

IN THE HIGH COURT OF TANZANIA

DODOMA SUB-REGISTRY

AT DODOMA

MISC. LAND APPLICATION NO. 49 OF 2021

1. HAMADI ALI PIRO

2. IDDI JUMA MASEREMU.....APPLICANTS

VERSUS

ISSA R. CHUKA.....RESPONDENT

(Arising from Land Appeal No. 11 of 2017 in the High Court of Tanzania at Dodoma and from the decision of the District Land and Housing tribunal for Kondoa in Land Appeal Case No. 56 of 2016, Originated from Land Dispute No. 13 of 2013 Paranga Ward Tribunal)

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RULING

5th July, 2023

HASSAN, J.:

This application is made under the provisions of section 11 (1) of the Appellate Jurisdiction Act, Cap. 141 R. E 2019 (AJA). It is by way of chamber summons supported by joint affidavit of the applicants HAMADI ALI PIRO and IDDI JUMA MASEREMU, affirmed on 28th of June, 2021.

Upon being served with the chamber summons and affidavit, the respondent ISSA R. CHUKA filed a counter affidavit on the 17th day of August, 2021, to contest the application.



Briefly, the fact leading to the present application reveals, that the respondent instituted a land Dispute No. 13 of 2013 at Paranga Ward Tribunal. In the decision delivered on 22nd day of July, 2016, the Ward Tribunal verdict was that each party has to remain in his parcel and there should be no trespassing.

That decision of the Ward Tribunal was reversed by the District Land and Housing Tribunal (DLHT) for Kondoa in the Land Appeal No. 56 of 2016. Whereas, the DLHT decided that the respondent was the right owner of disputed land save the road reserve area. Hence, the appellant was ordered to demolish his building in the disputed land.

Dissatisfied by the decision of the DLHT, the applicants appealed to this court in the Misc. Land Appeal No. 11 of 2017 which was dismissed in a judgement delivered on 30th November, 2017. On that, the court upheld verdict of the DLHT.

Further pained by the decision of the High Court, the applicants lodged a notice of appeal to the Court of Appeal on 7th December, 2017 which was within stipulated time. Thereafter the appellant lodge an appeal on 8th May, 2019 which was out of time without certificate of delay in the record of



appeal issued by the Registrar under the proviso to rule 90 (1) of the Rules. The same was truck out for being incompetent on 1st June, 2021. Hence, that decision of the Court of Appeal coxed the current application which was lodged on 23rd July, 2021, and carries the following prayers:

- 1. That, the Court be pleased to extend time for the Applicants to file notice of appeal to the Court of Appeal of Tanzania.*
- 2. That, Costs of this application to be provided for.*
- 3. Any other order (s) that this honourable Court may deem fit and just to grant.*

Basically, the joint affidavit in support of application contain one ground for the delay. That is, the applicants were waiting for the appointment of legal representative of the late Omari Juma Maseremu which is not complete as per paragraph 3 of the applicant's joint affidavit.

The application was heard on the 17th of November, 2022 in which date, the Applicants were represented by Mr. Samuel Mcharo, learned Advocate whereas Mr. Hashim Mziray, also learned Advocate served the Respondent.

Submitting in support of the application Mr. Mcharo after adopting the contents of the Applicant's affidavit briefly stated that, the Applicants were the Appellant in the High Court through Land Appeal No. 11 of 2017 after being aggrieved by the decision of the Land and Housing Tribunal of Kondoa in Land Appeal No. 56 of 2016 Which had overruled the decision of the Ward Tribunal of Paranga in Land case 13 of 2016.

The applicants appealed the same to the High Court which then delivered its judgment on 30th November, 2017. Still pained, the Applicants Appealed to the Court of appeal by filing a notice of appeal on 7th December, 2017. Thereafter, the applicants lodged an appeal on 8th may, 2019 without the certificate of delay as per Rule 90 (1) of the Rules. Thus, appeal was struck out for being lodged out of time since it was lodged out of 60 days, and in absence of the certificate of delay issued by the Registrar of the high court excluding some days.

Subsequently, the appellants continued to make follow up of a person who could represent OMARY JUMA MASEREMU who passed away soon after the appeal from the High Court was decided on 30th November, 2017.

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On 26th June, 2021 the Applicants lodged the application for extension of time to file a notice of appeal to the Court of Appeal with the following reasons: **First**, that there was a technical delay on the part of the Applicants. He averred, that delay was caused by failure to have certificate of delay which is issued by the Registrar as per the law. **Second**, that the Applicants were making follow up of an inheritance of the late Applicant Omary J. Maseremu. The learned advocate argued here that, that time ought to be excluded under section 25 (1) and (2) of the Law of Limitation Act, Cap. 89 R. E 2019. **Third**, that there are legal issues of which if this application will be allowed, the same could be determined and decided by the Court of Appeal. That includes: (i) That, the cause of action at the Ward Tribunal was brought to the Tribunal out of time; therefore, the Ward Tribunal had no jurisdiction to decide the matter. (ii) that, there was no cause of action against the applicants. (iii) That, there was no legal representative of the late BISADA RASHID YUSSUF. (iv) Another issue is whether the allocation of Land by the Village Council can be overruled by disposition of individual. To cement his argument, the learned advocate cited the case of **The Principal Secretary Ministry of Defence and the National Services v. Devram Valambhia (1992) TLR. 387.**



In conclusion, he prayed for the order to enlarge time within which the applicants to lodge a notice of appeal to the Court of Appeal.

In reply, learned advocate Mziray firstly prayed to adopt the respondent's counter affidavit to form part of his submission. He further submitted that the applicants had not advanced any good cause in their application.

Thereafter, he kickstarted by submitting that, on the ground that the applicants were late to file appeal because they were making follow up of the deceased administrator as in paragraph 3 of their affidavit. To his view, there is no prove in the affidavit that they were following death certificate or any other issue pertaining to it. He stressed that, the assertion was a mere statement which does not have proof. In addition, he adds that the applicant's advocate failed to tell the court that the applicants were obliged to follow up for the representative of the deceased. Hence, there is no law which give the applicants such responsibility.

As to the ground that, court should invoke section 25 (1) (2) of the Law of Limitation Act Cap. 89. To the advocate Mziray's view, this application



was not filed under the Law of Limitation Act, hence the section should not be invoked since the application was not filed under that law.

With regarding to the legal issues that the Court of Appeal will get an opportunity to address the same, he submitted that, there was a Civil Appeal No. 329 of 2019, of which, the Court of Appeal could have addressed those legal irregularities but they did not.

Also, with respect to the issue that matter was time barred at trial tribunal; and that, there was no legal representative of the deceased BISADA. To him, all these issues were before the court of appeal and they were not entertained.

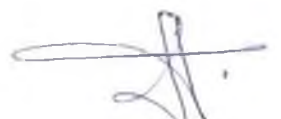
Finally, Mr. Mziray argued about the case of **Devram Valambhia** (supra), he submitted that it should be disregarded since the matter has been before the Court of Appeal. Also, he pressed that there should have been a certificate of the point of law for the matter originated from the ward tribunal. Hence, to his opinion, this matter is premature to be discussed here. He argued further that, those grounds were not raised on the appeal before DLHT and even before the High Court where they could have been observed.



The learned advocate submitted more that, appeal was filed out of time not because of technical delay but it was because of the negligence on the part of the applicants. Further to that, Mr. Mziray probed the court to observe the chronological of events after the order of the Court of Appeal was issued on 1st June, 2021 in the Civil Appeal No. 339 of 2019. Thereafter, the respondent herein filed the Misc. Land Application No. 66 of 2021 at the DLHT of Kondoa and the applicants herein appeared to that tribunal (annexure 2).

About eviction order, it has been issued on 2nd August, 2021 and the court broker Mr. MVAMBA of MILLINIUM Co. Ltd was appointed for execution on the same date. On the 5th August, 2021 the executing court (DLHT) of kondoa, in the letter dated 5th August, 2021 referenced DLHT/KND/GR/5E wrote to the Paranga executive officer for the same. The copy of the same was sent to DC of Chemba, OCD-Chemba, Court Broker and the Village Chairman of Paranga.

To his belief, on the basis of those documents, to proceed with the application for extension of time is abuse of court process because the execution is over and there is no any pending application against an execution order. The Misc. Land application before Mansoor, J was over and



nothing can be done by the court of appeal since the execution has completed. He cited Regulation 25 of the Land Dispute Court (the District Land and Housing Tribunal) G. N. No. 174 of 2003 and the annexure 2 of the counter affidavit herein attached.

Mr. Mziray concluded that, case is not an open-ended mechanism, it ends up with execution order. Therefore, once the execution order is completed the case ends there. He therefore prayed this application be dismissed with costs.

In rejoinder the learned advocate Mcharo reiterated his earlier submission in-chief and additionally, he succumbed that, execution does not bar this application. He further reinforced that section 95 and regulation 25 of DLHT Regulation G.N. No. 174 of 2003 which was raised by the respondent's advocate is irrelevant.

He insisted that, the case of **Devram Valambhia** (supra) is relevant because it allow appeal out of time after execution order was pronounced due to the legal irregularity in the matter.

With respect to the issue of appointment of administrator of OMARY J. MASEREMU, is that, his case was abated in the court of appeal and since

that was not heard on merit. And for that reason, it was prudent for the applicants herein to make follow up for the same. He pressed that, the fact that he made some follow up for the issue of appointment of administrator is in the applicant's affidavit.

On the issue of irregularity, he reinforced by contesting the respondent's reply on that point. Hence, he simply argued that, issue of irregularities was not entertained by the Court of Appeal since the matter has not been heard in merit. He also stressed that, the point that this issue was raised prematurely, his response was that, for that reason it is why they have mentioned it in order to be determined by the Court of Appeal. He closed this argument by submitting that, basically, court can allow application for extension of time so that these issues can be determined by the Court of Appeal.

Finally, he reiterated his earlier prayers seeking for the court order to allow this application with costs.

Based on the parties' submissions, the question to be resolved is whether the applicants had assigned good cause to for this court to exercise



its discretion to extend time under section 11 of the Appellate Jurisdiction Act (supra)?

It bears reaffirming that, the power of this court to grant an order for extension of time to the applicant is obtained in the provision of section 11 of the Appellate Jurisdiction Act, which reads:

"11.-(1) Subject to subsection (2), the High Court or, where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned, may extend the time for giving notice of intention to appeal from a judgment of the High Court or of the subordinate court concerned, for making an application for leave to appeal or for a certificate that the case is a fit case for appeal, notwithstanding that the time for giving the notice or making the application has already expired."

Although the provision of section 11 of AJA is silent on the factors to be considered by the court in the determination of whether or not court should grant extension of time. However, there are number of decided cases which laid down the guidelines that can be considered as a good cause. To mention a few, see the case of **Benedict Mumello v. Bank of Tanzania, Civil Appeal No. 12 of 2002 CAT** (Unreported); see also **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010** (unreported), of which at page 6 of the ruling, it was held that:

"In exercising its discretion of whether or not to grant extension of time the court is required to exercise it judicially while being guided by such factors which may not be exhaustive such as:

- 1. The Applicant must account for all the period of delay;*
- 2. The delay should not be inordinate;*

- 3. The Applicant must show diligence, and not apathy, negligence or sloppiness of the action that he intends to take; and*
- 4. If the court feels that there are other sufficient reasons, such as existence of a point of law of sufficient importance such as the illegality of the decision sought to be challenged."*

The above factors were also stated in the case of **Damas Assey and Another v. Raymond Mgonda Paula and 8 Others, Civil Application No. 232/17 of 2018**, CAT at Dar es Salaam (unreported).

Reverting to the case at hand, where I am guided from the above tutorial guidance. On that, I am aware that there is no hard and fast rule in order to activate court discretion to grant extension of time; but normally, it will be determined upon the case to case basis.

Now, looking to the arguments at hands, the applicants' counsel has advanced that there was a technical delay on the part of the Applicants. He averred that the delay was caused by failure to have certificate of delay which is issued by the Registrar as per the law. However, on his part, the



learned counsel for the respondent contested the argument and upheld that, the said appeal was filed out of time not because of technical delay but because of negligence on the part of the applicants. He asked the court to observe sequential of events after an order of the Court of Appeal was issued on 1st June, 2021 in the Civil Appeal No. 339 of 2019. Thereafter, the respondent herein filed the Misc. Land Application No. 66 of 2021 at the DLHT of Kondoa and the applicants herein appeared in that tribunal (annexure 2).

In my view, looking at this contested ground, it is obvious that it was the duty of the applicants to apply for the certificate of delay from the registrar of high court if there was any justifiable reason so to do. Justifiable reason could have been drawn from the evidence that the applicants were making the follow up of an inheritance of the late Applicant Omary J. Maseremu. However, to the contrary, nothing has been done by the applicants. Instead, the applicants hurried to file a notice of appeal to the Court of Appeal. Knowing that the applicants had enjoyed legal service from qualified advocate, to do that is an intolerable negligence on their part. For that reason, it could have been a technical delay only if the applicants were in compliance with the due process of the law. To that far, I coincide with

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the view of the respondent's counsel that this ground lacks merit and it should be discounted as the applicants were loosely negligent.

In another ground, the applicant's counsel argued that there are legal issues of which if this application will be allowed, they could be determined and decided by the Court of Appeal. He listed the said legal issues as follow:

(i) That the cause of action at the Ward Tribunal was brought to the Tribunal out of time; therefore, the Ward Tribunal had no jurisdiction to decide the matter. (ii) there was no cause of action against the applicants. (iii) There was also no legal representative of the late BISADA RASHID YUSSUF. (iv) Another issue is whether the allocation of Land by the Village Council can be overruled by disposition of individual. To cement his argument, the learned advocate cited the case of **The Principal Secretary Ministry of Defence and the National Services V. Devram Valambhia (1992) TLR. 387.**

On his side, Mr. Mziray queried this ground with regard to the legal issues raised by the applicants' advocate. He protested that, there was a Civil Appeal No. 329 of 2019, of which, the Court of Appeal could have addressed those legal irregularities but they did not. Also, with respect to the issue that matter was time barred at trial tribunal, and that there was no legal representative of the late BISADA. To his view, all these issues were before



the court of appeal and they were not entertained. Adding to that, Mr. Mziray argued about the case of **Devram Valambhia** (supra) which was cited by the applicants' counsel that, it should be disregarded since the matter has been before the Court of Appeal.

More so, he contended that the applicants should have applied for certificate on the point of law for the matter originated from the ward tribunal. Something which they failed to comply with. Hence, to his opinion this matter is premature to be discussed here since those grounds were not raised on the appeal before DLHT and even the High Court where they could have been observed.

Going through the squabble, keenly to determine the fate as to whether or not illegalities contain a good cause to warrant extension of time. I am guided by canon handed down in the bulk of cases which unveil that, a claim of illegality or otherwise of an impugned decision, has all along constituted a good cause for extension of time (See **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** (1992) TLR. 185; **Vip Engineering and Marketing Ltd and Two Others v. Citibank Tanzania Ltd - Consolidated Civil Reference No. 6, 7 and 8 of 2006** (unreported)).



In the matter at hand, it is apparent that the applicants have pointed out a number of illegalities which need to be addressed by the court above. In his critical view, the respondent protested that the ground of illegality has not been unveiled in the DLHT as well as in the High Court. In my considered view, that was not the case. For instance, by observing the records of the High Court which sat as the second appellate court, the issue of illegality of an impugned decision was raised by appellants. See the first ground of appeal which reads:

"The ward tribunal was not composed hence incompetent."

Indeed, this ground co-relates with the again raised ground of illegality; that is, the Ward Tribunal had no jurisdiction to decide the matter. Fair enough, having touched the issue of jurisdiction, it cannot be gainsaid that, the same is not apparent to the impugned decision. Alone, this is a serious allegation of illegality in the impugned decision which need to be investigated by the Court. See the case of **Lyamuya Construction Co. Ltd vs. Board of Trustees of the Young Christian Women Association (YWCA), Civil Application No. 2 of 2010** (unreported) where authority was settled.



Far beyond what I have composed, I think it is important to comment on two issue raised by respondent's counsel. **One**, the assumption that the respondent is trying to draw in the mind of this court is that, the Court of Appeal has purposely ignored to entertain appeal No. 339 of 2019, of which, those illegalities were composed in the records of appeal. In my opinion this assumption is misleading since the Court of Appeal has never discussed the merit of that appeal. It appears, after observing that an appeal was incompetent, rightaway the court struck out the same. **Two**, that the respondent herein had filed the Misc. Land Application No. 66 of 2021 at the DLHT of Kondoa to seek for execution. It follows, as result of the said application, eviction order has been granted and execution completed. In the circumstance, he contends that to proceed with this application for extension of time is abuse of the court process because the execution is over and there is no any pending application against an execution order. He pressed that the Misc. Land application before Mansoor, J was over and nothing can be done by the court of appeal since the execution has completed. To impress the court, he cited the Regulation 25 of the Land Dispute Court (the District Land and Housing Tribunal) G. N. No. 174 of 2003 and the annexure 2 of the counter affidavit herein attached. In my view,



since the subject matter of this dispute is still inexistence, party's legal right will never fade. It will always fall under the principle of equity that equity never fail. Thus, so long as there is a right, there will be a remedy.

From the foregoing, I am of the view that, the Applicants have been able to make their case. The ground of illegality on the face of proceedings was apparent and that alone raised a good course to warrant extension of time. That said, an order to extend time for the applicants to file a notice of appeal to the Court of Appeal is preferred in terms of section 11 (1) of the Appellate Jurisdiction Act, Cap. 141 R. E 2019 (AJA).

Hence, without prejudice to the generality, the applicants are hereby given time to file a notice of appeal to the Court of Appeal as per the law. Costs will follow the course.

It is so ordered.

DATED at DODOMA this 5th day of July, 2023.



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S. H. Hassan
JUDGE