

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 94 OF 2022

(Originating from Land Case No. 36 of 2018)

SALMA SAID HAMZA APPLICANT

VERSUS

KHER SAID OMARY (Administrator of the estate of

the late **TATU HAMZA**) **1st RESPONDENT**

VALENCE EMMANUEL MASSAWE **2nd RESPONDENT**

RULING

Date: 28/03 & 08/05/2023

NKWABI, J.:

This application is brought under the provisions of section 11(1) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 and section 95 of the Civil Procedure Code, Cap. 33 R.E. 2019. It is supported by the affidavit of the applicant. The applicant is seeking the following orders:

1. Extension of time to file Notice of Appeal to the Court of Appeal against the ruling of this Court dated 17/09/2021 in Land Case No. 36 of 2018.
2. Extension of time to present to this Court a letter requesting for copies of ruling, drawn order and proceedings of the said Land Case No. 36 of 2018.

The application is resisted by the 2nd Respondent who file a counter affidavit duly sworn by the 2nd respondent.

The hearing of this application was carried out by way of written submissions. Submissions for and against this application were filed. Mr. Juma Nassoro, learned counsel drew and filed the submission for the applicant. The respondent was represented by Mr. Edward Peter Chuwa, also learned counsel. Mr. Chuwa drew and filed the reply submission.

It was submitted by the counsel by the counsel for the applicant that the applicant had no notice of delivery of the ruling until 11/2/2022 thus she failed to lodge the notice of intention to appeal to the Court of Appeal and a letter applying for copies of proceedings.

In the above ground of the delay, it was replied by the counsel of the respondent that despite the serious allegations the ruling and drawn order were not annexed to the affidavit in support of the application. It was added that the ruling was delivered by the presiding judge Hon. S.M. Kulita, J. in the presence of the 2nd respondent in person and Ms. Beatrice Mapunda Advocate holding brief for Mr. Wilson Mafie, advocate for the plaintiff (applicant herein) who filed the plaint. Therefore, it was a lie (falsehood) to

say that the applicant was not present and unaware of the ruling. It was also added that the statement that the applicant was informed that the judge has been transferred and that the ruling could not be delivered is also false. He cited **Ignazio Mesina v. Willow Investment Splr**, Civil Application no. 21 of 2001, CAT (unreported) where it was stated that:

"An affidavit which is tainted with untruth statements is not an affidavit at all and cannot be relied upon to support an application."

Another decision that was cited by the counsel for the respondent is **Kidodi Sugar Estate & 5 Others v. Tanga Petroleum Co. Ltd**, Civil Application No. 110 of 2009, CAT (unreported) where it was stated that:

"There is no doubt that the affidavit sworn by Mr. Semgalawe in support of the notice of motion contains falsehood with regard to the reason for the delay in serving respondent with necessary document as required by law ... Surely no court properly directing its mind to the dictates of justice can act on an affidavit which is based on falsehood."

It was added that the applicant was duly represented by advocate Wilson Mafie who at all material time appeared for the applicant in Court. The

applicant has not stated what made her follow-up on the case with the Court officials and not with the advocate she duly instructed to represent her. Further, the said officer of the Court who told the applicant that the judge has been transferred has not been disclosed. It was the view of the counsel for the respondent that that is fatal to the application as well. It was stated that mentioning of a blanket phrase "by the Court officials at the front desk" is not sufficient disclosure of the source of information as required by the law citing **Sinani Umba v. National Insurance Corporation Tanzania & Another**, Civil Application No. 50 of 2003, CAT (unreported) where it was ruled that:

"The question is, was this sufficient disclosure of the source of the deponents' information? I do not think so. A blanket reference to "my advocates" is, in my considered view, insufficient disclosure. The deponent should have specifically mentioned the name of the advocate who was the source of the information/advice in paragraph 4. It is trite law that an affidavit must depose to facts either within the deponent's personal knowledge or obtained information the source of which are set out therein. There is no paragraph in the whole

affidavit, which discloses the source of information in paragraph 6 – the verification clause. Having said that, what are the consequence? Without8 paragraph 4, the remaining paragraphs cannot stand on their own, ... In the result, I am constrained to uphold the preliminary objection and strike out the application with costs.”

It was finally contended that the applicant has offered no reason for the delay to lodge the notice of appeal to warrant the grant of an order for the extension of time sought.

In rejoinder submission, the counsel of the applicant stated that the decisions cited by the counsel for the respondent are distinguishable to the application at hand and added that the applicant told the truth that she was not present during the delivery of the ruling.

I accept the argument of the counsel for the respondent. The argument that the applicant was represented by counsel on the date of the delivery of the ruling cannot be outsmarted by the claim that the counsel for the respondent did not claim that the applicant was present. In addition to that as correctly lamented by the counsel for the respondent the applicant did not attach to

the affidavit material documents to establish her allegations. The missing documents include the ruling of the court, drawn order and the proceedings of the Court for this Court to ascertain the claims of the applicant. That is contrary to the decision in **James Anthony Ifunda v Hamis Alawi**, Civil Application No. 482/14 of 2019, (unreported) (CAT) where it was ruled that:

"In addition, the alleged sickness is not supported by a medical report or medical chits which could be acted upon by the Court. In the circumstances, I am satisfied that the first reason for the delay advanced by the applicant is untenable."

The applicant demanded the respondent to prove her counter affidavit. That is a misdirection. It is for the one who wants to get a relief who has to prove his or her allegations. In this application, it was for the applicant to prove her allegations in the affidavit.

It was also contended by the applicant's counsel that the complaint about the information in paragraph 6, the argument is devoid of merits. It was maintained that the source of information is the court officers at the front desk. It was also stated that assuming that the source of information was not enough, the remedy is to expunge the complained paragraph.

It is trite law, though by analogy, that that involved must swear affidavit as per **Ramadhani J. Kihwani v TAZARA**, Civil Application No. 401/18 of 2018, CAT (unreported):

*"In application for enlargement of time, like the present, all material persons must swear affidavits to trigger the Court exercise its discretion under rule 10 of the Rules – see: **Mary Rugomora v. Rene Polete**, Civil Application No. 2 of 1992 (unreported)."*

I would have expected, the counsel for the applicant who represented her in matter to have sworn affidavit as to the reason(s) for non-appearance. In the circumstances, the applicant has not established good cause for extension and has failed to account for each day of the delay.

The second ground for extension of time advanced by the applicant is that the ruling of this Court is tainted with material irregularities, one of them being the Court dismissed the suit for the plaintiff did not disclose a cause of action while it ought to be struck out. The illegalities were cited as follows:

- a. Whether when the Court makes a finding that the plaintiff has no cause of action, is it right, to dismiss the suit instead of striking it out.

- b. Whether it is proper in law to dismiss a suit a suit filed by a person in her personal capacity for the interest of the deceased's estate. If it is not proper whether it was correct for the Court to dismiss the suit instead of striking it out for being incompetent before the Court.
- c. Whether it is proper in law a valid decision of the same Court to be declared overtaken by event by another Honourable Judged of the same Court.

To bolster his position, the counsel for the applicant cited **Principal Secretary, Ministry of Defence and National Service v. Deveram Valambhia** [1992] TLR 387 and **Victoria Real Estate Development Ltd v. Tanzania Investment Bank & Others**, Civil Application No. 225 of 2014, CAT (unreported). It was then prayed that the application be granted with costs.

One of the grounds stated by the applicant to enable this Court to grant the application is that the decision of the High Court is tainted with illegalities and irregularities which ought to be looked into. He cited **VIP Engineering and Marketing Limited and Two Others v. Citibank Tanzania Limited**, Consolidated Civil Reference No. 6, 7 and 8 of 2006:

"It is settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under Rule 8 (now Rule 10) of the Court of Appeal Rules regardless of whether or not a reasonable explanation has been given by the applicant under the Rules to account for the delay. ..."

In reply submission, the counsel for the respondent is of a contrary view for the reasons that he argued that there are no illegality in the ruling and the applicant has failed to refer to such illegalities neither in the affidavit nor in the submission. It was added that the illegality must be on the face of the judgment. He cited **Moses Mchunguzi v. Tanzania Cigarette Co. Ltd**, Civil Reference No. 3 of 2018, CAT, (unreported) where it was stated that:

"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 it and explain sufficiently to deserve extension of time."

The counsel for the respondent also cited **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. 10 of 2015, CAT (unreported) which quoted with approval the decision in the case of **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) where it was ruled that:

"Since every party intending to appeal seeks to challenge a decision either on point of law or fact, it cannot in my view, be said that in VALAMBHIA'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 emphasized that such point of law must be that 'of sufficient importance' and, I would add that it must be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by long drawn argument or process."

It was finally contended by the counsel for the respondent that the applicant has failed to give sufficient reasons to warrant the grant of the extension of time. It was prayed the application be dismissed with costs.

While trying to fortify his submission in chief, the counsel for applicant contended that the cited cases in that respect are distinguishable with the current application. It was pointed out that when making a finding that there was no cause of action, it was wrong for it to dismiss the suit instead of striking it. It was added that the two phrases have different effect in law. While dismissal attracts res-judicata, striking out the suit, there will be no res-judicata if the plaintiff wishes to refile the suit subject to the law of limitation. It was stated that that is a clear point of illegality, sufficient to extend time.

Also, the counsel for the applicant warned this Court not to go as far as determining the merits of the alleged illegalities at this stage citing **Victoria Real Estate Development Ltd v. Tanzania Investment Bank & Others**, Civil Application No. 225 of 2014 CAT (unreported) where it was ruled that:

*"Certainly, deciding at this stage whether or not the illegality, if upheld, will be an exercise in futility may border closer to going into the merits of the application intended to be filed if time is extended. See the case of **The Regional Manager Tanroads Lindi v. DB Shapriya and Company Ltd**, Civil Application No. 29 of 2012 CAT (unreported) in which the Court warned that;-*

"... it is now settled that a court hearing an application should restrain from considering substantive issues that are to be dealt with by the appellate Court. This is so in order to avoid making decisions on the substantive issues before the appeal itself is heard. Further to prevent a single judge of the Court from hearing an application by sitting or examining issues which are not his/her purviews."

The counsel for the applicant then prayed the application be allowed with costs.

I have closely considered the above alleged illegalities; I am satisfied that the applicant has failed to establish the alleged illegalities because she did not attach the impugned decision for me to examine it and be able to rule that the alleged illegalities are apparent on the face of the record and that

they are of sufficient importance. Further, for lack of attaching the decision to this application (affidavit), I am unable to rule that such illegalities would or would not require a long drawn-argument to establish. In short, the applicant has failed to put before this Court the materials that will enable me to exercise my discretion to grant extension of time sought.

That said, I find that the applicant has failed to demonstrate sufficient cause for extension of time. I dismiss the application with costs.

It is so ordered.

DATED at **DAR-ES-SALAAM** this 8th day of May, 2023.



A handwritten signature in black ink, appearing to read "J. F. Nkwabi", is written over the printed name.

J. F. NKWABI

JUDGE