IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 628 OF 2022

(Arising from land appeal No. 141 of 2015)

WAZIRI JUMA MSIGIRI ..... APPLICANT

VERSUS

KISAGE GINCHE MARWA..... RESPONDENT

Date of last Order: 15/02/2023

Date of Ruling: 23/03/2023

RULING

I. ARUFANI, J

Before me is an application for extension of time within which the applicant may file in the court an application for leave to appeal to the Court of Appeal. The applicant wishes to appeal against the decision of this court delivered in Land Appeal No. 141 of 2015 dated 5th May, 2022. The application is made under section 11 (1) of the Appellate Jurisdiction Act Cap 141 [R.E 2019]. The application is supported by an affidavit sworn by Anindumi Jonas Semu, advocate for the applicant and opposed by the counter affidavit sworn by the respondent.

While the applicant was represented in the matter by Mr. Anindumi Jonas Semu, learned advocate, the respondent was represented by Mr. Raphael Levi David, learned advocate. The counsel for the parties prayed

and allowed to argue the application by way of written submissions. Therefore, the application was heard by way of written submission.

In support of the application, the counsel for the applicant prayed to adopt his affidavit as part of his submission. He stated that, paragraph 9 of his affidavit states the court made its ruling basing on the issue which was not part of the issues to which the parties addressed the court during hearing of the preliminary objection raised by the respondent. He stated that can be seeing at paged 7 of the impugned ruling of the court which shows the finding of the court was made on the date of payment of the court fees while the objection and all arguments made by the counsel for the parties as recorded at pages 3 and 4 of the ruling of the court was on the date of filing the appeal in the court.

He argued the court addresses the issue of two dates appearing in Exchequer Receipt with Ref. No. 8194744 and make its decision basing on the stated issue without according parties an opportunity to address it on what was found as an anomaly during examination of the court's documents after hearing the counsel for the parties. He referred the court to the case of **Mustapha Lyapanga Msovela V. Tanzania Electrical Supply Co. Ltd Iringa Regional Manager & Another,** Civil Appeal No. 16 of 2020, HC at Iringa which followed the position of the law stated in the case of **Zaid Sozy Mziba V. Director of Broadcasting, Radio**

Tanzania Dar es Salaam & Another, Civil Appeal No. 4 of 2001, CAT at Mwanza (Both unreported).

It was held in the latter case that, where in the course of composing its decision, a court discovers an important issue that was not addressed to by the parties at the time of hearing, it is duty bound to re-open the proceedings and invite the parties to address it on the discovered issues before it decides the discovered issue.

The counsel for the applicant stated they agree extension of time is in toto discretion of the court and referred the court to the case of **Damari Waston Bojinja V. Innocent Sangano,** Misc. Civil Application No. 30 of 2021 which followed the holding made in the case of **Elias Mwakalinga V. Domina Kagaruki & 5 Others,** Civil Application No. 120/12 of 2018 were it was stated that, extension of time can be granted where there is arguable case such as whether there is a point of law on illegality or otherwise of the decision sought to be challenged.

He submitted that in their case the applicant was condemned unheard on the issue of the exchequer receipt to have two dates while it was neither raised nor argued by the counsel for the parties in the objection raised by the respondent. He referred the court to the case of **Pili Ernest V. Moshi Musami,** Civil Appeal No. 30 of 2019 where it was stated that, court should not decide matters affecting rights of the parties

without according them opportunity to be heard because it is a cardinal principle of natural justice that a person should not be condemned unheard. At the end he prayed the court to base on the stated reason to grant the application.

The counsel for the respondent stated the sole reason for the applicant's delay is stated at paragraph 8 of the affidavit which states that, during all material time the applicant was in court forums pursuing and countering the application for execution filed by the respondent before the District Land and Housing Tribunal for Kinondoni District at Mwananyamala (hereinafter referred as the tribunal). He argued that, the ruling of this court which dismissed the applicant's appeal was delivered on 5th May 2022. He went on arguing that, whereas the application for execution was filed at the tribunal by the respondent on 12th May, 2022 but the present application was filed in the court on 5th October 2022 which is after the elapse of 151 days from when the impugned ruling of this court was delivered.

He submitted further that, although the applicant tried to seek refuge on the ground of being busy pursuing application for stay of execution he filed in the Court of Appeal which was Civil Application No. 298/17 of 2022 but the stated application was decided and granted on 9th June, 2022. He stated from 9th June, 2022 to 5th October, 2022 when the

present application was filed in this court about 116 days elapsed without any action by the applicant while he had already obtained an order of staying execution from the Court of Appeal.

He argued that, although the court is vested with discretionary powers when it comes to the issue of granting or refusing to grant extension of time but those powers should be exercised judiciously. He stated there must be relevant factors to be considered and the court has to be furnished with sufficient information from which it can deduce sufficient reason for the delay in filing the application in the court within the time. He cited in his submission the case of **Mega Builders V DPI Simba Limited** [2020] TLR 553 where the court held that, even a single delay in a single day can be adversely judged whereas delay of several days albeit with valid reason can lead to grant of an application for extension of time.

He also referred the court to the case of **Dan O' Bambe Iko (By William Daniko as Administrator of the estate) V. Public Service Social Security Fund & Another**, [2019] TLR 205 where the court stated that, the applicant has a duty to account for every single day of the delay. He argued that, the case of **Pili Ernest** (supra) cited by the counsel for the applicant is distinguishable to the situation of the present case as in that case the issue was the right of being heard. He stated it is

of no help for the applicant who want to secure extension of time without assigning any reason for his delay. Finally, he prayed the application be dismissed with costs for being devoid of merit.

In his rejoinder the counsel for the applicant stated that, the counsel for the respondent has attempted to mislead the court and undermine the fundamental issue of the right to be heard. He reiterated what he stated in his submission in chief that, the question of different dates on exchequer receipt was not addressed by the parties during hearing of the preliminary objection and the ruling of the court was based solely on the stated issue. He referred the court to the case of **Mbeya Rukwa Autopart & Transportation Ltd. V. Jestina George**, [2003] TLR 251 where importance of the principle of natural justice which includes right to be heard was emphasized.

He stated the position of the law stated in the case of **Zaid Sozy Mziba** (supra) raised a serious question of illegality in the ruling of the court. He also cited in his rejoinder the case of **MMI Steel Industry Ltd V. Mohamed Said Katoto**, Civil Application No. 392/1 of 2017, CAT at DSM (unreported) where it was stated that, where the application raised a serious question of illegality of an impugned decision, that is a good cause for granting extension of time. In conclusion he reiterated his prayer that the application be granted.

Having carefully considered what is stated in the chamber summons, facts deposed in the affidavit, counter affidavit and the arguments made in the rival submissions filed in the court by the counsel for the parties, the court has found it is proper to start by looking into what is provided under section 11 (1) of the Appellate Jurisdiction Act upon which the application is made. The cited provision of the law states as quoted hereunder: -

> *"subject to subsection (2) the High Court or where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned may extend the time for giving the notice of intention to appeal from the judgment of the High Court or of the subordinate court concerned, for making an application for leave to appeal or for a certificate that the case is a fit case for appeal, notwithstanding that, the time for giving the notice or making the application has already expired".*

From the wording of the above quoted provision of the law and as rightly argued by the counsel for the parties the court is vested with discretionary power of granting or refusing to grant extension of time for doing what is stated in the above quoted provision of the law. The court has arrived to the above finding after seeing the word used in the quoted provision of the law is the word "may" which as provided under section 53 (1) of the Interpretation of the Laws Act, when such word is used in

conferring a power, is required to be construed to imply that the power so conferred may be exercised or not.

However, the position of the law as stated in number of cases decided by this court and the Court of Appeal is that, the discretionary power vested to the court by the quoted provision of the law is required to be exercised judiciously. One of the cases where the stated position of the law was emphasized is in the case of **Ngao Godwin Losero V. Julius Mwarabu,** civil application no. 10 of 2015. CAT at Arusha (unreported), where the Court of Appeal of Tanzania stated that: -

> *"Is the matter of general principle that whether to grant or refuse an application ... is entirely on the discretion of the court,* ***but that discretion is judicial and so it must be exercised according to the rules of reason and justice".***
> [Emphasize added].

The question which one may ask here is which rules of reason and justice are required to be used to guide the court in deciding to grant or refuse extension of time sought. The court has found the answer to the above question can be found in the case of **Elias Msonde V. R**, Criminal Appeal No. 93 of 2005 where Mandia, JA (as he then was) stated that:-

> *"We need not belabor, the fact that it is now settled law that in application for extension of time to do an act required by law, all that is expected of the applicant is to show that he was prevented by sufficient or reasonable or good cause and*

that the delay was not caused or contributed by dilatory conduct or lack of diligence on his part".

The term "sufficient or reasonable or good cause" used in the above quoted decision which a party seeking for extension of time is required to show to the court are not defined in any provision of the law. However, some of the factors which our courts are required to consider when determining whether "reasonable or sufficient or good cause" has been shown by a party seeking for extension of time have been deliberated by our courts in different cases. Some of those cases include **Tanga Cement Company Limited V. Jumanne D. Massangwa & another**, Civil Application No. 6 of 2001 and **Lyamuya Construction Company Limited V. Board of Trustees of Young Women's Christian Association of Tanzania,** Civil Application No. 2 of 2010 (Both unreported). The Court of Appeal of Tanzania laid in the case of **Lyamuya Construction Company Limited** (supra) some factors or principles to be considered in granting extension of time to be as follows: -

(a) The applicant must account for all the period of delay.

(b) The delay should not be inordinate.

(c) The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take and

(d) If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient

importance; such as the illegality of the decision sought to be challenged."

While being guided by the position of the law stated in the above quoted authorities the court has found the applicant's application is based on two grounds. The first ground as stated at paragraph 8 of the affidavit supporting the application is to the effect that, during all material time from when the impugned decision was delivered the applicant was in the court forum countering the application for execution filed at the tribunal by the respondent and the application for stay of execution filed in the Court of Appeal by the applicant. Another ground as deposed at paragraph 9 of the affidavit is that the impugned ruling of the court is tainted with illegality.

The court has found proper to start with the argument that the applicant was engaged in countering the application for execution filed in the tribunal by the respondent and the application for stay of execution he filed in the Court of Appeal. What was deposed by the applicant in the above stated ground constitutes what is known as technical delay stated in the case of **Fortunatus Masha V. William Shija & Another**, [1997] TLR 154 where it was stated the period the applicant was pursuing another proceeding in court is supposed to be exempted from limitation of time to institute a proceeding in the court.

The court has found that, although it is true as argued by the counsel for the parties that after delivery of the impugned ruling the respondent filed an application for execution at the tribunal on 12th May, 2022 but as stated by the counsel for the respondent the application for stay of execution filed in the Court of Appeal by the applicant was decided on 9th June, 2022 whereby the order to stay execution was granted. The court has found that, from 9th June, 2022 when the Court of Appeal granted the order of staying execution filed in the tribunal by the respondent until 5th October, 2022 when the present application was filed in the court about 118 days had elapsed.

The court has found that, as rightly argued by the counsel for the respondent, it is not stated anywhere being in the affidavit supporting the application or submission filed in the court by the counsel for the applicant as to what the applicant was doing for the stated period or what caused him to fail to file the application in the court for the stated period time. The court has found that, as held in the cases of **Mega Builders Ltd** and **Dan O' Bambe Iko** (supra) cited in the submission of the counsel for the respondent and in the case of **Lyamuya Construction Company** (supra) cited hereinabove by the court, the applicant was required to account for the whole period of the delay to move the court to exercise

its discretionary power to grant the extension of time is seeking from this court.

As the applicant has not accounted for the period from when the order of staying execution was granted by the Court of Appeal until when the instant application was filed in the court, the court has found the argument that the applicant was in the court forum prosecuting the mentioned cases cannot be taken is a technical delay developed in the case of **Fortunatus Masha** (supra) to find it is a good, sufficient or reasonable cause to grant the applicant the order of extension of time is seeking from this court.

Coming to the second ground which states the impugned ruling is tainted with illegality the court has found the counsel for the applicant submitted that, the parties were not heard on the issue of the exchequer receipt to have two different dates upon which the court relied on in making the impugned ruling. The court is in agreement with the position of the law stated in the cases of **Zaid Sozya Mziba** (supra) which was followed by the court in the case of **Mustapha Apanga Msovela** (supra) where it was stated that, where in the course of composing its decision a court discovered an important issue that was not addressed to by the parties at the time of hearing of the matter the court is bound to reopen

the proceeding and invited the parties to address it on the discovered issue before it decides the issue.

The court is also in agreement with the counsel for the applicant that, as held in the case of **Mbeya – Rukwa Autopart & Transportation Ltd** (supra) the right of hearing is a fundamental constitutional right in Tanzania by virtue of Article 13 (6) (a) of the Constitution of the United Republic of Tanzania and once breached it constitute an illegality recognized by our laws. It is the view of this court that, as rightly argued by the counsel for the applicant the position of the law as stated in numerous decisions is that illegality is a sufficient cause for granting extension of time. The stated position of the law can be seeing in the case of **Principal Secretary Ministry of Defence and Defence and National Service V. Devram Valambia,** [1992] TLR 182 where the Court of Appeal stated 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 measure to put the matter and the record right."*

The position of the law stated in the above cited case was elaborated by the Court of Appeal in the case of **Lyamuya Construction Company Limited,** Civil Application No. 2 of 2010 where it was stated that: -

"Since every party intending to appeal seeks to challenge a decision either on point of law or fact, 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 applied for one. ***The court there emphasized that such point of law must be that of sufficient importance and, I would add that it must be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by long argument or process."***

That being the position of the law the court has found the illegality the applicant is alleging is in the impugned ruling is that the court made the impugned ruling basing on the issue of the two dates noted are appearing on the exchequer receipt issued on payment of the fees paid to file in the court the appeal which was dismissed by the court without according the parties right of hearing them in relation to the stated observation. The counsel for the applicant argued that, the submissions of the parties in relation to the objection raised in the appeal which was dismissed as can be deduced from pages 3 and 4 of the impugned ruling was made in relation to the time of filing the appeal in the court and not on the two dates appearing on the exchequer receipt issued for payment of the court fees which was relied upon by the court to arrive to its decision.

Since the counsel for the applicant argues they were not heard on the issue of the exchequer receipt to have two dates and the counsel for the respondent did not respond to the stated argument in his submission the court has found that is a point of illegality of sufficient importance to move the court to grant the applicant the order of extension of time is seeking from this court.

The court has arrived to the above stated view after seeing the point of illegality raised by the applicant and argued by the counsel for the applicant is a point of law which does not need a long process or argument to discover the same. The stated view of the court is getting support from the case of **VIP Engineering and Marketing Ltd & 2 Others V. Citi Bank Tanzania Ltd**, Civil Reference No.6, 7 & 8 of 2006, CAT at DSM (unreported) where it was stated by the Court of Appeal that, a decision arrived in breach of principle of natural justice is tainted with illegality.

In the light of what has been stated hereinabove the court has found that, although the applicant has not accounted for all period of the delay but this is a proper case where the court can exercise its discretionary power to grant extension of time the applicant is seeking from the court to enable the court to get a chance of looking into the alleged illegality for the purpose of putting the record of the court right if the illegality will be established.

Consequently, the applicant is granted extension of time to file in the court an application for leave to appeal to the Court of Appeal against the ruling of this court delivered in Land Appeal No. 141 of 2015 dated 05th May, 2022. The applicant to filed in the court the above stated application for leave to appeal to the Court of Appeal within thirty days from the date of this ruling. It is so ordered.

Dated at Dar es Salaam this 23rd day of March, 2023

I. Arufani

JUDGE

23/03/2023

Court:

Ruling delivered today 23rd day of March, 2023 in the presence of Ms. Joana David Mwankimwa, learned advocate holding brief for Mr. Anindumi Jonas Semu, learned advocate for the applicant and Ms. Joana David Mwankimwa is also appearing for the respondent. Right of appeal to the Court of Appeal is fully explained.

I. Arufani

JUDGE

23/03/2023