

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

MISC. LAND APPLICATION NO. 572 OF 2020

*(Arising from the Ruling and Decree order of the District Land and
Housing Tribunal in Land Application No 115 of 2018)*

MIKALI ABDUEL MSUYA 1ST APPLICANT

YOSEA HERMAN MSUYA 2ND APPLICANT

VERSUS

MAENDELEO BANK TANZANIA PLC 1ST RESPONDENT

BEST GROUP (T) LIMITED 2ND RESPONDENT

RULING

Date of Last Order: 07.12.2021

Date of Ruling: 08.12.2021

A.Z. MGEYEKWA, J

I am called upon in this matter to decide whether this court should exercise its discretion under section 41 (1) and (2) of the Land Disputes Courts Act, Cap. 216 [R.E 2019] to extend the time within the applicant

to file an appeal to impugn the decision of the District Land and Housing Tribunal for Morogoro at Morogoro in Land Application No. 115 of 2018 delivered on 28th June, 2020. The application is supported by an affidavit and supplementary affidavit deponed by Mr. George Michael Muhanga, the applicant's Advocate. The respondent opposed the application by filing a counter affidavit and supplementary counter affidavit deponed by James Bwana, for the 1st respondent. The second respondent did not file a counter affidavit.

When the matter was called for hearing on 22nd November, 2021, By the court order, the application was argued by way of written submissions whereas, the applicants' Advocate filed his submission in chief on 26th November, 2021 and the respondent's Advocate filed his reply on 02nd December, 2021 and the applicant's Advocate waived the right to file a rejoinder.

In his submission, the learned counsel for the applicant submitted that the applicant prays for this court to grant an extension of time within which to file an appeal out of time to challenge the Judgment and Decree entered against the applicant herein on 29th June, 2020. He further submitted that the tribunal determined a preliminary objection on the

issue of jurisdiction and the objection was sustained and the application was dismissed instead of being strike out.

He submitted that the applicant has two main reasons for extension of time; reasons for delay and illegality.

He contended that the matter was set for mention on 18th June, 2020 but the Chairman was not present and parties were informed to appear on 5th August, 2020. Mr. Mbamba went on to testify that when the applicant appeared at tribunal he noted that the ruling was delivered on 29th June, 2020 and the matter was dismissed for want of jurisdiction. He added that the applicant filed an application on 10th August, 2020 while the time to appeal had expired. He continued to submit that the first application for extension of time before Hon. Maghimbi and the same was struck out on technical delay.

Mr. Mbamba did not end there, he submitted that the applicant has sufficiently explained the delay, the period starting from 29th June, 2020 to the time when the application was before Hon. Maghimbi, J. The learned counsel for the applicant complained that the tribunal did not notify the applicant about the new date of delivering the ruling and the proceedings do not indicate a formal order for an adjournment from 18th June to 29th June, 2020. Fortifying his position he referred this court to

paragraph 8 of the applicant's affidavit and the case of **Mashinganga Salum Mashinshanga v CRDB Bank PLC & Others**, Civil Appeal No. 335 (unreported).

Regarding the ground of illegality, Mr. Mbamba contended that the applicant on paragraph 13 of his affidavit stated that the tribunal dismissed the application instead of striking it out as a result parties were not heard on merit. It was his view that this is an illegality and irregularity. He contended that the work striking out is issued when a matter has not been decided on merit while dismissal is issued when a matter is heard on merits. To support his submission he cited the case of **National Insurance Cooperation & another v Shengana Ltd**, Civil Application No.20 of 2007 (unreported).

The learned counsel for the applicant went on to submit that another illegality is when the Chairman failed to involve the assessors. To bolster his submission he cited sections 23 and 24 of the Land Disputes Courts Act, Cap.216 [R.E 2019] and the case of **Hamisa S. Mohsin & 2 Others v Tanningra Contractors**, Civil Appeal No. 51 of 2013, and the third illegality was for the Chairman failure to inform the applicant the date of delivering the ruling. To support his position he cited the cases of **Partobert D. Ishengoma v Kahama Mining Corporation Ltd**

Barrick Tanzania BulyaMkulu and 2 others, Civil Application No.2 of 2013 and the case of **Harrison Mandali & 9 others v The Registered Trustees of the Archdiocese of Dar es Salaam**, Civil Application No.482/17/2017.

In conclusion, the learned counsel for the applicant beckoned upon this court to grant the applicant's application for an extension of time to file an appeal to challenge the decision of the District Land and Housing Tribunal for Morogoro.

Mr. Emmanuel, the learned counsel for the respondents vehemently resisted the application. He began with disputing the length of the delay. The learned counsel urged this court to adopt the counter affidavit and form part of his submission.

The learned counsel for the respondent contended that the matter before the District land and Housing Tribunal was scheduled for mention on 7th May, 2020, and on the same date the ruling date was scheduled on 29th June, 2020. He complained that the submission of the applicant's Advocate that the matter was scheduled for mention on 18th June, 2020, and the parties were informed to appear on 5th August, 2020 is untrue. He referred this court to the tribunal's proceedings. Mr. Emmanuel went on to complain that the applicant did not show diligence in prosecuting

their matter. To support 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). The learned counsel for the respondents went on to submit that the applicants have failed to account for their delay. He argued that the ruling was made available to the applicants on 10th August, 2020, and on 7th September, 2020 they filed their first application for extension of time which was struck out on 21st September, 2020. He further contended that the applicant did not account for the days of delay from 21st September, 2020 when the application for extension of time was struck out to 7th October, 2020 when they filed the instant application.

On the issue of illegality, Mr. Emmanuel contended that the issue of illegality is based on jurisdiction. He referred this court to paragraph 13 of the applicant's affidavit. He went on to submit that there is nowhere pleaded the facts of the illegality of the decision for dismissing a matter which is not determined on merit and the illegality for non-involvement of assessors. He added that raising the same at the submission stage is nothing other than an afterthought and the same is unacceptable.

He continued to submit that it is trite law that parties are bound by their pleadings, the matter not raised in the pleadings cannot be

subsequently raised and relied upon. To support his submission he cited the case of **Ally Mohamed Mkapa v Republic**, Criminal Application No. 93/07 of 2019 (unreported) and **NICO Insurance (T) Ltd v Philip Paul Owoya and 2 others**, Civil Appeal No.151 of 2017 HC at Dar es Salaam (unreported). He urged this court to disregard the issue of illegality which was not raised in the applicant's affidavit.

As to the issue of illegality relating to the decision for dismissing a matter not determined on merit, he valiantly contended that the applicant's application was determined on merit since the same was dismissed for want of jurisdiction. He added that there was nothing left to be determined on merit by the tribunal. He stated that once it is ascertained that the court or tribunal has no jurisdiction to determine the matter before it, the proper recourse is to dismiss the matter for want of jurisdiction.

Concerning the issue of the assessor. The learned counsel for the respondent contended that since jurisdiction was a matter of pure point law then the involvement of assessors was not useful and their opinion could not vest the tribunal with jurisdiction. He strongly submitted that with the foregoing observation the issue of illegality is misconceived and unfounded. He prayed for this court to disregard them and dismiss the application with costs.

On the issue of delivering date of the judgment, Mr. Emmanuel submitted that there was an exact date as to what transpired in the tribunal and the proper recourse was for the applicant to produce the tribunal's proceedings to prove their assertion on the dates of the events before the tribunal and whether there was no formal order of adjournment. Stressing, he stated that the matter before the tribunal came on 07th May, 2020 when the date for the ruling was given the applicants were absent with no notification therefore they cannot blame the tribunal for their negligence. He claimed that there was no diversion of the date of the ruling.

On the strength of the above submission, Mr. Emmanuel urged this court to find that this application is unmerited and the same be dismissed.

Having carefully considered the submissions made by the learned counsels in their oral 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 case of **Mbogo and Another v Shah** [1968] EALR 93.

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, Mbamba has shown the path navigated by the applicant and the backing he has encountered in trying to reverse the decision of the District Land and Housing Tribunal for Morogoro. The applicant's Advocate has raised two main grounds for extension of time; reasons delay, and illegality. In addressing the first limb. The applicant is claiming that the matter was scheduled for mention on 18th June, 2020 for the view of scheduling the

ruling date. He added that when the 2nd applicant appeared on 5th August, 2020 for delivering the ruling he was informed that the ruling was delivered and the application as dismissed for want of jurisdiction.

On paragraph 7 of the affidavit, the applicant complained that they wrote a letter requesting for file perusal and a copy of ruling and contended they noted that the application was dismissed and the ruling was delivered on their absence. He claimed that the parties were not informed on the date of the ruling, until 5th August, 2021 when they came to learn that the matter was dismissed.

As rightly pointed out by Mr. Emmanuel, in order for the applicant to prove their assertion, they were required to attach the proceedings of the tribunal to move this court to believe their claims and grant their ground of reasons for delay. Also, I have noted that the applicants did not account for the days of delay from 5th August, 2020 when they informed that the application was dismissed to 10th August, 2021 when they requesting to be supplied with copies of judgment and decree.

It is trite law that the court can only grant an extension of time after the applicant shows good cause which includes the reasons for the delay and to account for each day of delay. As it was held in the case of **FINCA (T) Ltd and Another v Boniface Mwalukisa**, Civil Application No.

589/12 of 2018 Court of Appeal of Tanzania at Iringa, (unreported) which was delivered in May, 2019 and the case of **Bushiri Hassan v Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported) which had held that:-

"Dismissal of an application is the consequence befalling an applicant seeking an extension of time who fails to account for every day of delay."

Applying the above authority, I find that the applicant did not account for the days of delay therefore this ground cannot hold water.

Regarding the issue of illegality, 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**, CAT-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 an 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].*

Applying the above authorities, in the instant application, the applicant in his affidavit particularly on paragraph 13, Mr. George Muhanga, the

learned counsel who deponed the affidavit stated that the District Land and Housing Tribunal decision was irregularities. In his submission, Mr. Mbamba has raised three points of illegality; dismissing the matter that was not determined on merit, non-involvement of assessors and diversion of the date of judgment. On his side, the learned counsel for the respondent opposed the application, he argued that there is no any illegality in the ruling sought to be appealed against. In his submission, Mr. Emmanuel insisted that the alleged illegalities are not apparent on the face of the record.

Regarding the issue of non-involvement of assessors, the respondent's Advocate strongly opposed Mr. Mbamba's submission for the reason that the issue of illegality cannot stand because the alleged point of illegality was not included in the supporting affidavit. Instead, it was raised by the learned counsel for the applicant at the bar. I had to go through the applicant's affidavit to find out whether the applicant included the issue of illegality in his affidavit and found that the applicant did not raise an issue of illegality.

The position in our jurisprudence is settled on the matter. It is to the effect that, in determining whether the application has met the required conditions for its grant, a conclusion is drawn from the affidavit that

supports the application. The rationale for this is not hard to find. It stems from the fact that an affidavit is an evidence, unlike submissions which are generally meant to reflect the general features of a party's case and are elaborations or explanations on evidence already tendered. This was observed by the Court of Appeal of Tanzania in the case of **The Registered Trustees of Archdiocese of Dar es Salaam v Chairman Bunju Village Government and Others**, Civil Application No. 147 of 2006 (unreported).

Applying the above analyses, it is clear that this ground of illegality cannot be entertained. After all, as rightly pointed out by Mr. Emmanuel There is no dispute that the matter was dismissed for want of jurisdiction, thus, the issue of assessor could not raise since the preliminary objection based on point of law and assessors are not involved.

The issue of illegality that the decision was dismissed thus was not determined on merit. In my respectful view, this was a point law which was determined by the tribunal, therefore, saying that it is an illegality while it was on point of law might be not correct. However, the only issue which I think needs to be determined is whether the application was required to be dismissed or strike out. Answering the same at this stage will be determining the intended appeal.

For the sake of clarity, I have read the case of **Mashishanga Salum** (supra). In **Mashishanga's** case, the issue for discussion was related to the day when the judgment was pronounced. The trial court did not pronounce the judgment persuade to its court order and the parties were not notified. In the instant case, unlike the cited case of **Mashishanga**, the ground of illegalities are not on the face of the record, although the applicant is claiming the same incident but he did not proof his assertion that on the mention date the tribunal proceeded to pronounce the judgment.

Guided by the above findings, I am in accord with the respondents Advocate submission that, the question of illegalities in the conduct of the District Land and Housing Tribunal for Morogoro based on the two illegalities; non-involvement of assessors and diversion of the date of judgment does not arise. The same cannot, as a matter of law, be termed as points of illegalities thus cannot be a ground for applying for extension of time. On the other hand, the issue whether the matter was required to be strike out or dismissed needs to be determined at the appeal level.

In sum, based on the foregoing analysis I am satisfied that the said ground of illegality is evident that the present application has merit.

Therefore, I proceed to grant the applicant's application to file an appeal before this court within thirty days from today.

Order accordingly.

DATED Dar es Salaam this date 08th December, 2021.




A.Z.MGEYEKWA

JUDGE

08.12.2021

Ruling delivered on 08th December, 2021 in the presence of Ms. Aziza Msangi, learned counsel for the applicant and also holding brief for Mr. Emmanuel Ally, learned counsel for the respondents.




A.Z.MGEYEKWA

JUDGE

08.12.2021