

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(SONGEA DISTRICT REGISTRY)**

AT SONGEA

MISC. LAND CASE APPLICATION NO. 5 OF 2020

*(Originating from Land Application No. 243 of 2016 of the District Land
and Housing Tribunal for Ruvuma at Songea)*

DR. WADE ASYUKILE KABUKA..... APPLICANT

VERSUS

ASUMAN RASHID1ST RESPONDENT

ALLY AMIR..... 2ND RESPONDENT

MAUA KIBONGE 3RD RESPONDENT

ANDENDE DAMLA4TH RESPONDENT

Date of Last Order: 30/06/2020

Date of Ruling: 13/08/2020

RULING

I. ARUFANI, J.

The applicant filed in this court the application at hand seeking for extension of time to file an appeal in the court out of time. The applicant wants to challenge the decision of the District Land and Housing Tribunal for Ruvuma at Songea (hereinafter referred as the tribunal)

delivered in Land Application No. 243 of 2016 dated 16th July, 2018. The application is made under section 41 (2) of the Land Disputes Courts Act, Cap 216 R. E. 2002 as amended by section 41 of the Written Laws (Miscellaneous Amendments) Act no. 2 of 2016 (hereinafter referred as the Land Disputes Courts Act). The application is supported by the affidavit sworn by the applicant and the second respondent affirmed a counter affidavit on his own behalf and on behalf of the rest of the respondents and it was filed in the court to oppose the application.

When the application came for hearing the applicant was represented in the matter by Mr. Eliseus Ndunguru, learned advocate and the respondents appeared in the court themselves, without legal representation. By consent of the parties and leave of the court the application was argued by way of written submissions. Mr. Bernard Mapunda, learned advocate drew and filed in the court the written submission of the applicant. The learned counsel stated in the submission of the applicant that, the judgment of Land Application No. 243 of 2016 filed in the tribunal by the applicant was delivered on 16th July, 2016. He stated that, as the applicant was aggrieved by the decision of the tribunal, on 27th July, 2018 he wrote a letter to the

tribunal seeking for the copies of the judgment and decree of the above mentioned Land Application.

He stated that, the sought copies of judgment and decree were not supplied to the applicant on time as were supplied to them on 31st August, 2018 which was out of time of filing appeal in the court by one day. He went on stating that, after the applicant being supplied with the copies of the judgment and decree the applicant appealed to this court vide Land Appeal No. 18 of 2019 which was filed in the court on 8th October, 2018. He argued that, the mentioned appeal was withdrawn from the court on 19th March, 2019 after being discovered it was filed in the court out of time.

After the said appeal being withdrawn from the court the applicant filed in the court the application for extension of time to file appeal in the court out of time vide Misc. Land Application No. 11 of 2019 which was filed in the court on 28th March, 2019. The mentioned application was struck out of the court on 24th March, 2020 after being found it was preferred under wrong provision of the law. After the above mentioned application being struck out of the court, the applicant filed the application at hand in the court on 1st April, 2020.

The counsel for the applicant argued that, copies of judgment is a crucial document without which an appeal cannot be filed in the court as it will violate the requirement of Order XXXIX Rule 1 (1) of the Civil Procedure Code, Cap 33 R.E 2019. To support his argument he cited in his submission the case of **Juma Ibrahim Mtale V. K. G. Karmali** [1983] TLR 50 where it was held an appeal without decree is incompetent. He argued further that, the applicant deposed at paragraph 13 of his affidavit that there is illegality in the impugned decision of the tribunal which occasioned miscarriage of justice.

It is the argument by the counsel for the applicant that, once illegality appearing on the face of records has been raised the court is required to extend time so that the alleged illegality can be rectified. To support his argument he referred the court to the case of **Finca (T) Limited and Another V. Boniface Mwalukisa**, Civil Application No. 589/12 of 2018, CAT at Iringa (unreported) where it was held that, complaint of illegality in the decision intended to be impugned is a sufficient ground to move the court to grant extension of time so that, the alleged illegality can be addressed by the court.

He stated that, the land which was adjudicated by the tribunal that is within 60 meters from the river and therefore the applicant has

nothing to claim was not the land which was supposed to be adjudicated. He added that, the tribunal did not visit the land in dispute to ascertain whether the land in dispute is within 60 meters and stated that is an error on the face of records and the only court to rectify the same is this court. He stated that, as the matter is time barred the court is required to extend the time to appeal out of time so that the complained illegality can be corrected. He submitted that, as the delay to appeal was not caused by fault of the applicant but failure to be supplied with necessary documents within the time he is praying the application be granted.

In their joint reply the respondents stated that, after the applicant's application for extension of time being struck out on 24th March, 2020 he stayed for one solid week as the application at hand was filed in the court on 1st April, 2020. They stated that, the applicant has not accounted for every day of the week he failed to file the application in the court. They argued that, the law requires the applicant to account for each day of the delay and all that happened while the applicant is represented in the matter by an advocate who is presumed to know the law. They submitted that is lack of diligence which amount to negligence which is not excusable in law.

They argued in relation to the allegation that there is an illegality in the decision of the tribunal which need to be rectified that, there is no such illegality. They stated that, the alleged illegality is a factual matter which was properly dealt by the tribunal by using the evidence adduced before the tribunal and the applicant lost the case. The respondents submitted that, all the cases cited in the decision of the applicant are distinguishable from the facts of the case at hand. They submitted further that, the applicant's delay to file the application at hand and other previous applications in the court is due to lack of diligence and negligence. The respondent submitted furthermore that, there is no illegality which needs to be corrected by this court. In fine they prayed the application to be dismissed with costs.

The court has carefully considered the submissions filed in this court by both sides and after going through the affidavit supporting the application it has found that, as the application is made under section 41 (2) of the Land Disputes Courts Act, it is proper to have a look on what is required to be done by the applicant to move the court to grant the order is seeking from the court. The cited provision of the law states in its proviso that, the court may for good cause extend the time for filing an appeal in the court. That being the position of the law the court has

found it is required before granting the applicant extension of time is seeking from the court to be satisfied the applicant was delayed by good cause to file the appeal in the court within the period of time provided under the law.

The question one may ask is what is good cause? The court has found the term "good cause" is not defined under the Land Disputes Courts Act or any other law. However, our courts have tried to define it in different cases. One of those cases is the case of **Bertha V. Alex Maganga**, Civil Reference No. 7 of 2016 (unreported) whereby the Court of Appeal of Tanzania stated as follows:-

*"Whilst it may not be possible to lay down an invariable definition of **good cause** so as to guide the exercise of the court discretion, the court is enjoined to consider, inter alia the reasons for the delay, the length of the delay, whether the applicant was diligent and the degree of prejudice to the respondent if time is extended."* [Emphasis added].

The similar meaning of the term "good cause" was given in the case of **Omary Ally Nyamalege (as the administrator of the estate of the late Ally Nyamalege) and Two Others V. Mwanza Engineering Works**, Civil Application No. 94 of 2017, CAT at Mwanza

(unreported) where when the Court of Appeal of Tanzania was looking into what constitute the term "good cause" used in Rule 10 of the Court of Appeal Rules, 2009 it stated as follows:-

"... The Court invariably considers factors such as the length of the delay, the reasons for the delay, the degree of prejudice the respondent stands to suffer if time is extended, whether the applicant was diligent, whether there is point of law of sufficient importance such as the illegality of the decision sought to be challenged".

That being what the court is required to take into consideration when determine an issue of whether to refuse or grant extension of time, the court has found one of the reason given by the applicant for his delay to file the appeal in the court within the time as deposed at paragraph 6 of his affidavit is because the tribunal delayed to supply him with the copies of the judgment and decree. The court has found as deposed by the applicant in his affidavit, the decision intended to be challenged was delivered on 16th July, 2018 and the copies of the judgment and decree were supplied to him on 31st August, 2018. That shows up to when the applicant was supplied with the said documents about 46 days had elapsed from when the decision of the tribunal was

delivered. Since the applicant was required to file the appeal in the court within 45 days after the date of the decision it is obvious and as rightly deposed by the applicant that he was out of time of filing the appeal in the court by one day.

The court has found the applicant deposed at paragraph 7 of his affidavit that, on 8th October, 2018 he filed Land Appeal No. 18 of 2018 in this court hopping the time to appeal runs from the date of the parties being supplied with the copies of judgment and decree. He deposed in the same paragraph of his affidavit that, after the appeal being discovered it was filed in the court out of time it was withdrawn from the court on 19th March, 2019. The stated sequence of events makes the court to find that, despite the fact that the applicant was supplied with the copies of judgment and decree on 31st August, 2018 but the appeal which was withdrawn from the court was filed in the court on 8th October, 2018 which is after the elapse of 38 days from the date when the applicant was supplied with the copies of the judgment and decree intended to be challenged in the intended appeal.

To the view of this court the stated 38 days of the delay from when the copies of the judgment and decree were supplied to the applicant have not been accounted for by the applicant. The court has

arrived to the above finding after seeing that, the reason given by the applicant that his hope was that, the days starts to run from the date of being supplied with the mentioned documents is not supported by any law. To the contrary the court has found that is a plea of ignorance of legal procedure which as stated in the case of **Charles Machota Salugi V. R**, Criminal Application No. 3 of 2011, CAT at Mwanza (unreported) and other numerous cases it has never been accepted as a good or sufficient cause for granting extension of time. The above position of the law was emphasized in the case of **Ngao Godwin Losero V. Julius Mwarabu**, Civil Application No. 10 of 2015, CAT at Arusha (unreported) where Justice of the Court of Appeal of Tanzania stated that,

*"I will right away reject the explanation of ignorance of the legal procedure given by the applicant to account for the delay. As has been held times out of number, **ignorance of the law has never featured as a good cause for extension of time...**"*[Emphasis added].

The position of the law stated in the above quoted cases makes the court to find that, the argument by the applicant that he was hopping the time to appeal starts to run from the date a part is

supplied with the copies of the judgment and decree is not a good cause which can move the court to grant him extension of time is seeking from the court.

The court has also found the applicant deposed at paragraph 13 of his affidavit and is submitted in his submission that, there is an illegality in the impugned decision of the tribunal which need to be rectified by this court. That being the case the applicant has urged the court to use that ground to grant him extension of time to appeal so that the alleged illegality can be considered in the intended appeal and rectified by the court. The court is in agreement with the applicant that an allegation of existence of illegality in a decision intended to be challenged has been held in numerous cases including the case of **Principal Secretary, Ministry of Defence and National Service V. Devram Valambia**, [1999] TLR 182 cited in the case of **Finca (T) Limited** (supra) to be a good cause for granting extension of time.

However, the court has found it has also been expressed in numerous cases that, the above case did not lay a general rule that every applicant who has alleged there is illegality in an impugned decision he must be granted extension of time is seeking from the court. The alleged illegality must be of sufficient importance and must be

apparent on the face of the record. One of the cases where the position of the law stated in the above cited case was considered by the Court of Appeal of Tanzania is the case of **Lyamuya Construction Ltd V. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) where it was stated that:-

"Since every party intending to appeal seeks to challenge a decision either on point of law or facts, it cannot in my view, be said that in Valambia'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."

While being guided by the position of the law stated in the above excerpt the court has found the illegality the appellant is alleging is in the decision of the tribunal and he wants the court to use it to grant him

extension of time to appeal out of time is deposed at paragraph 13 of the affidavit supporting the application. The applicant deposed in the mentioned paragraph that, the tribunal decided the matter on the piece of land which was not in dispute and contrary to the evidence adduced before the tribunal. It is also argued in the submission of the applicant that, the tribunal failed to visit the land in dispute to ascertain whether the land in dispute was within the purported 60 meters from the river or not and left the issue in dispute undecided.

The court has considered the alleged grounds of illegalities and found that, the argument that the tribunal decided the matter on a piece of land which was not in dispute and left the land in dispute undecided is a mixture of point of law and facts. The court has arrived to the above finding after seeing that, the allegation that the tribunal failed to apply the evidence adduced before it properly and decided the matter on land which is not in dispute as alleged by the applicant is point of law and facts as the law requires the court or tribunal to evaluate properly the evidence adduced before it and apply that evidence on the issue in dispute. To the view of this court the alleged irregularity or illegality is a sufficient ground which can move the court to exercise its discretionary power to grant extension of time sought by the applicant so as to enable

the court to look at it and if need arise to put the record of the tribunal correct.

The court has considered the argument by the respondents that the above stated point is not an illegality but issue of facts which was properly dealt by the tribunal in the course of evaluating the evidence adduced before the tribunal and find that, despite the fact that the alleged illegality has elements of being issue of facts but the allegation that the tribunal made a decision on land which is not in dispute and left the land in dispute undecided is an allegation which cannot be left unattended as is an irregularity which if is really in existence may vitiate an end of justice.

The court has also considered the allegation that the tribunal failed to visit the land in dispute to ascertain which land is in dispute and find this cannot be a point of illegality which would have moved the court to grant the extension of time the applicant is seeking from this court. The court has arrived to the above finding after seeing that, the exercise of visiting a land in dispute is not an exercise done in every matter where land is dispute. As stated in the case of **Avit Thadeus Massawe V. Isidory Assenga**, Civil Appeal No. 6 of 2017, CAT at Arusha (unreported) visitation of locus in quo or land in dispute by the court is

required to be done on exceptional circumstances to avoid the adjudicators to turn into witness in a case.

Therefore if visitation of land in dispute is required to be done by the court on a very exceptional circumstance and not in all land disputes it is crystal clear that it cannot be a point of illegality which can move the court to grant extension of time on a ground that is a point of illegality as it need long process to establish there was a need for the tribunal to visit the land in dispute. In the premises the court has found the stated point of illegality cannot be used to grant the applicant extension of time is seeking from the court.

In the upshot the court has come to the settled view that, as there is an allegation that the tribunal made a decision on a land which is not in dispute and left the land in dispute undecided that is an issue of sufficient importance which need to be looked at by the court and if need arise to put the record of the tribunal correct for the interest of end of justice. Therefore the court has found that point of illegality is a good caused to move the court to grant the applicant extension of time to file appeal in this court out of time. The application is hereby granted and the applicant is given thirty (30) days from the date of this ruling to file his appeal in this court. No order as to costs. It is so ordered.

Dated at Songea this 13th day of August, 2020


I. ARUFANI

JUDGE

13/08/2020

Court:

Ruling delivered today 13th day of August, 2020 in the presence of the applicant who is also represented by Mr. Eliseus Ndunguru, Advocate and in the presence of all respondents save for the first respondent who has never appeared in this matter. Right of Appeal is fully explained to the parties.


I. ARUFANI

JUDGE

13/08/2020