

IN THE HIGH COURT OF TANZANIA
(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

MISC. LAND APPLICATION NO. 33 OF 2022

(Arising from Misc. Land Appeal No. 30 of 2020 in the High Court of Tanzania at Sumbawanga, Land Appeal No. 81 of 2019 from the Decision of District Land and Housing Tribunal of Rukwa at Sumbawanga, Originated from Land Case No. 16 of 2019 from Kaoza Ward Tribunal)

SENA BETTERY MTAYO (The Administrator of Estate of Late
BETTERY USALIKE DOLFU).....**APPLICANT**

VERSUS

EZEBIO MSONGO.....**RESPONDENT**

RULING

11th December, 2023 & 03rd January, 2024

MRISHA, J.

Sena Bettery Mtayo (The Administrator of Estate of late Bettery Usalike Dolfu) the applicant herein, filed this application before this court seeking for extension of time within which to lodge an application to set aside the dismissal order dated on 5th October, 2022 in Land Appeal No. 30 of 2020

and for restoration of the said appeal so that the parties can be heard inter parties on merit.

The application is made under section 14(1) of the Law of Limitation Act Cap 89 R.E. 2019 and Order XXXIX, Rule 19 and section 95 of the Civil Procedure Code [Cap 33 R.E. 2019] and supported by the affidavit of Sena Bettery Mtayo.

In this application the applicant was represented by Ms. Neema Charles, learned Advocate, whereas the respondent did not appear in court after being approached by the process server with a summons to appear at the hearing of the present appeal, but he refused to receive the said summons.

Besides, the learned advocate for the applicant prayed to this court to proceed with the hearing of her client's application ex parte by way of written submission, whereby on the 05th day of September, 2023 the court granted the prayer with a direction that the applicant's counsel should file her respective written submission on 19.09.2023. The applicant's advocate complied with the order of the court by filing her written submission on 19th September, 2023. Hence, the present Ruling.

In her written submission, Ms. Neema Charles submitted that the applicant is seeking to this court for an order for extension time to file an Application to set aside a dismissal order dated on the 5th day of October, 2022 in respect of Land Appeal No. 30 of 2020 and restoration of the said appeal; she has also prayed to the court to adopt the contents of the Chamber summons and sworn affidavit of the applicant in order to form part of the applicant's submission. She further submitted that; the applicant is the Administrator of estate of late Bettery Usalike Bolfu who was the Appellant in Misc. Land Appeal No. 30 of 2020 before this court, and who demised on the 14th day of August, 2022 before the determination of his Appeal.

She went on submitting that, however; on the 5th day of October, 2022 when the said appeal was called on for hearing; the administrator of estate of late Bettery Usalike Dolfu was not yet appointed which resulted to the dismissal of Misc. Land Appeal No. 30 2020 for want of prosecution.

The learned counsel for the applicant also submitted that on the 15th day of November, 2022 the applicant was appointed by the Primary Court of Ifakala as the Administrator of estate of late Bettery Usalike Dolfu where after he filed the Misc. Land Application No. 33 of 2022 before this Court in

order to seek for readmission of an appeal dismissed for a want of prosecution.

It was also the submission of Ms. Neema Charles that nonetheless the application was made after expiration of thirty (30) days contrary to section 14(1) and Part III Item 9 Column 2 of the Law Limitations Act, Cap 89 R.E. 2019. She further added that, the administrator of the deceased's estate was appointed on 15th November, 2022 while the time to file Misc. Land Application for re-admission the appeal was statutory barred. That it was denied for the applicant to file the application without having *locus standi* or being appointed as the Administrator of the estate of late Bettery Usalike Dolfu. To bolster her argument, she cited the case of **Hemed Said Amri v Ally Amri Said and Others**, Civil Application No. 135 of 2017[2023] CAT sitting at Tanga, at page 5, whereas the Court of Appeal held inter alia, that:

"Any person claiming to be the legal representative of a deceased party or any other interested person may apply to revive the application; and, if it is proved that he was prevented by good cause from continuing the application, the Court shall revive the application upon such terms as to costs or otherwise as it deems fit."

Again, the learned counsel for the applicant submitted on the second ground of illegality that the ward tribunal was not properly constituted. She argued that on the 16th day of August, 2019 the Ward Tribunal of Milanzi was formed by eight (8) members; but only one woman seated on said case which is contrary to section 11 of the Land Dispute Court Act Cap 216 R.E. 2019 (the Land Dispute Court Act).

She claimed that the members of the Milanzi Ward Tribunal who presided over such tribunal were Felenatusi Kasansi(Male), Othman Hela(Male), Plukelia Damian(Female), Frank Raphael (Male), Alex Kasolo(Male), Sangija Upule(Male), Siwezi Kipama(Male) and Ludovick Nzyungu(Male).

Likewise, the applicant's counsel submitted that on the 27th day of August, 2019 the said Ward Tribunal was presided over by only five members namely Victoria Fanuel, Michael Sukare, Turuka Makanya, Charles Elias and Samwel Togo (Chairman); however, the record of the said tribunal does not indicate the gender of the sitting members. To substantiate her stance, she cited the case of **Christopher Wantora v Masero Meck Makura**, Misc. Land Appeal 112 of 2021 HC Musoma.

She further submitted that one member of the trial Tribunal whose name is Ludovick Nzyungu, was not present on the 23rd day of August, 2020 when the case was being heard by the tribunal; however, he just participated during the delivering of the judgment and casted his vote in the course of making the decision of the trial tribunal.

Again, the applicant's counsel submitted that another member of the said trial tribunal one John Mwalaba who was among the presiding members of the said trial tribunal, participated in the casting vote process, but he did not hear the respondent at all which is contrary to the provisions of section 14 of the Land Dispute Court Act.

To strengthen her proposition, she cited the case of **Pili Saiba Mwakipwete vs Eliud Mwalupeta**, Misc. Land Appeal No. 6 of 2020 (unreported). Finally, she capitulated that the applicant failed to file Application for re-admission of Misc. Land Appeal No. 30 of 2020 within time due to two points of law; one, *locus standi* and two, illegality, as indicated in her former submission in chief. Thus, due to the above reasons, the learned advocate prayed to this court to grant the applicant extension of time in order to enable her to apply for setting aside of the dismissal order and re-admission of Land Appeal No. 30 of 2020.

Section 14(1) of the Law of Limitation Act Cap 89 R.E. 2019 provides for extension of time for the doing of any act authorized or required by the law if there are sufficient reasons. In **Benedict Mumello v Bank of Tanzania**, Civil Appeal 12 of 2002) [2006] TZ CA 12 (*Uploaded on Tanzlii on 12 October 2006*) the Court of Appeal held at page 227 as follows:

"It is trite law that an application for extension of time is entirely in the discretion of the Court to grant or refuse it, and that extension of time may only be granted where it has been sufficiently established that the delay was with sufficient cause."

Extension of time is a matter for discretion of the court and that applicant must put material before the court which will persuade it to exercise its discretion in favour of an extension of time. (See also **Lyamuya Construction Company LTD vs Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010.

The question now is whether the applicant has shown good and sufficient cause to warrant the grant of extension of time. I have carefully considered the arguments put forward by the learned counsel for the applicant and in

the end; I have reached to the conclusion that there is merit in the application.

It was submitted and likely so in my view, that there is undisputed fact that the appellant in Misc. Land Appeal No. 30 of 2020 one Bettery Usalike Dolfu died on 14th August, 2022 and that his appeal was dismissed by the court on the 05th day of October, 2022 for want of prosecution. It is also an undisputed fact that at the time the Misc. Land Appeal No. 30 of 2020 was dismissed, the Administrator of the estate of late Bettery Usalike Dolfu was not yet appointed.

In the circumstances, it is my considered opinion that since, the Administrator of the estate of late Battery Usalike Dolfu was appointed by the probate court after the appeal was dismissed, the Administrator of the above-named deceased person may apply to the court to revive the appeal and death of the appellant is in my view, a sufficient good cause of extension of time for the Administrator to revive the appeal or application, as the case may be.

It appears to me that the death of the appellant is a proof that the case could not be further prosecuted until the administrator of the estate of the

appellant could be appointed. Even if the late appellant had engaged an advocate to represent him in his case, still the advocate, could be barred under the law to proceed with the matter prior to the appointment of the administrator of the deceased's estate and be instructed by the administrator.

For the court to entertain the case or action in respect of the deceased's estate, it has to satisfy itself as to whether applicant has a *locus standi* or has interest in the case; See **Gervas Masawe Kulwa vs The Returning Officer and Another** [1996] TLR 320, as cited in the case of **Ally Ahmed Bauda** (Administrator of the Estate of the late **Amina Hussein Senyange vs Raza Hussein Ladha Damji and Others**, Civil Application No. 525/17 of 2016 (unreported)).

In the above cases the Court insisted that *locus standi* is not the matter of evidence, but rather the matter of law as it goes to the jurisdiction of the court. Besides that, being a jurisdiction issue a person cannot maintain a suit or action unless he/she has shown an interest in the subject matter as well.

Likewise, the applicant in the case at hand cannot proceed with the Land Appeal No. 30 of 2020 unless he satisfies the court that he had been appointed to be administrator of the late Battery Usalike Dolfu. Having gone through the written submission filed with this court by his learned advocate, I have found that there is sufficient evidence to prove that the applicant herein was appointed by the Primary Court of Ifakala to be the administrator of the estate of his late father one Battery Usalike Dolfu, the deceased person.

He has also proved to have an interest in the estate of his late father by filing the instant application so that he can apply for readmission and prosecution of the Misc. Land Appeal No. 30 of 2020 from where his late father ended before passing away.

The applicant has raised the issue of illegality as a second ground of extension of time. I am aware of the holding in the **Principal Secretary Ministry of Defence and National Service vs Devram Valambhia** (1992) TLR 387 in which the Court of Appeal held that:

"In our view, since 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."

Again, in the case of **Ngao Godwin Losero vs Julius Mwarabu**, Civil Application No. 10 of 2015(unreported) the Court of Appeal held that:

"It is noteworthy that in Valambhia's case (supra), the illegality of the impugned decision was clearly visible on the face of the record."

This reminds me to consider the allegations of illegality of the impugned decision as a reason to find good cause for delay when seeking extension of time, to exercise caution and consider specific circumstances especially by taking time to consider whether the illegality is visible on the face of the record. In **Lyamuya's** case (supra), the Court of Appeal had the following to say on the issue of illegality: -

"Since every party intending to appeal seeks to challenge the 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 indented 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."

I will apply the above holding to the present application. It is the assertion of the applicant's counsel that the trial tribunal was not properly constituted when tribunal seated on 16th August, 2019 where the members of the Ward Tribunal were eight and among of the member seated, there was only one women, and she has further added that on 27th August, 2019 the trial proceedings does not indicate gender of the members and lastly, she contended that one of the members whose name is Ludovick Nzyungu, participated in the decision making process while he was not present during hearing of the case. The composition of members of the Ward Tribunal is prescribed under section 11 of the Land Disputes Courts Act, which provides that:

"Each Tribunal shall consist of not less than four nor more than eight members of whom three shall be women who shall be elected by a Ward Committee as provided for under section 4 of the Ward Tribunals Act."

Also, section 4(1)(a) of the Ward Tribunal Act Cap 206 R.E. 2019 expressly provides for almost similar requirement.

As already pointed out above, the trial tribunal shall consist of not less than four nor more than eight members of whom three shall be women who shall be elected by a Ward Committee. In the present case, the presiding tribunal seated with one woman during hearing of the case. That was contrary to the directives under section 11 of the Land Dispute Court Act which governs the composition of the Ward Tribunals, requiring them to be three women members in any particular sitting.

Since only one female member participated in the trial of the matter subject of this application at the level of Ward Tribunal, the trial court proceedings are tainted with irregularity, thus become null and void. Successively, illegality is among of the grounds for extension of time.

Therefore, I exercise my discretion power to grant extension of time to the applicant which would in neither way prejudice the respondent. In such circumstances, the applicant has to lodge the intended application for readmission of Misc. Land Appeal No. 30 of 2020 within fourteen (14) days of the date of this ruling. No order as to costs is made.

I so order.



A.A. MRISHA
JUDGE
03.01.2024

DATED at SUMBAWANGA this 03rd day of January, 2024



A.A. MRISHA
JUDGE
03.01.2024

ORIGINAL