

UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOROGORO DISTRICT REGISTRY

AT MOROGORO

LAND APPEAL NO. 67 OF 2023

(Arising from Miscellaneous Land Application No.2012 of 2022 Of the DLHT for Morogoro originating from Land Application no. 117 of 2005 of DLHT for Morogoro).

JAMES CHRISTAINAPPLICANT

VERSUS

ABDALLAH SAID MBELWA.....RESPONDENT

JUDGEMENT

Date of last Order: 17/11/2023

Date of Judgment: 09/02/2024

BEFORE: G. P. MALATA, J

The appellant herein was aggrieved by the decision by the District Land and Housing Tribunal for Morogoro in Miscellaneous Land Application No.2012 of 2022 granting leave to the respondent to file an application for extension of time within which to apply and set aside Ex parte Judgement in Land Application No.11 of 2005 entered against the respondent.

The appellant came to this court armed with five grounds of appeal. The grounds states;

1. That, the learned trial Chairman of the Tribunal discretionally erred in law, misdirected himself and had no jurisdiction for allowing the application for extension of time to set aside an Ex parte Order in relation with the Land Application No.11 of 2005,
2. That, the learned trial Chairman of the Tribunal erred in law for granting such leave knowing the matter (land Application No.11 of 2005) was already determined by Ex parte Judgement and decree since 15th March, 2006 and thus functus officio,
3. That, the learned trial Chairman of the Tribunal erred in law granting leave on ruling and drawn order so appealed against on the matter of illegality which is subject to appeal,
4. That, the learned trial Chairman of the Tribunal erred in law in granting leave the sought leave injudiciously and hence the abuse of discretionary power,
5. That the ruling and drawn order were certified and issued to the appellant on 24/03/2023 hence the appeal.

In nutshell, the appellant instituted Land Application No.11 of 2005 in the District Land and Housing Tribunal for Morogoro (DLHT). The case proceeded Ex parte against the respondent as he was not within Morogoro region thus all attempt to reach him was in vain. As result, the appellant prayed for ex parte hearing and the DLHT honoured the prayer, thus the appellant managed to secure Ex parte Judgement.

It is on record that, the respondent became aware of the Exparte Judgement on 25/11/2022 which deprived his rights under the land. As the matter, was heard exparte and time limit within which to set aside the same had expired, the respondent collected all the information of the case and filed an Application No. 2012 of 2022 for extension of time within to file an application to set aside the Ex parte Judgement delivered in 15/03/2006. In the application, in particular paragraph 18 to the affidavit, the respondent's impleaded, inter alia that;

1. He was condemned unheard,
2. He was not notified on the judgement date,
3. The appellant had no locus standi to sue the applicant/respondent in his own name as the appellant was not appointed administrator of the deceased estate

On 24/03/2023 the DLHT for Morogoro delivered its ruling and granted leave to the respondent to file an application to apply and set aside Exparte Judgement in Land Application No. 11 of 2005. The appellant was aggrieved thence the present appeal.

By consensus the parties agreed to dispose the appeal by written submission. This court honoured the parties' position and ordered for the parties to file their written submission. Both parties filed submission timely.

The appellant is unrepresented whereas the respondent is enjoying the legal service of Mr. Emmanuel Nkoma learned counsel.

In support of the grounds of appeal, the appellant argued the grounds of appeal in *seriatim*. However, having gone through the nature of grounds, I noted that the first and second ground of appeal is attacking the DLHT that, it was functus officio to grant application for extension of time for the reasons that; one, the matter has already been conclusively determined by the DLHT. It is in his position that, such application cannot be granted to allow the applicant to disturb the already made decision and two, that, the execution has already been taken place.

On the third ground, the appellant is attacking that, the DLHT erred in principle as the respondent did not account for every day of delay of the sixteen years he failed to challenge the decision.

As to the fourth ground of appeal, the appellant is arguing that, the DLHT wrongly exercised its discretion as it failed to take into account material facts that had it been taken, it could have rejected the application. It is the appellant's position that, it is not true that the respondent had no knowledge on the presence of Land Application No.11 of 2005 and that it is lies that he came to know in 2022.

However, he submitted nothing in support of ground five of appeal.

Finally, he prayed that the appeal be allowed and the decision by the DLHT in Miscellaneous Land Application No. 2012 of 2022 of the DLHT be set aside.

In reply thereof, the respondent attacked the appellant's submission and grounds of appeal. On the issue of DLHT being functus officio, he submitted that, it is misconception on the appellant's part in that, the respondent has taken a correct root in challenging the Ex parte Judgement and that the DLHT is not functus officio to entertain such kind of application and set aside

its own decision entered ex parte. That, the law confers jurisdiction to the court to set aside its own decision.

As to the rest of the grounds of appeal, he submitted that, the DLHT was justified in granting extension of time based on the sufficient and good cause for extension of time. To mention a few is the issues of denial of right to be heard, lack of locus standi by the appellant who instituted Land Application No.11 of 2005 while he was not an administrator of the deceased estate and illegality of the decision sought to be set aside. To bolster his position the respondent referred this court to numerous court decision on what should the court take into account when determining an application for extension of time.

Finally, Mr. Emmanuel Nkoma prayed the court to dismiss the application with cost.

In view of the background, and submissions for and against the appeal, this court is now in position to determine the appeal.

To start with, this is an appeal arising from the grant of an application for extension of time. This court and the court of appeal have already principled on the parameters in which the aggrieved party may ground his appeal. It

should be made known to both parties that, the impugned decision was arrived in the exercise of DLHT discretionary mandates, thus for this court to interfere with, the appellant must satisfy this court that, DLHT wrongly applied its discretionary powers.

In weighing whether to interfere or not with any impugned decision arrived by any court or tribunal in the exercise of its discretionary powers, courts are guided by of the Court of Appeal Principles which has been repeatedly in numerous decisions. The guiding court of appeal decisions includes, the case of ***Republic v. Donatus Dominic @ Ishengoma and 6 Others, Criminal Appeal No. 262 of 2018 (unreported)***, cited in ***Credo Siwale v. Republic, Criminal Appeal No. 417 of 2013 (unreported)***. The Court analogously held that: -

*"There are principles upon which an appellate Court can interfere with the exercise of discretion of an inferior court or tribunal. These general principles were set out in the decision of the East Court of Appeal in **MBOGO AND ANOTHER v. SHAH [1968] E.A. 93** and these are: -*

- (i) if the inferior court misdirected itself; or*
- (ii) it has acted on matters on which it should not have acted; or*

(iii) *it has failed to take into consideration matters which it should have taken into consideration,
And in so doing, arrived at a wrong conclusion."*

In view thereof, it is clear that, it is the duty of the appellant to demonstrate to court how the inferior court wrongly exercised its discretionary mandates while linking his ground with the principles numerated in the case of ***MBOGO AND ANOTHER v. SHAH***, supra.

In the present appeal, it is undisputed that; **one**, there is an Ex parte Judgement which is sought to be set aside, **two**, the respondent was outside the jurisdiction of Morogoro where the case was conducted, **three**, the respondent was not made aware of the filing and hearing of the case against him, **four**, the decision was delivered without the respondent's knowledge, five, the respondent became aware of the decision in 2022, **six**, the respondent was aggrieved thereof, **seven**, that the respondent applied for extension of time within which to set aside the impugned Ex parte Judgement, **eight**, the appellant did not notify and serve the respondent with Land Application No.11 of 2005, **nine**, that the respondent applied for extension of time within which to set aside the Ex parte Judgement thus **ten**, the respondent pleaded that he was condemned unheard.

The question therefore is whether the DLHT has jurisdiction to hear such kind of application. The above question gets the answer from Rule 9 of Order IX of the Civil Procedure Code, Cap.33 R.E.2019

"In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that, where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also."

In case the time limit within which to file application to set aside Ex parte Judgement has expired, the applicant may apply for extension of time subject to fulfillment of the requirement stated in section 14 (1) of the Law of Limitation Act. Cap. 89 R.E. 2019

Section 14(1) provides;

"Notwithstanding the provisions of this Act, the court may, for any reasonable or sufficient cause, extend the period of limitation for the institution of an appeal or an application, other than an application for the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application"

It is with no iota of doubt that, where the court has passed ex parte judgement and the aggrieved party wants to apply and set it aside, the Court/tribunal has jurisdiction to entertain such application as stated under Rule 9 of Order IX of the Civil Procedure Code.

If the time limit within which to file such application has lapsed then the applicant has leeway of invoking section 14 (1) of the Law of Limitation Act. The Court/tribunal may grant extension if it is satisfied that the applicant has given sufficient cause for the failure to take necessary action within time. Therefore, the issue that DLHT has jurisdiction to entertain the respondent's application of extension of time within which to apply and set aside Ex parte Judgement is unfounded in law. The court/tribunal may set aside its own decision; **one**, in the circumstances of this case and **two**, when moved to review its own decision.

The next concern is whether the DLHT wrongly exercised its own discretion in granting the extension of time in Miscellaneous Land Application No. 2012 of 2022. Extension of time may only be granted if the applicant has satisfied the court that he was prevented by sufficient reasons from taking necessary action. Sufficient cause may be due to; **one**, sickness, **two**, bereaved of a key person in the family, **three**, denial of right to be heard for not being aware of the proceedings, **four**, presence of illegality such as jurisdiction, time bar, locus standi and denial of right to be heard. Proof of existence of the same may warrant the court to exercise its discretion and grant the extension of time.

I am fortified by the court of appeal decision in the cases of **Lyamuya Construction Co. Ltd Vs. The Registered Trustees of Young Women Christian Association of Tanzania** Civil Application No. 2 of 2010 CAT (unreported), **Addija Ramadhani (binti Pazi) vs. Sylvester W. Mkama**, Civil Application No. 13 of 2018 where the court principled that;

*(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.

(e) the degree of prejudice the respondent stands to suffer if time is extended;

The court of appeal has maintained similar position in **Elius Mwakalinga vs. Domina Kagaruki and 5 others**, Civil Application No. 120/12 of 2018 (unreported) and added that;

"A delay of even a single day has to be accounted for otherwise there should be no point of having rules prescribing period within which certain steps have been taken."

In the case of **Hamisi Ismail @ Zulu Vs. Republic**, Criminal Appeal No. 205 of 2015 (unreported) the court of appeal held that

"It is settled that in an application for extension of time, the applicant is duty bound to demonstrate good or sufficient cause for

delay. Further, every delay, even if for one day has to be accounted for."

In the case of **Osward Masatu Mwizarubi vs. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010 where the Court of Appeal stated that:

"What constitutes good cause cannot be laid down by any hard and fast rules. The term "good cause" is relative one and is dependent upon the party seeking extension of time to provide the relevant material in order to move the court to exercise its discretion."

In the case of **Sebastian Ndaula vs. Grace Rwamafa**, Civil Application No. 4 of 2014 (unreported) where the Court stated that,

"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"

Furthermore, illegality being among the factors to be considered in an application for extension of time has been discussed in plethora of authorities on how it should be looked at; see the case of **The Principal Secretary**,

Ministry of Defence and National Service v. Devram Valambhia
[1992] T.L.R. 387, **Arunaben Chaggan Ministry vs. Naushad and others**, Civil Application no. 6 of 2006 CAT at Arusha (unreported) **Lyamuya Construction Company Limited** (supra). In the case of **The Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** (supra) it was stated;

"The Court... 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."

It is clear therefore that, based on the long-standing authorities of this court and court of appeal, for illegality to be accommodated, it must be; **one**, apparent and **two**, the ones touching jurisdiction, time limit, res judicata, locus standi and denial of right to be heard.

This is also echoed by the decision in the case of **Charles Richard Kombe vs. Kinondoni Municipal Council**, Civil Reference No. 13 of 2019, where the court of appeal after defining the word illegality came to the conclusion as I hereby quote;

*"From the above decisions, it is our conclusion that for a decision to be attacked on ground of illegality, one has to successfully argue that the court **acted illegally for want of jurisdiction**, or for **denial of right to be heard** or that **the matter was time barred**"*

The respondent in this case, in paragraph 18 to the affidavit in support of the application for extension of time raised three grounds. That is to say; **first**, denial of right to be heard, **second**, that he was not notified on the judgement date and **third**, that the appellant had no locus standi to sue the applicant/respondent in his own name as the appellant was not appointed administrator of the deceased's estate.

The appellant failed to disprove existence of the first, second and third facts raised by the respondent in paragraph 18 to his affidavit as reasons for extension of time.

Based on the lucid principles in the cases of (1) **Charles Richard Kombe vs. Kinondoni Municipal Council**, (2) **Arunaben Chaggan Ministry vs. Naushad and others**, (3) **Lyamuya Construction Co. Ltd Vs. The Registered Trustees of Young Women Christian Association of**

Tanzania just recap few of them, the DLHT for Morogoro was satisfied and correctly exercised its discretionary supremacies. Additionally, all the raised grounds for extension of time met the legal requirement under section 14 (1) of the Law of Limitation Act which requires for provision of sufficient cause for extension of time.

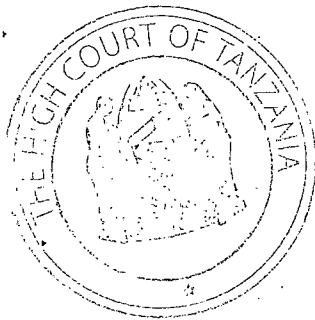
Having said all what I wanted to be said, I hereby hold that, the appellant has failed to demonstrate how the DLHT wrongly exercised its discretionally supremacies in granting extension of time sought by the respondent. The appellant failed to convince this court that, the DLHT for Morogoro wrongly and faulted the principles established in the cases of **Republic v. Donatus Dominic @ Ishengoma and 6 Others, Criminal Appeal No. 262 of 2018 (unreported)**, cited in **Credo Siwale v. Republic, Criminal Appeal No. 417 of 2013 (unreported) and Mbogo and Another V. Shah [1968] E.A. 93** cited herein above.

Unhesitatingly, I am inclined to agree with the respondent' position on the matter and disagree with the appellant based on the lucid reasons for the decision herein above.

In the upshot, the appeal is found to be worthless for want of legal base. Consequently, it stands dismissed with costs.

IT IS SO ORDERED.

Dated at MOROGORO this 09th February, 2024.

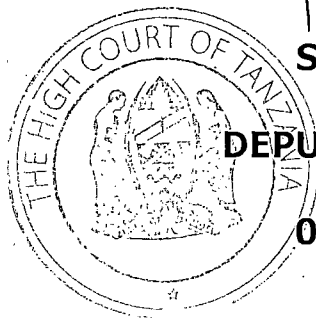
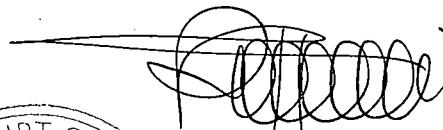


G. P. MALATA

JUDGE

09/02/2024

JUDGEMENT delivered at **MOROGORO** in chambers this 09th February 2024 in the presence of the appellant and respondent.

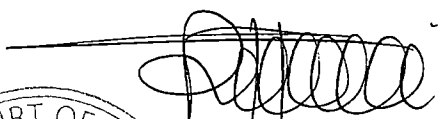
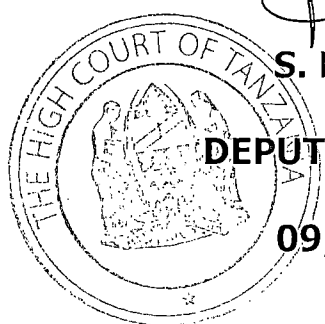


S. P. KIHAWA

DEPUTY REGISTRAR

09/02/2024

Right of appeal explained to the parties.



S. P. KIHAWA
DEPUTY REGISTRAR
09/02/2024