**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND APPLICATION NO.51 OF 2021**

*(Originating from Land Case No. 84 (B) of 2007 by A.F Chinguwile, J dated 1.12.2010)*

**LEONARD S. NDESHAU ..... APPLICANT**

**VERSUS**

**JOSEPH J. MKIPONYA ..... RESPONDENT**

**RULING**

*Date of last Order: 26.07.2021*

*Date of Ruling: 26.07.2021*

**A.Z.MGEYEKWA, J**

I am called upon in this matter to decide whether this court should exercise its discretion under section 14 (1) of the Law of Limitation Act, Cap. 89 [R.E 2019] and section 95 of the Civil Procedure Code Cap. 33 [R.E 2019] to enlarge the time within the applicant to file an application to set aside a dismissal Order by Hon. A. F Chinguwile, J in Land Appeal No. 84 (B) of 2007 out of time delivered on 1st December, 2010. The application is supported by an affidavit deponed by Leonard S. Ndeshau,

the applicant. The respondent feverishly opposed the application. In a Richard Joseph Makiponya, the Administrator of the estate of the late Joseph J. Makiponya.

When the matter was called for hearing before this court on 8th April, 2021, the applicant had the legal service of Mr. Flavian John, learned counsel holding brief for Mr. Innocent Mushi, learned counsel whereas the respondent enjoyed the legal service of Mr. Ambrosi Nkwera, learned advocate. By the court order and consent by the parties, the application was argued by way of written submissions whereas, the applicant's Advocate filed his submission in chief on 22nd April, 2021 and the first and second respondents' Advocate filed his reply on 6th June, 2021 and the applicant's Advocate filed a rejoinder on 14th May, 2021.

Mr. Mushi, learned counsel was the first one to kick the ball rolling. Reiterating what was deposed in the supporting affidavit, the learned counsel urged this court to adopt the applicant's application and form part of his submission. Mr. Mushi argued that the main two grounds which constitute good reasons for delay are wanted of the assessor's opinion and fraud on the offer letter. The learned counsel for the applicant contended that the applicant has discovered that the opinion of the assessors is not featured in the judgment, not the tribunal proceedings.

He added that only the Chairman on his judgment page 2 last paragraph mentioned that he has considered the opinion of the assessors. He added that it is not known what they did say. In his view, this is illegality on the face of the record which must be corrected by this court. He went on to state that the District Land and Housing Tribunal proceedings and judgment were not properly constituted hence the whole proceedings and judgment are null and void. To fortify his position he cited the case of **Mbarak and another v Kahwili**, Civil Appeal No. 134 of 2015 [2016] TZCA 154.

Mr. Mushi continued to state that the applicant wants to challenge the issue of illegality on the face of the record and in his view, the same constitute sufficient reason for extension of time. Regardless of whether or not a reasonable explanation has been given by the applicant to account for the days of delay. to buttress his position he cited the case of **Monica Nyamakare Jikamba v Mutega Bwire and another**, Civil Application No. 487/01 of 2018.

It was Mr. Mushi further submission that the decision of the tribunal involves another illegality and fraud since it failed to consider between the respondent and applicant who was the first to apply for an offer. He went on to argue that as the result the Chairman relied on a forged offer which

was procured by fraud to reach a conclusion. He claimed that the purported offer letter was relied upon by the Chairman to declare the owner in Land Case No. 192 of 2017 while it was obtained by fraud. He lamented that the offer letter could not be issued before the approved plan since the land title is approved by a plan. In his view, the approved plan was required to be the first to be issued before the approved plan. To bolster his argumentation he cited the case of **Ms. Safia Ahmed Okash (As administratrix of the estate of the late Ahmed Okash) v Ms. Sikudhani Amiri & 82 Others,** Civil Appeal No.138 of 2016. He further argued that the fraud discovered on the part of the letter offer therefore the period of limitation begins to run after the discovery. In his view, this ground constitutes sufficient reason for extension of time.

In conclusion, Mr. Mushi urged this court to grant the applicant's prayer as stated in the chamber summons.

Mr. Nkwera, the learned counsel for the respondent vehemently resisted the application. The learned counsel for the respondent urged this court to adopt the counter affidavit and form part of his submission. The learned counsel for the respondent started with a brief background of the facts which led to the instant application which I am not going to reproduce in this application. Mr. Nkwera contended that the applicant's

affidavit contains many defects to support the application. In his view, the same renders the whole application incompetent before the court.

Submitting on the pertinent issue which this court is invited to consider, Mr. Nkwera stated that on whether there are sufficient reasons advanced by the applicant to warrant this court to give time to the applicant to file the application sought before this court. He referred this court to the case of **Badru Issa Badru v Omary Kilendu and Another**, Civil Application No. 164 of 2016 where the Court of Appeal insisted for consideration of several principles when considering the grant of extension of time including the following:-

(a) Length of delay

(b)Reasons for delay

(c)Degree of prejudice to the respondent

(d)Overwhelming chances of succeeding after grant of extension.

With respect to the length of delay, Mr. Nwkera argued that it is indisputable fact that the dismissal order in which the applicant wants to be set aside was delivered on 01st February, 2010. He went on to argue that looking at the time of filing the present application more than 11 good years have passed henceforth the time has passed a lot. On the reason for the delay, the learned counsel for the respondent argued that the applicant did not submit on the reasons for the delay which would attract

this court that is genuine reasons for the delay of filing an application like the present application since the applicant was aware of the dismissal order since then. Regarding, the degree of prejudice to the respondent; Mr. Nkwera contended that the respondent has been litigating to be given his land for more than 14 years, he added that justice delayed is justice denied. He valiantly argued that the applicant has been filing endless cases until the respondent has passed away and the suit land is not given to his heirs. On overwhelming chances of succeeding after the grant of extension, Mr. Nkwera contended that the applicant has no any chances of succeeding since there is no any reason for nonappearance before this court considering that it was the applicant who filed the said appeal against the respondent. He went on arguing that the applicant and his advocate were both negligent in prosecuting the appeal.

The learned counsel for the respondent repeatedly argued that there is no chance of success and if the applicant will be availed with extension of time that will be in total violation and disrespect of legal principles which requires that the litigation must come to an end. Fortifying his position, Mr. Nkwera cited the case of **Bank of Tanzania v Said A. Marinda and 30 others**, Civil Reference No.3 of 2014 (unreported). Mr. Nkwera stated that in an application for extension of time the concern should be on the evaluation and analysis of the legal situation apart from tribunal situation,

he went on to state that the nature of the instant application, the application is granted by the court upon discretion if at all sufficient reasons or reasonable ground have been adduced by the applicant. To support his position he seeks refuge from the case of **Tanzania Electricity Supply Co Ltd v Permanent Secretary, Ministry of Energy and Minerals** (Consolidated Civil Case Application No. 19 and 27 of 1999 (unreported) and the case of **Osward Masatu Mwizabura v Tanzania Fish Processors Ltd**, Civil Application No.13 of 2020 (unreported).

Stressing, Mr. Nkwera argued that it is a principle in any application for extension of time to file an application for anything including the instant application for setting aside dismissal order, the applicant must account for any single day of delay. Fortifying his position he referred this court to the case of **FINCA (T) Ltd and Another v Boniface Mwalukasa**, Civil Application No. 589/12 of 2018.

In his long submission, Mr. Nkwera argued that the issue of assessors was addressed by the Chairman in his judgment and has put clear that he had opinion of assessors. He stated that the court records are serious documents. To support his argumentation he cited the case of **Halfan Sudi v Abieza Chichili** (1998) TLR 528. Regarding the ground of fraud, the learned counsel for the respondent valiantly submitted that the learned counsel for the applicant was required to advise his client to report the

same in the authorities dealing with fraud issues. In his view, the same does not constitute illegality. To buttress his position he referred this court to the case of **Lyamuya Construction Company Ltd v Board of Registered Trustees of Young Women's Christian Association of Tanzania,** Civil Application No.2 of 2010 (unreported).

On the strength of the above submission, Mr. Nkwera stated that for the interest of justice the applicant's application be dismissed with costs since the applicant intends to delay the execution process which was granted way back in 2007. He valiantly argued that litigation must come to an end prevailing by this court dismissing the application which has no any other aim than delaying the respondent's execution process.

In his rejoinder, Mr. Innocent reiterated his submission in chief. Stressing, he argued that illegality raised by the applicant is on the face of the record. He argued that the issue of fraud was never addressed by the respondent in his reply. Insisting, he contended that the claim of the illegality of the challenged decision constitutes sufficient reason for extension of time regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay. the learned counsel for the applicant further complained that the affidavit is not defective since the cited application No. 192 of 2007 was a typing

error the proper application is No. 192 of 2007. He added the said error does not go to the root of the case and the same can be corrected.

In conclusion, the learned counsel for the applicant urged this court to allow the remedies sought in the chamber summons.

Having carefully considered the submissions made by the learned counsels in their written submission and examined the affidavit and counter affidavit, the issue for our determination is ***whether the application is meritorious***.

The position of the law is settled and clear that an application for extension of time is entirely the discretion of the Court. But, that discretion is judicial and so it must be exercised according to the rules of reason and justice as it was observed in the cases of **Mbogo and Another v Shah** [1968] EALR 93 and **Ngao Godwin Losero v Julius Mwarabu**, Civil Application No. 10 of 2015.

Additionally, the Court will exercise its discretion in favour of an applicant only upon showing good cause for the delay. The term "good cause" having not been defined by the Rules, cannot be laid by any hard and fast rules but is dependent upon the facts obtained in each particular case. This stance has been taken by the Court of Appeal in a number of its decision, in the cases of **Regional Manager, TANROADS Kagera v Ruaha Concrete Company Ltd**, Civil Application No.96 of 2007, **Tanga**

**Cement Company Ltd v Jumanne D. Massanga and another**, Civil Application No. 6 of 2001, **Vodacom Foundation v Commissioner General (TRA)**, Civil Application No. 107/20 of 2017 (all unreported). To mention a few.

I have keenly followed the application and the grounds deposed in the supporting applicant's affidavit and the respondent's counter affidavit, Mr. Luhogi has shown the path navigated by the applicant and the backing he has encountered in trying to reverse the decision of this court. The applicant's Advocate has raised one main limb for his delay; illegality. The applicant alleges that the decision of this court is tainted with illegality.

The illegality is alleged to reside in the powers exercised by the trial tribunal that the assessors' opinions were not considered and the respondent tendered forged documents before the tribunal, thus, fraud was involved. Supporting his application, Mr. Innocent referred this court to pages ... of the tribunal judgment. However, he did not refer this court to the applicant's affidavit. Reading paragraph 6 of the applicant's affidavit, the applicant alleges that the tribunal decision was tainted with illegality. In paragraph 7of his affidavit, the applicant cemented that the applicant's application for enlargement of time is illegality which needs the intervention of this court. In his submission.

On his side, the learned counsel for the respondent opposed the application, on paragraph 5 of the counter affidavit, the learned counsel for the respondent argued that there is no any illegality in the judgment sought to be appealed against. In his submission, the respondent on paragraph 4 of the counter affidavit insisted that the applicant was required to account for each day of delay to file an application to set aside the dismissal order from 1st February, 2010 to 28th January, 2021. In his view, he stressed that the alleged illegality is not apparent on the face of the record.

The legal position, as it currently obtains, is that where illegality exists and is pleaded as a ground, the same may constitute the basis for extension of time. This principle was accentuated in the **Permanent Secretary Ministry of Defence & National Service v D.P. Valambhia** [1992] TLR 185, to be followed by a celebrated decision of **Lyamuya Construction Company Limited and Citibank (Tanzania) Limited v. T.C.C.L. & Others**, Civil Application No. 97 of 2003 (unreported). In **Principal Secretary, Ministry of Defence and National Service v Devram Valambhia** [1992] TLR 185 at page 89 thus:

> *"In our view, when the point at issue is one alleging illegality of the decision being challenged,* ***the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and, if***

***the alleged illegality be established, to take appropriate measures to put the matter and the record straight.*** *" [Emphasis added].*

Similarly, in the cases of **Arunaben Chaggan Mistry v Naushad Mohamed Hussein & 3 Others**, the Court of Appeal of Tanzania in Civil Application No. 6 of 2016 (unreported) and **Lyamuya Construction** (supra), the scope of illegality was taken a top-notch when the Court of Appeal of Tanzania propounded as follows:-

*"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in Vaiambia's case, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one.* ***The Court there 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." [Emphasis added].*

Likewise in Valambia (supra), the illegality of the impugned decision was visible on the face of the record in that the High Court had issued a garnishee order against the Government without affording it a hearing which was contrary to the rules of natural justice. While in the instant application, the illegality is not on the face of the record, it requires this

court to go through the evidence on record while as stated by Mr. Nkwera, the applicant was required to account for each day of delay and not coming before this court calcimining that there are grounds of illegality after 11 years passed when the Judgment was delivered. The justification for a delay of 11 years was necessary.

Guided by the above authority, it cannot in my view, be said that the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for it. Each *case has to be determined on its own merit and all pertinent circumstances must be considered. In the case of* **Moto Matiko Mabanga v Ophir Energy PLC and 2 Others**, Civil Application No.463/01 of 2017, delivered on 17th April, 2019, the Court of Appeal of Tanzania emphasized that:-

> *"... for the ground of illegality to stand, the challenged* ***illegality of the decision must clearly be visible on the face of the record****, and the illegality in focus must be that of sufficient importance." [Emphasis added].*

For the sake of clarity, in the cited cases of Monica Nyamakare (supra), the issue for discussion was the claim of illegality constituted good cause for an extension of time while in the instant application the alleged illegality is not on the face of the record. The case of **Mbarak and another** (supra)

is also distinguishable for want of accounting days of delay. After taking in consideration what has been stated in the affidavit and the applicant's Advocate submission the alleged illegality is not on the face of the record.

Guided by the above findings, I am in accord with the respondent Advocate's submission that, the question of illegality in the conduct of the trial proceedings does not arise. The same cannot, as a matter of law, be termed as illegality thus cannot be a ground for applying for extension of time. It should be noted that extension of time is not a right of a litigant against a Court but a discretionary power of courts which litigants have to lay a basis [for] where they seek [grant of it] the same was held by the Supreme Court of Kenya in the case of **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others**, Sup. Ct. Application No. 16 of 2014. I recapitulate that I accede to Mr. Nkwera's views that the applicant's application is devoid of merit.

Applying the foregoing statement of principle to the case at hand, I am not persuaded that the alleged illegality is clearly apparent on the face of the impugned decision. Certainly, it will take a long drawn process to decipher from the impugned decision the alleged misdirections or non-directions on the said grounds. To that end, I must conclude that the applicant has not demonstrated any good cause that would entitle him

extension of time to file an application to set aside the order in Land Appeal No. 84 B of 2007. As a result, this application fails and is, accordingly, dismissed with costs.

Order accordingly.

Dated at Dar es Salaam this date 26th July, 2021.

A.Z.MGEYEKWA

**JUDGE**

26.07.2021

Ruling delivered on 26th July, 2021 in the presence of Mr. Kelvin, learned counsel holding brief for Mr. Ambros, learned counsel for the respondent.


A.Z.MGEYEKWA

**JUDGE**

26.07.2021