

IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MKUYE, J.A., MWANDAMBO, J.A. And RUMANYIKA, J.A.)

CIVIL APPLICATION NO. 63/07 OF 2023

**THE BOARD OF TRUSTEES OF THE FREE
PENTECOSTAL CHURCH OF TANZANIA APPLICANT**

VERSUS

ASHA SELEMANI CHAMBANDA..... 1ST RESPONDENT

RASHIDI SELEMANI CHAMBANDA 2ND RESPONDENT

**(Application for Extension of time for a leave to appeal from the decision
of the High Court of Tanzania, District Registry of Mtwara at Mtwara)**

(Ngwembe, J)

dated the 27th day of November, 2020

in

Land Appeal No. 19 of 2019

RULING OF THE COURT

24th & 28th March, 2023

MWANDAMBO, J.A.:

The applicant unsuccessfully sued the respondents before the District Land and Housing Tribunal (the DLHT) for Lindi in a dispute over ownership of a farm. Its appeal to the High Court at Mtwara was equally unsuccessful resulting into lodging a notice of appeal to this Court on a second appeal which was subject to leave in terms of section 47 (2) of the Land Disputes Courts Act.

The judgment of the High Court dismissing the appeal was delivered on 27/11/2020. Rule 45 (a) of the Tanzania Court of Appeal Rules, 2009 (the Rules) requires that an application for leave to appeal to be lodged within 30 days of the date of the decision sought to be appealed. The applicant lodged her application timeously but that application was found to have been defective. It was struck out by the High Court in a ruling delivered on 29/09/2021. As time for filing a fresh application had long expired, on 20/10/2021, the applicant filed an application for extension of time but, on 26/05/2022, Muruke, J. dismissed it due to the applicant's failure to show sufficient cause for the delay. The applicant is now before the Court on a second bite; a course sanctioned by rule 45A (1) (b) and (3) of the Rules. The application is predicated upon seven grounds set out in the notice of motion supported by the averments in the founding affidavit but resisted by the respondents in their joint affidavit in reply.

Acting through LLEX Attorneys, the applicant filed written submissions in pursuance of rule 106 (1) of the Rules. The respondents too replied through their joint written submissions in reply as required by rule 106 (8) of the Rules. At the hearing of the appeal, Mr. Francis Stolla, learned advocate appeared representing the applicant. The respondents appeared in person, unrepresented. In his oral address, Mr. Stolla sought

to make elaborations and emphasis on the question of illegality as a ground for extending time evolved from case law, particularly; **Principal Secretary Ministry of Defence And National Service v. Devram P. Valambhia** [1992] T.L.R. 387 included in the applicant's list of authorities. We shall come to that aspect later. The submissions by the applicant's advocates comprise four issues on which they invite the Court to determine in its favour. These revolve around; **one**, existence of illegalities in the impugned decision; **two**, reason for the delay; **three**, length of the delay, was it inordinate? and; **four**, degree of prejudice to the respondents should the Court extend time.

As for the reason for the delay, the learned advocates submitted and indeed it is common ground that it is due to the striking out of its first application before High Court on account of incompetence. Despite the respondents' resentment on this ground, we do not think we should belabour further on this. The reason for the delayed lodging of the application for leave has been sufficiently explained in the notice of motion and the affidavit even though that is not equivalent to saying that the application is meritorious on that ground alone.

Next is the length of the delay. On this, the applicant is inviting the Court to hold that the delay was not inordinate and so it should exercise the discretion in its favour. It is submitted that, following the decision dismissing its appeal, the applicant filed an application for leave to appeal within time but that application was struck out and subsequently, an application for extension of time was lodged before the High Court which was again dismissed. Hence, the instant application. The respondents made no submissions in reply on this.

Be it as it may, the issue whether the delay is ordinate or not is settled through decided cases. It revolves around the applicant accounting for each day of delay. See for instance: **Lyamuya Construction Company Ltd v. Board of Trustees of Young Women's Christian Association of Tanzania (YWCA)**, Civil Application No. 2 of 2010 and **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. 10 of 2015 (both unreported).

Much as there is no dispute on the sequence of events between the date of the impugned decision and the date the first application for leave to appeal was struck out, it is doubtful whether the applicant accounted for the delay from 29/09/2021 to 20/10/2021. The applicant has not

explained away that period and, as we have held in our numerous decisions, a delay of even a single day must be accounted for to enable the Court exercise its discretion in the applicant's favour. Confronted with a similar application, in **Sebastian Ndaula v. Grave Rwamafa (Legal Personal Representative of Joshwa Rwamafa)**, Civil Application No. 4 of 2014 (unreported), the Court made the following observation which is relevant to this application thus:

*".... The position of this Court has consistently been to the effect that in an application for extension of time, the applicant has to account for every day of the delay: see- **Bariki Israel vs. The Republic**, Criminal Application No. 4 of 2011(unreported). The need to account each of the days of delays becomes even more important where matters subject of appeal like the present one is, was decided eighteen years ago on 6/02/1997."*[at page 8].

The applicant's affidavit is conspicuously silent on this which justifies the Court's disinclination towards exercising discretion in the applicant's favour.

With regard to prejudice, the applicant's advocates argue and invites the Court to hold that no prejudice will result to the respondent because all what the applicant is seeking is right to be heard. However, it

has not been suggested in the affidavit that the applicant was denied its right to be heard by either the DLHT or the first appellate court. In any case, the issue regarding prejudice cannot by itself be a determining factor independent of the critical issue; length of the delay and the applicant's failure to account for each day of delay which we have already determined against the applicant.

Finally, we turn our attention to illegality as an overriding ground for extending time. The essence of Mr. Stolla's submission both written and oral is that, the impugned decision contains illegality by reason of its failure to uphold the applicant's ground challenging the DLHT's decision for not joining necessary parties to the case as mandated by Order I rule 10 of the Civil Procedure Code. The learned advocate has cited **Devram P. Valambia** (supra) and subsequent Court's decisions, notably, **VIP Engineering & Marketing Ltd v. Citibank Tanzania Ltd**, Consolidated Reference No. 67 and 8 of 2006 (unreported) for the proposition that, a claim of illegality of the challenged decision suffices to extend time regardless whether or not reasonable explanation has not been given accounting for the delay.

In their reply, the respondents see nothing illegal in the impugned decision. On the contrary, they argue that, joining necessary parties, if any, was not a shared responsibility but exclusive to the applicants and; failure to do so can only be attributed to negligence. The respondents have cited several decisions to reinforce their arguments, urging us to decline exercising our discretion in the applicant's favour because the applicant has not succeeded in moving the Court to extend time. Given the nature of the ground, and the arguments made, we need not cite all the cases the respondents have cited except, **Ezron Magesa Manyogo v. Kassim Mohamed Said & Another** [2017] T.L.R. 87 summarising the factors to be considered in determining applications for extension of time as it were. The other decisions include **Dr. Ally Shabhay v. Tanga Bohora Jamaat** [1997] T.L.R. 305 on the litigant's duty to exercise diligence in pursuing matters in Courts and; **Hadija Adamu v. Godbless Tumba**, Civil Application No. 14 of 2013 (unreported) for the proposition that ignorance of law is not a sufficient reason to extend time.

In persuading the Court to grant the application under this ground, Mr. Stolla placed his emphasis on **Shaibu Salim Hoza v. Helena Mhacha (As a legal representative of Merina Mhacha (Deceased))**, Civil Appeal No. 7 of 2012 (unreported) in which the Court nullified

proceedings of the trial court upon being satisfied that the case proceeded against Dar es Salaam City Council; a necessary party who had been impleaded in the plaint. Similarly, the Court was referred to **Tanzania Railways Corporation (TRC) v. GBT (T) Limited**, Civil Appeal No. 218 of 2018 (unreported) stressing the need to join necessary parties to a suit failing which, the judgment entered in the absence of such party will be a nullity.

We have examined the submissions and authorities placed before us in the light of the grounds in the notice of motion and the affidavit. Grounds three contends that the intended appeal raises points of law fit for the determination of the Court on appeal whereas ground four alludes to the allegations of illegalities in the circumstances of the case by the failure to join the Commissioner for Lands, Director of Surveys and Mapping and Attorney General. Paragraph 10, 11, 12, 13, 14 15, 16 and 17 of the affidavit are in the form of grounds of appeal to be determined by the Court in the intended appeal. Be it as it may, as Mr. Stolla might be aware, we are not considering an application for leave to appeal in which case the grounds contending that the intended appeal disclose points of law for consideration and determination by the Court will be relevant. Here we are concerned with existence of an illegality of sufficient

importance underscored in the cases referred to by Mr. Stolla. In our view, there must be a distinction between existence of an illegality in the impugned decision and existence of arguable grounds on appeal be it of law or mixed fact and law for the consideration by the Court on appeal. The former is mostly relevant in applications for extension of time and the latter exclusively in applications for leave to appeal. It is significant that in **Lyamuya Construction Company Ltd** (supra), a single Justice of the Court referred to **Devram P. Valambhia** (supra) to stress the point that such point of law must not only be of sufficient importance but added that, such point 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.

We have no difficulty in agreeing with the applicant regarding its dissatisfaction with the outcome of its appeal attributed to the absence of the alleged necessary parties but that is not equivalent to saying that there exists an apparent illegality of sufficient importance warranting exercise of discretion extending time as an overriding consideration having held that the applicant has failed to account for each day of delay.

In the event, since the applicant has not only failed to account for the delay in lodging his application following the dismissal of the first

application by the High Court but also no any ground of illegality has been disclosed, we are constrained to decline exercising the Court's discretion. The application is accordingly dismissed with costs.

It is so ordered.

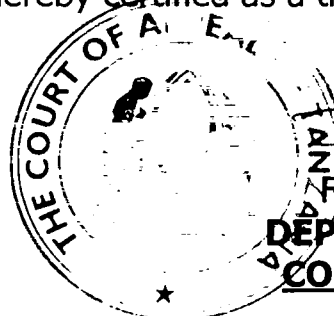
DATED at MTWARA this 27th day of March, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

This Judgment delivered this 28th day of March, 2023 in the presence of Mr. Frank Abrahamman Mchihama learned counsel holding brief for Mr. Francis Stola for the Appellant and the 1st and 2nd Respondents in persons, is hereby certified as a true copy of the original.

 F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL