

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

MISCELLANEOUS CIVIL APPLICATION NO. 72 OF 2023

*(Arising from Civil Appeal No.191 decided by Hon. T. B Mihayo on 28th February
2007, Originating from Civil Case No. 318 of 1998 at Kisutu RM Court)*

DR. SALUM ALI CHUMBUSO.....APPLICANT

VERSUS

PAUL ELIAS MARO 1st RESPONDENT

ALI SALUM HOT @ ALI KUKU2ND RESPONDENT

RULING

10th August & 25th September, 2023.

MWANGA, J.

The Application is for an extension of time for the Applicant to file.
notice of appeal from Decision and orders of the high court in Civil Appeal

No. 191 of 2004. It was filed under Section 11 (1) of the Appellate Jurisdiction Act [Cap.141R.E2019] and Sections 14(1) and 21(2) of the Law of Limitation Act, Cap.89 [R.E2002].

This matter emanates from Civil Case No. 318 of 1998 at Kisumu RM Court, later followed Civil Appeal No. 191 of 2004, which was decided on 28th February 2007 by Hon Mihayo, J. In that Appeal, the 1st Respondent herein won the case. However, the applicant alleges that in the course of making that decision, the learned Judge misinterpreted and misapplied the Town and County Planning (Nairobi Land Distribution Order) of 1988 G.N No. 374 of 24 of November 1989, which was an instrumental law at the particular time for resolving the dispute. Another contention is that the learned Judge wrongly distinguished the existing decision of the Court of Appeal in the case of **Fatuma Awadhi Said El Hindi Vs Salima Ali** (1997) TLR 156, which was directly binding on him, as it can be seen on page 5 of the Judgement. Furthermore, the learned judge, during composing judgment, suo moto, held that the applicant herein obtained the certificate of title by fraud.

The aggrieved applicant decided to pursue the matter to the court of appeal. However, every time, the case was struck out on technical grounds.

The last time, on 26 October 2021, when the appeal was set for hearing, the court of appeal raised the issue suo moto that the 2nd respondent was not included in the appeal; hence, the appeal was struck out. The applicant then applied for an extension of time through the miscellaneous application 589 of 2021, where it was struck out on 10 February 2023. The applicant was supplied with the court's ruling on 16 February 2023. lastly, he filed this application on 21st February 2023.

When the matter was called for hearing on 17th July 2023, Yunis Kabamanya, the learned Advocate, represented the applicant while the Respondents were absent. Subsequently, this application was argued by way of written submission.

On his part, the applicant, through his learned advocate, submitted that the impugned judgment is tainted with illegality since the Honorable Judge denied him the right to be heard when he raised ***suo motto*** the fact that the Applicant's certificate of title was obtained by fraud. According to him, the learned judge never availed the applicant's right to express himself and concluded without inviting parties to address him. To support his argument, he cited the cases of **Shule ya Sekondari Mwilavya vs. Kaemba Katumbo**, Civil Appeal No.323 of 2021 (Unreported), as well as

the case of **MIC Tanzania Limited vs. Mayunga Saduka and Others**, Civil Appeal No.145 of 2020 (unreported) where the court provided that the law and the court practice prohibits judges or magistrate while composing judgments and eventually to find new issues, to make sure that they invite the parties to address on the issue. Further, the learned judge misinterpreted and misapplied the Town and Country Planning (Dar es Salaam Land Distribution Order) of 1988 G.N No. 374 of 24 November 1989. He also wrongly distinguished the existing decision of the Court of Appeal in the case **Fatuma Awadhi Said El Hindi Vs Salima Ali** (1997) TLR 156, which was directly binding on him, as can be seen on page 5 of the Judgement.

On the other hand, the 1st respondent said the law requires the applicant in an application for an extension of time to show the reasons for the delay, length of the delay, the degree of the prejudice to the respondent, and to some incidences, the chances of success and an account for each day of the delay.

To him, the applicant has failed to account for the delay and, on his part, stressed that the reason for the delay is that the matter has been dragged a long way since 2007. However, the applicant has been struggling

to achieve his right to appeal through the court process as a reaction against the illegalities above.

For further emphasis, and on account of delay, the applicant challenged the 1st Appellate Court decision by filing a notice of Appeal in time and filing the appeal in time. Nevertheless, it was discovered that there were no sufficient court documents for the other parties to the act, which led the matter to be struck out. According to the applicant, he struggled towards his right through various applications, although both were faulted on technicalities. It was his submission that the matter took a long time to complete, but the applicant has been in court pursuing his rights all the time. Therefore, he never wasted time. On that basis, he cited the case of **Benjamini Brighton Gembe vs Path Tanzania** Misc. Application No.427 of 2019.

After going through the counsel's depositions and submissions, my duty in this application is to determine whether the applicant has demonstrated an excellent cause to warrant the exercise of the Court's discretion for an extension of time.

In several cases, the Court has developed some factors to be considered as constituting good cause, namely, timeliness of taking action,

the length of the delay, illegality, and delay in being supplied with the necessary documents. See cases of **Moses Muchunguzi vs. Tanzania Cigarette Co. Ltd**, Civil Reference No. 3 of 2018, and **Tanga Cement Company Limited v. Jumanne D. Massanga and Another**, Civil Application No. 6 of 2001 (All unreported), to mention just a few.

Nevertheless, the reason for the delay is a question of facts that differs depending on the circumstances of each case; it is settled that a claim of the illegality of an impugned decision constituted a good cause for an extension of time. In **VIP Engineering and Marketing Ltd and Two Others Vs. Citibank Tanzania Ltd** - Consolidated Civil Reference No. 6, 7 and 8 of 2006 (unreported), the Court of Appeal observed:

"It is, therefore, settled law that a claim of the illegality of the challenged decision constitutes sufficient reason for the extension of time under rule 8 regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay. (emphasis is mine)."

It is an established rule that for illegality to qualify as a ground for extension of time, the point of law must be apparent on the face of the record as opposed to the one that can only be discovered by evidence

adduced and exhibits thereto. This position was provided for by the Court of Appeal in the case of **Lyamuya Construction Company Limited Vs Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 02 of 2010, Court of Appeal of Tanzania (unreported) that: -

" Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot, in my view, be said that in Vallambya'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 an extension of time if he applies for one. The court there emphasized that such a point of law must be of sufficient importance and, I would add that it must also be apparent on the face of the record, such as the question of jurisdiction, not one that would be discovered by a long drawn argument or process."

The illegality the applicant's advocate pointed out in the case is evident in the face of the High Court Decision in Civil Appeal No. 191 of 2004. As rightly contended by the counsel for the applicant, on page 7 of the

judgment, the learned Judge concluded that the title deed was obtained by fraudulent means and, hence, irregular.

Throughout the chamber summons, affidavit, and submission of the applicant, I believe it is an appropriate application that deserves an extension of time. The applicant cited the cases of **Twazihirwa Abraham Mgema vs James Christian**, Civil Appeal No. 2290 of 2018 (Unreported), **Bilali Ally Kinguti vs Ahsadi Lulela Said, and 4 others**, Civil Appeal No. 500 of 2021 (Unreported), where it was stated that the allegations of fraud need strict proof.

In that regard, it is my view that it was prudent that if the trial court found that the applicant had no better title and the same was procured by fraudulent means, he should have invited parties to address the court on that matter before reaching such conclusions.

I stand guided by the authority in the case of **Lyamuya Construction Co. Ltd vs Board of Registered of Young Women's Christian Association of Tanzania**, Civil Application No.2 of 2011 [2011] TZCA 4 it was held that

"As a matter of general principle, it is the discretion of the court to grant an extension of time, but that discretion is judicial and so it must be exercised of that discretion is judicial, and so it must be exercised according to the rules of reason and justice and not according to private opinion or arbitrarily."

The court went further to prove guidelines that may be followed in the course of determination of an application for an extension of time, these are:

- (a) The applicant must account for all periods of delay.
- (b) The delay should not be inordinate
- (c) The Applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take
- (d) If the court feels that there are other sufficient reasons, such as the existence of **a point of law of importance, such as the illegality of the decision** sought to be challenged.

Apart from that, it is observed that this matter took a long since 2007 to date, but it is justified by the applicant in annexure **CB-1** to **CB-8**, which shows how the applicant used all of his time in the court struggling to pursue

his right through the court process. This can be seen in chronological events from when the decision was delivered to the current application.

For instance, the impugned decision sought to be challenged was delivered on 28th February 2007. The applicant filed an appeal to the Court of Appeal in Civil Appeal No. 191 of 2008, but it was struck out. He was given an extension for leave and filing notice and filled out Appeal No. 16 of 2013. It was struck out again. He delayed and granted an extension of time to file an appeal which was granted. Then, he filed a new Appeal No. 116 of 2021. On 26 October 2021, when the appeal was set for hearing, the court of appeal raised the issue suo moto that the 2nd respondent was not part of the appeal; hence, the appeal was struck out.

It followed that the applicant applied for an extension of time through the Miscellaneous Application No. 589 of 2021, but it was struck out on 10 February 2023. He was supplied with the court's ruling on 16 February 2023; consequently, he filed this application on 21st February 2023, just five days after receiving a copy.

In my view, the applicant took such a long and tedious journey without sleeping over his rights; it suffices to say. Apart from the illegalities pointed

out, he has sufficiently expounded the reason for the technical delay to attract a grant of extension of time.

The Court took a similar stance in **Fortunatus Masha vs. William Shija and Another** [9997] T.L.R. 154 and **Bharya Engineering & Contracting Co. Ltd v. Hamoud Ahmed Nassor**, Civil Application No. 342 of 2017 (unreported). According to the court,

*"In Fortunatus Masha, the court held that... "A distinction had to be drawn between cases involving real or actual delays and those such as the present one, **which only involved technical delays in the sense that the original appeal was lodged in time but had been found to be incompetent for one or another reason and a fresh appeal had to be instituted. In the present case the applicant had acted immediately** after the pronouncement of the ruling of the court striking out the first appeal. **In these circumstances, an extension of time ought to be granted. (emphasis is mine).**"*

It is observed that from what has transpired in this application, the applicant has met the requirements stated in the authorities cited above to attract grant of extension of time.

In the upshot, I am convinced this application is a fit, and the applicant deserves an extension of time. Henceforth, the applicant is granted an extension of time to file a notice of Appeal against the decision and orders of this court by Mihayo, J. made on the 28th February 2007 and application for leave to appeal to the court of appeal as prayed for. The Application shall be filed within 21 days from the date of this ruling.

It is so ordered,



H. R. Mwanga

Judge

25/09/2023

COURT: Ruling delivered in Chambers this 25th day of September 2023, in the presence of the applicant, Advocate Yunisi Kabamanya for the Applicant, and the Respondent in person.



H. R. Mwanga

Judge

25/09/2023

