

**IN THE HIGH COURT OF TANZANIA
(IN THE SUBREGISTRY OF MWANZA)**

AT MWANZA

MISC.LAND APPLICATION NO. 90 OF 2022

TAI FIVE HOTEL LIMITED1ST APPLICANT

WILSON TARIMO.....2ND APPLICANT

VERSUS

CRDB BANK.....1ST RESPONDENT

BAAYA KUSANJA MALAGI.....2ND RESPONDENT

RULING

Date of Last Order: 20/02/2023

Date of Ruling: 21/02/2023

Kamana. J:

The Applicants Tai Five Hotel Limited and Wilson Tarimo knocked the doors of this Court seeking extension of time to file a memorandum of review with regard to the decision of this Court in Land Case No. 46 of 2017 in which the Respondents CRDB Bank and Baya Kusanja Malagi triumphed. The application is built on the chamber summons made under section 14(1) of the Law of Limitation Act, Cap.89 [RE.2019]. The same is supported by affidavit deposed by Mr. Remigius Silas Mainde, an Advocate. On the other hand, there were counter affidavits sworn by Mr. Silwani Galati Mwantembe and Mr. Emmanuel Anthony Muyengi, learned Counsel for the first and second Respondents.

When the application was called on for hearing, the Applicants were represented by Mr. Joseph Madukwa, learned Counsel. The first Respondent had the services of Mr. Mwantembe whilst the second Respondent was advocated by Mr. Muyengi. The application was argued orally.

Mr. Madukwa, learned Counsel was the first to take the floor. In his brief submission, the learned Counsel contended that the decree issued by this Court in Land Case No. 46 of 2017 does not reflect the reliefs granted by the Court in its judgment. In substantiating his argument, the learned Counsel submitted that the Court in its judgment ordered that the Applicants are at the liberty to take their belongings which were in the disputed land.

However, to their dismay, the Decree that was issued in respect of the said judgment did not reflect the said order. In view of that, the learned Counsel was of the opinion that the irregularity amounts to contravention of Order XX Rule 6(1) of the Civil Procedure Code, Cap.33 [RE.2019] which stipulates that a decree must be in agreement with the judgment.

Responding, Mr. Mwantembe, learned Counsel for the first Respondent prefaced by contending that extension of time is not automatic. He submitted that there are conditions which courts ought to

consider before granting applications for extension of time. He argued that for extension of time to be granted, an applicant must state the reasons for the delay. The learned Counsel contended that the affidavit filed by the Applicants states no reason as to why they failed to file memorandum of review since 28th May, 2020 when the impugned decree was delivered.

Mr. Mwantembe argued further that an applicant for extension of time is bound to account for each day of delay. He stressed that failure to account for each day of delay means that the applicant has no sufficient reasons for the delay. In this regard, the learned Counsel referred the decision of the Court of Appeal in the case of **Abdu Issa Bano v. Mauro Daolio**, Civil Application No. 563/02 of 2017.

The learned Counsel contended that for an application for extension of time to be granted, the lengthy of delay should be considered by the court. In this regard, it was his argument that for the Court to grant an application for extension of time, the delay in question should not be inordinate. The learned Counsel contended that the delay of almost three years is inordinate taking into consideration that the Applicants did not furnish any reason for such delay.

With regard to irregularity as raised by the Applicants, Mr. Mwantembe was of the view that the same does not mean illegality as

the learned Counsel for the Applicants contended. He further averred that for illegality to be considered as a ground for extension of time, the same must be apparent on the face of the record. In view of that, the learned Counsel was of the position that the irregularity claimed by the Applicants does not meet the standard set by courts for the same to be considered as sufficient ground for extension of time. To bolster his arguments, the learned Counsel referred this Court to the decision of the Court of Appeal in the case of **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. 10 of 2015.

Mr. Muyenji, learned Counsel for the second Respondent was of the view that the application at hand was misplaced. He contended that the application does not state the reasons for the delay. That being the case, the learned Counsel was of the opinion that the application contravenes the established principle which requires the affidavit to state the reasons for the delay. In buttressing his argument, the learned Counsel cited the decision of the Court of appeal in the case of **Denis T, Mkasa v. Farida Hamza (Administratrix of the Estate of the late Hamza Adam and Another)**, Civil Application No. 407/08 of 2020.

With regard to the difference between the judgment and the decree, Mr. Muyengi was of the position that there is no such difference.

The learned Counsel equated the application as an abuse of court processes.

When he was invited to rejoin, Mr. Madukwa insisted that there is no difference between irregularity and illegality. The learned Counsel contended that what he termed as irregularity is on the face of the record. In that case, he beseeched this Court to consider the irregularity as offending Order XX Rule 6(1) of the Civil Procedure Code, Cap.33.

Having gone through the pleadings and submission for and against the application, the issue for my determination is whether the application has merits. In determining this application, I am going to be guided by 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. In that case, the Court of Appeal laid down essential factors to be judiciously considered in the exercise of the discretion vested in courts of extending time beyond the limits stated in legislation. The Court stated:

'As a matter of general principle, it is in the discretion of the Court to grant extension of time. But 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. On the

authorities however, the following guidelines may be formulated:-

(a) The applicant must account for all the period 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 sufficient importance; such as the illegality of the decision sought to be challenged.'

On whether the Applicants have accounted for the whole period of delay, the affidavit in support of this application is silent. To be precise, none of the five paragraphs of the affidavit states why the Applicant failed to file a memorandum of review within the time. In that case, I agree with Mr. Mwantembe that the Applicants have failed to account for each day of delay. It has been held in numerous decisions that a delay of even a day must be accounted for. Otherwise, if the Courts condones delays without them being accounted for, there is no reason to have rules of limitation of actions relating to litigation. See:**Adrofu**

Fulgence Mfunya v.Juma Hereye and Two Others, Civil Application
No. 33 of 2021.

The impugned decree was issued on 17th July, 2020. In that case as per the Law of Limitation Act, the Applicants were supposed to file a memorandum of review within thirty days from that date. Since the present application was filed on 27th October, 2022 being 830 days from the date on which the Decree was issued, I do not hesitate to conclude that such delay is inordinate and cannot be condoned by this Court.

In the absence of reasons for the delay plus the lengthy of delay, it is clear in my mind that the Applicants were not diligent in handling their case. By applying for extension of time to file a memorandum of review of the decision which was delivered almost three years ago, the Applicants have successfully demonstrated how negligent they were.

While submitting in support of this Application, Mr. Madukwa, learned Counsel contended that the difference between the judgment and the decree is an irregularity which warrants extension of time to file a memorandum of review. He went further by stating that irregularity has the same meaning with illegality. That argument was sharply countered by Mr. Mwantembe, learned Counsel for the 1st Respondent who averred that the words have different meanings.

For the purpose of this Ruling, I will not task my mind in interpreting those two words. By way of an assumption that what is referred by Mr. Madukwa as irregularity is illegality, for illegality to be considered as a ground for extension of time, the same must be on the face of the record. It should not be something which requires legal arguments and reasoning to prove its existence. This position was accentuated by the Court of Appeal in the case of **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Christian Association of Tanzania** (Supra) where it was stated:

'Since every party intending to appeal in my view, be said that in VALAMBIA'S Case, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raised point 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 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.'

Fortified by the above decision, I am convinced that what is claimed to be an illegality is not as such. The same fails the test of illegality as it is not on the face of the record. For the same to be established, long arguments and reasoning are inevitable.

Assuming that there is illegality on the face of the record, still I would not use this esteemed Court to grant extension of time after almost three years since the lapse of time to a litigant who sat on his right to file a memorandum of review within the time. Litigants who are negligent in pursuing their rights and come to this Court lately should not be allowed to abuse court processes.

For the foregoing reasons, it is my holding that the application is devoid of merits. Consequently, I dismiss it with costs.

DATED at MWANZA this 21st day of February, 2023.



KS KAMANA

JUDGE