IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 629 OF 2019

THADEO FUKUDA RWEYAMBA (*the Administrator of the Estate of the Late George Thadei Rweyamaba*).....**APPLICANT**

VERSUS

MARY KAIJAGE.....**RESPONDENT**

Date of the ruling 24/10/2010

Date of the last order 13/11/2020

RULING

I. MAIGE, J

This is application of extension of time to apply for revision against the judgment and decree of the District Land and Housing Tribunal for Kibaha in Land Application No. 08 of 2016 delivered by Hon. Mbuga (chairperson) on 31st October 2017. The Application is preferred under section 14 (1) of the Law of Limitation Act.

In his affidavit in support of the application, the applicant has associated the delay with poor advise from his former advocate one

Simba Kipengele on the proper procedure to be followed. He clarified that, soon after procuring copies of judgment and decree, his former advocate lodged two separate successive applications for extension of time which were struck out for being incompetent. The first application which was Misc. Land Application No. 182 of 2018 was struck out, by His Lordship Mohamed, as he then was, on 17th October 2018. The second one which was Misc. Land Application No. 768 of 2018, was struck out, by His Lordship Mallaba, on 30th August 2019, for being preferred under a wrong provision of the law.

On top of that, the applicant has placed reliance on illegality as a ground for extension of time. In paragraph 12 of the affidavit, he has pinpointed five elements of illegality. First, the **trial tribunal** was not properly constituted. Two, the assessors were not properly involved in the decision making. Three, the decision is not founded on evidence. Four, evidence was not properly recorded. Five, the decision was reached in sheer disregard of the right to be heard.

By the Court direction, the argument for and against the motion was made by way of written submissions. Mr. **Makanja Manono**

presented the submissions for the applicant whereas his learned friend advocate **Samson Samo** for the Respondent.

In his submissions on the issue of illegality, **Mr. Manono** informed the Court that, the **trial tribunal** was not duly constituted when it was conducting the trial. The reason being that participation of assessors and their opinions is not reflected in the proceedings. He submits therefore that, this being an apparent issue of illegality, it does by itself constitute a sufficient ground for extension of time. He referred a number of judicial pronouncements in support of the view that illegality can be a ground for extension of time. One such authorities is a decision in **Ameir Mbaraka and Azania Bank Corp Ltd Vs. Edgar Kahwil Civil Appeal No. 154 of 2015 CAT.**

On the other hand, **Mr. Samo** submits that, there is no illegality involved in the intended appeal. In his understanding, the trial chairperson was justified in the circumstance of the case to proceed with the decision in the absence of assessors. The counsel faults the applicant in not accounting for every day of delay. He cemented his

contention with the decision in **Elfazi Nyatenga and 3 others Vs. Caspian Mining ltd, Civil Application No. 44 of 2017 CAT.**

In his rejoinder submissions, **Mr. Manono** pressed on the point that the judgment of the **trial tribunal** is tainted with illegality.

Having gone through the written submissions, I find the gist of this application to be short and narrow. Though in the affidavit the applicant has justified the delay both on factual and legal points, in his submissions he has only addressed the legal issue. He has not addressed the factual issue. Equally so, out of the six points of illegality pinpointed in the affidavit, it is only the issue of assessors which have been addressed. I take it that he has abandoned the remaining grounds. I will therefore consider the application based on the alleged point of illegality.

I agree with **Mr. Samo** that, for the Court to grant an extension of time, the applicant must establish by affidavit or otherwise that, he was prevented by sufficient cause from timely pursuing his action. What amount to sufficient cause and what is not is not statutorily defined. Nonetheless, case law provides some factors to be

considered in determining whether sufficient cause has been demonstrated. For instance, in **LYAMUYA CONSTRUCTION COMPANY LIMITED VS. THE BOARD OF THE REGISTRED TRUSTEES OF YOUNG WOMEN'S CHRISTIAN ASSOCIATION,** CIVIL APPLICATION NO. 2 OF 2010, the **CAT** outlined the following four factors to be considered:-

(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 existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged.*

The four above factors may however not be exhaustive. Neither does each and every one apply in every case. Therefore, in **INSURANCE TANZANIA LIMITED VERSUS KIWENGWA STRAND HOTEL LIMITED**, CIVIL APPLICATION NO. 111 OF 2009 the CAT remarked that; *" there could be many other factors, that could arise from the facts of each case".*

Whereas the first three guidelines intend to test if the delay was not associated with negligence or inaction on the part of the applicant, the last one intends to test if the extension of time is necessary for correction of illegality in the record of the lower tribunal. This principle was enunciated in **THE PRINCIPAL SECRETARY MINISTRY OF DEFENCE AND NATIONAL SERVICE VS. DEVRAM VALAMBIA (1992)** TLR 185 where the Court of Appeal remarked as follows:-

> *When the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending time for the purpose, to ascertain the point and, if the alleged illegality be established to take appropriate measures to put the matter and record right.*

This principle has been constantly ricocheted in various judicial pronouncements including the authority in **KALUNGA AND COMPANY ADVOCATE VS. NATIONAL BANK OF COMMERCE LIMITED (2006) TLR 235 LYAMUYA CONSTRUCTION COMPANY LIMITED** (*SUPRA*). It is also the law that, for an extension of time to be granted on account of illegality, the same must be apparent on the face of the record. Therefore, in **OMARI ALLY (AS THE**

ADMINISTRATOR OF THE ESTATE OF THE LATE SELEMAN ALLY NAYMALEGE) AND OTHERS VS. MWANZA ENGINEERING WORKS, CIVIL APPLICATION NO. 98/08 OF 2017 it was observed that;

> *"Applying the above settled position to the instant application, I have no difficulty in holding that the applicant's contention that the decision sought to be challenged is fraught with illegalities is nothing but an unsubstantiated general complaint. Without the details of the alleged illegalities, it is impossible to determine whether the said illegalities are apparent on the face of the record and that they are of sufficient importance to merit the attention of this court.*

In this case, the illegality alleged is non-participation of assessors in the decision of the **trial tribunal**. Mr. Samo in his counter submission contends that, the trial chairperson was justified to continue as such under section 23(3) of the Land Courts Disputes Act. The reason being that the assessors with whom he sat at the commencement of the trial were unable to proceed until the end of the trial. The claim, it would appear, is founded on page 7 and 8 of the judgment where the trial chairperson remarked as follows:-

> *In this matter as the law requires at the commencement of hearing, I sat with wise assessors, however in the middle of proceedings due to internal affairs both assessors were*

indisposed, I therefore under section 23(3) of the Land Courts Disputes Settlement Act (Cap. 216 R.E. 2002, proceeded with the matter.

Perhaps, the issue which I have to consider is whether looking at the judgment of the **trial tribunal** in isolation of the evidence on the record can a higher court observe any obvious element of illegality. I am preparing myself to answer the question negatively. The reason being that, in the above quoted passage, the trial chairperson has justified his determination of the dispute without the opinions of assessors on account of inability of the assessors to enter appearance at the end of the trial. Under section 23(3) of the Land Court Disputes Act that is one of the justifications of the chairperson determining a matter without the opinion of assessors. Whether the finding is reflected in the proceedings of the trial tribunal requires examination of the record of the trial tribunal. It is not apparent on the face of the judgment itself. It requires calling the records of the trial tribunal which could have been done if there was an appeal or revision. In my view therefore, the alleged illegality, assuming is valid, is not apparent on the face of the judgment.

In view of the foregoing discussion, I would but for the reason to be assigned hereinafter, dismissed the application. My reading of the last paragraph of the judgment raises a doubt if the judgment of the trial tribunal amount to a judgment in law. I will quote hereunder the said paragraph.

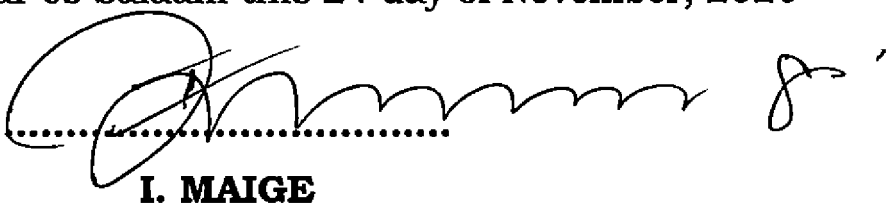
> *In the final results, this application is devoid of merits. The same is dismissed. I proceed to reiterate that by prima facie proof, the lands in dispute belong to the late Balena unless contrary intention is proved. Based on the nature of this case that parties are relatives, I will not award costs.*

As a matter of law, it is not a judgment that which does not finally and conclusively determine the facts in controversy. The above extract from the judgment on the face of it, suggests that, whether the suit property belonged to the late Balena from whom the respondent traces root of title is subject to proof of what the trial chairperson calls "contrary intention". This apparent anomaly in my view raises an issue of legality of the judgment of the trial tribunal which in view of the authority in **Valambia *supra*** it may by itself amount to sufficient cause.

It is on the foregoing ground that I will, as I hereby do, exercise my indulgency and grant the application to enable the Court to correct the illegality if established and put the record correct. The applicant is given 30 days to file his intended revision. In the circumstance, I will not give an order as to costs.

Order accordingly.

Dated at Dar es Salaam this 24 day of November, 2020



I. MAIGE

JUDGE

24/11/2020

Date: 24/11/2020

Coram: Hon. S.H. Simfukwe - DR

For the Applicant: Mr. Makanja Manowo, Advocate

For the Respondent: Present in person

RMA: Bukuku

COURT:

Ruling delivered this 24th day of November, 2020 in the presence of both sides.

THE HIGH COURT OF TANZANIA
LAND DIVISION

S.H. Simfukwe
DEPUTY REGISTRAR
24/11/2020