

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC. LAND APPLICATION NO.231 OF 2022**

(Arising from Land Case No.213 of 2005 and Civil Application No. 527/17 of
2019)

RAJENDRA SHIVCHANO CHOHAN APPLICANT

VERSUS

REHEMA IDDI MSABAHA 1ST RESPONDENT

SELEHBAHAI JAFFERJEE SHEIKH 2ND RESPONDENT

RULING

Date of last Order: 04.07.2022

Date of Ruling: 06.07.2022

A.Z.MGEYEKWA, J

This application is brought under the certificate of urgency. The applicant is praying for an extension of time to lodge a Notice of Appeal out of time against the decision of this court in Land Case No. 213 of 2005. The application, preferred under the provisions of section 11 (1) of the Appellate

Jurisdiction Act, Cap. 141 [R.E 2019]]. The affidavit is supported by an affidavit deposed by Rajendra Shivchano Chohan, the applicant. The applicant has set out the grounds on which an extension of time is sought. The 1st respondent has stoutly opposed the application by filing a counter-affidavit deposed by Rehema Idd Msabaha, the respondent.

The 2nd respondent was summoned to appear in court by way of publication in the Kiswahili tabloid – Mwananchi Newspaper dated 17th June, 2022. I am alive to the fact that the 2nd respondent was notified through the said publication to appear in court on 30th June, 2022 for hearing but he did not show appearance. Having regard to the entire circumstances of this case, I am of the considered view that the 2nd respondent was duly being served but he opted not to show appearance, therefore, I proceed to determine the application *ex parte* against him.

When the matter was called for hearing on 6th June, 2022 when the matter came for hearing, the applicant enlisted the legal service of Mr. Ngassa Ganja, learned counsel, and the 1st respondent enjoyed the legal service of Ms. Mary Lamwai, learned counsel.

In his submission, in support of the application, Mr. Ngassa urged this court to fully adopt the affidavit together with all appended documents thereon. He

submitted that the applicant is praying for an extension of time to lodge a Notice of Appeal to the Court of the Appeal against the Judgment and Decree of this court in Land Case No. 213 of 2005. Mr. Ngassa went on to submit that after the delivery of the court decision on 25th August, 2015 the applicant lodged a Notice of Appeal and prayed to be supplied with court proceedings while the Notice of Appeal was pending before the Court of Appeal in 2019. He added that the Court of Appeal granted 1st respondent to withdraw the Notice of Appeal since the applicant did not take initial steps to move the Court of Appeal to proceed with determining the appeal. He submitted that the application was struck out on 8th March, 2022. To support his submission he referred this court to annexure RS4.

The respondent continued to submit that on 25th April, 2022, the applicant was informed that the records were ready for collection and after obtaining the records the applicant found himself out of time thus he had to lodge the present application for extension of time. Mr. Ngassa went on to state that in an application for an extension of time, the law requires the applicant to show sufficient cause to move this court to grant the applicant's application. In his view, sufficient cause means that the applicant must account for all the periods of delay, and the delay should be inordinate and the applicant must show diligence. The applicant's counsel invokes the Court of Appeal's

jurisprudence in the case of **Ludovick Michael Massawe v Samson Herman**, Civil Application No. 256 of 2021.

Mr. Ngassa did not end there, he submitted that illegality is a sufficient ground for extension of time in order to allow the upper court to correct the errors of the subordinate court. Fortifying his submission he cited the case of **Equbal Ibrahim v Alexandra Wayayi**, Civil Application No. 235.17 of 2021. It was his submission that the applicant in his affidavit has an attached impugned ruling and on page 4 the Judge stated that she overlooked the requirement of the law because the court decided a matter while it had no jurisdiction. He added that this court noted that since a judgment was delivered then the Judge was not in a position to reopen the debate on jurisdiction as it was *functus officio*.

On the strength of the above submission, the learned counsel for the applicant stated that this is a fit case for this court to exercise its discretion. To buttress his submission he referred this court to the case of **Hussein Juma v Faluk Mohamed**, Misc. Land Application No. 26 of 2020. He urged this court to grant the applicant's application with costs.

In her reply, the learned counsel for the 1st respondent urged this court to adopt the counter affidavit and form part of our submission. Ms. Mary contended that the present application is misconceived and lacks merit. It

was her submission that Hon. Mkuye, J on page 3 clearly stated that she has addressed the issue of jurisdiction which was raised by Mr. Ngassa. Ms. Mary contended that the Notice of Appeal was struck out and astonishingly the certificate of delay is issued two months after the Court of Appeal issued its order. She added that the same was issued before filing a Notice of Appeal. In her view, the certificate of delay was improperly issued.

It was her further submission that the issue for determination is whether the applicant has fulfilled the conditions for the grant of extension of time. Ms. Mary submitted that the applicant was not diligent and had not accounted for the days of delay. To bolster her contention she cited 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. The learned counsel for the 1st respondent contended that the applicant has delayed lodging the Notice of Appeal for two years.

On the strength of the above submission, the learned counsel for the 1st respondent urged this court to dismiss the application with costs.

In his rejoinder, Ngassa reiterated his submission in chief. Stressing on the point of illegality, he stated that the ruling does not state that the issue of jurisdiction was determined. He insisted that the Hon. Judge noted the issue

of illegality and found herself *fuctus officio* to determine the said issue. Mr. Ngassa submitted that the Deputy Registrar of this court complied with the law and issued the certificate of delay. He added that after the Court of Appeal strike out the applicant's application, the applicant had to obtain the certificate of delay and proceedings of this court before filing the Notice of Appeal, in order to avoid the same mistake. Ending, he urged this court to grant his application.

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 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 want first to address the issue raised by Ms. Mary that the applicant was required first to file a Notice of Appeal at the Court of Appeal before obtaining the court proceedings and certificate of delay. In my view, this requirement should not be a bar for the applicant to lodge the Notice of Appeal out of time. I say so because I have considered the circumstances of the matter before this court that the first Notice of Appeal was stuck out by the Court of Appeal of Tanzania therefore, the applicant wants to lodge the Notice of Appeal after being assured that he has obtained the court proceedings and a certificate of delay.

I have keenly followed the application and the grounds deposed in the supporting applicant's affidavit and the respondent's counter-affidavit, I have shown the path navigated by the applicant and the backing he has encountered in trying to reverse the decision of this court. In his submission, the applicant's Advocate relied solely on the ground of illegality. The applicant's counsel alleges at the decision of this court is tainted with illegality. On his side, the learned counsel for the 1st respondent opposed the

application. Ms. Mary valiantly argued that the applicant was required to account for each day of delay and the issue of illegality did not arise. I agree that the applicant and his Advocate have not accounted for the days of delay. However, the case law permits a party to raise a ground of illegality as a sole ground for extension of time.

It has been held in times without number that where illegality exists and is pleaded as a ground the same as well constitute a good cause for an 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) and **Ngao Godwin Losero v Julius Mwarabu**, Civil Application No. 10 of 2015 (unreported). In **Principal Secretary, Ministry of Defence and National Service v Devram Valambhia** (supra) the Court of Appeal of Tanzania at page 89 held that:-

*"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].

Therefore, I fully subscribe to the submission of the learned counsel for the applicant that the ground of illegality is a sufficient cause for an extension of time in order to rectify the raised anomaly. See also the case of **Badru Issa Badru v Omary Kilendu** (supra) the Court of Appeal of Tanzania held that:-

"...I am of the considered view that even though there is a considerable delay in the application, pertinent issues have been raised. First,.. there is an allegation of illegality, irregularities, and impropriety... which cannot be brushed aside."

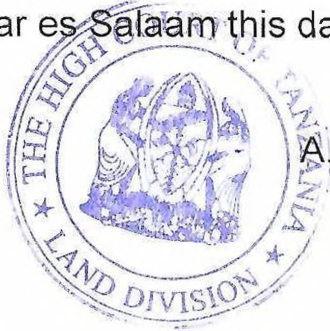
The illegality is alleged to reside in the powers exercised by this court in excess of its hearing of the Misc. Land Application No. 494 of 2015, this court stated that the issue of pecuniary jurisdiction or overlooking the requirement of the law that the court entertained a matter without having jurisdiction is not among the grounds of review, However, this court gave the applicant room to file an appeal to the Court of Appeal. The ground of illegality cited by the applicant touches on jurisdiction, therefore, in my view, the raised illegality bears sufficient importance, and its discovery does not require any long-

drawn argument or process. Therefore, this point of illegality meets the requisite threshold for consideration as the basis for enlargement of time, and this alone is weighty enough to constitute sufficient cause for an extension of time.

In sum, I proceed to grant the applicant's application to lodge a Notice of Appeal within thirty days from today.

Order accordingly.

Dated at Dar es Salaam this date 6th July, 2022.




A.Z. MGEYEKWA

JUDGE

06.07.2022

Ruling delivered on 6th July, 2022 via video conferencing whereas the applicant and Mr. Roman Selesini Lamwai, learned counsel for the 1st respondent and were remotely present.




A.Z. MGEYEKWA

JUDGE

06.07.2022