IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

MISCELLANEOUS LAND APPLICATION NO.17 OF 2021

(Arising from Land Application No.29 of 2018, before the District Land and Housing Tribunal for Iringa at Iringa)

ALLAN MNG'ONG'O ..... 1st APPLICANT

LINAH DUGANGE ..... 2nd APPLICANT

VERSUS

CHRISTINA KIMELA ..... RESPONDENT

RULING

Date of last order: *25/11/2021*

Date of Ruling: *10/03/2022.*

MLYAMBINA, J.

The Applicants herein are applying for extension of time, to lodge an appeal against the decision of the District Land and Housing Tribunal for Iringa, in *Land Application No.29 of 2018*, which was concluded in favor of the Respondent on 29th September, 2020. The Application is supported by the affidavit of Dr. Ashery Fred Utamwa, Counsel for the Applicants. The advanced major cause that prompted the Applicants' delay to lodge their appeal timely is the long wait of being supplied with the copies of the Judgement and Decree in *Land Application No.29 of 2018*. The challenged decision was delivered on 29th September, 2020.

It has been alleged that; on 9th October, 2020, the Applicants requested to be supplied with the certified copies of the said Judgement and Decree, through the letter with the reference number *DUAA/Correspondence/2020/35*. However, the Applicants did not obtain the said copies until 29th July, 2021, after reminding the

Tribunal through another letter with the reference number of *DUAA/Correspondence/2021/27.* Immediately thereafter, the Applicants lodged this application on 2nd August, 2021.

The Applicant has submitted that by virtual of *Section 19 (2) of the Law of Limitation Act Cap 89 [R.E.2019],* the period of time from the day on which the Judgement complained of was delivered to the day of obtaining a copy of the Decree appealed from, is always excluded in computing the period of limitation prescribed for an appeal. In view of the Applicant, the period from 29th September, 2020, when the Judgement was pronounced to 29th July, 2021, when the Applicants were supplied with the copies of the Judgement and Decree, should be excluded in computing the time to appeal against *Land Application No.29 of 2018.*

It was the strong view of the Applicant that failure to be supplied with the copies of the Judgement or Decree within time has always been treated as a sufficient ground for Courts to grant an order for extension of time. The Applicants cited the case of **Benedict Mumello v. Bank of Tanzania**, Civil Appeal No.12 of 2002, Court of Appeal of Tanzania at Dar es Salaam (unreported), in which the Court of Appeal, at page 11, was of the view that, the delay to be supplied with the copies of the Proceedings and Judgement, amounts to a sufficient cause for extension of time because it contributes to the delay to appeal within the prescribed period. Furthermore, at page 7, the Court of Appeal observed that, applying for copies of Proceedings and Judgement within such a short time from the date of Judgement, and later making a follow up by way of a reminder, and finally lodging the application immediately after being supplied with the same, depicts diligence.

Another point advanced by the Applicant was the illegalities in the impugned Judgement. The Applicant cited the case of **ANCHE Mwedu Limited & 2 Others**

v. Treasury Registrar (Successor of Consolidated Holding Corporation, Civil Reference No. 3 of 2015, Court of Appeal of Tanzania at Dar es Salaam, in which the Court had these to say at page 13:

> *In our view when the point at issue is one alleging illegality or the decision being challenged, the Court has a duty even if it means extending the time for the purpose to ascertain the point and if the alleged illegality is established, to take appropriate measures to put the matter and the record right.*

According to the Applicants, the Judgement of the Iringa District Land and Housing Tribunal was marred with *inter-alia*, the following illegalities: *First*, it failed to adequately dispose of all the four framed issues but disposed only 2 issues of number one and four, leaving behind issues number two and three. *Second*, the Tribunal decided for the Plaintiff on reason of acquiring the land by *gift inter-vivo* despite the fact that the said *inter-vivo* acquisition was not proved to the required standard. Three elements must be proved for acquisition by *gift inter vivo*. *One*, the Donor must show that he actually intends to make a gift; *Two*, the Donee must accept the gift made to him or her. *Three*, there must be actual delivery of the property immediately the gift is given. It was the Applicants' submission that the three elements were never proved at all. There was no proof that the purported Donor intended to give gift to the couple.

Also, there is no proof showing that the Donee accepted the said gift, and more importantly, the said gift was not transferred to the Donee immediately in 1960 as claimed. There is evidence showing that Elly (the husband of the Applicant) started allowing people to bury in the subject land after the death of his father (The Donor) in 1982. More to it, none of the two supporting witnesses (PW2 and PW3) who

witnessed the *inter-vivo* gift acquisition. *Fourth*, it is not clear why was the Judgement awarded to the Applicant. Was it because the land was given to her through gift *inter-vivo* or because the Applicant stayed on that land for long period of time? it is presumable that the Tribunal gave victory to the Applicant by wrongly invoking the rule of *adverse possession*. Invocation of adverse possession is due to the fact that there was consideration of time the Applicant has stayed on that land. In support of that contention, there was also invocation of *Section 9 (1) of the Law of Limitation Act Cap 89 [R. E. 2019].*

The other advanced point by the Applicant was of injustice of the decision. The Applicant cited page 14 of the decision of the Court of Appeal in the case of **Anche Mwedu** *(supra)* in which the Court provided the following remark:

> *But even where the application is unduly delayed, the Court may grant extension of time if shutting out the appeal may appear to cause injustice.*

In response, the Respondent disputed the Applicant claims of failure to timely lodge their appeal due to long wait of being supplied with the copies of the Judgement and Decree in *Land Application No. 29 of 2018*. Further, the Respondent disputed the Applicants' claims that they had initially applied for the said copies on 9th October, 2020. The reason being that as per endorsement at the last pages of the extracted Judgement and Decree, it appears they were stamped and certified as true copy of original by the Chairman of the trial Tribunal on 7th December, 2020, the fact which signifies that the said copies were made available for collection since 7th December, 2020.

The Respondent was of submission in reply that the Applicants in their submission failed to disclose when the said copies of Decree and Judgement were availed to

them. The Applicants have only submitted that on 29th July, 2021 they applied for reminder of the said copies the facts which was not disclosed, pleaded or adduced in the Applicants' counsel affidavit, which was deponed and verified on 20th February, 2021 almost 5 months before the purported and fictitious letter of reminder was drafted. The Applicants only appended the said reminder letter to the application but an affidavit in support of the application is silence regarding the reminder letter. As such, the submission by the Applicants' relating to said letter are waste less, useless and an afterthought.

It was the Respondent's reply submission that the Applicants took no further step after they applied for copies of Judgement and Decree on 9th October, 2020 until on 2nd August, 2021 when filed this application despite the fact that the said copies were made available at the trial Tribunal since 7th December, 2020. Failure to collect the said copies since 7th December, 2020 when those copies were due for collection amounts as the Applicant's failure to take essential steps in furthering with their appeal. The Respondent cited the case of **The Registered Trustees of agriculture Inputs Trust Fund v. Alhaj Ali Utoto**, Civil Application No 63 of 2007 (unreported), the principle which it was restated in the case of **H.H. Hilal & Company Limited v. Medical Stores Department and Another**, Civil Application No 53/01 of 2019 (unreported) and in the case of **Daudi Robert Mapuga & 417 Others v. Tanzania Hotels Investment Limited and 4 Others**, Civil Application No 462/18 of 2018 (unreported) in which the Court while confronted with similar phenomena at page 19 it ruled as follows:

> *...we find that the Respondents as the intending appellants failed to take essential steps towards instituting their intended appeal.*

The Respondent was of firm view that the delay for collection of the copies of Judgement and Decree has not been justified in any way by the Applicants. Thus, it is worthy to say the Applicants failed to take essential steps towards instituting their intended appeal.

As regards the applicability of *Section 19 (2) of the Law of Limitation Act Cap 89 [R.E. 2019],* for excluding the period of time from the day on which the Judgement complained of was delivered to the day of obtaining a copy of Decree appealed from, the Respondent was of two view point: *One*, the copies of Decree and Judgement were made available and ready for collection on 7th December, 2020. *Two*, the Applicants' never stated when the said copies of Judgement and Decree were availed to them. Under such circumstances, it was the Respondent's view that it should be taken and construed that the said copies were obtained by the Applicants on 7th December, 2021, the date when the extract of both Judgement and Decree were stamped and verified as true copy of origin by the trial Tribunal Chairman. For such reason, the cited case by the Applicants, the case of **Benedict Mumello** *(supra)* is inapplicable in this case.

As regards the point that the Judgement of the Iringa District Land and Housing Tribunal was marred with illegalities, the Respondent in respond thereof submitted as follows: *Firstly,* the allegations by the Applicants regarding the illegalities have been raised for the first time during submission in chief, as it was never disclosed in the affidavit. Hence, the Respondent was denied a vital opportunity to counter-act against that allegation in his counter affidavit. *Secondly*, it is no doubt that illegality is good cause for extension of time, however it is trite position of law that the illegality so claimed must be apparent on the face of record not one that can be discovered by long drawn argument or process. To back up the argument, the Respondent cited the case of **Hamis Mohamed (as the Administrator of the**

estate of the late Risasi Ngawe) v. Mtumwa Moshi, Court of Appeal of Tanzania at Dar es Salaam, Civil Application No 407/17 of 2019 (unreported). Thus, the alleged illegalities as raised by the Applicants are not apparent on the face of record the discovery of which requires long drawn arguments or process.

The Respondent concluded her submission by arguing that the Applicants have failed to account for their delay from 7th December, 2020 when the copies of Judgement and Decree were ready for collection to 2nd August, 2021 when this application was filed by the Applicants before this Court, and that the alleged illegalities were not disclosed in the Applicants' affidavit to enable the Respondent counter the same. Furthermore, the alleged illegalities are not apparent. For that reasons the applicant prayed that this application be denied with cost.

Having gone through the entire records, it is not in dispute that an application for extension of time is entirely in the discretion of the Court to grant or refuse it, and that extension of time may only be granted where it has been sufficiently established that the delay was with sufficient cause.

As regards the affidavits, both in support and in opposition of the application, I did note correct that point of illegalities and irregularities was pleaded at paragraph 6 of the Applicant's Counsel Affidavit. Therefore, it is not true that the same was pleaded for the first time during submission in chief as alleged by the Respondent.

However, as correctly submitted by the Respondent, the illegality so claimed must be apparent on the face of record not one that can be discovered by long drawn argument or process as per the case of **Hamis Mohamed** *(supra).* In the supporting affidavit, the Applicant merely sworn that:

6. But more to that the subject Judgement is marred with numerous illegalities, irregularities and unproceduralities which shall be adduced in Court...

In their submission, the Applicants specifically stated the alleged three illegalities and irregularities to be:

(i) That, the drawn issues were not adequately disposed of by the trial Court. Drawn were 4 issues, but disposed of were only two issues leaving two un-attended. The first to be left was issue No. 2 which said; *Whether the 1st Respondent cut down 250 wattle trees worth TZs Five Million.* The second issue left un-attended said, *Whether the Applicant is entitled to the payment of TZs Ten Million from the 2nd Respondent after trespassing on her land.*

Thus, leaving the two issues un-decided, made the entire Judgement hollow and unworthy because it contravened the mandatory requirement under *Rule 5 of Order XX of the Civil Procedure Code Cap 33 [R.E. 2019]* which provides:

> In suits in which *issues have been framed,* the Court *shall* state its finding or decision, with the reason therefore, upon *each separate issue* unless the finding upon any one or more of the issues is sufficient for the decision of the suit. (Emphasis added)

(ii) There is no dispute that the trial Tribunal decided in favour of the Applicant/ instant Respondent in belief that the land was given to the couple as gift inter-vivo. *Gift inter-vivo,* being a Common law doctrine, it imposed mandatory duty on the trial Tribunal to make sure that acquisition

by it *(gift-inter-vivo)* was truly proved to the required standard. In proving the same three elements must be proved to co-exist, namely:

(a) The Donor's specific intent. The intent of the donor to give the gift must be stated in writing; If the gift is purported to have been given to the couple of the Respondent in 1960, it leaves much to be desired to see that, till 1982 when the Donor died, no statement was given by him to the Respondent and her husband. It was the duty of the spouse to see that this was fulfilled in order to obviate them with unnecessary doubts.

(b) The Donee must accept the gift made to him or her. There is no material proof that the Donees accepted the gift. From 1960 to-date, no registration or change of title on the land has been effected.

(c) There must be *actual delivery of the property immediately* the gift is given. There is no proof that the purported land was delivered to the Donees in 1960 as claimed. More to it, it was the testimony of the PW2 that Villagers started to ask permission to bury people on that land after the death of the Donor in 1982. There was nothing like that before 1982, which means to say the land was never delivered to the Donees in 1960. Thus, gift inter-vivo was never proved at all.

(iii) It is a legal requirement under *Rule 4 of Order XX of the Civil Procedure Code (supra)* that a Court must give reasons for the decision it arrives at. It says:

> A Judgement *shall* contain a concise statement of the case, the points for determination, the decision thereon *and the reasons for such decision.* (Emphasis added)

According to the Applicants, it is not known why the Judgement was given to the Respondent in this case. Was it because the land was given to them as *gift intervivo* or because it was acquired through *adverse possession.* If *gift intervivo,* the Tribunal erred by suggesting *long stay of the Respondent on the land*, which *stay was without interference*, because the two are ingredients for acquisition of land by adverse possession. More to it, the invocation of *Section 9 (1) of the Law of Limitation Act, Cap 89 [R.E. 2019]* which is on matters of time limitation is, more often than not, a corroboration for acquisition of land by *adverse possession.* This was erroneous because the subject land was never acquired by *adverse possession.*

In the light of the above submission, I entirely agree with the Applicant on the alleged illegalities and that *gift inter-vivo,* being a Common law doctrine, requires three elements be proved to co-exist: (i) The Donor's specific intent. (ii) The Donee must accept the gift made to him or her (iii) There must be actual delivery of the property immediately the gift is given. However, the illegalities were not at least mentioned in the supporting affidavit. what comes up during hearing is only final submission to the hearing. It is not an evidence. It follows, therefore, correct that the Respondent was denied a vital opportunity to counter-swear against that allegation in his counter affidavit. It is such non specifying of the illegalities and illeguralities in the supporting affidavit renders the same be drawn by long process which is unacceptable in law. In another case of **Motor Matiko Mabanga v. Ophir Energy PLC and Another,** Civil Application No. 163 of 01 of 2017 (unreported) the Court of Appeal emphasized that; *allegations of illegalities should be apparent on the face of the record;* and consequently, the Court dismissed the application.

The other important point for consideration is that of accounting each day of delay. I find the following to be essential facts in reaching this decision. *One*, there is no dispute that the challenged decision was delivered on 29th September, 2020. *Two*, there is no dispute that on 9th October, 2020, the Applicants requested to be supplied with the certified copies of the said Judgement and Decree, through the letter with the reference number of *DUAA/Correspondence/2020/35*. *Three*, it is alleged that the Applicants did not obtain the said copies until 29th July, 2021, after reminding the Tribunal through another letter with the reference number of *DUAA/Correspondence/2021/27. Four*, the Applicants never stated when the said copies of Judgement and Decree were availed to them. *Five*, it is not in dispute that the Applicants lodged this application on 2nd August, 2021.

The arising issue is; *when was the copy of Judgement and Decree ready for collection*? As per the annexed copy of Judgement and Decree, the two were certified as true copy of the original on 7th December, 2020. That means, the said copies were ready for collection as of that date. Failure of the Applicants to collect the same on time remains unjustified. Hence, the alleged reminder letter does not serve any merits for the sake of extension of time. In short, the Applicants failed to account each day of delay from 7th December, 2020 to 2nd August, 2021. In the case of **Sebastian Ndaula v. Grace Twamafa,** Civil Application No. 4 of 2014, Court of Appeal of Tanzania at Bukoba (unreported) page 8 the Court stated:

> *The position of this Court has consistently been to the effect that in an application for extension of time, the Applicant has to account for every day of the delay: the need to account each of the days of delays becomes even more important where matters subject of appeal like the present one is.*

In the case of **Lyamuya Construction Company Ltd. v. Board of Registered Trustee of Young Women's Christian Association** of Tanzania, Civil Application No. 2 of 2010, the Court of Appeal of Tanzania at Arusha at page 8 observed that:

> *The present application was filed on 23rd of March 2010, which is 11 days later from the date of collecting the copy of the ruling. From this explanation, there is not a single paragraph to account, for the two weeks between obtaining the copy of the decision/ruling on review and the filing of the application for extension of time in the High Court. But there is also no explanation for the delay of the 11 days, between the date of obtaining a the copy of the ruling dismissing the application for extension of time by the High Court, and the day the present application was filed this is my reckoning, makes a total of 25 days un-accounted for and I cannot ignore it. The Applicant's diligence is therefore called in question.*

Moreover, as per the case of **Maria and Others v. Matundure** (2004) E.A 163 there are two factors usually considered by the Court before granting these kinds of application. These are length of delay and reasons of delay as well as other grounds including illegality of the decision. In **Maria and Others case** *(supra),* the Court held:

> *The first consideration is whether the Applicant has disclosed good cause for the delay in taking the applied for action. In deciding that issue, Courts take into consideration factors like lengthy of delay and reasons for the delay. The second consideration is whether there are other grounds constituting good reasons for granting the application.*

An example of such good ground, has been taken to include; whether the point of law at issue is legality of the decision being challenged.

As strengthened in the cases of **Lyamuya Construction Co. Ltd** (*supra*) and **Motor Matiko Mabanga** *(supra)* illegality must clearly be visible on the face of the record. In this case, the alleged illegalities were not visible in the affidavit evidence supporting the application.

In the circumstances of the above, the application is hereby dismissed for lack of merits. Costs be shared. It is so ordered.

THE HIGH COURT OF TANZANIA

Y.J. MLYAMBINA

JUDGE

10/03/2022

Ruling delivered and dated 10th March, 2022 in the presence of Counsel Dr. Ashery Utamwa for the Applicant, also Dr. Ashery Utamwa holding brief of Counsel Miniva Nyakunga for the Respondent. Right of Appeal fully explained.

THE HIGH COURT OF TANZANIA

Y.J. MLYAMBINA

JUDGE

10/03/2022