

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 753 OF 2021

(Arising from Kinodhoni District Land and Housing Tribunal in Land Application No.491 of 2016 and from the High Court in Land Revision No.56 of 2020)

VICTORIA RWEIKIZA APPLICANT

VERSUS

BENEDICTO R. IJUMBA 1ST RESPONDENT

NOELA O ISHEBABI 2ND RESPONDENT

ALEX MSAMA MWITA 3RD RESPONDENT

RULING

Date of the last Order: 24.02.2022

Date of Ruling: 25.02.2022

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], section 51 (1) of the Land Disputes Courts Act, Cap. 216 [R.E 2019] and sections 93 and 95 of the Civil Procedure Code,

Cap.33 [R.E 2019] to extend time within the applicant to file a revision in respect to the decision of the District Land and Housing Tribunal to dated 16th February, 2017.

The application is supported by an affidavit deposed by Paschal Livin Mshanga, the applicant's Advocate. The application has encountered formidable opposition from the 3rd respondent and has demonstrated his resistance by filing a counter-affidavit, deposed by Alex Msama Mwita, the 3rd respondent.

When the matter was called for hearing on 24th February, 2022 the appellant enjoyed the legal service of Mr. Paschal Mashanga, learned counsel, Mr. Kasambala, learned counsel appeared for the 2nd respondent and the 3rd respondent enjoyed the legal service of Mr. Rajabu Mrindoko, learned counsel. From the outset, Mr. Kasambala stated that they do not contest the application.

Mr. Mashanga 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 his affidavit and form part of his submission. Mr. Mashanga asserted that the applicant intends to challenge the decision of the District

Land and Housing Tribunal in Land Application No.49 of 2016 dated 16th February, 2017. He stated the impugned decision emanates from the Settlement Decree which was signed by the 1st and 3rd respondents. He claimed that the 1st and 3rd respondents disposed of the applicant's land without informing the applicant.

The learned counsel went on to submit that the court has developed a guiding principle in applications for extension of time. The first principle is sufficient case, the second principle is diligence and the third principle is illegality. Concerning sufficient case, Mr. Mshanga submitted that the applicant lodged several applications before this court including an application for extension of time that the applicant has sufficient cause of delay to file an application for revision. To buttress his submission he referred this court to paragraphs 2, 3, 4, and 5 of his affidavit.

He went on to submit that counting the days from the day when the applicant filed the first application for extension of time on 14th December, 2020 when it was granted until 14th December, 2021 when the applicant's application for revision was struck out is the time which acquires the status of technical delay. He added that the applicant was within the court

corridors seeking his right to file a revision application. To buttress his contention he cited the case of **Victor Rweyamamu Binamungu v Geoffrey Kaba & another**, Civil Application No. 602/08 of 2017.

Mr. Mashanga further submitted that the application for revision was struck out, he referred this court to paragraph 6 of the affidavit and stated that the same illustrate exhibited diligence what was done by the applicant. He added that the applicant and his lawyer took several steps in filing the instant application. He added that on 24th December, 2021, the applicant was supplied with copies of judgment and on 25th and 26th December, 2021 was holidays. He went on to state that the applicant filed the application electronically and on 30th December, 2021 it was manually printed and lodged in court. He urged this court to consider the applicant's promptness in filing the instant application. Fortifying his position he cited the case of **Michael Lessain Kweka v John Eliafye** (1997) TLR 152.

Regarding the ground of illegality, the learned counsel for the applicant stated that the conspicuous illegality in the tribunal's decision shows that the tribunal records were tainted with illegalities such as purported sale that was not recognized by the applicant, purported power of attorney

which the 2nd respondent used to sale the property to the 3rd respondent which was registered on 26th February, 2016 while the applicant revoked the power of attorney on 11th November, 2015. He lamented that the Settlement of Decree was made by two strangers to the property. He insisted that the applicant is the registered owner but she was not part of the said agreement. Mr. Mashanga continued to argue that on 8th June, 2016, the tribunal issued an order of re-service but such order was not complied. He submitted that the 3rd respondent has admitted part of the averments raised by the applicant. He also cited the case of **East African Cable v Spenco Service Limited**, Misc. Application Case No. 42 of 2016.

The learned counsel for the applicant did not end there, he added that the 3rd respondent in his counter-affidavit did not state anything concerning the ground of illegality. Stressing on the point of illegality, Mr. Mashanga submitted that the ground of illegality is a good cause for an extension of time. Supporting his stand, he cited the case of **Tropical Air (TZ) Limited v Godson Eliona Moshi**, Civil Application No.9 of 2017.

Mr. Rajabu, the learned counsel for the 2nd respondent vehemently resisted the application. The learned counsel urged this court to adopt the counter affidavit and form part of his submission. He began with disputing the length of the delay.

The learned counsel for the 3rd respondent contended that the applicant has not accounted for days of delay. He complained that the only reason for the delay advanced by the applicant in his affidavit is stated in paragraph 5 of the affidavit that Mr. Mashanga made a mistake which led the court to strike out the application for revision. . Mr. Rajabu contended that Mr. Mashanga is bringing up other grounds which are not stated in the affidavit. He added that the mistake or negligence of a counsel is not a ground for extension of time. Mr. Rajabu fortified his submission by citing the case of **Omari R. Inrahim v Ndege, Commercial Service Limited**, Civil Application No. 85/01 of 2020 (unreported).

He further argued that the grounds for extension of time in the previous application for extension of time and instant application for extension of time are different. He valiantly argued that the applicant did not state good reason as to why she did not collect the copy of the judgment on time.

Regarding the ground of illegality, the learned counsel for the 3rd respondent stated that illegality can be a ground of extension of time if it is apparent on the face of the record, not the one which is discovered by a long argument or process. He spiritedly argued that the affidavit does not contain what the learned counsel for the applicant has submitted in court. It was his view that Mr. Mashanga's submission was from his own knowledge since the same is not acknowledged in the verification part of his affidavit.

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

In his rejoinder, Mr. Mashanga reiterated his submission in chief. He strongly argued that he did not say that there was a mistake. He stated that Mr. Rajabu did not dispute the actual and technical delay. He claimed that the fact that the Ruling was delivered does not mean that it was available for collection. Mr. Mashanga insisted that the applicant has raised the ground of illegality in paragraphs 7 and 8 does not require a long argument.

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, Mr. Mashanga has shown the path navigated by the applicant and the backing he has encountered in trying to reverse the decision of the tribunal. The applicant's Advocate has raised two main limbs for his delay, technical delay, and illegality. I have opted to address first the second limb. 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 District Land and Housing Tribunal in determining the parties' claims. It is alleged that the Settlement of Decree was made by two strangers to the property and the applicant who is the registered owner was not part of the said agreement. Mr. Mashanga referred this court to paragraphs 2, 3, 4, and 5 of the affidavit. 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. Rajabu contended that the alleged illegality is not apparent on the face of the record, it requires a long argument.

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 the case of **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 Valambhia'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].*

Applying the above authorities, it is clear that the ground of illegality that has been cited by the applicant does not meet the requisite threshold for consideration as the basis for enlargement of time. The applicant's Advocate affidavit specifically paragraphs 7 and 8 contains points of law that require to be discovered by a long drawn argument or process. The point of law must be of such significance as to warrant the attention of the court of law as it was observed 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 applicant's Advocate in his submission analyzed the point of law but the same was supposed to be explicitly stated in the applicant's affidavit. In my view, had the applicant's Advocate covered that important aspect in the affidavit there would be a wide room for this court to weigh the issue of illegality. Thus this court cannot rely on the submission made from the bar.

Concerning the ground of technical delay. As amply submitted by Mr. Mashanga, he convinced this Court to find that the applicant's delay falls under technical delay which is explicable and excusable as stated in the case of **Fortunatus Msha v William Shija and Another** [1997] TLR

154, I will determine whether the delay in the instant application qualifies as a technical delay.

Needless to say, the Court has interpreted and distinguished categories of delay between real delay and technical delay for purposes of determining whether the application for extension of time merits granting or not. Technical delay is explicable and excusable in the cases of, **Bank of Tanzania Ltd v Enock Mwakyusa** Civil Application No. 520/18 of 2017, **Samwel Kobelo Muhulo v National Housing Corporation**, Civil Application No. 302/17 of 2017 (all unreported), and the landmark case of **Fortunatus Masha** (supra) in which the Court of Appeal of Tanzania held that:-

*"A distinction had to be drawn between cases involving real or actual delays and those such as the present one which only involved **technical delays in the sense that the original appeal was lodged in time but has been found to be incompetent for one or another reason and a fresh appeal had to be instituted**. In the present application, the applicant had acted immediately after the pronouncement of the*

ruling of the Court striking out the first appeal. In these circumstances, an extension of time ought to be granted." [Emphasis added].

The technical delay is well elaborated in the above-cited case that the original appeal or application was lodged in time but the same was found incompetent thus fresh appeal or application has to be instituted. I have gone through the applicant's affidavit and found that the applicant has demonstrated his technical delay on paragraphs 3, 4, 5, and 6 of the applicant's Advocate affidavit. Mr. Mashanga has convinced this court that the applicant's delay was a technical delay contrary to the observation of Mr. Rubeni, learned counsel for the 3rd respondent.

Having unfleetingly reviewed the depositions in the affidavit and the submissions made by the applicant's learned counsel and the 3rd respondent learned counsel, I am convinced that this case fits in the mould of cases for which extension of time on the ground of technical delay may be granted. Circumstances of this case reveal sufficient cause capable of exercising the Court's discretion and extend the time within which to file an application to lodge an application for revision in respect to the decision of the District Land and Housing Tribunal.

In sum, I proceed to grant the applicant's application to file the application for revision within twenty-one days from today.

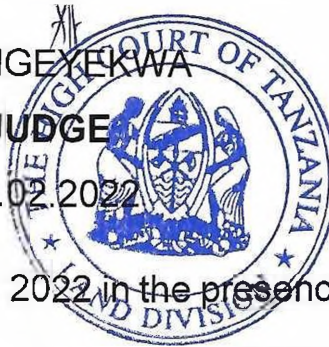
Order accordingly.

Dated at Mwanza this date 25th February, 2022.

A.Z.MGEYEKWA

JUDGE

25.02.2022



Ruling delivered on 25th February, 2022 in the presence of Mr. Mashanga, learned counsel for the applicant, and Mr. Rajabu Mrindoko, learned counsel for the 3rd respondent were remotely present.

A.Z.MGEYEKWA

JUDGE

25.02.2022

