IN THE HIGH COURT OF
THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO 138 OF 2020

(Originating from Ilala District Land and Housing Tribunal in
Land Application No. 140 of 2016 (Hon. M.Mgulambwa, Chairperson)

SULEIMAN OMARY ALLY (The Administrator of the Estate of the Late OMARY ALLY KOMBO).....**APPLICANT**

VERSUS

JULIUS CHARLES MHANDE.....1ST RESPONDENT
GODFREY MUBYAZ.....2ND RESPONDENT
DAUDI RUGEMALIRA.....3RD RESPONDENT
NICANOR OMOLLO WARIEDA.....4TH RESPONDENT

Date of Last Order: 05.08.2020
Date of Ruling 05.10.2020

RULING

V.L. MAKANI, J

The applicant SELEMANI OMARY ALLY is seeking for orders of extension of time within which to file an appeal against the decision of Ilala District Land and Housing Tribunal (the **Tribunal**) in Land Application No. 140 of 2016.

The application is under section 41(2) of the Land Disputes Court Act CAP 216 RE 2002 as amended by the Written Laws (Miscellaneous Amendments) (No.2) Act, 2016.The application is supported by the affidavit of the applicant herein.

The application was argued by way of written submissions and the applicant was represented by Mr. Frank Chacha, Advocate while the 2nd, 3rd, and 4th respondents were represented by Dr. Lucas Charles Kamanija, Advocate. The 1st respondent filed no submission and therefore the matter proceeded ex-parte against him.

Mr. Chacha reiterated the grounds contained in the affidavit that was affirmed by the applicant. He said that the intended appeal stands a chance to succeed and he added that it is a trite law that where there is an allegation of illegality contained in any judgment the court shall exercise its judicial discretion to extend time so as to ascertain the alleged point of illegality and determine it accordingly. He supported his argument with the case of **Samwel Munsiro vs. Chacha Mwikwabe, Civil Application No.539 of 2019 (CAT-Mwanza)** (unreported).

He said the Chairman of the Tribunal moved to discuss the issue of limitation of time based on the cause of action while the same was not pleaded nor raised in the course of hearing and even if it were raised it was a misconception for failure to make proper interpretation of section 9(1) of the Law of Limitation Act, CAP 89 RE 2019. He added that the above provision was misapprehended because on the date of death there was no dispute arising from the suit property therefore it was wrong to conclude that the applicant was time barred to claim from respondents.

Mr. Chacha further submitted that there was a delay by the Tribunal in giving the applicant copies of the proceedings, judgment and decree. He said soon after being supplied with the said copies on 17/12/2019, the applicant was financially constrained he was thus unable to afford filling fees and instruction fees payable to an advocate to institute an appeal. He added that the financial difficulty caused by COVID-19 slashed most of the business operations. He said though the financial constraints is not a good cause for extension of time however, under strict circumstances like in this case, it can be a good cause for extension of time because in civil cases litigants are required to pay judicial fees, failure of which, the pleadings are not admitted. He said that the applicant is an Administrator of the estate of the deceased having no defined business, therefore, he could not afford the costs. In support thereto he cited the case of **Yusufu Same and Hawa Dada vs. Hadija Yusufu, Civil Appeal No.1 of 2002** and prayed for the court to grant this application.

In reply Dr. Lucas adopted the contents of the 2nd, 3rd and 4th respondents counter affidavit and stated that, paragraphs 11, 12 and 13 of the applicant's affidavit contain conclusions. He said that paragraph 11 of the applicant's affidavit contain a conclusive statement:

> *"Henceforth the respondents did not prove their case as strictly required by the law and the chairman ignored the evidence adduced by the applicant and instead accepted the evidence of the respondents while was tented with irregularities and that the tribunal delivered judgment in their favour without any proof and or without proof at the required standards".*

He said that the same is the case in paragraphs 12 and 13 of the affidavit which contain conclusion. He said that conclusion in applicant's affidavit offends the law on affidavits and therefore has to be expunged or struck out by the court. He supported his position with the case of **Phantom Modern Transport (1985) Limited vs. Dobie (Tanzania) Limited, Civil Reference No.15 of 2001 and 3 of 2002** (unreported) cited in **Convergence Wireless Networks and 3 Others vs. WIA Group Limited and 2 others, Civil Application No.263 "B" of 2015.**

Further, Dr. Lucas said that the applicant has not accounted for the delay. He said that the applicant was supplied with the copies on 17/12/2019 and instituted this application on 20/03/2020 that is after about 4 months. He insisted that the attachment of copies of decree and judgment is not a condition precedent in instituting an appeal originating from the District Tribunal as provided for under section 41 of the Land Disputes Court Act and amended by section 21 of the Written Laws (Miscellaneous Amendments) No.2 of 2010 and section 41 of the Written Laws (Miscellaneous Amendments) (No.2) Act,2016. He supported his position with the case of **Asha Saidi vs. Given Manyanga & Another, Misc. Civil Application No.28 of 2003,(HC-DSM)** (unreported). He said that the period within which to file the petition of appeal begun to run from 24/06/2019 when the Tribunal delivered the judgment and not from 17/12/2019 when the copies were supplied to the applicant. He was therefore of the view that the applicant has not advanced sufficient reasons for his delay.

On the issue of illegality, the Dr. Lucas said that, the allegations of illegality and irregularity must be clearly stated in form of facts in the affidavit. In support of this he cited the case of **Samwel Munsiro vs. Chacha Mwikwabwe, Civil Application No.539/08 of 2019 (CAT-Mwanza)**(unreported). He said that the applicant's affidavit does not clearly state in form of facts the alleged irregularities and illegalities in the judgment of the trial Tribunal, rather the paragraphs (paragraph 11) contains conclusions. He said those paragraphs should be expunged/struck out and if so struck out the applicant's affidavit becomes devoid of any allegations of illegality and irregularity. Further learned Counsel said that the applicant has not argued the said illegality or irregularity in his submission in chief and that the issue of financial constraints were not stated in the applicant's affidavit. He prayed for this application to be dismissed with costs.

In rejoinder Mr. Chacha for the applicant prayed to adopt the contents of the applicant's affidavit. Further he reiterated his main submissions and added that, if the respondent finds that the contents of paragraphs 11, 12 and 13 of applicant's affidavit contained conclusions and arguments then he should have raised the same in the counter affidavit as preliminary objections and that failure to raise it at the earliest stage is tantamount to admission of the facts in the applicant's affidavit and cannot safely be raised at the submission stage. He said that even if the said paragraphs contained conclusions the proper remedy is for the court to expunge them accordingly since the remaining paragraphs are enough to contain application.

Mr. Chacha insisted on the issue of sufficient reasons that, soon after the applicant was supplied with the copies of decision, the court went on vacation and there was no legal business transacted. He prayed for the application to be granted.

Having gone through affidavits and submission from the parties, the issue for determination is whether this application has merit. The applicant's reasons for delay are contained in paragraphs 10 and 11 of the applicant's affidavit, that the Tribunal delayed to issue him with copies of the judgment and that the said judgment was tainted with illegalities and irregularities. The respondent in reply contended that the copies of the decision are not mandatory when appealing from the decision originating from the Tribunal; he further contended that paragraphs 11, 12 and 13 of applicant's affidavit contain conclusions. The duty here is to; **one,** determine the merits of the respondent's submissions that the applicant's affidavit contains conclusions and; **two,** determine the merits of this application.

I have taken time to go through applicant's affidavit especially paragraphs 11, 12 and 13 which has been complained about. But I have found out that the paragraphs contain beliefs of the applicant and not conclusion as claimed by Dr. Lucas the respondent's Advocate. For instance, paragraph 13 of the applicant's affidavit signifies the applicant's belief that he has advanced sufficient reasons to warrant this court to extend time within which he can appeal. The respondent's claim that the applicant's affidavit contains conclusions

cannot stand. In any case, and as correctly argued by Mr. Chacha, it is the practice that such objections in terms of law and facts ought to be raised at the earliest possible time so that they are disposed of before hearing of the substantive application. Raising such objections at the time of submission is nothing else but an afterthought.

On the merit of the application, the applicant's main reasons for delay are contained in paragraph 10 and 11 of applicant's affidavit that, the Tribunal delayed to issue of the judgment and that the impugned judgment was tainted with irregularities and illegalities. Dr. Lucas was of the view that attachment of copies of decree and judgment is not a condition precedent in instituting an appeal originating from the District Tribunal. However, according to Order XXXIX, Rule 1 of the Civil Procedure Code CAP 33 RE 2019 (the CPC) when filing an appeal to the High Court it is mandatory for the appeal to be accompanied by the copy of the judgment and decree appealed against. So, attachment of the judgment is one of the requirements when filing appeal.

However, the judgment at the Tribunal was delivered on 24/06/2019 and the applicant requested for the copies of the judgment and decree on 12/10/2019, which is four months after the delivery of the judgment. Such period of delay is not well accounted for by the applicant. On the other hand, in his submissions the applicant said that, he was prevented by financial constraints caused by the COVID-19 pandemic. Much as I peruse the applicant's affidavit, I find no where the said economic constraint is pleaded. It is trite law that

parties are bound by their pleadings, therefore economic constraints cannot be considered since it was not pleaded in the applicant's affidavit. In the case of **Astepro Investment Co. Ltd vs. Jawinga Investment Limited, Civil Appeal No. 8 of 2015** (unreported) cited with approval in **Leonard Nyang'uye vs. Republic, Misc. Criminal Application No.39 of 2016 (HC-Mbeya)** (unreported) it was stated that:

> *"...parties are bound by their own pleadings...the function of the pleading is to give notice of the case which is to be met. A party must therefore, so state his case that his opponent will not be taken by surprise. It is also to define with precision the matters on which the parties differ and the point on which they agree, thereby to identify with clarity the issues on which the court will be called upon to adjudicate and determine the matter in dispute."*

On the strength of the above authority I decline to consider the ground of financial constraints submitted by the applicant.

It is clear now that the applicant requested for the copies of the judgment and decree 4 months after the delivery of the judgment, such period goes unaccounted. It is trite law that every single day of delay must be accounted for to enable the court to exercise its discretionary powers in granting extension of time. It was so stated in the case of **Bushiri Hassan vs. Latifa Lukio Mashayo, Civil Application No. 3 of 2007** (unreported) the court stated with precision that:

> *"Delay of even a single day, has to be accounted for otherwise there would be no proof of having rules*

prescribing periods within which certain steps have to be taken."

On the issue of illegalities, I find that the same is not apparently on the face of records. For the illegality to be the basis of the grant of extension of time, it is now settled that the illegality must be apparent on the face of the record and of significant importance to deserve the attention of the appellate court. (See **Arunaben Chaggan Mistry Vs. Naushad Mohamed Hussein & Mohamed Raza Mohamed Hussein, Misc Land Application No.23 Of 2018 (HC-Arusha)** (unreported). The applicant claimed that the Chairman of the Tribunal failed to interpret section 9(1) of the law of Limitation Act, or he dealt with the matter of time limitation which was not pleaded. This cannot be said to be an error apparent on the face of the record as the court has to hear parties and establish the illegality. It is not a self-explanatory error apparent on record. The applicant could have had the chance to extensively establish them if appealed on time.

In the result and for the reasons stated above, it is evident that the applicant has failed to account for the delay and hence establish sufficient reasons for the court to exercise its discretionary powers to grant extension of time to file an appeal. Subsequently, the application has no merit and it is hereby dismissed with costs.

THE HIGH COURT OF TANZANIA * LAND DIVISION *

V.L. MAKANI
JUDGE
05/10/2020