted for each and every day of the delay from the date he was served with the copy of the judgment. If he was summoned to appear for judgment, the day would start to run from the date of judgment but in the application, he was duty-bound to account for the delay from the date of receipt of the judgment.

In conclusion, the respondent submitted that the appeal is devoid of merit he prayed for the appeal to be dismissed with costs.

In rejoinder, the appellant's advocate reiterated what she had submitted in chief. That, the Chairman failed to exercise its discretion of extending the time, second, that he didn't recognise the submissions by the appellant and that he violated the principles established in the case of **Lyamuya Construction.**

That marks the end of parties' submissions in respect of preliminary objection as well as appeal.

It is well established principle of law that once there is a preliminary objection, the court must first deal with the same before dealing with the main case. Thus, in the instant matter, I will start with the preliminary objections raised by the respondent.

On the first ground of objection that, the appeal is abuse of court process as there is Land Revision No. 6 of 2021 which was filed in this court to challenge Misc. Land Application No. 410 of 2021. Contesting the objection, the appellant's advocate submitted that the said Land Revision No. 6 of 2021 had been struck out following the objection which was raised by the respondent which they conceded. They attached a copy of the order to substantiate the argument.

I have gone through the said order, indeed, this court on 18/5/2022 struck out Land Revision No.6 of 2021. Thus, since the said Land Revision is not before this court any more, this ground of objection has been overtaken by events.

The second ground of objection is that the appeal is bad in law for omitting to attach the copy of the decision which is being appealed against. With due respect to the respondent, I have perused the records of this appeal and found that the copy of the decision of Misc. Application No. 410/2021 was attached together with the grounds of appeal. Therefore, the respondent misdirected himself on that aspect.

In the upshot, the two raised objections are hereby overruled. Considering the nature of the objections, no order as to costs.

Having overruled the objections, I now turn to the merits of this appeal. I have considered the rival submissions of both parties the grounds of

appeal and the trial Tribunal's record. The issue is ***whether this appeal has merit.***

Before discussing the merits of this appeal, I wish to start with the position of the law as far as extension of time is concerned. It is an established principle of law that granting an application for extension of time is in the discretion of the Court/Tribunal. The discretion has to be exercised judiciously. However, the law does not exonerate the applicant from accounting every day of delay. There are so many authorities to that effect, some of them have been cited by the parties. In the case of **Philipo Katembo Gwandumi vs. Tanzania Forest Services Agent and Permanent Secretary, Ministry of Natural Resources and Tourism, Revision Case No. 891 of 2019**, it was which held that:

> *"It is also a tenet principle of law that, in application for extension of time a party should account for each day of delay. This is the position in numerous decisions including the case of* ***Bushiri Hassan Vs. Latifa Lukio Mashayo, Civil Application No. 3 of 2007 (unreported)*** *the Court of Appeal held that; I quote" delay of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken."*

On the first ground the appellant faulted the trial Tribunal for failure to exercise its discretion properly. That, the learned Chairman violated the decisions of the Court of Appeal giving an example of the case of **Vodacom Tanzania Public Limited Company** (supra) which held that 9 or 10 days of delay was reasonable since the days were spent in

preparing and filing the application. The respondent was of the opinion that the Honourable tribunal exercised its discretion judiciously as the appellant had failed to account for each day of delay. The respondent added that the cited case of **Vodacom Tanzania Public Company Limited** (supra) is distinguishable to the instant case.

In scrutinizing this ground, I have gone through the findings of the trial Tribunal. For ease of reference the Hon. Chairman at page 2 of his ruling stated the following:

> *"Hoja zote za sababu za mwombaji sioni kama zina msingi kwani alitakiwa kuonyesha sababu ya kuchelewa kwake kwa kuonyesha ni kwa namna gani siku aliyochelewa kwa kuonyesha kuwa sababu yake ilikuwa nje ya uwezo wake."*

As established above, the applicant ought to have accounted for each day of delay by establishing sufficient reasons for the delay. Before the trial tribunal, in calculating the days of delay, the appellant excluded Saturdays, Sundays and public holidays. With due respect to the appellant, that is not the position of the law. As rightly submitted by the respondent herein, there is no law which excludes Saturdays, Sundays and public holidays in accounting for days of delay. What was stated by the appellant before the trial Tribunal, did not suffice to account for each day of delay thus, the Chairman was correct to make the said findings.

On the second ground of appeal that, the trial tribunal erred in law and in facts for failure to consider the submission made by the appellant. It was submitted that, at the Tribunal, the appellant advanced various grounds including illegality, and that the degree of lateness was not inordinate.

However, the Chairman denied the authorities which were cited by the appellant.

On the 14th paragraph of the Applicant affidavit, in Misc. Application No. 410/2021, the applicant stated that the decision which is sought to be challenged was tainted with illegalities. The respondent argued that the alleged illegalities were never disclosed and were not apparent on the face of the decision. He said that a claim of illegality as a ground for granting an order for extension of time is not automatic. It must comply to the laid down principles as enunciated by the Court of Appeal in the case of **Mrs. Rafiki Hawa Mohamed Sadik** (supra) and other cases.

Concerning the issue of illegality, the Chairman had this to say at page 2 last paragraph of his ruling;

> *"Kuhusu mapungufu ya kisheria kwenye Shauri la msingi, hii siyo hoja ya kuleta hapa kwenye maombi ya kuongezewa muda. Hivyo hoja hii pia inakataliwa. Hoja hii haiwezi kutumiwa kuomba kuongezewa muda wa kutengua maamuzi nje ya muda."*

With due respect to the learned Chairman of the trial Tribunal, what he stated is not the position of the law. Where there is illegality on the face of the record, it can be a ground for extension of time. In the instant matter, I have examined the trial tribunal's record of the original matter, thus Application No. 14 of 2021. The record reveals that the matter was mentioned for the first time on 02/3/2021 whereas the coram shows that advocate Emmanuel Ntungi held brief of advocate Anna Lugendo for the applicant. The respondent was absent. Mr. Emmanuel Ntungi stated inter alia that:

"Pia mwombaji alipelekewa samansi lakini amekataa kuipokea."

Then, the record reads:

"Baraza: Samansi imepokelewa.

Signed:

2/3/2021

Amri: Itasikilizwa tarehe 2/6/2021."

On 2/6/2021 the matter was adjourned to 6/7/2021. On 6/7/2021 the proceedings of the tribunal read:

"Mdai: Shauri hili ni la kusikilizwa upande mmoja. Nipo tayari kuendelea."

Thereafter, issues were framed and the hearing of the matter proceeded ex parte. It may be noted that first, the issue of service is contradictory. While advocate Emmanuel reported that the appellant had refused to be served, the Hon. Chairman recorded that summons had been received. Second, the proceedings are crystal clear that the tribunal never ordered the matter to proceed ex parte. Rather, it is the applicant (respondent herein) who pronounced that the matter was for ex parte hearing. I am strongly convinced that the two errors which I have just pointed out are clear illegalities and irregularity on the face of the record of the trial tribunal.

It is an established principle of law that once there is allegation of illegality of the impugned decision and the illegality is on the face of the record, the same constitutes sufficient reason for extension of time. There are many authorities to that effect. In addition to the cases cited by the respondent, I would like to refer to the case of **Ezrom Magesa Maryogo**

v. Kassim Mohamed Said and Another, Civil Application No. 148/17 of 2017 which held that:

> *"...a claim of illegality of the challenged decision, constitutes a sufficient reason for extension of time under rule 8* ***regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay....*** *"*Emphasis added

In another case of **Hussein Said vs Republic, Criminal appeal No 159 Of 2018**, it was stated that:

> *"It is trite law that* ***where there are apparent illegalities*** *in the decision sought to be challenged the court hearing an application for extension of time should not hesitate to exercise its discretion to grant such an application."*Emphasis supplied

In the instant matter, in Misc. Land Application No. 410 of 2021, the applicant deponed inter alia at paragraph 5 and 6 of his affidavit, that he was not served and that on the date of judgment, he was not notified. At paragraph 14 he stated that the application sought to be challenged was tainted with illegalities. Surely, as I have pointed out herein above, the said application was tainted with illegalities and irregularities so to say.

As stated above, once there is illegality then the court has to exercise discretion and extend time. Thus, since illegality of the decision sought to be challenged was among the grounds for extension of time, the Tribunal as a matter of law should have considered the circumstances of the case

and granted the application. Apart from the illegalities, the matter was heard ex parte thus curtailed the appellant right to be heard which is a Constitutional right enshrined under **Article 13(6)(a) of the Constitution of United Republic of Tanzania of 1977** as amended from time to time.

It is trite law that the case has to be heard on merit by considering the evidence of both parties. This position was also stated in the case of **Essanji and Another v. Solanki [1968] EA 224** in which His Lordship Georges CJ (as he then was) held that:

> *"The principle which guides the court in the administration of justice when adjudicating on any dispute is that* ***where possible, disputes should be heard on their own merit.*** *The spirit of the law is that as far as possible in the exercise of judicial discretion,* ***the court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for not to do so.***"
>
> Emphasis mine

The decision which the appellant sought to challenge was reached ex parte. The appellant denied to have been served with any summons. In such circumstances, I am of settled mind that the Tribunal ought to have granted the application for extension of time. I find this ground suffices to dispose of the appeal thus, I will not discuss the rest of the issues raised by the parties.

Despite the fact that in Misc. Land Application No. 410 of 2021 the appellant was praying for extension of time to file an application to set aside the ex parte judgment; **section 79 of the Civil Procedure Code,**

Cap 33, R. E 2019 prescribes illegality as one of the grounds of revision. Thus, for expeditious and final determination of the matter on merit, suo motto, I invoke revisionary powers conferred on this court under **section 79 of the CPC** (supra) to nullify the ex parte judgment, decree and proceedings of the trial tribunal in Application No. 14 of 2021 on the basis of the illegalities apparent on the face of the trial tribunal's record which I have pointed out.

I therefore allow this appeal and order the matter to be remitted back to the trial tribunal for determination of the main application inter parties. Considering the circumstances of this case, no order as to costs.

It is so ordered.

Dated and delivered at Moshi this 16th day of August, 2022.

S. H. SIMFUKWE

JUDGE

16/8/2022