

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 271 OF 2019

**(Originating from the decision of the District Land and Housing Tribunal for
Coast Region at Kibaha)**

Dated the 10th day of November, 2016

in

Land Appeal No. 08 of 2015

PROF. ARON MASSAWE.....1ST APPLICANT

FARAJA R. KUNDYA (as Administrator of the Estate

of the Late MAHAN RAJAB KUNDYA).....2ND APPLICANT

VERSUS

THOMAS GERALD MWENDANUNU

(TANZANIA CUTLERIES LTD).....RESPONDENT

RULING

S.M. KALUNDE, J.:

The applicants have filed an application seeking for extension of time to file an appeal out of time against the decision of the District Land and Housing Tribunal for Coast Region at Kibaha ("**the tribunal**") dated the 11th November, 2016 in Land Appeal No. 08 of 2015. The application is preferred under section 38(1) of **the Land Disputes Courts Act, Cap. 216 R.E 2019** with the supporting affidavit of **MR. FRANK KILIAN** an advocate representing the applicants.

The contents of the founding affidavit filed by the applicants in support of their application, may be summarized as follows:

- (1). That on 05th October, 2016 it was ordered that judgement would be delivered on 18th January, 2017, however when they attended to the tribunal on the respective date they were informed that the decision was delivered on 11th November, 2016 in absence of the parties;
- (2). On being informed that the decision had been delivered the applicants filed a letter requesting for copies of judgement and decree for his action;
- (3). That copies of judgement and decree were made available to him on 22nd May, 2017. Copies of exchequer receipts were exhibited to evidence payment of fees for collection of judgement;
- (4). That on 06th July, 2017 he filed an appeal which was rejected for being time bared. Following the rejection, on 19th July, 2017 the applicant filed Misc. Land Application No. 637 of 2017. On 10th April, 2019 the application was struck out for being filed under a wrong citation of the enabling provision.
- (5). Consequently, the applicant then filed the present application which was filed on 29th April, 2019.

Against these allegations, the answering counter affidavit must be considered. The respondent denied most of the allegations raised

by the applicants. They contended that the applicants have failed to demonstrate good cause for extension of time after a delay in more than six months. In their view the delay was inordinate. They argued that the applicants were negligent in filing the memorandum of appeal out of time.

It was further averred that the applicants have failed to account for the delay between 22nd May, 2017 when they were allegedly supplied with copies of judgement and decree up to 06th July, 2017 was the memorandum of appeal was rejected for being filed out of time.

In view of social distancing measures imposed to control the spread of *Severe Acute Respiratory Syndrome Coronavirus 2* (**SARS-CoV-2**) and hence *Coronavirus Disease - 2019* (**COVID-19**), I ordered that the application be argued by written submissions. Submissions of the applicant were drawn and filed by **Mr. Frank Kilian** learned advocate who had all along represented the applicants since the proceedings before the tribunal. submissions of the respondent were drawn and filed by **Mr. Jerome Joseph Msemwa** learned advocate.

Mr. Kilian did not offer much than that deponed in the affidavit filed in support of the application. He submitted that it was on 18th January, 2017 that they became aware that the decision in Land Appeal No. 08 of 2015 was delivered on 11th November, 2016. On 06th April, 2017 they wrote a letter requesting for copies of judgement and decree. He alleged that, on filing the letter he was

informed that the secretary to tribunal was on annual leave and therefore there was no one to type the judgement.

He complained that the delay in filing the appeal was occasioned by the delay in obtaining copies of judgement and decree of the tribunal. He blamed the failure to be informed of the date of delivery of the decision as being the cause of the delay. Imploring that he was not at fault.

He cited the case of **Castellow vs. Somerset County Council (1993) All E.R. 952** and **Mobrama Gold vs. Minister for Energy and Minerals and Others** [1998] TLR 426 to support a contention that rules of Court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed and that a party should not in the ordinary way be denied an adjudication of his claim on its merits because of a procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate.

Further to that, Mr. Kilian cited the authority in **Kalunga and Company Advocates vs. National Bank of Commerce Ltd** [2006] TLR 235 to support a contention that there was illegality in the decision sought to be challenged. Hence there is good ground for extension of time.

On the onset Mr. Msemwa, alleged that written submissions of the applicants were filed out of the schedules ordered by the Court. He prayed that the application be dismissed for failure to prosecute. In the alternative he alleged that the applicants have failed to

demonstrate good cause to warrant extension of time. He argued that the applicants has failed to account for the three years delay from 11th November, 2017, when the decision was made, to 16th May, 2019 when the present application was filed. In bolstering his position he cited the case of **Julius Francis Kessy & 2 Others vs. Tanzania Commission for Science and Technology**, Civil Application No. 59/17 of 2018, CAT at Dar es Salaam (unreported).

He also alleged that delay in filing the appeal was occasioned by negligence on the counsel for the applicants. In his view the alleged negligence was twofold. **Firstly**, the applicants were negligent in filing the memorandum of appeal out of time which was refused by the registrar. **Secondly**, the counsel for the applicants was negligent in filing Misc. Land Application No. 637 of 2017 which was struck out on 10th April, 2019 for being filed under a wrong citation of the enabling provision. To support his argument he cited the case of **VIP Engineering and Marketing Limited vs. Said Salim Bakharesa Ltd.**, Civil application No. 52 of 1998, CAT at Dar es Salaam (unreported) and **Deogratius Kapela vs. Republic**, Criminal Application No. 1 of 2006, CAT at Mwanza (unreported).

On the question of illegality the counsel for the respondent argued that the applicants exhibited gross negligence in handling the case and thus they cannot be heard to raise an argument that there is a point of law at stake. He cited the case of **Tanzania Harbours Authority vs Mohamed R. Mohamed**, Civil Appeal No. 80 of 1999 (unreported). Mr. Msemwa concluded that the application ought to be dismissed with costs.

In rejoining, Mr. Kilian maintained a view that having been filed on 21st May, 2020 written submissions were filed within the fourteen (14) days ordered by the Court on 07th May, 2020. He added that, the period between 06th July, 2017 when the memorandum of appeal was rejected and 10th April, 2019 when Misc. Land Application No. 637 of 2017 which was struck out on technical grounds should be excluded in calculating the limitation period. He cited section 19(2) of **the Law of Limitation Act, Cap. 89 R.E 2019** to support his argument.

In a bid to salvage the application, Mr. Kilian submitted that the Court was duty bound to uphold the principle of overriding objective by interpreting the law with a view to ensure just, expeditious, proportionate and affordable resolution of civil disputes. He cited section 3A of **the Civil Procedure Code, Cap. 33 R.E 2019**. He insisted that there were sufficient grounds to condone the delay.

From the pleadings, and the supporting and opposing written submissions as well as the cited authorities it is not disputed that the issue for my determination is whether this application befits intervention of this Court to condone the delay and extend time within which to file an appeal out of time.

Before I proceed to the merits of the application, I recognize it is essential to set the records straight on whether written submissions in this case complied with the orders dated 07th May, 2020. Mr. Msemwa seemed to suggest that the applicant's submissions were filed out time and without leave of the Court. Clearly, his argument is misplaced. On the respective date I ordered

the applicants to file his submissions within 14 days. In terms of section 60(1)(b) of **the Interpretation of Laws Act, Cap.1 R.E. 2019**, the 14 days limitation was due to expire on 22nd May, 2020. So submissions filed on 21st May, 2020 were well within the prescribed order. Even assuming that computation would include the date when the order was made, still the cutoff day was 21st May, 2020. I fail to fathom the basis of Mr. Msemwa's argument. The same is dismissed.

As for the merits, the law is well settled that extension of time is a discretion of the Court upon demonstration of **"good cause"** or **"sufficient reasons"** by the applicants. The position is also settled that though what constitutes **"good cause"** cannot be laid down by any hard and fast rules, Courts have developed various factors to be considered in ascertaining whether there is good cause for it to exercise its discretion. Before exercising its discretion the court must satisfy itself that:

- (a) The applicant has accounted for all the period of delay;*
- (b) The delay should not be inordinate;*
- (c) The applicant must show diligence; and*
- (d) If the Court feels that there are other reasons, such as the existence of a point of law of sufficient importance.*

The above position was enunciated by the Court of Appeal in **Regional Manager, TANROADS Kagera vs Ruaha Concrete**

Company Ltd, Civil Application No. 96 of 2007, CAT (unreported); **Lyamuya Construction Company Ltd. vs. Board of Registered Trustees of Young Women’s Christian Association of Tanzania**, Civil Application No. 2 of 2010, CAT (unreported) and **Julius Francis Kessy vs. COSTECH (supra)**.

The gravamen of the applicants is that the delay in filing the appeal was occasioned by failure to obtain copies of judgement and decree on time; and an alleged illegality in the decision sought to be challenged. I shall start with the later.

In his written submissions Mr. Kilian complained that the applicants were misled on the date for delivery of the decision at the tribunal. He argued that the decision was delivered on 11th November, 2016 instead of 18th January, 2017 known by both parties. In his view that irregularity was a point of law that required rectification and hence extension of time. The cited **Kalunga & Company Advocates vs. NBC (supra)**. On his side, Mr. Msemwa maintained that the applicants exhibited gross negligence and thus they were not entitled to complain that a point of law at stake for consideration on appeal. His view was anchored in the case of **Tanzania Harbours Authority vs Mohamed R. Mohamed (supra)**.

On my part, I am inclined to agree with Mr. Msemwa, that this argument is unfounded, albeit for different reasons. Firstly, there is no where in the affidavit filed in support of the application where an allegation of illegality was raised as a ground for extension of time. It turns out that, this point was raised and argued by Mr. Kilian in his

written submissions. I know, Mr. Kilian must be aware that submissions by counsel, as opposed to an affidavit, are not evidence. (See **Kalunga & Company Advocates vs. NBC (supra)**). Secondly, even assuming that the point was raised in the affidavit and well-articulated in the submissions, it is not true that every allegation of illegality deserved an opportunity for rectification. Lest I am misunderstood, I am not saying illegality is not a ground for extension.

Illegality is indeed a good ground for extension of time. However, whether an alleged illegality is a good ground or not should be gauged on a case to case basis. For an alleged illegality to constitute a ground for extension of time; *one*, there must an illegality in the decision sought to be challenged; *two*, the illegality must be apparent of the face of records (see **Lyamuya Construction Company Ltd. vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, CAT (unreported)); and *three*, the illegality must, at least, be indicated in the intended in the grounds of appeal (see **Tropical Air T. Ltd vs Godson Eliona Moshi** (Civ. Application No.9 of 2017) [2018] TZCA 157; [03 April 2018)TANZLII].

None of these threshold are present in the present case. In the present case the alleged illegality is the delivery of decision in absence of the parties. The illegality does not touch the decision itself but rather a manner in which it was delivered. The affidavit of the applicants does not include materials to support the allegation. Also as noted above the allegation was not included in the affidavit of the

applicants. For the foregoing reasons, I hold that this argument have no merit.

I shall now proceed to the next point. There is no dispute that the decision of the tribunal was delivered on 11th November, 2016 in absence of both the appellants and the respondent. Mr. Kilian alleged that he became aware that the decision had been delivered on 18th January, 2017. He maintained that the failure to be notified of the date of the decision was the cause of the delay in failing the appeal. I hold a view that the argument by Mr. Kilian is devoid of merit and I will illustrate hereunder.

Firstly, this appeal originated from the Kongowe Ward Tribunal, in that respect it was not mandatory for the applicant to wait for copies of judgement and decree of the tribunal. The requirement to attach copies of judgement and decree is a requirement arising from the provisions of section 51 (1) of Cap. 216 and **Order XXXIX Rule 1(1) of the Civil Procedure Code, Cap. 33 R.E 2019**. Since, the CPC does not apply to ward tribunals, this requirement does not apply to appeals originating from ward tribunals. It therefore follows that Mr. Kilian could have filed his appeal on being informed of the decision of the tribunal.

Secondly, assuming it was mandatory to attach copies of judgement and decree, which I have held it was not, the records are clear that Mr. Kilian became aware of the decision on by 18th January, 2017 and copies of the were made available for collection on 20th February, 2017. In that respect Mr. Kilian cannot complain that not being informed of the date of the decision is the cause for

his delay. This period would have been excluded in accordance with section 21(2) of Cap. 89.

Thirdly, there is a question whether Mr. Kilian exercised diligence in representing the applicants in the present case. He allegedly became aware that the decision had already been delivered on 18th January, 2017. Surprisingly, the letter seeking to obtain copies of judgement and decree were filed on 06th April, 2017, almost three months from becoming aware and almost two months from 20th February, 2017, when copies were available for collection. If indeed Mr. Kilian was diligent in prosecuting this case he could have filed the letter immediately after becoming aware that the decision had been delivered. Applying the exclusion under section 21(2) of Cap. 89 the clock started ticking from 20th February, 2017. By the time Mr. Kilian applied for copies he was in fact on the 45th day and the cutoff in filing the appeal. He finally collected the copies on 22nd May, 2017, three months from the date when they were available. To my surprise he has not offered any explanation to account for the delay between 20th February, 2017, when copies were made available to 22nd May, 2017 when the copies were paid for and collected.

In the same vain, Mr. Msemwa intimated that the alleged delay in filing the appeal was occasioned by negligence and lack of diligence on the counsel for the applicants in filing the subsequent appeal out of time and filing Misc. Land Application No. 637 of 2017 which were both struck out. I agree with Mr. Msemwa for the simple reason that throughout the proceedings before the tribunal up to this application, the applicants were represented by Mr. Kilian, a

practicing advocate. For all purposes and intent, the advocate is expected to know the timelines for filing an appeal as well as the requisite provisions in an application for extension of time. Being an advocate conversant with the facts of this case and the law, Mr. Kilian, cannot be heard now to complain that he did not know that by the time he obtained copies he was out of time and ought to have filed an application for extension of time; or that he did not know the appropriate citation of the enabling provision for an application for extension of time.

Time and again courts have held that ***"an error of an advocate or failure to check the requirements of the law properly is not a sufficient ground for extension of the period of limitation set by law"***. See **Umoja Garage vs. National Bank of Commerce**, [1997] TLR, 109; **VIP Engineering & Another vs. Said Salim Bakharesa (supra)**; **Ali Vuai Ali vs. Suwedi Mzee Suwedi**, ZNZ Civil Application No. 1 of 2006, CAT at Zanzibar (unreported); and **Calico Textile Industries Ltd vs. Pyarali Esmail Premji** [1983] TLR 28 to mention a few.

In **Umoja Garage vs. National Bank of Commerce (supra)**, the Court of Appeal, **Kisanga, JA** (as he then was) said in that connection:

"I am quite clear in my mind that the state of affairs in this case was brought about by the failure of the applicant's counsel to act diligently...It seems plain to me...lack of diligence on the part of counsel or an oversight ...would be even more devoid of merit as a plea for extension of time. In the result , therefore, I

am of the view that no sufficient cause has been disclosed for enlarging the time as prayed."

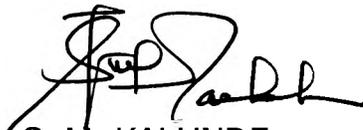
Similarly in **VIP Engineering & Another vs. Said Salim Bakharesa (supra), Ramadhani, J.A.** had this to say: -

"But this Court has repeatedly said the error of an advocate does not constitute sufficient cause to enlarge time. In our considered opinion, it automatically follows that the error of an advocate cannot be a ground for stalling the running of the period of limitation as proposed by Mr. Tenga"

In the end, I have not been satisfied by the reasons advanced by the applicants to show that they have good cause for the delay in filing the appeal. I have not been moved to exercise my discretion in granting the orders sought. In the premises, I proceed to dismiss the application with costs for lack of merit.

It is so ordered.

DATED at DAR ES SALAAM this 18th day of SEPTEMBER, 2020.


S. M. KALUNDE
JUDGE