

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
CIVIL APPLICATION NO.484/17 OF 2019**

JUTO ALLY.....APPLICANT

VERSUS

LUKAS KOMBA.....1st RESPONDENT

ALOYCE MSAFIRI MUSIKA.....2nd RESPONDENT

[Application for extension of time within which to serve the respondent with the notice of appeal and letters requesting certified copies of proceedings, judgment and decree from the decision of the High Court of Tanzania, (Land Division) at Dar es Salaam]

(Mziray, J)

Dated the 30th day of June, 2015

in

Land Case No 98 of 2009

.....
RULING

5th May & 15th July, 2020

WAMBALI J. A.:

On 30th June, 2015, the High Court of Tanzania, Land Division delivered a judgment in respect of Land Case No. 98 of 2009 concerning the dispute between the applicant Juto Ally, who was the plaintiff and the first respondent, Lukas Komba and the second respondent Aloyce Msafiri Musika who were the first and second defendants respectively. The applicant lost the suit.

In the said judgement, the second respondent was declared to be the rightful owner of the suit premises. Nevertheless, although the suit failed,

the first respondent was ordered to refund the applicant within three months TZS 11,000,000/= (eleven million) which he unlawfully obtained from the transaction.

The High Court's decision did not please the applicant and thus on 2nd July, 2015, in terms of Rule 83(1) of the Tanzania Court of Appeal Rules, 2009 (as amended) (the Rules), she lodged the notice of appeal with the intention to appeal to the Court to challenge both the judgment and decree. On the same date, she also wrote a letter to the Registrar of the High Court in which she requested to be provided with certified copies of proceedings, judgment and decree in respect of Land Case No.98 of 2009.

Unfortunately, until when the applicant lodged this application on 11th November, 2019 she had not managed to serve the respondents with both the copy of the said notice of appeal and a letter.

In this application, therefore, the applicant seeks extension of time within which to serve the respondents with the requisite copies of the documents alluded to above. The applicant has put forward two major reasons for the delay. First, that there is an apparent illegality in the judgment of the High Court which is intended to be challenged in an appeal. Two, that because of her illness and financial hardship, she could not afford to find a lawyer to pursue or initiate her appeal to the Court against the

High Court's judgment and decree within a prescribed statutory period. The applicant's Notice of Motion is supported by her affidavit and the written submission.

At the hearing, the applicant appeared in person, unrepresented and adopted her notice of motion, affidavit and the written submission. Essentially, she urged me to consider the same to determine the application as she had nothing useful to add. She also prayed that the application be granted with costs.

The first respondent similarly appeared in person, unrepresented and adopted his affidavit in reply as a basis of opposing the applicant's application. It is however noted that he did not lodge written submission. He therefore, orally and briefly submitted against the application. Generally, while relying on his affidavit in reply, he firmly maintained that the application is devoid of merit as the applicant has not substantiated her grounds upon which she relies to deserve extension of time. In his view, the applicant has not demonstrated how her inability to engage an advocate and her illness prevented her to serve him with the copy of the notice of appeal and the letter to the Registrar of the High Court for almost four years until when the current application was lodged. Moreover, the first respondent argued that the applicant has not categorically indicated the

nature of the illegality in the High Court's judgment which she intends the Court to consider on appeal. In the end, he pressed me to dismiss the application with costs.

On the other hand, the second respondent was duly represented at the hearing by Mr. Thomas Brush learned advocate, who equally adopted the second respondent's affidavit in reply to oppose the application. As it was the case with the first respondent, the second respondent did not also manage to lodge a written submission. Mr. Brush thus submitted orally to support the second respondent's affidavit in reply.

It is not out of place to remark at this juncture that the first and second respondents' affidavits in reply are identical in terms of the facts they have relied upon and explained in paragraph 12 of their respective affidavits.

Essentially, Mr. Brush also reiterated the oral submission of the first respondent that the applicant has not sufficiently explained the cause of delay or pointed out clearly the nature of the illegality in the judgement of the High Court. The learned counsel for the second respondent explained that it is a requirement that in order for the applicant to deserve extension of time she must explain every day of delay.

Unfortunately, he stated, the applicant's argument that she has been ill throughout the period she delayed to serve the respondents with the requisite documents is not substantiated by the medical documents attached to her affidavit. In his submission, the attached documents relate to the treatment she received in 2016 and 2017 and there is no evidence that throughout that period she was admitted in hospital. On the contrary, he argued, the period of fourteen days within which the applicant was required to serve the respondents with the requisite copies of the notice of appeal and a letter to the Registrar of the High Court in terms of Rule 84(1) and 90(3) of the Rules does not fall within the period in which she was supposed to have served the respondents, that is, by 16th July, 2015. This is because, he stressed, her illness covered the period from 2016 up to 2017.

On the other hand, Mr. Brush submitted that the applicant cannot rely on her inability to serve the respondents with the requisite notice of appeal and the letter to the Registrar of the High Court because of her financial difficulty to hire a lawyer to pursue her intended appeal. He emphasized that the applicant has not stated why she failed to apply the same measure she used to serve the respondents with the notice of motion for an application for extension of time to lodge an application for stay of execution

that was lodged on 16th December, 2015 and in other applications that followed in 2016 and 2017 as indicated in her supporting affidavit.

The learned counsel for the second respondent argued further that the decision of the Court in **Yusuph Nyembo @ Kachuo v. The Republic**, Criminal Appeal No.5 of 2013 (unreported) referred by the applicant concerning the factors to be considered in granting extension of time cannot be disputed. However, he maintained that the applicant cannot seek refuge from the factors stated therein as she has not demonstrated that she has met any of them to deserve extension of time in view of her an unexplained longtime of delay. To support his argument, he made reference to the decision of the Court in **Iddi Nyange v. Mana Saidi**, Civil Application No.132/01 of 2017 (unreported) which is to the effect that the applicant must fully explain the reason behind and account for every day of delay.

On the issue of illness, the learned counsel made reference to the decisions of the Court in **Moto Matiko Mabanga v. Ophir Energy PLC and Two Others**, Civil Application No.463/01 of 2017 and **F.1800 Sgt Hemed (Hemed Khalfa Mkindi) & 14 Others v. The Attorney General and The Inspector General of Police**, Civil Application No.303/01 of 2017 (both unreported).

With regard to the alleged illegality of the judgment of the High Court Mr. Brush submitted that the applicant has simply mentioned the existence of illegality without sufficiently explaining its nature.

In conclusion, he prayed for the dismissal of the application with costs for lacking merit.

At this juncture, the crucial issue for determination is whether the applicant has demonstrated good cause to deserve extension of time. I wish to preface my deliberation by reproducing in full the most relevant paragraphs of the applicant's affidavit in support of her application as hereunder:

10. That the applicant is a sick old aged widow who frequently attending medical treatment at Mwananyamala Hospital. Copies of the medical sheets are attached and marked J8 and the leave of this honorable court is craved for it to form part of this affidavit.

11. That the intended appeal stands to be successful as the same is tainted with illegality, to wit, the trial court lacked requisite pecuniary jurisdiction to entertain the matter and erred in law in entertaining a case which was based on illegal money lending by unregistered financial institution and individuals.

I have deliberately reproduced the above stated paragraphs because most of the rest of the paragraphs, that is, 5,6,7,8 and 9 support the applicant's arguments that she has all along been in and out of the High Court and this Court pursuing several applications concerning the aftermath of the complained of judgment. The relevant period in question is from 16th December, 2015 to 17th June, 2019. It is thus not doubted that both in her affidavit in support of the application and her written submission, the applicant states nothing on why she did not manage to serve the respondents with the requisite stated documents within fourteen days from 2nd July, 2015 when she lodged a notice of appeal and wrote a letter to the Registrar of the High Court.

Admittedly, according to a copy of the ruling of this Court in Civil Application No. 261 of 2015 which is part of the applicant's affidavit in support of the application, she lodged before the Court an application for extension of time within which to lodge an application for stay of execution which was granted through a ruling that was delivered on 10th March, 2016. In that ruling it is indicated that the respondents were duly served on 18th February, 2016 to appear for the hearing on 4th March, 2016. However, it is noted that both did not enter appearance and as a result the application was heard in their absence.

To this end, one wonders why the applicant did not manage to serve the respondents with the notice of appeal and the letter to the Registrar of the High Court on the reason that she was an ill person and had no financial means to engage an advocate to pursue an appeal. However, as pointed out by the respondents, during the same period she managed to serve them with the notice of motion in Civil Application No.261 of 2015 in which she applied for extension of time to lodge an application for stay of execution.

In this regard, I entirely agree with the first respondent and counsel for the second respondent arguments that the applicant has not expressly stated in her affidavit and the written submission the reason for delaying to serve them the requisite documents during the period from the date she lodged the notice of appeal and wrote a letter on 2nd July, 2015 to 16th December, 2015 when she lodged the said application. Certainly, the period from December 2015 to 17th June 2019 when the High Court (Malaba, J) marked her application for leave to appeal in Misc. Land Civil Application No. 948 of 2018 to have been withdrawn has to be taken as the period in which the applicant was fully involved in court proceedings both in the High Court and this Court involving the same parties. However, she has failed to explain why it took her some four months and some days from 17th June 2019 to 11th November, 2019 when she lodged the present application.

The applicant cannot, therefore, rely on the decision of the Court in **Yusuph Nyembo @Kachuo** (supra) to advance her argument that she is entitled to extension of time for showing good cause for the delay as she has not fully explained the reason for the period of delay from July to December 2015 and from June 2019 to November, 2019.

Therefore, in the present application, I am in agreement with the first respondent and the counsel for the second respondent submissions that the applicant has failed to explain the reason for her delay in serving them with the notice of appeal and letter to the Registrar of the High Court within the prescribed period of fourteen days. I thus reject her argument in the first ground that she failed to serve them because she was sick and lacked financial means to engage an advocate to initiate the appeal processes during the respective period. Indeed, she has also not explained how her illness contributed to the delay as the medical evidence she attached to her affidavit concerns the period specifically for the dates when she attended to hospital on 8th October, 2016 and 19th June, 2016. Besides, there is no indication that on those particular dates she was admitted and for how long. The only indication is that she attended at Mwananyamala Hospital as an outpatient where she was attended and allowed to go to her residence on both occasions.

With regard to the issue of illegality in the proceedings and judgment of the trial court, it is admitted that paragraph 11 of her affidavit reproduced above intimates that the High Court lacked pecuniary jurisdiction to try the case before it.

On the adversary, the learned counsel for the second respondent strongly submitted that, it is not sufficient for the applicant to simply allege in passing without explaining briefly the alleged illegality. He made reference to the decision of the Court in **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), where it was stated among others that: -

"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; nor one that would be discovered by a long drawn argument or process".

On my part, while I take cognizance of the observation of the Court in **Lyamuya Construction Company Limited** (supra) concerning pleading illegality generally to support an application for extension of time within which to take some steps, I think the circumstance in the present application is distinguishable. It is my considered opinion that the allegation that the High Court lacked jurisdiction to try the case which is the subject of the applicant's intention to appeal is a point of law of sufficient importance which may touch on the illegality of the proceedings and judgment to suffice consideration of the Court. Jurisdiction of the court is a fundamental requirement in the administration of justice as it is the basis of the court's mandate to deal with the requisite proceedings brought before it by parties. Therefore, an allegation of lack of jurisdiction is an illegality which deserves the attention of the Court to ascertain its authenticity. It is in this regard that in **VIP Engineering and Marketing Limited and Two Others v. City Bank Tanzania Limited**, Consolidated Civil Reference Nos. 6, 7 and 8 of 2006 (unreported) it was succinctly stated that: -

"It is settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under Rule 8 of the Court of Appeal Rules regardless of whether or not a reasonable explanation has been given by the applicant under the rules to account for the delay". (It is noted that Rule

8 referred above is the current Rule 10 of the Rules).

(See also the decisions of the Court in **TANESCO v. Mafungo Leonard Majura and Two Others**, Civil Application No. 94 of 2016 and **Jahangir Aziz Abdulrasul v. Balazi Ibrahim Abubakar and Another**, Civil Application No. 79 of 2016 (both unreported).

Moreover, in **Kashinde Machibya v. Hafidhi Said**, Civil Application No. 48 of 2009 (unreported) it was stressed that: -

"Bearing in mind that it is now established law in this country that where a point of law involves the illegality of the decision, that by itself constitutes sufficient reason to grant an extension of time... even if the appellant's appeal is out of time, there is no other option but to grant extension of time".

Applying the above quoted sound observations of the Court in the circumstances of this application, I am of the settled opinion that although the applicant has not sufficiently accounted for the period of delay, the issue of the alleged illegality of the decision to be impugned suffices to move me to grant her extension of time.

It is instructive to note that in an application for extension of time the Court does not only consider whether there is sufficient reason for the delay but also the reason for extending time to take the intended steps [see **Republic v. Yona Kaponda and 9 Others** (1985) TLR 84 and **Victoria**

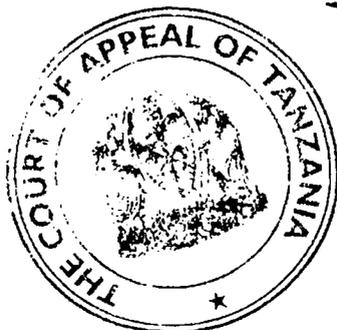
Real Estates Development Limited v. Tanzania Investment Bank and Others, Civil Application No. 225 of 2014 (unreported)]. In the present application, I am convinced that the alleged illegality in the jurisdiction of the High Court is sufficient reason for extending time for the applicant to take necessary steps towards lodging the intended appeal.

In the result, in terms of Rule 10 of the Rules, I exercise the discretion to grant the application on condition that, the applicant should serve upon the respondents copies of a notice of appeal and a letter within fourteen days from the date of the delivery of this ruling. Nevertheless, considering the circumstances of this application, I make no order as to costs.

DATED at **DAR ES SALAAM** this 30th day of June, 2020.

F. L. K. WAMBALI
JUSTICE OF APPEAL

The Ruling delivered this 15th day of July, 2020 in the Absent of applicant but represented by his Grandson called Said Mzee and Mr. Thomas Brashi, counsel for the 1st and 2nd Respondents is hereby certified as a true copy of the original.



A handwritten signature in black ink, appearing to read "E. G. Mrangu", is written over a horizontal line.

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL