

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE SUB - REGISTRY OF MWANZA)
AT MWANZA
LAND APPLICATION NO. 56 OF 2022

HUMURI SILILO ----- APPELLANT

VERSUS

PHILBERT KASHANGAKI-----RESPONDENT

RULING

April 27th & May 5th, 2023

Morris, J

Through a chamber application, the applicant above invites this court to extend time within which to apply for leave to appeal to Court of Appeal against the judgment of Resident Magistrates Court of Mwanza (extended jurisdiction) in Land Appeal No. 53 of 2020. He supports his application with his affidavit and supplementary affidavit. The respondent contests the application. He, too, has his counter affidavit filed before the court. When the matter was tabled for hearing, the applicant was represented by Advocate Stephen Kitale. The respondent had services of Advocate Joseph Kinango.



From the available records, parties' litigation is hinged on ownership of the Plot No. 353 Block "A" Kabuhoro, Mwanza. Apparently, the respondent successfully sued the applicant for trespass over the subject property. The former was, thus, declared by the District Land and Housing Tribunal for Mwanza to be its lawful owner. The applicant then unsuccessfully appealed to this court (determined by the Resident Magistrates Court-extended jurisdiction). Dissatisfied, he intends to challenge the appellate decision. He is, however, still having a time-bar hurdle to cross before reaching there. Hence, this application.

The rivalry submissions from each party are easy to summarize. The counsel for applicant, after adopting the affidavits, he submitted that, the application advances three (3) grounds: illegality of the decision; sickness of the applicant; and applicant's financial difficulty. Regarding illegality, he referred the court to paragraph 9 of the affidavit. He contended that a new issue was raised by the appellate court without according parties the right of being heard. He stated that the new issue formulated as "*whether or not the appellant was compensated*" formed the basis of appellate court's judgement. He argued that parties were litigating over the issue of who the



rightful owner of the disputed land was. He cited the case of ***Ramadhan Selaman Nuru v Geoffrey Protas***, Civil Appl. No. 1/2020 (unreported) and submitted further that illegality forms the basis of extension of time irrespective of whether or not the applicant has that's he has accounted for each day of delay.

Regarding sickness, he submitted that, the applicant fell sick for a long time. Consequently, he failed to file the appropriate application in time. According to him, from 3/7/2022 the applicant was under terrible fever. On 4/7/2022 he was treated of Malaria and typhoid at Magige dispensary only to be discharged on 7/7/2022. However, he had been affected financially as well. I was referred to the case of ***Alasai Josiah v Lotus Valley Ltd***, Civil Appl. No. 498/12 of 2019 (unreported) to justify that, sickness is beyond person's/ human control.

The last ground is financial difficulty. It is deposed further that, the applicant had no financial means to seek legal assistance due to, partly, sickness. Consequently, on 24/6/2022 he applied for legal assistance from Tanganyika Law Society (TLS). He was accorded one on 14/7/2022 whereby, Advocate Patrick Kija was appointed to represent him on *pro-bono*



basis. On 20/7/2022 the advocate filed the necessary paperwork. Thus, the counsel concluded that, the applicant has been able to account for the 24 days of the delay pursuant to paragraphs 6,7 & 8 of affidavit.

In reply Advocate Kinango submitted that, it is untrue that the appellate court raised a new issue and determined it without according parties an opportunity of being heard. He argued that the issue of compensation was raised by the applicant (then appellant) in land appeal no. 53/2020 as ground no. 2 and 3. Later, this aspect was argued by parties. He made reference to page 3 of judgement on appeal. Consequently, he submitted that the ground of illegality carries with it no merits.

Regarding sickness, he contended that it should be medically proved as stated in the case of ***Christina Alphonse Thomas v Saamoja Masingija***, Civil Appl. No. 1/2014 (unreported). He further stated that, reading the applicant's affidavit, it is apparent that he was taken to hospital on 4/7/2022 and was discharged on 7/7/2022. Between such time, the applicant demonstrates that he was indeed sick. But the claim that he fell sick since 25/6/2022 as per paragraph 7 of affidavit is not supported by any proof. Further the supplemental affidavit indicates that the applicant fell sick



since 3/7/2022 not 4/7/2022 as is the deposition in the affidavit. It is thus vague in terms of when exactly the applicant fell sick. Paragraph 2 of supplemental affidavit is to the effect that he went to TLS offices to follow up on his letter until on 2/7/2022. That, by the time he fell sick/hospitalized on 4/7/2022 the time within which to make an application for leave had already expired. Mr. Kinango also argued that the applicant claims to have been discharged on 7/7/2022 but the application was lodged on 20/7/2022 (13 clear days of the alleged discharge). To him, these days have not been accounted for. This anomaly notwithstanding, the counsel submitted that the alleged sickness is not proved because no proof of such alternative/informal treatment.

Regarding financial challenges, the defence advocate submitted that, the supplementary affidavit is inconsistent with the averment above because the applicant paid for the *pro-bono* application form as per annexures DEL 1; which annexure also tells it that the applicant applied for assistance on 13/7/2022. Thus, the applicant has failed to demonstrate adequate ground to allow extension of time. He prayed for the application to be dismissed.



In rejoinder it was submitted that, the principle of law is that, when illegality is raised as a ground; parties should not dwell into details thereof. However, in the counter affidavit there is no deposition to challenge the point/ ground of illegality. Hence, the submissions arose from the bar. Regarding grounds 2 & 3 of the appeal, he rejoined that they did not comprise the issue of whether the appellant was compensated or not. Instead, they were directed towards answering the query if the appellant had not been compensated, he remained to be the rightful owner of the property. He added that, the applicant sought assistance on 24/6/2022 when he was still in time to apply for leave.

From the above contentious arguments, the court will determine the application by answering one major question: whether or not the grounds advanced by the applicant (alleged illegality of the decision; applicant's sickness; and his financial difficulty) suffice for this court to allow the application. I will analyze each ground at a time, a little later.

It is a cardinal law that the powers to extend the time is discretionary. This discretion must be exercised judiciously as opposed to personal whims, sympathy, empathy or sentiment. See, ***Bakari Abdallah Masudi v.***

Republic, CoA Criminal Application No. 123/07 of 2018 and **Bank of Tanzania v Lucas Masiga**, Civil Appeal No. 323/02 of 2017 (both unreported). I, probably, should also state it here that, the essence of setting the time limits in law is, among other objectives, to promote the expeditious dispatch of justice [**Costellow v Somerset County Council** (1993) IWLR 256]; and to provide certainty of timeframe for the conduct of litigation [**Ratman v Cumara Samy** (1965) IWLR 8]. Consequently, it works in the advantage of proper management of resources; most important of which are time and finance.

Further, the overriding principle is that, the applicant must demonstrate sufficient reason(s) as to why he/she did not take the necessary step(s) in time. In so doing, he/she should prove how each day of delay justifiably passed by at no applicant's fault. This is the principle recapitulated in **Hamis Babu Bally v The Judicial Officers Ethics Committee and 3 Others**, CoA-Dar es Salaam, Civil Application No. 130/01 of 2020 (unreported).

Now, I turn back to the grounds supporting the application. Starting with the first point, illegality is fronted on allegation that the appellate court



erred in raising the new issue which formed the basis of the judgement without affording the parties right to be heard. However, the respondent is of the view that the said issue was never new for it formed an integral part of grounds 2 and 3 of appeal.

It is now settled a principle of law that, apart from the onus of applicant accounting for the day(s) of delay, where illegality is raised as a ground for seeking extension of time, it amounts to a sufficient cause. Repeatedly, this position has been stated by the Court of Appeal. Among other pronouncements in this regard, are cases of ***the Principal Secretary, Ministry of Defence and National Service v Devram Valambia*** [1991] T.L.R. 387; ***Ngao Godwin Losero vs Julius Mwarabu***, Civil Application No. 10 of 2015; ***VIP Engineering and Marketing Limited and Three Others v Citibank Tanzania Limited***, Consolidated Civil Reference No. 6, 7 and 8 of 2006; ***Sabena Technics Dar Limited v Michael J. Luwunzu***, Civil Application No. 451/18 of 2021; ***Iron and Steel Limited v Martin Kumaliya and 117 Others***, Civil Application No. 292/18 of 2020; and ***Lyamuya Construction Company Limited vs***



Board of Registered Trustee of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010 (all unreported).

Sieving from the available record, it is evident that the applicant herein had previously raised 5 grounds of appeal. Through 2nd and 3rd grounds, he was faulting the trial Chairman of the tribunal to had decided the case by disregarding principles and proof of payment of compensation. In my view, the issue of compensation is not being heard of for the first time. Therefore, to knight it in this matter to justify illegality is being overzealous.

Second, the applicant advances sickness as his next ground. As correctly submitted by parties, it has been held in numerous cases that sickness is beyond human control and once proved, it suffices to warrant extension of time. I subscribe to holdings in, for example, **Alasai Josiah v. Lotus Valley Ltd**, Civil Appl. No. 498/12 of 2019; **Christina Alphonse Thomas v Saamoja Masingija**; Civil Appl. No. 1/2014 (both unreported).

In the matter at hand, the affidavit reveals that the applicant fell sick on 25/06/2022 and was hospitalized at Magige Dispensary from 4/7/2022 to 7/7/2022. Contrary to that averment, in the supplementary affidavit, he states that he spent time from 24/6/2022 to 2/7/2022 making a follow up



for legal assistance from TLS. He also contradicts the previous affidavital depositions by claiming that he got sick on 3/7/2022. This court need not re-emphasize that affidavits are evidence. Law is clear that when inconsistency is found in evidence the court is mandated to disbelieve it. Reference is made to ***DPP v Daniel Mwasonga***, Criminal Appeal No. 64 2018; and ***Zakaria Jackson Magayo v R***, Criminal Appeal No. 411/2018 (both unreported).

Further, even if this court opts to disregard the inconsistency in dates, the only reliable evidence herein is a medical report (annexure ONL-4). In essence, it indicates that the applicant was hospitalized from 4/7/2022 to 7/7/2022. Obviously, at this time, the applicant was already late on taking the requisite legal action. Surely, the ground of sickness is also adequately accounting for the whole period of delay. It is, thus, devoid of merit.

Financial difficulty is the applicant's third and final bullet in justifying his tardiness. Under exceptional circumstances, this ground can be sufficient to stand as good reason for extension of time. For example, when the applicant falls in the category of legal aid scheme. See the cases of ***Costantine Victor John v Muhimbili National Hospital***, Civil Application No. 214/18

of 2020 and ***Yusuph Same and another vs Hadija Yusuph***, Civil Appeal No. 1/2002 (both unreported).

The applicant above claims to have faced financial constraints. Consequently, on 24/06/2022 he wrote a letter to TLS seeking the legal assistance which was granted to him on 14/7/2022. In the supplementary affidavit, however, according to annexures DEL1, he filed legal aid assessment form and paid for the service on 13/07/2022. Some things here do not add up. The alleged letter to TLS is dated 24/06/2022. It bears no proof of having been received by the addressee.

Further, paragraph 8 of the affidavit expresses it that the applicant received a call from TLS regarding his letter dated 24/06/2022. Again, no proof to that effect in form of extract for the said call or an affidavit from TLS to support the same. Law requires that when the source of information is another person, an affidavit from such person is obligatory lest such averment becomes hearsay and inadmissible. ***Narcis Nestory v Geita Gold Mining Ltd***, Misc. Lab. Appli. No. 13 of 2020; ***NBC Ltd v Superdoll Trailer Manufacture Co. Ltd.***, Civ. Appli. No. 13 of 2002; ***Awadh Abood*** (As Legal personal representative Of the Estate of the Late Salehe Abood



Salehe) v **Tanroads and AG**, Misc. Land Appli. No. 53 of 2020(all unreported) followed.

In this matter, therefore, the only ascertainable proof for the alleged application for legal aid are the legal aid assessment form and payment receipt (annextures DEL-1). Consequent to that, it becomes safer for this court to hold that the applicant applied for legal assistance on 13/7/2022 which aid was granted the next day - on 14/7/2022. Apparently, at the time, once again, he was already out of time for several days.

If the second and third grounds are put in joint perspectives, the applicant has failed to prove days of delay from 27/6/2022 when the intended application was due to 4/7/2022 when he was hospitalized; discharged and filed form for legal assistance. This omission makes a total of 7 days of delay. Also, the from the day when he secured the legal assistance to 20/7/2022 when the present application was filed, the applicant wasted another period of 6 days. Consequently, an aggregate of 13 days remains unaccounted for. It is illegitimate.

It is cardinal principle of law that, one applying for extension of time must account for each and every day of the delay. In the case of **Hassan**

Bushiri v Latifa Mashayo, Civil Application No. 3 of 2007 (unreported), the Court held that 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”.

Other cases in line with this legal position are ***Yazid Kassim Mbakileki v CRDB (1996) Ltd Bukoba Branch & another***, Civil Application No. 412/04 of 2018; ***Sebastian Ndaula v Grace Rwamafa*** (*legal personal representative of Joshua Rwamafa*), Civil Application No. 4 of 2014; ***Dar es Salaam City Council vs. Group Security Co. Ltd***, Civil Application No. 234 of 2015; ***Muse Zongori Kisere v Richard Kisika Mugendi***, Civil Application No. 244/01 of 2019, ***Ally Mohamed Makupa v Republic***, Criminal Application No. 93/07 of 2019; and ***Lyamuya Construction Company Ltd. vs. Board of Registered Trustee of Young Women’s Christian Association Of Tanzania***, Civil Application No. 2 of 2010 (all unreported).



In upshot the application lacks merit and it is accordingly dismissed. I make no order as to costs. It is so ordered and the right of appeal is fully explained to the parties.



C.K.K. Morris
Judge
May 5th, 2022

Ruling delivered this 5th day of May 2023 in the presence of the respondent and in the absence of the applicant.

C.K.K. Morris
Judge
May 5th, 2022