

**IN THE HIGH COURT OF TANZANIA**

**AT SUMBAWANGA**

**MISC. LAND APPLICATION NO. 16 OF 2020**

(Originating from Application No. 26 of 2015 in the District Land and Housing Tribunal  
for Katavi District at Mpanda)

**FERUZI MUSTAFA ..... 1<sup>st</sup> APPLICANT**

**AYUBU MUSTAFA ..... 2<sup>nd</sup> APPLICANT**

**VERSUS**

**NGIBWA FARMERS ASSOCIATION (NFA) ..... RESPONDENT**

Date of Last Order : 17/06/2021

Date of Ruling : 10/08/2021

**RULING**

**C.P. MKEHA, J;**

By a chamber summons made under section 41 (2) (a) of the Land Dispute Courts Act, Cap 216, (the Act) and section 14 (1) of the Law of Limitation Act, Cap 89, the above-named applicants, are seeking for the following reliefs. A court's leave for an extension of time within which to lodge an appeal against the decision of the District Land and Housing Tribunal for Katavi (trial Tribunal) in Application No. 26 of 2015 dated 12<sup>th</sup> September, 2018. They also prayed for the respondent to be condemned to pay costs of the present application and any other relief this Court may deem fit and just to grant. The application is supported by an affidavit sworn by Ileth Sombiro Mawalla, the applicants' attorney.

The respondent, on the other hand, contested the merits of the application by filing the counter affidavit that was sworn by Patrick Isakwisa Amulike Mwakyusa.

On 25<sup>th</sup> February, 2021, when this contentious application came for hearing, the applicants were under the services of Mr. Laurence John, learned counsel whereas Ms. Sekela Amulike, learned counsel appeared for the respondent. By the parties' consents, the matter was argued by way of written submissions. The respondent's written submission was drawn and filed by Mr. Patrick Isakwisa Amulike Mwakyusa, learned counsel.

In his submission in support of the application, Mr. John, who adopted the affidavit in support of the application as part of his submission, had this to submit. The trial Tribunal's failure to incorporate the opinion of the assessors is a fatal irregularity as it violates section 24 of the Land Disputes Act Cap. 216 R.E. 2019 and Regulation 19 (2) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations of 2003. The irregularity vitiates the whole proceedings before the trial Tribunal. He also submitted that, the opinions of the assessors were not read during trial in the presence of the parties. He, in support of the argument, cited the case of **Edina Adam Kibona v. Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017, Court of Appeal of Tanzania at Mbeya (unreported).

He further submitted on the other illegality contained in a decree of the trial Tribunal. To him, it violates Order XX Rule 9 of the Civil Procedure Code, Cap 33 R.E. 2019. The said decree failed to specify the suit premise, he submitted. He further submitted that, the irregularity is fatal as it has occasioned injustice to the applicants since it leaves uncertainty on the specific acres awarded to the respondent. Mr. John urged the court to grant the application on the basis of his submission. He was of the further submission that, the present application is non-contentious because the respondent had failed to oppose it as required by the law. His main contention on this point is centered on the misdescription of the court that was done by the respondent when filing its counter affidavit. He pointed out that, filing a counter affidavit in the Court of Tanzania at Sumbawanga is fatal irregularity as the said court is non-existent. He, in the absence of the opposing affidavit, urged the Court to grant the application. He referred the Court to the following case laws; **Salvius Francis Matembo and 2 Others v. Republic**, Criminal Appeal No. 95 of 2019, High Court of Tanzania at Dar es Salaam (unreported) and **Wilbard Makuke v. Mages Masinde**, Misc. Land Application No. 119 of 2019, High Court of Tanzania at Mwanza (unreported).

The reaction by Mr. Mwakyusa was to the following effect. The whole application is a misconception as the intended course has been overtaken by events. He submitted that, the decree was already executed and thus the present application cannot be granted bearing in

mind the concept that litigation must come to an end. He valiantly challenged the respondent's indulgence during that whole time when the trial Tribunal's decision was delivered and finally executed by the same Tribunal. He further submitted that, there was neither an appeal nor an application for stay of execution that would have express their discontents. He quickly termed this application as a mere afterthought that seeks to rescue the learned counsel, who was handling the matter, from the negligence complaints. The complaints that were about to be raised against him for his failure to take the necessary steps on time. In the absence of sufficient reasons from the applicants, it was Mr. Mwakyusa's prayer that, the application be dismissed with costs as it is merely an abuse of court process.

As for the raised concern about the anomaly contained in a counter affidavit, Mr. Mwakyusa invited this Court to the "oxygen principle", the overriding objective principle, as well as Article 107A (2) (e) of the Constitution of the United Republic of Tanzania, 1977. He simply urged the Court to see the said misdescription as a minor and curable defect. The fact that, the said "oxygen principle" is a creature of statute then it must prevail over the case law that goes against it, he submitted. In support of the argument, he cited the case of **National Bank of Commerce v. J.M. Sinzobakwila** (1978) LRT No. 39.

In his rejoinder submission, Mr. John contended that, neither the cited Article 107A (2) (e) of the Constitution of the United Republic of Tanzania, 1977 nor the "oxygen principle" would rescue the application.

The irregularity is not a mere irregularity as it goes to the root of the matter. He cited the following case laws to support the argument; **China Henan International Cooperation Group v. Salvand K.A Rwegasira**, Civil Reference No. 22 of 2005, Court of Appeal of Tanzania at Dar es Salaam (unreported), **Mwalimu Amina Hamisi v. National Examination Council of Tanzania and 4 Others**, Civil Appeal No. 20 of 2015, Court of Appeal of Tanzania at Dar es Salaam (unreported) and **Erick Raymond Rowberg and 2 Others v. Elisa Marcos and David Elisa Marcos**, Civil Application No. 517/02 of 2017, Court of Appeal of Tanzania at Arusha (unreported).

In his further rejoinder submission, Mr. John contended that, the execution is not over within the meaning of Regulation 30 (1) and (2) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations of 2003. Besides that, he contended that, no evidence was tendered by the respondent to support the assertion. He, however, admitted that there was an Execution Application No. 43 of 2019 which was granted but the same cannot bar the applicants from bringing the present application. Otherwise, he emphasized on his submission in chief. He cited the case of **Tanzania Cigarette Company v. Hassan Marua**, Civil Application No. 49/01 of 2018, Court of Appeal of Tanzania at Dar es Salaam (unreported).

Upon a serious consideration of the submissions made by the learned advocates and the affidavital evidence of both parties, I am of the settled view that the issue for determination is whether the applicant has demonstrated a good cause to warrant an extension of

time. Usually, parties are duty bound to move the court timely (see the case of **Loswaki Village Council and Another v. Shibesh Abebe** [2000] TLR 204).

However, before I proceed any further, I found proper to address the point of law that was, in an unorthodox manner, raised by the applicant through his submission. Before all else, those who have the duties towards justice seekers are always supposed to discharge their duties diligently. The overriding objective principle together with Article 107A (2) (e) of the Constitution of the United Republic of Tanzania are not magic wands in the hands of defaulting litigants. In other words, the import of that principle was not meant to dwindle the requirement that litigants must comply with the rules of procedure in litigation. See for instance the following cases; **Yakobo Magoiga Kichere v. Peninah Yusuph**, Civil Appeal No. 55 of 2017, Court of Appeal of Tanzania at Mwanza (unreported), **Mondorosi Village Council and 2 Others v. Tanzania Breweries Limited and 4 Others**, Civil Appeal No. 66 of 2017, Court of Appeal of Tanzania at Arusha (unreported), **Mohamed Enterprises (T) Limited v. Masoud Mohamed Nasser**, Civil Appeal No. 33 of 2012, Court of Appeal of Tanzania at Dar es Salaam (unreported) and **National Housing Corporation v. Etienes Hotel**, Civil Application No. 10 of 2005, Court of Appeal of Tanzania at Dar es Salaam (unreported).

The concern about the misdescription of the court in a counter affidavit was supposed to be raised before the parties were allowed to

engage into arguing the merits of the application. It could have been different had the concern touches the jurisdiction of the Court to entertain the present matter. Besides that, as rightly submitted by Mr. Mwakyusa, I take note of the overriding objective principle @ “the oxygen principle” brought by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 which now requires the courts to deal with cases justly and to have regard to substantive justice. In the event, I hereby overlook the anomaly and allow the matter to proceed on merit. See the following case laws; **Yakobo Magoiga Gichere v. Peninah Yusuph**, Civil Appeal No. 55 of 2017, Court of Appeal of Tanzania at Mwanza (unreported) and **Chang Qing International Investment Limited v. TOL Gas Limited**, Civil Application No. 292 of 2016, Court of Appeal of Tanzania at Dar es Salaam (unreported).

When confronted with a situation where there was a misdescription of the name of the party in a case, the Court of Appeal of Tanzania in the case of **Chang Qing International Investment Limited v. TOL Gas Limited** (supra) went far and held that, *“The respondent’s name should however read **TOL GASES LIMITED** as appearing in the Affidavit in Reply.”*

Back to the merits of the present application, as I have observed herein above, there ought to be good cause for the delay or other factors before exercising the discretionary powers of the Court. In the case of **Mbogo v. Shah** [1968] EA 93, which was cited with approval in the case of **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. 10 Of

2015, Court of Appeal of Tanzania at Arusha (unreported), it was held as follows: -

*“All relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reason for the delay, whether there is an arguable case on the appeal and the degree of prejudice to the defendant if time is extended.”*

This Court’s discretionary powers emanates from the enabling provision. Those powers must be exercised justly, according to the rules of reason and justice, not according to private opinion. In other words, the court’s discretion has to be exercised judiciously. The applicants, besides advancing good cause for the delay, they have to account for each day of delay. Admittedly, there are no hard and fast rules on what amounts to good cause. In case an element of illegality is established in an impugned decision, the extension is typically granted regardless of the applicant’s failure to account for each day of delay. See for instance the case of **Berry v. British Transport Commission** [1962] 1 QB 306, **Abdul-Rahman Salemeen Islam v. Africarriers Limited**, Misc. Commercial Application No. 203 of 2018, High Court of Tanzania (Commercial Division) at Dar es Salaam (Unreported), **Republic v. Yona Kaponda and 9 Others** (1985) TLR 84, **Wambele Mtumwa Shahame v. Mohamed Hamis**, Civil Reference No. 8 of 2016, Court of Appeal of Tanzania at Dar es Salaam (unreported), **Republic v. Yona Kaponda & 9 Others** (1985) TLR 84 and **The Principal Secretary, Ministry of Defence and National Service v. Duram P. Valambhia** (1992) TLR 387.

In the case of **Aidan Chale v. Republic**, (2005) TLR 76 the Court of Appeal had an opportunity to judicially consider what amounts to good cause when it adopted with approval the reasoning in the case of **R v. Governor of Winchester Prison, ex parte Roddie** [1991] 2 All ER 931, at page 934 Lloyd, L. J said;

*“...good cause will usually consist of some good reason why that which is sought should be granted. It does not have to be something exceptional. To amount to good cause there must be some good reason for what is sought. It was considered that it was undesirable to define good cause and that it should be left to the good sense of the tribunal which has to decide whether or not good cause has been disclosed.”*

The present application is based on illegality on the face of the impugned decision. The said illegalities are associated with the failure to include the opinions of the assessors and the failure of the decree to properly describe the suit premise. Principally, the complained illegality should be apparent on the face of record not that, which needs a long-drawn process of reasoning on points. It should be the one that can be seen by one who runs and reads. See the following cases; **Lyamuya Construction Co. Ltd v. Board of Trustees of Young Women’s Christian Association of Tanzania**, Civil Appeal No. 2 of 2010, Court of Appeal of Tanzania (unreported) and **OTTU on Behalf of P. L Asenga & 106 Others and 3 Others v. AMI (Tanzania) Limited**, Civil Application No. 20 of 2014, Court of Appeal of Tanzania at Dar es Salaam (unreported).

I should emphasize that; the issue of illegality has to do with correctness of the court's decision and anything that touches the legality or otherwise of the decision itself (see **Abdul-Rahman Salemeen Islam v. Africarriers Limited**, (supra). As for the complained defects in a decree I did not take it as an illegality in a decision sought to be challenged that would warrant an extension of time in this matter. Besides, if the said decree was executed by the trial Tribunal as it appears in paragraph 4 of the affidavit in support of the application and annexure "SMLCA 2" how can the said defects be entertained at this stage. It is my considered observation that, the complaint is overtaken by events. Had the applicants sought to challenge the decision in execution application they could do so through proper forum. As for the opinions of the assessors, section 24 of the Land Disputes Act (supra) and Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 provides for the following. The chairperson to require every assessor present, before making the judgment and after the conclusion of hearing, to give his or her opinion in writing. Then the chairperson shall take into account the assessors' opinions but shall not be bound by it. I have gone through the trial Tribunal's decision and found the assessors' opinion and how the trial Tribunal handled them. The ground of illegality, therefore, holds no water.

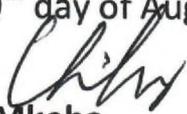
In the event and for the reasons stated herein above, I am of the settled view that no good cause has been advanced by the applicants to warrant the extension of time to lodge an appeal against the decision in

Application No. 26 of 2015. Thus, the application is hereby dismissed with costs.

It is so ordered.

Dated at Sumbawanga this 10<sup>th</sup> day of August, 2021.



  
C.P. Mkeha

JUDGE

10/08/2021

ORIGINAL

Date - 10/8/2021  
Coram - Hon. W.M. Mutaki – DR  
For Applicant - Mr. Laurence John – Advocate  
1<sup>st</sup> Applicant }  
2<sup>nd</sup> Applicant } Absent  
For Respondent -  
Respondent - Absent  
B/C - Zuhura

Mr. Laurence John – Advocate for Applicant and holding brief for Mr. Patrick Mwakyusa advocate for Respondent.

**Court:** Ruling is hereby delivered in the presence of Mr. Laurence John Advocate for Applicant and holding brief for Mr. Patrick Mwakyusa advocate for the Respondent.



**W.M. MUTAKI**

**DEPUTY REGISTRAR**

**10/08/2021**

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