

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI.**

MISC. LAND APPLICATION NO. 38 OF 2022

(C/F Application No. 97 of 2017 of the District Land and Housing
Tribunal for Moshi at Moshi)

ABBAS KASIMU KADUMA1ST APPLICANT

LUCIA JUMA MALIPULA 2ND APPLICANT

VERSUS

AUGUSTINO JAPHET MREMA RESPONDENT

RULING

28/06/2023 & 18/07/2023

SIMFUKWE, J.

This is an application for extension of time to file Revision against *ex parte* decision of the District Land and Housing Tribunal (The trial Tribunal) in Application No. 97 of 2017 delivered on 15th October 2020. The application was made under **section 14(1) of the Law of Limitation Act, Cap 89 R.E 2019** and any other enabling law. The application is supported by the affidavits of both applicants and an affidavit deposed by one Fredrick Kasimu Kaduma (1st applicant's brother). The Respondent through his counter affidavit resisted the application.

During the hearing of this application, the applicants were unrepresented while the respondent was represented by Mr. Bernard Chuwa, learned counsel. The hearing was by way of written submissions.

The applicants prayed the court to consider their Affidavits and annexures thereto to form part of their application. The applicants submitted to the effect that in an attempt to make revision they filed the following applications:

1. Misc. Application No. 317 /2020 Abbas Kasimu Kaduma and Lucia Juma Malipula vs Augustino Japhet Mrema which was struck out.
2. Misc. Application No. 50 of 2021 Abbas Kasimu Mrema and Lucia Juma Malipula vs Augustino Japhet Mrema which was also struck out.

It was stated further that save for Misc. Application No. 38/2022; all other applications aimed at seeking the indulgence of the tribunal in trying to set aside its orders unsuccessfully.

The applicants elaborated further that the *ex parte* judgment in Application No. 97 /2017 was delivered on 15/10/2020. The applicants herein were dissatisfied and filed Misc. Application No.317 /2020 seeking to set aside the said *ex parte* judgment whereas the same was struck out on 20/09/2021 because the 1st Applicant told the presiding Chairman that he had no trust in him though such fact is not reflected in the records. The Applicants then filed Misc. Application No. 50/2021 seeking for extension of time to appeal against the said decision. On 15/02/2022 the court struck it out and ordered the applicant to file an application for revision within 7 days.

From the above submissions, the applicants stated that from 15/10/2020 to 25/08/2022 the time was lost in prosecuting the applications which were struck out and some were dismissed as stated in the affidavits.

The applicants went on to explain that when Misc. Application No. 38 of 2022 was filed, the Preliminary Objection was raised but the court overruled it. Thus, more time was lost while dealing with the raised preliminary objection.

It was stated that the position of the law in respect of the applications which are struck out is well settled. The applicants referred to the case of **Eliakim Swai and Another vs Thobias Karawa Shoo, Civil Application No. 2 of 2016** in which at page 12 the court cited the case of **Fortunatus Masha vs William Shija and Another [1997] TLR 154** which held that:

"A distinction should be made between cases involving real or actual delays and those like the present one which only involve what can be called technical delays in the sense that the original appeal was lodged in time but the present situation arose only because the original appeal for one reason or another has been found to be incompetent and a fresh appeal has to be instituted. In the circumstances, the negligence if any really refers to the filing of an incompetent appeal not the delay in filing. The filing of an incompetent appeal having been duly penalized by striking it out, the same cannot be used yet again to determine the timorousness of applying for filing the fresh appeal. In fact, in the present case, the applicant acted immediately after

the pronouncement of the ruling of this Court striking out the first appeal.”

In the instant case, it was insisted that the applications which were struck out, the delay is purely technical as elaborated under paragraph 30 of the 1st Applicant’s affidavit. The applicants prayed that the same be accepted as a justifiable cause for the delay.

It was further submitted that the intended revision raises fundamental points of law for the development of law in land matters to wit; the right to be heard as stated under Paragraph 25 of the 1st Applicants affidavit. The applicants believed that the above issue can only be adjudicated if the Applicants are accorded an opportunity to be heard. They referred to the case of **Samson Kishoka Gabba vs. Charles Kingongo Gabba [1990] TLR 133**, which held that:

“In determining whether or not to allow an application for leave to appeal out of time the Court has to consider reason for the delay as well as the likelihood of the intended appeal.”

It was emphasised that the issue to be determined by this court clearly indicates that success of intended revision is obvious. The applicants prayed that this application be granted.

In his reply, Mr Bernard Chuwa adopted the counter affidavit of the respondent to form part of his submission. On the outset, the learned counsel subscribed to the argument that it is the discretion of this court to grant extension of time upon good cause, the discretion which must be exercised judiciously. He cited **Section 14(1) of the Law of Limitation Act** and the case of **Benedict Mumelo vs. Bank of Tanzania, Civil Appeal No. 12/2002** in which the Court of Appeal held that:

"It is trite law 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."

Mr. Chuwa contended that in our case, the applicants have failed to establish sufficient reasons to move this court to exercise its discretion because of the following reasons:

First, the applicants have failed to show sufficient reasons for the delay. Expounding this point, Mr. Chuwa referred to paragraph 29 of the 1st applicant's affidavit which states that time was lost in preparing this application and subsequent amendments. It was the opinion of Mr. Chuwa that this reason is not sufficient for this court to grant extension of time. That, in their affidavits and even in their written submission, the Applicants have not provided any documentary proof warranting their delay. He asserted that lack of documentary proof from the Applicants that they either did consultation, or instructed any professional in regard to this case, or proof to have visited any office be it public or private office, then this court cannot establish whether there is a good cause to grant extension of time. Also, it was argued that in absence of any supplementary affidavit, visitors' signed book, written opinion from a lawyer, receipt for consultation etc, the reason remains mere words. That, this court cannot establish if the applicants acted promptly to take the necessary steps in pursuit of their intended application for revision.

It was stated that the case of **Eliakim Swai & Frank Swai** (supra) which was cited by the applicants is distinguishable because, in that case, the

original appeal was filed on time, whilst in the present case no appeal was filed on time. Also, in the cited case, the applicants acted immediately after the pronouncement of the ruling of the Court whilst, in the present matter the Applicants acted approximately 14 months after pronouncement of the *ex parte* judgment which was delivered on 15/10/2020; while Misc. Land Application No. 50/2021 was filed on 27/12/2021. The learned counsel requested this court to accord no legal weight on all cited cases by the Applicants.

According to Mr. Chuwa, the second reason for contesting this application is that the Applicants have failed to account for each day of delay. That, counting from the date of *ex parte* judgment on 15/10/2020 to 22/08/2022 when the current matter was filed, there is a delay of 652 days. That, the Applicants have managed to account for approximately 435 days only which are days spent in court prosecuting the mentioned cases and they have failed to account for 217 days (approximately seven (07) months). He stated that there are numerous court decisions which emphasize that Applicants must account for each day of delay, failure to do so, the court will deny extension of time. He supported his argument with the case of **Onesmo Oscar vs Mkurugenzi Mkuu, Nyehunge Express, Misc. Civil Application No. 136 of 2021** HC in which it was held that:

"It is a settled principle that for an application of extension of time to be granted, the applicant should account for each day of delay, this means that even a single day has to be accounted for."

The learned counsel also referred to the case of **Tanzania Fish Processors Ltd vs Eusto K. Ntagalinda, Civil Application No. 41/2018** at page 9 where it was held that:

"The law is clear that in an application for extension of time, the applicant should account for each day of the delay."

Mr. Chuwa reiterated that in our case the applicants did not account for each day of delay to be specific, 217 days. He urged this court to dismiss this application since the Applicants have failed to account for each day of delay.

Thirdly, the learned advocate submitted that the delay should not be inordinate and the Applicants must demonstrate diligence and not negligence. It was argued that the Applicants herein have not shown any diligence as they have been negligent all along since 15/10/2020. That, they have failed to take appropriate action for a period of 217 days.

Mr. Chuwa buttressed his argument by citing the case of **Lyamuya Construction Company Ltd v. Board of Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010** in which the Court stated the following:

- 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 in the prosecution of the action that he intends to take and time.*

4. *If the court feels that there are other sufficient reasons such as the existence of a point of sufficient importance; such as the illegality of the decision sought to be challenged.*

Basing on the above arguments, Mr. Chuwa submitted that the Applicants have been negligent all along and therefore this application should be dismissed with costs.

Responding to the argument that the intended revision raises a fundamental point of law as the right to be heard was jeopardized, it was submitted that the law is very clear on how to challenge an *ex parte* judgment. Thus, there is no point of law to be determined. Therefore, the cited case of **Samson Kishoka Gabba vs. Charles Kingongo Gabba**, (supra) is distinguishable and cannot be applied to our current case. It was opined that the instant Application is bad in law since the applicants apply for Revision while there is an option of appeal. That, the appropriate remedy is to set aside the *ex parte* judgment.

Responding to the issue of illegality, the learned counsel for the respondent was of the view that, this ground will open floods of litigants to those who deliberately default appearance and place the blame to the court, like the conduct of the Applicants. That, there is no law to that effect especially when the applicant was present in court on last appearance.

In addition, Mr. Chuwa explained that this ground is not on the face of the record and is discoverable by long drawn processes as it was held in the case of **Lyamuya Construction** (supra).

In his conclusion, Mr. Chuwa prayed the court to dismiss this application with costs since the applicants have failed to discharge their duty of adducing good cause and account for 217 days as required by the law.

In their joint rejoinder responding to the argument that there is no proof of documentary evidence, the applicants argued that documents cannot be attached to the submissions. They supported their argument with the case of **Bish International B.V and Another vs Charles Yaw Sarkodie and Another, Land Case No. 9 of 2006** (HC) at Dar es Salaam.

It was further re-joined by the applicants that all days of delay were accounted for and the delay was not inordinate as the alleged 217 days alleged to have not been accounted for, are the days used to prosecute Misc. Land Application No. 50 of 2021 for setting aside *exparte* judgment before the tribunal. The applicants urged the court to take further Judicial Notice on Misc. Land Application No. 17 of 2021 seeking an order for stay of execution before the trial Tribunal and Misc. Land Application No. 19 of 2022 seeking for extension of time to file revision before this court.

It was insisted that the intended revision raises fundamental points of law in that the 1st applicant was condemned unheard and the 2nd applicant had no authority to represent the 1st Applicant in both Application No. 97 of 2017 and Misc. Application No. 50 of 2021. That, if the 1st applicant had been given the opportunity of being heard, then appeal would have been proper. That, in the current situation, the only remedy is to revise the said illegality of the trial tribunal.

It was insisted that illegality is sufficient ground to extend time as stated in the case of **Principal Secretary Ministry of Defence, National Service vs Davan P. Valambia [1992] TLR 387** and the case of **Kalunga and Company Advocates vs National Bank of Commerce Limited [2000] TLR 235**.

Having considered the submissions of both parties as well as their respective affidavits and the available records, I am of considered opinion that the issue for determination is ***whether the Applicants have advanced sufficient reasons for the court to grant extension of time to file revision.***

To grant or not to grant extension of time is the court's discretion. However, such discretion must be exercised judiciously. For the court to exercise its discretion, the applicant is required to establish sufficient reasons for the delay. In the instant matter, I am grateful that the parties have cited numerous decisions in respect of the factors to be considered in granting extension of time. To top up on what has been stated, I wish to add that, in the case of **Hassan Ramadhani vs Republic, Criminal Appeal No.160 of 2018**, at page 6 it was stated that:

"It is plain that the High Court's power to admit an appeal after the lapse of period of limitation is not predicated on any benchmark. It is discretionary based on reasons placed before the High Court by a party who seeks admission of his appeal out of time."

Turning to the present application, the applicants prayed this court to grant extension of time to file revision against the proceedings and decision of trial Tribunal in Application No. 97 of 2017. They have advanced two reasons for the court to grant extension of time and I will scrutinize one reason after another to see whether the same amount to good cause for granting the extension of time sought.

First, at paragraph 12 of the 2nd applicant's affidavit it has been stated that the delay was technical one since they were pursuing other

applications to wit Misc. Application No. 317 of 2020 and Misc. Application No. 50 of 2021.

The learned advocate for the respondent didn't support this allegation. He argued that the applicants didn't account for each day of delay. That, the applicants failed to account for 652 days from 15/10/2020 when the impugned decision was delivered to 22/08/2022 when the current matter was filed. That the applicants accounted for 435 days only which are the days used to prosecute the said Applications. Thus, they failed to account for 217 days.

I have carefully gone through the parties' submissions in respect of this ground. I am of considered opinion that the applicants have failed to account for each day of delay as required by the law that is from 15/10/2020 when the impugned *ex parte* judgment was delivered to 22/08/2022 when the present application was filed. It has been stated that the applicants were pursuing other applications. However, starting with Misc. Application No. 317 of 2020 which was an application to set aside *ex parte* judgment, the same was struck out on 20/09/2021 while Misc. Application No. 50 of 2021 an application for extension of time to appeal was struck out on 15/02/2022 and the instant application was filed on 22/08/2022. Therefore, the applicants failed to account for the days from 15/02/2022 when Misc. Application No. 50 of 2022 was struck out to 22/08/2022 when they filed the instant application which is more than five months. In the case of **Philipo Katembo Gwandumi vs. Tanzania Forest Services Agent and Permanent Secretary, Ministry of Natural Resources and Tourism, Revision Case No. 891 of 2019**, it was held that:

*It is also a tenet principle of law that, in application for extension of time a party should account for each day of delay. This is the position in numerous decisions including the case of **Bushiri Hassan Vs. Latifa Lukio Mashayo, Civil Application No. 3 of 2007 (unreported)** the Court of Appeal held that; I quote" 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."*

In the circumstances of this case, I fail to support the contention that the delay was technical one since the applicants did not manage to account for each day of delay which proceeded after pursuing the alleged applications.

The second reason advanced by the applicants for the court to grant extension of time, was that the impugned judgment is suffered from illegality to the effect that the 1st applicant was condemned unheard. Also, the 2nd applicant argued that the Chairman wrongly reported that the 2nd applicant herein deliberately refused to make his defence. This is stipulated at page 18, 19, 20 and 21 of the 1st applicant's affidavit.

Disagreeing, the learned advocate for the respondent explained that this ground will open floods of litigants to those who deliberately default to appear and thereafter blame the trial court like the Applicants' conduct in this case. He added that this ground is not apparent on the face of the record.

I am aware that whenever there is illegality, even if the applicant has failed to account for each day of delay, the court must exercise its discretion and

extend the time sought. See the case of **Ezrom Mages Maryogo v Kassim Mohamed Said and Another, Civil Application No. 148/17 of 2017**. Also, I am alive with the recent principle developed by the Court of Appeal in the case of **Mtengeti Mohamed vs Blandina Macha (Civil Application No. 344 of 2022) [2023] TZCA 17328 (12 June 2023)** [Tanzlii] in which the Court expounded the above principle by stating that:

*"In view of this, I would but reiterate here what this Court held in the case of **William Kasian Nchimbi and three others v. Abas Mfaume Sekapala and Two Others, Civil Reference No. 2 of 2015** that, illegality cannot be used as a shield to hide against inaction on the part of the applicants. And if I may add, the position set by our previous decisions is that, irrespective of the nature of the grounds advanced by the applicant in support of an application for extension of time, he must as well show diligence, and not apathy, negligence or ineptness in the prosecution of the action that he intends to take."*

Much as I am aware with the above principles in respect of the issue of illegality, in the instant matter, based on the alleged illegality, I am of considered opinion that allegation on curtailment of right to be heard in this case warrant granting extension of time. The trial tribunal proceedings show that, the 1st applicant missed in court only once and he was present on the previous dates consecutively. In his affidavit, the 1st applicant deponed at paragraph 18 and 19 that on 15/7/2020 he was absent due to illness and he had sent his brother one Fredrick Kasimu Kaduma to report but the report is not reflected in the proceedings. The affidavit of the said Fredrick Kasimu Kaduma supports the assertion of the 1st applicant. It is

because of the pointed-out illegality which is apparent on the face of the record that this court exercise its discretion and grant the application sought by the applicants.

Therefore, I grant 21 days to the applicants to file Revision against the decision of the District Land and Housing Tribunal in Application No. 97 of 2017. No order as to costs.

It is so ordered.

Dated and delivered at Moshi this 18th day of July 2023.



X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

18/07/2023