IN THE HIGH COURT OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

MISC. LAND APPLICATION NO. 02 OF 2023

(Arising from the District Land and Housing Tribunal for Katavi at Mpanda in Application No. 6 of 2020)

HAMIS DOGAN.....APPLICANT

VERSUS

1. PIUS AUDY SACKY

2. SELIUS LEONARY MTEPA .....RESPONDENTS

3. KADUMI SHIJA

RULING

13th December, 2023 & 11th January, 2024

MRISHA, J.

Before the District Land and Housing Tribunal for Katavi at Mpanda henceforth the trial tribunal, the respondents namely **Pius Audy Sacky**, **Selius Leonady Mtepa** and **Kadumi Shija** herein to be referred to as the first, second and third respondents respectively, successfully sued the appellant

Hamis Dogan for allegedly invading into their eighteen (18) acres piece of land which is located at Itenka A within Tanganyika District in Katavi Region.

The said land dispute was referred to the trial tribunal through Land Application No. 6 of 2020 and upon hearing evidence from both parties in relation to the said dispute, the trial tribunal found that the applicant who was the respondent in that application, had invaded into the disputed land. As a result, it declared the respondents as the lawful owners of the said land.

The judgment of the trial tribunal in respect of the said land dispute, was delivered on the 24.08.2021 and a right of appeal was pronounced, as it appears at page 7 of the typed judgment of the trial tribunal. Since then, the applicant did nothing to show his grievances regarding the said lower court's decision, up until on 11.03.2023 when he filed with the court the chamber summons supported by an affidavit duly sworn by himself.

Through his chamber summons which is made under section 41 of the Land Disputes Court Act (the LDCA) as amended by section 41(2) of Written Laws (Miscellaneous Amendment) (No.2) Act, 2016, the applicant has moved the court to grant the following orders: -

a) **That may the Hon. Court extend the time for filing an appeal**

b) **Costs**

c) Any other relief (sic) fit.

Though it appears that the above prayers particularly the first one, do not specify which decision the applicant is intending to challenge, I am of the considered opinion that it is the judgment and decree of the trial tribunal delivered on 24.08.2018 which he is intending to proceed against should his application for extension of time granted by the Court.

It is important to state at this moment that upon filing of the said chamber summons and affidavit, all respondents were duly served with copies of such summons and affidavit. However, only the second and third respondents responded by filing their counter affidavits and they also entered appearance before the court through their counsel.

The efforts to have the first respondent be served with the chamber summons and affidavit physically, proved failure. Even the attempts to serve him by a substituted served through a well circulated newspaper to wit; **Jamhuri Newspaper** as it appears at page 19 of the same, the third respondent did not make appearance on the 15th day of August, 2023 which was scheduled for hearing by the court following the prayer of the counsel for the applicant and which was not disputed by the one for the first and the second respondent. Hence, the application was heard ex parte under Order XXXIX,

Rule 17(2) of the Civil Procedure Act, Cap 33 R.E. 2019 against the first respondent.

When the application was called on for hearing, the applicant appeared in person and was represented by Mr. Elias Kifunda, learned advocate, the respondents did not appear, but luckily Ms. Sekela Amulike, who is also the learned advocate, appeared for the second and third respondents, whereas the first respondent who had defaulted summons, neither appeared nor had he enjoyed any legal service.

Mr. Kifunda took the floor by submitting before the court that the present is an application for extension of time within which to appeal against the decision of the trial tribunal and it is made under section 41 of the LDCA as amended by section 41(2) of the Written Laws (Miscellaneous Amendments) (No. 2) Act of 2016.

He also submitted that this court has a discretion to enlarge time to file an appeal, but such discretion has to be exercised judiciously where there is reasonable ground to extend time.

To back up the above proposition, the applicant's counsel made reference to the case of **Brazafric Enterprises Ltd vs Kaderes Peasants Development (PLC)**, Civil Application No. 421/08 of 2021 CAT (unreported) where it was held that illegality is one of the grounds of extension of time.

In connection to the instant application, Mr. Kifunda submitted that there is illegality in the decision of the trial tribunal because the same tribunal dealt with the same land dispute and gave right to the applicant as it appears in annexures "C", "D" and "E" attached with the applicant's affidavit, but again the same trial tribunal dealt with the same land dispute and gave right to the respondents through Application No. 6 of 2020 which according to him, is not correct.

He added that since the trial tribunal had already determined the same land dispute, it became *functus officio;* hence could not be justified to dealt with the same land dispute vide Application No. 6 of 2020. He referred the court to the cases of **Maria Chrysostom Rwekamwa vs Palcid Richard Rwekamwa and Lucas Richard Kami**, Civil Application No. 549 of 2019 CAT (unreported).

That apart, the applicant's counsel submitted that after delivering of the impugned judgment of the trial tribunal, the applicant did not just stay at his home, rather he made some efforts until he reached to the court whereupon the Deputy Registrar directed him to follow the procedure in order to have his application for extension of time within which to lodge his intended appeal be granted. The applicant's counsel referred the court to pages 10, 11 and 12 of the applicant's affidavit which according to him, justify his argumentation.

From the above submissions, the counsel for the applicant humbly prayed to the court to consider all his submissions and grant his client extension of time. His prayer was however, disputed by Ms. Sekela Amulike whose submissions showed that the applicant failed to assign some good cause to warrant him extension of time. Her submission can be summarised as follows.

She submitted that by virtue of section 41(2) of the LDCA the court has a discretion to extend time before or after expiration of forty-five (45) days if there is a sufficient reason/good cause, but the said statute has not defined what the term good cause mean.

The counsel submitted further that however, the case law has developed the principles in which a good cause can be ascertained. She made reference to the case of **Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 where at page 6 of its Ruling the Court of Appeal formulated four guidelines for the court to consider before granting extension of time.

Applying the first guideline to the present application, Ms. Sekela Amulike submitted that the applicant failed to account for each day of his delay because the decision which he intends to challenge was pronounced on 24.08.2021 and the right of appeal was explained, but the present application

was filed with the court on 11.03.2023 which is about two (2) years delay and equivalent to 446 days which shows clearly that the applicant failed to account for each day of such delay.

In regard to the second guideline which is to the effect that the delay should not be inordinate, the applicant's counsel submitted that the applicant delayed to challenge the decision of the trial tribunal for two years while he had knowledge of the said decision, hence he does deserve to be granted extension of time.

As for the third guideline which requires the applicant to show diligence and not apathy, negligence or sloppiness in the prosecution of the action he intends to take, it was the submission of the counsel for the last two respondents that the applicant was negligent for his failure to file his appeal in time, or just immediately after expiration of the statutory time of forty-five (45) days.

She added that the applicant was thus negligent because he was aware that the impugned judgment was delivered on 24.08.2021, yet he did not take any action until on 11.01.2022 when he decided to report his matter to Regional Commissioner instead of going to the court and follow the legal procedure.

Turning to the fourth guideline, Ms. Sekela Amulike submitted that the allegedly illegality pointed out by her learned brother is not apparent on the

face of record, as far as the impugned judgement of the trial tribunal is concerned.

She clarified that the issue of *functus officio* raised by the applicant's counsel does not apply in the circumstances of the case at hand because the documents referred to by the applicant's counsel as annexures "C", "D" and "E", do not relate to the impugned decision of the trial tribunal; also, the said documents refer to 30 acres while the impugned decision is all about 18 acres which all show that the trial tribunal was not *functus officio* when it disposed of Application No. 6 of 2020.

The counsel for the second and third respondents further submitted that the case of **Maria Chrysostom** (supra) referred by the counsel for the applicant, is distinguishable to the circumstances of the instant application because the trial tribunal was not functus officio. She also had the similar reservation regarding the case of **Brazafric Enterprises Limited** (supra) stating that the same does not apply in the circumstances of the present case because there is no illegality on the face of record.

In the light of the foregoing reasons and submissions, Ms. Sekela Amulike prayed to this court to dismiss the applicant's application for failure of the applicant to show good cause for granting of extension of time within which to appeal against the decision of the trial tribunal out of time.

In rejoinder, Mr. Kifunda submitted that the applicant is a layman as he stood unrepresented before the trial tribunal. He also submitted that his client did not just seat at home after the trial tribunal had delivered its decision on 24.08.2021 because he appeared before the court as shown at Annexure "I" of the applicant's affidavit.

Regarding the issue of illegality, the applicant's counsel submitted that if the court makes a decision when it is *functus officio,* that decision becomes illegal. He went on submitting that if the court will make reference to Annexures "C", "D" and "E" of the applicant's affidavit, it will not get trouble to realise that there is illegality.

He was emphatic that the disputed land is the same despite the difference of the size in terms of acres, be it thirty (30) or eighteen (18) acres. For those reasons, Mr. Kifunda reiterated his previous prayer to the court that the instant application be allowed.

First of all, I wish to say that I have thoroughly gone through the rival submissions of the learned advocates representing the parties herein, save for the first respondent whom it appears quite clear that he has forfeited his right to be heard by defaulting the court summons and deliberately absented himself despite all the efforts to make him participate at the hearing of the

appeal. I have also considered all the authorities referred to me by the said learned counsel.

Having done so, I observed that the centre of contention between the two parties herein, is on the reasons assigned by the applicant in order to persuade the court to grant him extension of time. The first reason is illegality and the second is the technical delay.

It is those two reasons which have made the counsel for both parties to part ways, as indicated above. So, the issue here is whether the applicant has established some good cause for him to be granted extension of time.

Basically, it is the requirement of the law that an aggrieved party who wants to appeal against the decision of the District Land and Housing Tribunal (the DLHT) has to lodge his appeal with the High Court within 45 days from the decision of the DLHT.This can be inferred from section 41 (2) of the LDCA which provides that:

> *"An appeal under subsection (1) may be lodged within forty five days after the date of the decision or order"*

There are however, situations where an aggrieved party may be allowed to appeal from the decision of the DLHT even after expiration of the above

prescribed statutory period of forty five days. That can be inferred from the proviso to subsection (2) of section 41 of the LDCA which declares that:

> *"Provided that, the High Court may, for the good cause, extend the time for filing an appeal either before or after the expiration of such period of forty five days."*

The above proviso entails that an aggrieved party can file his appeal with the High Court against the decision of the DLHT even after expiration of the statutory period of forty five days provided that he establishes some good cause for his delay.

This means it is not an automatic right for an aggrieved party who fails to lodge his appeal with the High Court within the prescribed statutory time of forty five days. The intended appellant is duty bound to assign some good cause for his delay, otherwise the court cannot grant him extension of time. This is why the Court of Appeal in **Lyamuya Construction Company Ltd**'s case (supra) developed guidelines for the courts to consider when dealing which applications for extension of time. They are:

> *"(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"

In my view, the requirement that the intended applicant who applies for extension of time must assign some good cause for extension of time, is for purpose, otherwise there will be no need to have provisions of the law which sets a time frame to do a certain act, as some litigants will be abusing the court process by lodging their appeals out of time, just the way they like, thereby causing delay of justice.

The present application falls under the category of cases in which an aggrieved party cannot be allowed to access the doors of the appellate court unless he or she has assigned some good cause for him or her to be granted extension of time.

As I have indicated above, although the applicant has come up with two reasons through which he applies for an extension of time, I am of the considered view that all those reasons must be tested along with the

guidelines stipulated in the case of **Lyamuya Construction Company Ltd** (supra).

In the first reason, the applicant's counsel has submitted that there is illegality on the face of the impugned judgment of the trial tribunal, but his counterparty has contended that there is no illegality on the face of record as far as the decision of the trial tribunal is concerned; hence that is not a good cause for extension of time.

Admittedly, the point of illegality once raised and established constitute a good and sufficient cause for extension of time; see **VIP Engineering and Marketing Limited & Three Others v. Citibank Tanzania Limited**, Consolidated Civil Reference Nos. 6, 7 and 8 of 2006 (unreported). The issue is whether there is an illegality in the decision of the trial tribunal.

According to the applicant's counsel illegality of the said decision which was handled down on 24.08.2021 is twofold; first, the same trial tribunal dealt with the same land dispute and gave right to the applicant, as it can be inferred at Annexures C, D and E of the applicant's affidavit which refers to the Misc. Application No. 12 of 2019, but later on it turned up and gave right over the same disputed land to the respondents.

Secondly, the counsel for the applicant has submitted that by determining the Application No. 6 of 2020 the said tribunal became functus officio because it

had already dealt with the same land dispute vide Misc. Application No. 2019. As I have pointed out before, those arguments were disputed by the counsel for the first and second respondents, and I am inclined to subscribe to the reasons given by that counsel.

It is crystal clear that there is a big difference between the land dispute in Application No. 6 of 2020 and that in Misc. Application No. 12 of 2019. Reading the two documents between lines, one cannot get trouble to realise that in Misc. Application No. 12 of 2019, the parties thereto were different to those in Application No. 6 of 2020.

This is because while in the former, the parties were **Hamis Dogan** (Applicant) and **Helman Joseph** (Respondent), those in the latter application were **Pius Audy Sacky**, **Selius Leonady Mtepa** and **Kadumi Shija**, the first, second and third applicants respectively, and Hamis Dogan who was the Respondent.

Also, in Misc. Application No. 12 of 2019 the disputed land was of 24 acres as can be reflected in Annexure "E" of the applicant's affidavit, but the one involved in Application No. 6 of 2020 was 18 acres. This indicates that the disputed land which was involved in the latter decision of the trial tribunal, is not the same to the one in Misc. Application No. 12 of 2019.

Again, if the above is not enough, I have also observed another distinguishing feature which is that whilst the Misc. Application No. 12 of 2019 was presided over by Hon. P.I. Chinyele, learned chairperson, the Application No. 6 of 2020 which is the subject of the present application, was presided over by Hon. G.K. Rugalema, learned chairman.

In the circumstances, it can neither be said that the trial tribunal was *functus officio* when it inquired and determined the land dispute vide Application No. 6 of 2020, nor can it be said that there is illegality on the face of the impugned decision of the trial tribunal.

According to the **Black's Law Dictionary**, 8th Edition, Thomson West (2004), at page 696 the phrase *Functus Officio* has been defined as:

> *"Having performed his or her office of an officer or official body without further authority or legal competence because duties and functions of the original commission have been fully exercised"*

Also, according to the **Dictionary of Law**, a Latin *functus officio* has been defined to mean:

> *"...no longer having power or jurisdiction because the power has been exercised."*

From all the above excerpts, *functus officio* entails that once an officer or a certain decision-making body has performed its legal duties, its powers its power ends there; it can no longer turn back to its previous decision and make another decision on the same matter it had already decided.

Reverting back to the present application, it is my considered opinion that the circumstances in the Misc. Application No. 12 of 2019 are quite different to those prevailed in Application No. 6 of 2020. Hence, it is my settled view that the counsel for the applicant misdirected himself when he argued that by determining Application No. 6 of 2020 the trial tribunal became *functus officio*. I therefore, disagree with him on that argument.

Thus, owing to the reasons which I have assigned herein above while dealing with the issue relating to the claim of illegality, it is my finding that the applicant has failed to establish that there is illegality on the face of record as the impugned decision of the trial tribunal is concerned.

The above deliberation takes me to the second and last reason in which the applicant's counsel has assigned in order to convince the court to grant his client extension of time. It is his submission that after the delivering of the judgment in Application No. 6 of 2020, the applicant did not just stay at home doing nothing; rather he made some efforts until he reached to the court and

finally filed the present application after being directed by the Hon. Deputy Registrar of the High Court.

In other words by arguing so, the counsel for the applicant tries to show that the applicant was diligent and he was neither apathy nor negligent or sloppiness in the prosecution of the action that he intends to take, as it is required of him under guideline three as stipulated in **Lyamuya**'s case (supra).

If that is established, then automatically the applicant's delay becomes a technical delay and therefore, excusable under the eyes of the law. Is that so? I am certainly of the settled view that the answer to that important question is No.

I say so because first, it's apparent that since the impugned judgment of the trial tribunal was delivered in 24.08.2021, the applicant did not take any legal action to challenge it, be it by lodging an appeal or filing an Application for Revision with the High Court.

His affidavit only depicts that he complained to the Executives about the manner in which his cases were dealt with by the trial tribunal. It is also revealed therein that after a lapse of twelve months, the applicant wrote a letter to the Hon. Deputy Registrar of the High Court, Sumbawanga District Registry requesting for Revision of both case to wit; Application No. 6 of 2020

and Misc. Application No. 12 of 2019. This can be inferred at paragraphs 12 to 13 of the applicant's affidavit.

In my view, the applicant has not shown diligence in the prosecution of the action he is now intending to take, rather he has shown apathy, negligence and/or sloppiness in prosecution his case. This is because he ought not to stay at home that longer had he really not been amused by the decision of the trial tribunal. He ought to have approached this Court earlier either before or soon after expiration of the statutory period of forty five (45) days, and lodge his intended appeal.

Secondly, it is a trite law that the applicant who applies for extension of time must account for each day of delay; see **Hemed Ramadhan and 15 Others vs Tanzania Harbours Authority**, Civil Appeal No. 63 of 2001 and **Usangu Logistics (T) Limited vs Sodetra SPRL Limited**, Civil Application No. 47/01 of 2021, CAT at Dar es Salaam (all unreported). In the latter case, the Court of Appeal stated that:

> *"It is trite that, for an application of this nature to be granted, the applicant must account for every day of the delay."*

In our case, it is on record that the decision which is sought to be challenged by the applicant, was delivered on 24.08.2021, but did not take any measure

to challenge that decision up until on 11.03.2023 which is almost more than a year.

It is also on record that even the affidavit supporting the applicant's chamber summons, does not display any reasons for extension of time which the applicant would want the Court to consider when dealing with his application.

In the circumstances, it is my settled opinion that the applicant not only has failed to account for each day of his delay, but also his delay is inordinate. The argument by his counsel that he was a layperson does not make sense. This is because the applicant had enough time to look for legal services just as he did in the course of filing the present application.

It is due to the above stated reasons, that I am constrained to answer the main issue negatively that the applicant has not established some good cause for him to be granted extension of time. I therefore proceed to dismiss his application for being devoid of merit. However, since none of the counsel for the parties prayed for costs in the course of making his/her submission before the court, I make no order as to costs.

It is so ordered.

A.A. MRISHA
JUDGE
11.01.2024

DATED at **SUMBAWANGA** this 11th day of January, 2024.

A.A. MRISHA
JUDGE
11.01.2024