

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MOSHI SUB REGISTRY**

**AT MOSHI**

**MISC. LAND CASE APPLICATION NO. 45 OF 2023**

***(Originating from Land case No. 158/2021 of the District Land and Housing Tribunal for Moshi at Moshi)***

**JONATHAN SHEDRACK LYIMO ..... APPLICANT**

**VERSUS**

**ALEX MAKOMBO ..... RESPONDENT**

**RULING**

17/01/2024 & 12/02/2024

***SIMFUKWE, J.***

The applicant is seeking for extension of time so that he may file his application for revision against the proceedings and ruling of the District Land and Housing Tribunal of Moshi in Land Application number 158/2021 which was delivered on 24<sup>th</sup> August, 2021. The application was brought pursuant to **section 14 (1) (2) of the Law of Limitation Act (Cap 89**

**R.E 2002)** and **Order XLIII rule 2 of the Civil Procedure Code [Cap 33 R.E 2019]**. The application is supported by the affidavit sworn by the applicant. It was contested by the counter affidavit of the respondent.

Briefly, the background of this application as discerned from the record is that, the applicant sued the respondent herein, in Land Application No. 158/2021 at the District Land and Housing Tribunal of Moshi, for trespass into his land measuring 3,344 square meters located at Msangani village in Rombo District. In response to the filed land case, the respondent filed Misc. Land Application No. 356/2022 seeking joinder of other parties. Both cases were dismissed by the trial tribunal on 24<sup>th</sup> August, 2021. Aggrieved by the dismissal order, the applicant filed Land Appeal No. 39/2021 in this court which was dismissed on 26<sup>th</sup> August, 2022 for want of prosecution. Following the dismissal of his appeal, the applicant filed Misc. Application No. 54/2022 before this court praying to set aside the dismissal order, again the application was dismissed on 29<sup>th</sup> May, 2023 for being devoid of merit.

From there, the applicant wrote several letters to the Judge in charge of this court praying the Court to invoke its administrative powers to

intervene *suo motto* and order hearing of the said Application No. 158/2021 on merit. In reply letter, dated 16<sup>th</sup> September 2023, the Hon. Judge in charge advised the applicant to file a formal application to challenge dismissal order of Moshi District Land and Housing Tribunal. Being aware that time to file the same had lapsed, the applicant filed the instant application praying for extension of time for filing application for revision out of time.

At the hearing of this application, the applicant was represented by Mr. Philip Njau, learned counsel while the respondent was represented by Mr. Emmanuel Shayo, learned counsel. The application was ordered to be argued by way of written submissions.

Mr. Philip Njau for the applicant started his submission by praying to adopt the affidavit of the applicant to form part of his submission. He then stated the brief background of the matter which I have already captured herein above. He submitted that; the applicant is out of time because he has been fighting for his rights by prosecuting several suits. That, the applicant was detained while waiting for response from the Judge in charge. The applicant had attached exhibits to his affidavit in support of this application

as proof. Mr. Njau was of the view that, the delay is technical and it was not out of sloppiness or negligence. He cited **section 21 of the Law of Limitation Act, Cap 89 (R.E 2002)** which provides for exclusion of time of proceedings bona fide in court without jurisdiction. The learned counsel also cited the case of **THE REGISTERED TRUSTEES OF ST. ANITA GREENLAND SCHOOL (T) AND OTHERS VS. AZANIA BANK**, Civil appeal No. 225 of 2019 [2023] TZCA 59 Tanzlii, in which the Court said that where the applicant has been diligently prosecuting his case in court, the time spent to prosecute such case shall be excluded when computing time limit. Further reference was made to the case of **BENEDICTO SHAYO VS. CONSOLIDATED HOLDINGS CORPORATION AS OFFICIAL RECEIVERS OF TANZANIA FILM COMPANY LIMITED**, Civil application No. 366 of 2017 [2018] TZCA 252 Tanzlii at page 5, where the Court found that time which a party had spent in court pursuing his case as excusable technical delay. Basing on the above authorities, the counsel for the applicant argued that just like in **Benedict case** (supra), the applicant's Appeal No. 39/2021 was dismissed for want of prosecution. His attempt to set aside the dismissal order in Misc. Application No. 54/2022 got stuck as well. The learned counsel prayed this court to use the same spirit in the cited case herein

above, to find that the time the applicant spent in pursuing the cases as excusable technical delay.

The learned counsel for the applicant continued to aver that, the applicant received advice from the Judge in charge on 16/09/2023 and filed this application on 02/10/2023. It was his opinion that, the delay of two weeks was reasonable which cannot be termed as delay as the applicant had to compile and prepare all records of the case.

Another ground advanced by the counsel for the applicant was the new system of filing cases electronically. He said that a suit nowadays must be filled in court electronically and wait for the same to be admitted before getting the control number for payment. That, in most cases, the going has not been always smooth as most of the time the applicant faced poor/low internet receptors which take hours to complete a transaction. He cemented his argument with the case of **JUMA POSANYI MADATI V. HAMBASIA N'KELLA MAEDA**, Civil Application No. 230 of 2016, (CA) DSM [2017] TLS LR 306, in which delay of two weeks was condoned.

The third ground advanced by applicant's counsel for this court to grant extension of time, was that, Land case No. 158/2021 was dismissed

without being heard. The counsel subscribed to **Article 13 (1); (6) (a) (b) of the Constitution of the United Republic of Tanzania**, which prescribes equality before the law and the right to be heard to every person who approaches the court. As such, where a party institutes a suit in court, he must be heard before a verdict is given. The same applies where a decision has been reached without according that party the right to be heard, which will be interpreted as being against natural justice. In a situation where time to file an application to challenge such decision lapsed, the illegality of the decision reached is enough reason for the court to grant extension of time. To support his argument, the learned counsel cited the case of **HARRISON MANDAI AND OTHERS V. REGISTERED TRUSTEES OF THE ARCHDIOCESE OF DAR ES SALLAM**, Civil Appeal No. 482/2012 [2019] TZCA 298 Tanzlii which quoted with approval the case of **The Principal Secretary Ministry of Defense and National Service vs. Dervan Valambia** at page 188.

Mr. Njau submitted that, the applicant is intending to file application for Revision because he has no other option to pursue his right other than the intended application following the dismissal of Land Appeal No. 39/2021

and Misc. Application No. 58/2021. That, the path is derived from the case of **HALAIS PRO-CHEMIC V. WELLA A.G [1996] TLR 269** which held that:

*"A party to a proceeding in the High Court may invoke the revisional jurisdiction of the Court where the appellate process has been blocked by judicial process."*

Moreover, the learned counsel prayed this honorable court to grant this application as the prospects of success of the intended revision is high on the reason that the order issued in Land Application No. 158/2021 contravened the basic principle of natural justice of right to be heard.

Opposing the application, Mr. Emmanuel Shayo, learned counsel for the respondent at the outset strongly denied all the argument in support of this application and prayed to adopt the counter affidavit of the respondent to form part of his submission. He then cited the case of **LYAMUYA CONSTRUCTION COMPANY LTD VS BOARD OF TRUSTEES OF YOUNG WOMEN CHRISTIAN ASSOCIATION OF TANZANIA**, Civil Application No. 2 of 2010, CA, at page 6 where it was held that:

*"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 ruled of reason and justice, and not according to private opinion or arbitrary. On the authorities however, the following guidelines may be formulated: -*

*(a) The applicant must account for all the period of delay.”*

He stated that, it is settled position of law that when a party is applying for extension of time, he must first account for each day of delay. Whereas, the applicant herein, has failed to do so as he averred that the application to set aside dismissal order was finalized on 29<sup>th</sup>, May 2023. Since then, he failed to make such application up to 25/09/2023 when he filed the instant application before this court, almost four months which the applicant has failed to account for.

On the second ground, the learned counsel for the respondent contested the applicant's averment that he wrote several letters to the Judge in charge of this court so as to invoke her administrative powers to intervene *suo motto* and order the hearing of Application No. 158/2021. He submitted that, writing a letter to the Judge in charge was not a legal



action rather was an administrative procedure which did not bar him to file application for revision within time.

Mr. Shayo contended that, the applicant has failed to advance reasonable and sufficient cause for the delay of four months under **section 14 (1) (2) of the Law of Limitation Act.**

Concerning the cited cases of **REGISTERED TRUSTEES OF ST. ANITA GREENLAND SCHOOLS**, and **BENEDICT SHAYO** (*supra*) cited by the applicant, Mr. Shayo was of the opinion that the same are irrelevant to the present matter. He elaborated that the cited cases were decided in line with the provision of **section 21 of the Law of Limitation Act**, (*supra*) which provides for exclusion of time for proceeding bona fide in court but the applicant failed to prove if there was any proceeding pending in court. Mr. Shayo was of the view that, the applicant had failed to take legal action negligently without reasonable and sufficient cause.

Turning to the fourth ground of application, the learned counsel for the respondent strongly disputed the case of **JUMA POSANYI MADATI** (*supra*) cited by the applicant's counsel for being distinguishable from the facts at hand. As the cited case concerned extension of time to file stay of

execution out of time in which the applicant in that case was belatedly availed with copy of that impugned order and decree (which was sufficient reason for extension of time).

The learned counsel continued to state that, the cited case considered two weeks as amounting to reasonable time which was not a delay. That, in our circumstances the applicant has delayed for four months from the last proceeding which was finalized in this court without any reasonable and sufficient cause for such delay.

On the 5<sup>th</sup> fifth ground, Mr. Shayo submitted that the issue of illegality raised by applicant that he was not heard in Application No. 158/2021 in the District Land and Housing Tribunal for Moshi at Moshi; was not true as both parties were heard on the preliminary objections raised by the respondent herein by way of written submissions. The preliminary objections were overruled and Misc. Application No. 356/2021 was dismissed after the trial Chairman heard both parties through their counsels and the applicant herein personally was heard before the tribunal. He believed that under such circumstances, the principle of natural justice was well observed by the trial tribunal.

Moreover, the counsel for the respondent submitted that, the point of illegality raised by the applicant cannot stand since the parties were heard. That, even if the parties were not heard such illegality cannot be used as a panacea or ground for extension of time as it was well enshrined in the recent decision of the Court of Appeal in the case of **IBRAHIM TWAHIL KUSUNDWA AND ANOTHER VS EPIMAKI S. MAKOI AND ANOTHER**, Civil application No. 437/17 of 2022 at page 11&12 where the decision in the case of **IRON AND STEEL LIMITED VS MARTIN KUMALIJA AND 117 OTHERS**, Civil application No. 292/18 of 2020 was upheld.

On the last ground, Mr. Shayo strongly disputed the applicant's averment that he intends to file an application for revision because he has no any other option to pursue his right following the dismissal of Land Appeal No. 39/2021 and Misc. Application No. 54/2022 which intended to set aside the dismissal order. The learned counsel argued that, the applicant has exhausted his remedy of appeal in Land appeal No. 39/2021 in this honorable Court which was dismissed for want of prosecution. The applicant tried to set aside the dismissal order unsuccessfully.

The learned counsel for the respondent stressed that, even if the Court will enlarge time to the applicant still the applicant will have low chance of success as he has already pursued his right of appeal. Thus, at this juncture he may not invoke revision as an alternative of an appeal as it is well settled position in recent decisions of the Court of Appeal including the case of **HARITH RASHID SHOMVI v. AZIZA JUMA ZAMBOKO**, Civil Application No. 496/01 of 2023 in which at page 7, 8 and 9, the Court upheld the decision in the case of **HALAIS PRO-CHEMIE** (supra), that:

*"..... the revisional powers conferred by subsection (3) were not meant to be used as an alternative to the appellate jurisdiction of this court. ...."*

Mr. Shayo was of the opinion that, the applicant was expected to seek the available remedy before the Court of Appeal. He prayed this application to be dismissed with costs.

In brief rejoinder, in respect of discretionary powers of the court to grant extension of time, Mr. Njau stated that, the same is granted where the applicant has successfully shown reasons for the delay. The learned counsel insisted that the applicant failed to lodge his application on time

because he was waiting for a response from the Judge in charge on his several letters he wrote. He opposed the contention that writing letters to the Judge in charge was not a legal action on pretext that the same was within the procedure and process of the court. To bolster his argument, the learned counsel referred the case of **Balozi Ibrahim and Another v. MS Benandys Ltd and Two others**, Civil Revision No. 6 of 2016 [2015] TZCA 5 Tanzlii in which via a complaint letter to the Chief Justice, the Court initiated revision proceedings. In the same manner, Mr. Njau prayed the applicant's complaint letter to be treated as a court process and find the delay to institute this application as an excusable technical delay.

On the issue of illegality, Mr. Njau reiterated that dismissing the main suit during the hearing of miscellaneous application occasioned miscarriage of justice as it was never heard.

He reiterated his submission in chief and implored this court to grant this application.

Having summarized the rival arguments from both parties, the question for determination is whether this application for extension of time has merit.

It is trite principle that, granting extension of time is entirely upon the court's discretion, which should be exercised judiciously. Moreover, the grant is not automatic, a party has to convince the court that he/she has genuine grounds and sufficient reasons for the court to exercise its discretion and grant extension of time. The same was held in the case of **Benedict Mumello vs Bank of Tanzania, Civil Appeal No.12 of 2012** (CAT).

There is no statutory definition what a good cause must entail in extending time. However, it can be due to myriad of things such as the duration of delay: whether the delay is inordinate; whether the applicant has sufficiently accounted for the delay; whether the applicant has demonstrated diligence and not apathy, negligence or sloppiness in the prosecution of the action he intends to take; or whether there exists a point of law of sufficient importance such as the illegality of the decision sought to be challenged. (See, **Attorney General vs. Tanzania Ports Authority & Another**, Civil Application No. 87 of 2016 CAT and **Ramadhan J. Kihwan vs TAZARA**, Civil Application No. 401/18 of 2018, CAT (unreported).

As it can be seen from submission of the learned counsel for the applicant, the reasons for the delay in filing an application for revision within the prescribed time, was that the applicant was busy writing several letters to the Judge in charge. He wrote his first letter on 23/06/2023, the second letter on 16/08/2023 and the third letter on 25/08/2023. I have carefully gone through the record of these proceedings. It is uncontested that, the last order of this court was delivered on 29/05/2023 whereas the applicant's application was dismissed. From the date of dismissal until when the applicant started writing letters to the Judge in charge, 26 days had lapsed. This court has no record of any legal action taken by the applicant in that period. He did not act immediately after the pronouncement of the ruling and it took him four months to lodge this application. In his submission he consistently said that the delay was caused by the fact that he was waiting for a response from the Judge In charge on his administrative request. Under these circumstances, I am of the settled view that the applicant slept over his rights as he was not barred by any technicality. I cement my finding by referring the case of **Marry Mchome Mbwambo and Another v. Mbeya Cement Co. Ltd**, Civil Application No. 271 of 2001 and the case of **Royal Insurance**

**Tanzania Ltd Vs. Kiwengwe Stand Hotel Ltd**, Civil Application No.111 of 2009 (unreported) in which the court held that; if a party establishes that he did not sit back, but pursued his matter, that may amount to good cause subsequently in an application for extension of time. In the matter at hand, the applicant slept over his right because he did not follow the proper procedure after the last order of this court was delivered. The record shows that he delayed for 26 days. Then, he started writing letters to the Judge in charge. I join hands with Mr. Shayo the learned counsel for the respondent that writing letters was not a legal action rather an administrative procedure which was not a bar for the applicant to file the application for revision within the time. The applicant failed to prove how the awaited response from the Judge in charge legally obstructed him from lodging his application.

It is settled that, in the application for extension of time the applicant is supposed to account for each day of delay as it was held in the case of **Said Nassor Zahor and Another**, Civil Application No. 278/15 of 2016, Court of Appeal of Tanzania (unreported). This position has been emphasized by the Court of Appeal in numerous decisions. In **Hassan**



**Bushiri vs Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 the requirement of accounting for every day of delay was emphasized as follows:

***"Delay, of even a single day, has to be accounted for. Otherwise, there would be no point of having rules prescribing period within which certain steps have to be taken."***

From the foregoing authorities, I am of considered opinion that the applicant has not adduced good cause for the extension of time to be granted. The applicant has completely failed to account for the delay of each day. Rather, he gave general explanation that he wrote several letters to the Judge in charge. The record of this court shows that in Misc. Land Application No. 54/2022, the applicant was dully represented by Mr. Philip Njau the learned counsel who is very senior and conversant with legal procedures. Thus, he was supposed to comply to legal procedures without unreasonable excuses like waiting for advice from the Judge in charge.

Regarding the issue of illegality as advanced by the counsel for the applicant that there is a point of illegality in respect of the decision of the

trial tribunal; I agree that the point of illegality is a sufficient ground for extension of time. In **VIP Engineering and Marketing Limited and Two Others v. Citibank Tanzania Limited**, Consolidated Civil Reference No. 6, 7 and 8 of 2006, (unreported), the Court of Appeal of Tanzania held that:

*"It is settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of the 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 same issue was discussed in the case of **TanESCO v. Mufungo Leonard Majura and 15 others**, Civil Application No. 94 of 2016, Court of Appeal of Tanzania (Unreported), in which it was stated that:

*"Notwithstanding the fact, 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 ...suffice to move the court to grant extension of time so that, the alleged illegality can be addressed by the court.”*

However, the respective illegality has to be apparent on the face of the record as it was held in **Steven B.K. Mhauka vs The District Executive Director, Morogoro District Council and two Others**, Civil Application No. 68 of 2019, Court of Appeal of Tanzania, at Dar es salaam, (unreported). The question of illegality does not need to be discovered by a long-drawn argument or process as it was held in the case of **Lyamuya Construction Ltd vs Board of Registered Trustees of Young Women Association of Tanzania**, (supra).

Applying the above-mentioned principles to the application under consideration, the applicant's alleged illegality is that, Land Application No. 158/2021 was dismissed without being heard, which was violation of **Article 13 (1) (6) (a) (b) of the Constitution of the United Republic of Tanzania** which prscribes equality before the law and right to be heard. Opposing this argument, the learned counsel for the respondent firmly argued that Application No. 158/2021 in the District Land and Housing

Tribunal for Moshi at Moshi both parties were heard on the preliminary objection raised by respondent herein, and it was heard by way of written submissions. Thereafter, the application was dismissed and Misc. Application No. 356/2021 was also dismissed after the trial Chairman heard both parties.

I have carefully examined the trial tribunal's proceedings and ruling and proved that both parties were clearly heard before the trial tribunal by way of written submissions. I agree with the respondent's counsel that the alleged illegality does not qualify to be illegality apparent on the face of the record. The respective purported points of illegality are normal grounds of appeal which are subject to long drawn argument or process. The applicant is challenging the proceedings and ruling of the trial tribunal which disposed the matter. The alleged illegality in the trial tribunal decision is not apparent on the face of it. Thus, it is not a good cause for the court to grant extension of time.

In the event, I find that the applicant has failed to demonstrate a good cause for the court to extend time to file application for revision as prayed. Therefore, the application is dismissed for want of merits, with costs.

Dated and delivered at Moshi, this 12<sup>th</sup> day of February 2024.



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S. H. SIMFUKWE

JUDGE

Signed by: S. H. SIMFUKWE

**12/02/2024**