THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MOROGORO)

AT MOROGORO

MISC. LAND APPLICATION NO. 07 OF 2021

(Originating from the District Land and Housing Tribunal for Morogoro, Land Application No. 172/2015)

ISMAIL MOHAMED ..... 1ST APPLICANT

SHABANI ALLY KIBWANA ..... 2ND APPLICANT

SALMA ALLY ..... 3RD APPLICANT

VERSUS

NURDIN KIGULU NUHA ..... 1ST RESPONDENT

ERASTO E. NGOWI ..... 2ND RESPONDENT

DISMAS E. MAGELE..... 3RD RESPONDENT

RULING

Hearing date on: 11/08/2022
Ruling date on: 17/08/2022

NGWEMBE, J.

This is an application for extension of time to lodge an appeal out of time against the judgement and decree of the District Land and Housing Tribunal for Morogoro. The impugned judgement was delivered on 30/09/2020. The applicants though claimed to have been aggrieved

by the judgment, did not file any appeal or exercise any remedy against such decision until 08/11/2021, when they filed this application for extension of time by way of a chamber summons supported by affidavits of each of the applicants. This application was made under section 41 (2) of the **Land Disputes Courts Act, [Cap 216 RE 2019].**

The applicants' affidavits, adopted similar trend, flows and contents to the effect that, they were aggrieved by the decision, but they failed to appeal within time. The first and third respondents alleged serious sickness as the reason for delay. Copies of the Letters dated 05/11/2021 captioned "MEDICAL REPORTS" were annexed.

Other grounds, the applicants put reliance on; irregularity in the trial tribunal's judgment and overwhelming chances of success in the intended appeal.

The second and third respondent were not found, substituted service was effected on Nipashe News Papers dated 06/08/2022 at page 18 as per order of this court. However, the first respondent filed counter affidavit and seriously contested the application by disputing the main contents of the affidavits in support to the chamber summons. The respondent further stated that, he filed an execution application on 22/12/2020 which was registered as application No. 378 of 2020. The ruling and orders for execution were issued on 13/04/2021. When the Court Broker was in the process of effecting execution order, the applicants rushed to the tribunal for stay of execution and injunctive orders in Misc. Application No. 240 and 241 of 2021 respectively, both dated 11/05/2021. Copies of the said applications were annexed in the respondent's counter affidavit. (paragraphs 11 and 12). Both applications were dismissed.

On the hearing date of this application, both parties were represented by learned counsels. While the applicants were represented by Mr. Niragira, the first respondent was represented by advocate Jackson Mashankara.

In arguing the application, the learned advocate Niragira narrated briefly, the background of the matter, the essence of the application, the law under which it is made, and the general principles underlying applications for extension of time. Just along with the contents of the applicants' affidavits, he submitted that all applicants were aggrieved by the decision, but unfortunately, the first and third applicants fell sick suffering from Tuberculosis and they were under medication for more than six months. Therefore, they failed to appeal within time. To move this court for reliefs, Mr. Niragira submitted that, there were irregularities as the tribunal entertained the applicants' suit while the first respondent was not appointed an administrator of his late father purported to be the original owner of the disputed land. Rested by a prayer to grant extension of time.

On the adverse side, the learned advocate Mashankara opposed vigorously the application. Rightly submitted that, grant of extension of time is court's discretion, but there must be sufficient reasons to do so. Buttressed by citing the case of **Fatma Rashid Vs. Upendo Stiven, Misc. Application No. 15 of 2021,** at page 6. Argued further, the case against which an appeal is intended is in the execution stage. Granting extension of time will amount into starting the case afresh. Added that the applicants have raised no viable ground to move this court to exercise its discretionary powers to grant extension of time.

Extended his argument on the ground of sickness raised by the applicants, he responded that on the date of delivering the alleged

impugned judgment, two applicants were already sick, but managed to attend before the court. The first applicant's sickness started on 26/08/2020 and the third applicant on 24/09/2020, yet both attended on the date of judgement on 30/09/2020.

On top of that, while alleging to have fallen sick, they were able to institute two applications before the tribunal; Misc. Land Application No. 240 and No. 241 against the execution. He invited this court to take judicial notice under section 59 of **the Evidence Act, [Cap 6 RE 2022]**. The said applications were dismissed for want of prosecution. This application is filed after lapse of one year with no sufficient reason for that long delay. Rested by submitting that, the applicants are abusing the court process.

In rejoinder, Mr. Niragira maintained that, the applicants were sick throughout the time and that the respondent's counsel failed to submit on the issue of irregularity.

Having summarized the rival arguments of learned counsels, I find important to begin by referring to the enabling provisions of law. According to section 41 (1) of **The Land Disputes Courts Act** (supra) appeal against the decision of the District Land and Housing Tribunal lies to the High Court. Time prescribed for that appeal is 45 days. Also, this court has powers to extend time of appealing upon good cause being shown. Section 41 (1) provides: -

> *"An appeal under subsection (1) may be lodged within forty-five days after the date of the decision or order:*
>
> *Provided that, the High Court may, for the good cause, extend the time for filing an appeal either before or after the expiration of such period of forty-five days."*

The applicants are inviting this court to exercise its powers under the above provision of law. In determining this application, I will follow the guidance provided for by the Court of Appeal in the Case of **Henry Muyaga Vs. TTCL, Application No. 8 of 2011** also referred in the case of **Fatma Rashid** by this court as cited by the respondent's counsel Mr. Mashankara. Aware that the learned advocate impliedly was suggesting this court to follow its previous decision under the Doctrine of Stare Decisis, which requires like cases be treated alike. The Court interpreted judicial discretion among other things as follows: -

> *"The discretion of the Court to extend time under rule 10 is unfettered, but it has also been held that, in considering an application under the rule, the courts may take into consideration, such factors as, the length of delay, the reason for the delay, the chance of success of the intended appeal, and the degree of prejudice that the respondent may suffer if the application is not granted".*

The applicants argued strongly, that the delay to lodge an appeal within time was never contributed by their inaction, but attributed to what they call serious sickness of the first and third applicant, while the second applicant in the affidavit did not cite any reason for delay except that there was irregularity and chances of success is big. On the other hand, the first respondent argued that the applicants have not shown sufficient cause.

The annexures through which the applicants sought to prove sickness were letters addressed as to "WHOM IT MAY CONCERN". Its content was a statement that the said persons were patients suffering from Tuberculosis and Diabetes respectively, known to the hospital

departments. I will not quote the said letters, but I have observed them, they are letters, authored and signed by one Doctor T. M. Fimbo on behalf of Medical Officer In Charge for Morogoro Regional Referral Hospital.

At this earliest juncture, I wish to observe that, when sickness is sought to be a ground for delay in an application for extension of time, it must be established, not only that the said person was sick, but also that the said sickness was an impairment from attempting the pursuit. Developing from the above, I am of the strong view that even where the applicant has proved that he fell sick, it will not suffice unless the said sickness actually barred him to appeal in time.

In this case, the said letters are deficient of both, proof of sickness and the conditions of the patients. Just like a letter written by a magistrate cannot establish rights of the parties, but judgment. The same way, a letter by the Regional Medical Officer In charge cannot establish sickness, but the sick sheets, prescriptions and the detailed information of the patient's history would save the purpose.

Apart from that, assuming the two applicants were sick, correctly as the advocate for the first respondent argued, they managed to attend before the tribunal on 30/09/2020 the date when the alleged impugned judgment was delivered and managed to institute two Miscellaneous Applications before the tribunal seeking for stay of execution and injunctive orders. It is interesting that they could not file appeal within time, while they had the ability to work on the above. Even common sense does not suggest that the applicants' diseases were discriminatory.

The submission in chief by the applicants' advocate insisted that the applicants were sick and undergoing medication for six months, but contradicted on rejoinder when he submitted that they were sick throughout the time.

The reasoning above is nothing new in our jurisprudence. In **Shembilu Shefaya Vs. Omary Ally [1992] TLR. 245** the applicant sought extension of time on the ground of sickness without giving any elaborate explanation on how the illness restrained him from pursuing the intended cause. The Court of Appeal held: -

> *"The applicant has come to this Court with the same prayer for extending time to file a notice of appeal. His affidavit in support of this application does not provide the elaboration which was wanting before Mushi, J. Even at the hearing he merely insisted that the disease he had was not one for hospital treatment and that the local doctors could not be available to bear witness to that fact. Now, that, as properly pointed out by the respondent in his counter-affidavit, could be alleged by anybody with impunity. For court work we need something more than excuses... as such I cannot see any reason for enlarging time"*

The above decision was also followed by another recent decision of the Court of Appeal in **Nyanza Road Works Limited Vs. Giovanni Guidon, Civil Appeal No. 75 of 2020,** wherein, among others, the court observed the following: -

> *"At any rate, even assuming the respondent's illness prevented him from referring his dispute within the prescribed time, there is no explanation why he delayed in applying for*

condonation for as long as more than two months reckoned from 13/06/2014"

The rule is settled that the applicant must account for each day so delayed, it means *each day* in a very plain meaning. See for instance in the case of **John Dongo and 3 others Vs. Lepasi Mbokoso, Civil Application No. 14/01 of 2018, (CAT at Dsm),** where the reasons for delay, among others was a fact that the applicants' counsel was occupied and overwhelmed by many undertakings domestically and internationally without stating specifically the dates of the said undertaking, in a case where there was a three months delay, here is what the Court of Appeal held: -

> *"It is so unfortunate; the said undertakings were not disclosed and when exactly they did take place as a way of accounting for each day of the delay. The law is well settled, in case of delay, the applicant has to account for each day of delay. But this is not the case in the matter at hand."*

Other factors being taken along; length of the delay is 407 days, other diligence by the applicants, they attempted to stay execution in Misc. Land Application No. 40 and 41 before the Tribunal. The ground of illegality/irregularity is as well considered. I understand that illegality or irregularity may in itself suffice to move the court to grant extension of time so that the superior court can exercise its powers. It was so held in the case of **The Principal Secretary, Ministry of Defence and National Service Vs. Duram P. Valambhia [1992] TLR 387** in the following words: -

"While avoiding the risk of going into the merits of the case, we think that the points raised are sufficiently weighty. They are such that if proved they go to the root of the matter. For instance, they allege illegality of the order or orders of the Court. That is obviously a point of law. In Civil Reference No. 9 of 1991 involving the same parties as in this case, we took the view that where the point of law at issue is the illegality or otherwise of the decision being challenged, that is a point of law of sufficient importance to constitute sufficient reason within rule 8 of the Court of Appeal Rules to overlook non-compliance with the requirements of the Rules and to enlarge the time for such compliance. The same applies here"

Without preempting the merits of the case, I had a general glance of the trial tribunal's proceedings and found no irregularity apparent on the face of record. The applicants' counsel submitted before this court that the tribunal entertained the case in which the first respondent had no *locus standi* to sue on behalf of his late father. However, the record indicates the contrary; first, the respondent did not sue on behalf of his father, but on his own capacity and stated clearly that he inherited the land in dispute from his late father. A question of whether he really inherited or not was a matter of evidence not irregularity.

Second, raising illegality or irregularity generally does not confer an automatic right for extension of time. This is why the Court of Appeal felt a genuine need to expound what it ruled in **Valambhia's** case when determining the application for extension of time in the case of

Lyamuya Construction Company Ltd Vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010. It ruled in the following words: -

> *"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 emphasised 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 the record, such as the question of jurisdiction; not one that would be discovered by a long-drawn argument or process"*

This has been followed in a number of cases, including the famous case of **Ngao Godwin Losero Vs. Julius Mwarabu, Civil Application No. 10 of 2015** that the said irregularity must be on the face of record. And it is known that in **Valambhia** the illegality of the impugned decision was clearly visible on the face of the record.

Chances of success, according to the settled law does not *ipso facto*, constitute good cause to grant extension of time though in this case the court is unable to find overwhelming chances of success and generally, no sufficient cause for delay has been shown.

All said and done, this application lacks merits same is dismissed with costs.

Order accordingly.

Dated at Morogoro in chambers this 17th day of August, 2022.

P. J. NGWEMBE

JUDGE

17/08/2022

Court: Ruling delivered at Morogoro in Chambers on this 17th day of August, 2022, **Before Hon. S. J. Kainda, DR** in the presence of Mr. Mashankara Thomas Advocate holding brief for Mr. Gilagila Advocate for 1st & 2nd Applicants and in the presence of Mr. Mashankara Thomas Advocate for 1st Respondent and Absence 2nd & 3rd Respondents.

THE HIGH COURT OF TANZANIA

Sgd. S. J. KAINDA

DEPUTY REGISTRAR

17/8/2022

I Certify that this is a true and correct copy of the original

Deputy Registrar

Date 22/08/2022 at Morogoro