IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SHINYANGA SUB REGISTRY

AT SHINYANGA

MISC. CIVIL APPLICATION REFENCE NO. 20231222000028233

(Arising from Land Appeal No.43 of 2020 before this Honourable Court)

CHARLES FAUSTINE .....1st APPLICANT

NTUGWA SUGILO .....2ND APPLICANT

VERSUS

FAUSTINE MUNDIKAYA .....RESPONDENT

RULING

06th & 22nd March 2024

F.H. MAHIMBALI, J

This is an application for extension of time to file application for restoration of the dismissed Land Appeal No. 43 of 2020 which was dismissed by this Court (Matuma J) for want of prosecution on 25th March 2021. Application is brought under section 93 of the CPC, Cap 33 R.E 2019.

During the hearing of the application Mr. Frank Samwel learned advocate appeared for the applicants while the respondent appeared in person.

Arguing for the application Mr. Frank prayed before this Court for the adoption of the applicants' affidavit in support of application to form part of the submission.

He also proceeded that in essence, the said **Land Appeal No. 43 of 2020** was dismissed on 25th March 2021. For reasons beyond the control of the applicants, it was impossible for the applicants to restore the said appeal timely. This then led to the filing of Misc. Land Aapplication No.32 of 2022 for extension of time to restore the said appeal. Via the said application, the applicants were granted 14 days to file an application to restore the same. That after being granted the said time, Misc Land Application No. 57 of 2022 was filed to restore the said dismissed appeal. That prior to the hearing of the said application, the respondent approached the applicants in a view of settling the said case amicably out of court.

On 15th February 2023 when the matter came for hearing, the said application was struck out without costs. From then, there was no any settlement by the respondent but to the surprise, the applicants received court's summons from the DLHT wanting them to attend it on 20th October 2023. Before the said DLHT, they saw an application for execution. When they approached the respondent whether the

settlement deal was still there, it was realized that the respondent had no that interest. From 6th November 2023, the applicants approached the lawyer for necessary legal action where then this current application was filed on line before this court on **22nd December 2023**.

Mr. Frank also averred that the remedy of a struck out case is refiling it. As time to file the same had expired, then is the basis of this current application. Thus, this court is now invited to consider the merit of this application.

Further, Mr. Frank submitted that for such an application to be granted, the applicants are supposed to account for all the time lost as what he was doing. Apart from explaining all this, the said judgment has several illegalities: Firstly, the trial tribunal had no jurisdiction to determine the filed matter before it on the sense that, the Land Application No. 81 of 2014 before DLHT had breached regulation No. 3 (2) b of the Land Disputes Courts (District Land and Housing Tribunal Regulations of 2003) GN 174 of 2003. The said regulation demands that the said application ought to describe boundaries of the disputed property. He referred this Court to the case of Daniel **Dagala Kanuda v. Masaka Ibello and 4 Others,** Land Appeal No. 26 of 2015, HC Tabora at pages 5- 8. He also holds that the current case suffers the similar

problem that the suit land is not described as who are the neighbours of the said land and the physical features surrounding it. He thus prayed before this Court to consider the issue of illegality.

Mr. Frank also contended the second illegality is violation of regulation No. 5 and 19 (2) of the Land Disputes Courts (District Land and Housing Tribunal Regulations of 2003) GN 174 of 2003. This regulation wants the assessors' opinions to be first read over to parties before the said decision is read over. The proceedings of the trial tribunal are silent on that, whether the said opinions were read over as per law. He argued this Court that the omission of not reading the opinions of the assessors is a very serious omission. The CAT in their decision in the case of **William Vicent Maeda V. Happines Patrick**, Civil Appeal No. 506 of 2021, CAT at Shinyanga, at page 7 (para 2-3) is very clear in making such an insistence, and as the result, it quashed all the proceedings for being nullity.

He further alluded that, during the hearing of this case at the trial tribunal, the applicants were denied the right to cross examine the witnesses of the respondent. This is a serious violation of the law as provided under **section 147 (1) of the TEA.** He finally pressed for the application to be allowed.

On the side of the respondent, he opposed the application by the applicants and prayed first, his affidavit in opposition to the application be adopted by the court to form part of his submission. He also averred that, he was appointed as the administrator of the estate of the late Theresia Gigwa Shigela on 21st June 2013 at Isungang'holo primary court. He contended that the learned counsel Mr. Frank Samuel, had even assisted him at the trial tribunal over his case. So, he knows it well, and assisted him on drafting the said pleading.

He thus opposed all the submissions done as the same just try to play legal tactics over his legal rights. There was no any discussion by the respondent with the applicants over any settlement. There has not been any proof of such an assertion. With paras 7-10 of the applicants' affidavit, the same are denied as there is no any proof of such an assertion. Para 11 of the applicants' affidavit, is equally denied. There is no any proof of such an assertion. There is nothing substantial supporting the said averment to warrant court's respect. Similarly, on para 12 of the applicants' affidavit, what is stated there is a mere submission but with no any substance of truth in it. In his view it is just a wastage of time. He thus prayed for the application to be dismissed with costs.

In rejoinder, Mr. Frank submitted that, the origin of this case is Land Application No. 81 of 2013 which is sometimes also refereed as Land Application No. 81 of 2014. So, whenever there is such a mixture of year, it should be meant the same for purposes of this case as there is that confusion of record by the parties themselves. He also added that the submission, that he once assisted the respondent preparing the original case is not true as the said pleadings seem to be prepared and signed by himself. There is nowhere that he featured out as drawer or signatory of it.

The argument that he is an administrator of the estate of the late Theresia Gigwa Shigela, appointed on 21st June 2013 at Isumang'holo Primary Court, was a new fact to him. There is nowhere he pleaded so, or he pleaded himself so. Thus, he should not waste time on that fact.

Mr. Frank also contended that the respondent's affidavit is in opposition of the application and what he has submitted today, they are two different things. So, there is a danger of according the necessary weight of it.

Lastly, Mr. Frank holds that there was no need of such much time of mobilizing the necessary documents for the preparation of this application, the case had passed through three learned advocates. How possible could it be for a person to reconcile all those documents in a spur of a day or two days. Furthermore, as there is nothing counter submission on illegalities, he has nothing to rejoin as they seem conceded. He thus prayed for the application to be allowed.

I have thoroughly digested the arguments by both sides, scanned the trial tribunal's records, chamber summons, affidavit and counter affidavit. The vital issue for consideration is whether this application has been brought with sufficient cause.

As correctly argued by Mr. Frank that this application has been brought based on two major grounds; that there was pending negotiations between the parties out of court with the aim to settle the matter amicably which were not successful, the impugned exparte judgement of the DLHT is tainted with illegalities which need redress of this Court.

Mr. Frank has detailed that when the applicant had granted leave to file application for restoration via order in Misc. Application No.32 of 2022, he then filed Misc. Land application No.57 of 2022, but before the matter

has taken the board, the respondent approached for negotiation to settlement the matter out of the court which was accepted by the applicant. Unfortunately, the matter was not settled, when the application came for hearing the applicant was absent and thus the matter was dismissed for want of prosecution. He argues that, the delay was due to promised negotiation by the respondent who did not adhere to. The assertion which was opposed by the respondent.

My observation to the reasons advanced by Mr. Frank on the basis of negotiations out of the court, I hold that it is the trite law that pre-court action negotiations have never been a ground for stopping the running of time. In the Court of Appeal's decision in **Consolidated Holding Corporation v. Rajani Industries Ltd &Another,** Civil Appeal No, 2 of 2003 (unreported) is extra relevant in this current matter for the proposition that negotiations do not check the time from running. The Court sought inspiration from a book by J.K Rustomji on the Law of Limitation, 5th edition to the effect that the statute of limitation is not defeated or its operation retarded by negotiations for a settlement pending between the parties. The Court of Appeal drew a similar inspiration from a decision of the High Court at Dar es salaam in **Makamba Kigome &Another v. Ubungo Farm Implements Limited**

& PRSC, Civil Case No. 109 of 2005(unreported) whereby Kalegeya, J (as he then was) made the following pertinent statement:

> *"Negotiations or communications between parties since 1998 did not impact on limitation of time. An intending litigant, however honest and genuine/ who allows himself to be lured into futile negotiations by a shrewd wrong doer, plunging him beyond the period provided by law within which to mount an action for the actionable wrong/ does so at his own risk and cannot front the situation as defence when it comes to limitation of time "*(at page 16)

In another decision by the Court of Appeal in the case of **Barclays Bank Tanzania Limited v. Phylisiah Hussein Mchemi,** Civil Appeal No. 19 of 2016 (unreported), cited with approval a statement from another unreported decision of the High Court, Dar es salaam Registry in **John Cornel v. A. Grevo (T) Limited;** Civil Case No. 70 of 1998 thus:

> *"However unfortunate it may be for the plaintiff, the law of limitation is on evasions, knows no sympathy or equity. It is a merciless sword that cuts across and deep into all those who get caught in its web."*

It follows thus that, having the applicants granted a leave to file his application for restoration of the Land Appeal No.43 of 2020 by this court and failed to attend by the reasons that he was paving the way for pending negotiation with the respondent, does not rebut the principle of ***volent non fit injuria***. The dismissal order in Misc. Land Application No.57 of 2022 by this court was caused by the applicants themselves. Therefore, filing similar application for restoration of the suit on the ground of pending negotiation out of the court is unfounded and cannot be allowed.

I associate myself to that position that negotiations or communications between parties do not impact on limitation of time. An intending litigant, however honest and genuine, who allows himself to be lured into futile negotiations by a shrewd wrong doer, plunging him beyond the period provided by law within which to mount an action for the actionable wrong, does so at his own risk and cannot front the situation as defence when it comes to limitation of time.

The other ground for extension of time as correctly argued by Mr. Frank is illegalities in the impugned judgement which needs attention of this Court. Mr. Frank submitted that the decision of the tribunal has in violation of the law to wit; the said application does not provide

boundaries of the suit land. The omission of which contravene regulation No. 3 (2) (b) of the Land Disputes Courts (District Land and Housing Tribunal Regulations of 2003 GN 174 of 2003 which demands that the said application ought to describe boundaries of the disputed property. He also referred the case of Daniel **Dagala Kanuda v. Masaka Ibello and 4 Others,** Land Appeal No. 26 of 2015, HC Tabora at pages 5- 8 to the effect.

I sincerely agree with Mr. Frank that illegality is a solemnly ground for extension of time. However, as correctly argued by Mr. Frank the issue of boundaries is a requirement of law which is under regulation No. 3 (2) b of the Land Disputes Courts (District Land and Housing Tribunal Regulations of 2003 GN 174 of 2003, also Order 7 Rule 3 of CPC and the principle established in the case of **Dagala Kanuda v. Masaka Ibello and 4 Others,** Land Appeal No. 26 of 2015, HC Tabora. See also cases of **Fereji Said Fereji vs. Jaluma General Supplies Ltd and Another, Land Case No.86 2022, TZHC, Ramadhani Omary Itumbe and Another 58 Others vs Aneth Paulina and 8 Others, HCT, Land Case No.99 of 2023 (unreported).**

However, the argument by Mr. Frank is misplaced in the instant application, because for illegality to sound as ground for extension is only

considered when the impugned decision contains that illegality and not the application/plaint as argued by Mr. Frank. Since the pointed illegality by Mr. Frank is not from the impugned decision rather it is on the application filed before DLHT then the argument is misplaced. There are several decisions of the Court, which considered this issue, where the ground of illegality of the impugned decision is raised.

In **VIP Engineering and Marketing Limited and Two Others VS. Citibank Tanzania Limited,** Consolidated Civil Reference No.6, 7 and 8 of 2006 (unreported) it was held:

> *"It is settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under Rule 8 (now Rule 10) of the Court of Appeal Rules regardless of whether or not a reasonable explanation has been given by the applicant under the Rules to account for the delay'.*

The issue was also considered in the case of **Tanesco vs Mfungo Leornard Majura** and 15 Others, Civil Application No 94 of 2016, (Unreported), where it was stated:

> *"Not Withstanding the fact that, the applicant in the instant application has failed to sufficiently account for the delay in*

lodging the application, the fact that, there is a complaint of illegality in the decision intended to be impugned... suffices to move the Court to grant extension of time so that, the alleged illegality can be addressed by the Court'.

It is, however, significant to note that the issue of consideration of illegality when determining whether or not to extend time is well settled and it should be borne in mind that, in those cases extension of time was granted upon being satisfied that there was illegality on the impugned decision which needs attention of the court. The illegalities were explained. For instance, in **Principal** Secretary, **Ministry of Defence and National Service v. Devram Valambhia** [1999] TLR 182, the illegality alleged related to the applicant being denied an opportunity to be heard contrary to the rules of natural justice. I also subscribe to the case of **Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young Women's Christian Association of Tanzania**(supra) when the Court of Appeal observed; -

"*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* ***VALAMBIA'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 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***"

Applying the above mentioned statement of principle to the application under consideration, I find the averments by Mr. Frank unfounded since the complaint is on application filed before the tribunal and not on the impugned judgement for this Court to rectify it.

Meanwhile, Mr. Frank has also pointed another illegality of the proceedings of the tribunal did not contain assessors' opinion contrary to the requirement under regulation No. 5 and 19 (2) of the Land Disputes Courts (District Land and Housing Tribunal Regulations of 2003) GN 174 of 2003. This regulation wants the assessors' opinions to be first read over to parties before the said decision is read over. The proceedings of the trial tribunal are silent on that, whether the said opinions were read over as per law. He argued, that is a very serious omission.

I correctly subscribe the argument of Mr. Frank, that assessors' opinion need to be reflected in the tribunal proceedings, as it was held in the case cited by Mr. Frank which is the case of **William**

Vicent Maeda V. Happines Patrick, Civil Appeal No. 506 of 2021, CAT at Shinyanga, at page 7 (para 2-3) and also the case of **Sikuzani Said Magambo and Another vs Mohamed Roble**, Civil Appeal No.197 of 2018 (CAT- Dodoma) at page 9,10.

However, each case must be considered on its own facts. Whereas I agree with the position of aired in the referred cases, I wonder if such an illegality ought to be pointed now after all that time had passed and after having failed to prosecute both the appeal itself on other grounds and the subsequent applications. That is lack of seriousness in conduct of court business. In my considered view, such an illegality ground is one that is **discovered by a long drawn argument or process**. It is merely a tossing exercise and in any way, not one that is to be entertained by this Court.

Generally, the filing of the current application is squarely an abuse of court process as the court of law is now put into a gambling game of justice something which is dangerous in the administration of justice. To allow such an abuse, is to expose this Court to a legal ridicule. I will not allow it ever.

So long as this Court had ever granted the leave to the applicants to file his application for restoration of the Land Appeal No.43 of 2020, yet he failed to attend and thus the matter was dismissed for

want of prosecution, I do not see the bright door for the applicants to come with angle of filing of this application for extension.

Having carefully considered the rival submissions in line with the affidavit and its annexures, I find that, the main issue which I have to address is whether sufficient cause for extension of time to file application for restoration of the Land Appeal No.43 of 2020 has been demonstrated. In this case, the applicant has relied on excuse of pending negotiation out of the court which impeded him to attend hearing in Misc. Land Application No 57 of 2022 before this Court and illegality as a ground for an extension of time.

Admittedly, illegality or otherwise in the impugned decision can by itself constitute a sufficient ground for an extension of time. This is in accordance with the principle in the **Principal Secretary Ministry of Defence and National Service vs. Devram Valambia**, (1992) TLR 185. However, for illegality to be the basis of the grant, it is now settled, it must be apparent on the face of the record and of significant importance to deserve the attention of the appellate court and not one that would be discovered by a long drawn argument or process. [See for instance, **Lyamuya Construction Company Ltd vs. Board of the Registered Trustees of Young Women's Christian Association of Tanzania,** Civil Application No. 2 of 2010 (unreported)].

From the factual background of this application as has been exposed above, I am of the firm opinion that, this application is devoid of any merit and it is indeed an abuse of the Court process. There must be an end to every litigation. The current case having been dully determined by DLHT the aggrieved party had immediate recourse to seek his redress immediately as he did by filing Land appeal No.43 of 2020 before this Court and wait for its determination.

The application at hand clearly scanning is nothing, but an entertainment to a continuation of a series of proceedings at the instance of the applicants. What else, should this court do? It is on that account that, I find this application devoid of any merit and an abuse of the court process.

It is accordingly dismissed with costs.

DATED at Shinyanga this 22nd day of March, 2024.

THE HIGH COURT OF TANZANIA

F.H. Mahimbali

Judge