IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 730/17 OF 2022

THE REGISTERED TRUSTEES
OF CALVARY ASSEMBLIES OF GOD (CAG).....APPLICANT

VERSUS

TANZANIA STEEL PIPES LIMITED.....1ST RESPONDENT
TREASURER REGISTERAR.....2ND RESPONDENT
THE ATTORNEY GENERAL.....3RD RESPONDENT

(Application for Extension of Time to file Notice of Appeal against the Decision of the High Court of Tanzania, Land Division at Dar es Salaam)

(Mahimbali, J.)

dated the 1st day of July, 2022

in

Land Case No. 40 of 2020

RULING

7th &14th November, 2023

KEREFU, J.A.:

The applicant, The Registered Trustees of Calvary Assemblies of God (CAG), has lodged this application seeking orders for extension of time within which to lodge a notice of appeal against the decision of the High Court of Tanzania, Land Division at Dar es Salaam, (Mahimbali, J.) dated 1st July, 2022 in Land Case No. 40 of 2020. The application is brought by way of notice of motion lodged on 28th November, 2022 under Rules 10 and 45A (1) (a) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The grounds canvassed in the notice of motion are as follows, that:

(a) *The applicant has been diligently pursuing her rights in the courts of law but from the defects of jurisdiction or other causes became incompetent;*

(b) *That, the High Court's Ruling and Order sought to be appealed against is on the failure by the learned High Court Judge to appreciate sickness and other strong reason advanced for adjourning hearing of Land Case No. 40 of 2020 on 1st July, 2022;*

(c) *That, the applicant has been actively pursuing her rights in the courts of law and as such, technical delay; and*

(d) *The decision sought to be appealed against is tainted with serious illegalities and irregularities.*

The Application is supported by an affidavit deposed by one John James, learned counsel for the applicant. On the other hand, the respondents have filed affidavits in reply opposing the application.

For a better appreciation of the issues raised herein, it is important to explore the background of the matter and the factual setting giving rise to the current application. As indicated above, the application traces its origin from the decision of the High Court, Land Division, at Dar es Salaam (Mahimbali, J.) dated 1st July, 2022 in Land Case No. 40 of 2020 where the applicant sought for the following reliefs; (i) a declaratory order that the purported sale of Plot No. 17 (disputed property) situated at Ubungo Industrial Area within Kinondoni District in Dar es Salaam to

the first respondent is null and void; (ii) that, the applicant should be given the first chance/right to purchase the disputed property; and in the alternative, (iii) the applicant be declared the rightful owner of the disputed property through adverse possession since 2000; and (iv) permanent order restraining the respondents from harassing and evicting the applicant from the disputed property.

Upon completion of filing parties' pleadings, the said case was cause listed in a special clean-up session and it was scheduled for hearing on 15th and 16th June, 2022 consecutively. On 15th June, 2022, both parties entered appearance and it was agreed that, the hearing of the case would proceed by way of filing witnesses' statements and 1st July, 2022 was fixed for adoption of the said statements, admission of exhibits and cross-examination of the parties' witnesses. However, on that particular date, the learned counsel for the applicant, prayed for an adjournment on the reasons that, the applicant's two witnesses were sick and could not attend. That, one Imelda Wilbaldi Maboya, the Senior Pastor of CAG was excused from duty for four (4) days effectively from 30th June, 2022 (a medical chit from Kairuki Hospital was produced to that effect) and the other witness, Francis Raphael Nkoka, a leader at the CAG had travelled to Mbeya where he was faced with ill health. The prayer for adjournment was objected by the learned counsel for the

respondents who challenged the medical chit produced for failure to indicate the date when the said witness attended the said hospital, what she was suffering from, types of medication prescribed to her and whether she was admitted in the said hospital prior to that date or otherwise to justify her absence. They contended further that, there was no any proof produced to prove that Mr. Francis Raphael Nkoka had travelled to Mbeya and fell sick.

Having considered the arguments advanced by the learned counsel for the parties, the learned trial Judge sustained the objection raised by the respondents and dismissed the applicant's suit under Order VIII Rule 21 (a) read together with Order IX Rule 1 and 5 of the Civil Procedure Code, Cap. 33 (the CPC).

Aggrieved, the applicant filed Misc. Land Application No. 410 of 2022 sought to set aside the dismissal order. However, the said application was struck out on 16th September, 2022 for being incompetent. Subsequently, on 19th September, 2022, the applicant unsuccessful filed Misc. Land Application No. 579 of 2022 seeking extension of time to lodge notice of appeal to challenge the impugned decision, hence this second bite application. It is the applicant's contention that, she had actively and diligently pursued her rights in the courts of law and the delay was not a result of inaction and/or

negligence on her part. The applicant stated further that the impugned decision is tainted with illegality which is also a sufficient reason warranting extension of time. As such, the applicant prayed for the Court to grant prayers sought in the notice of motion.

In their affidavits in reply, the respondents opposed the application by stating that reasons submitted by the applicant do not constitute sufficient reasons to warrant the Court to grant extension of time. On the alleged illegality, the respondents stated that there is no any illegality demonstrated by the applicant as the issue raised fall short of the criteria of illegality underscored by the Court in its numerous decisions. They thus prayed for the application to be dismissed with costs.

When the application was placed before me for hearing, Mr. Victor Kikwasi assisted by Mr. John James, both learned counsel entered appearances for the applicant whereas the first respondent was represented by Mr. Elipidius Philemon, learned counsel and the second and third respondents were represented by Ms. Selina Kapange, learned Senior State Attorney assisted by Mr. Francis Wisdom, learned State Attorney.

Submitting in support of the application, Mr. Kikwasi commenced his submission by adopting the contents of the notice of motion, the supporting affidavit and the written submission. He then argued that, the reason for the applicant's delay to lodge notice of appeal, was on her reliance on the improper advice given by her previous advocate. Although, Mr. Kikwasi admitted that negligence by an advocate does not constitute good cause for the delay, he argued that, on special circumstances, it may be accepted as a sufficient cause for the delay. He added that, since the applicant has acted negligently, she should not be condemned on the mistakes performed by her previous advocate. To support his proposition, he cited the cases of **Yusuph Same & Another v. Hadija Yusufu**, Civil Appeal No. 1 of 2002 (unreported), **Zuberi Mussa v. Shinyanga Town Council**, Civil Application No. 3 of 2007 [2009] TZCA 63: [28 October 2009: TanzLII] and **Kambona Charles** *(As Administrator of the estate of the late Charels Pangani)* **v. Elizabeth Charles**, Civil Application No. 529 of 2019 [2020] TZCA 214: [12 May 2020: TanzLII].

He also referred me to paragraphs 19, 20 and 21 of the affidavit in support of the application and argued that the impugned decision is tainted with illegality that constitutes good cause for the delay. On this point, he cited the cases of **Lyamuya Construction Company LTD v.**

Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010 [2011] TZCA 4: [3 October 2011: TanzLII], **Aloyce Chacha Kenganya t/a Aloyce Chacha Msabi t/a Idara ya Maji na Ulinzi Magunga v. Irasanilo Gold Mine**, Civil Application No. 582 of 2022 [2023] TZCA 17348: [13 June 2011: TanzLII] and **Suba Agro-Trading and Engineering Company Ltd & Another v. SEEDCO Tanzania Limited**, Civil Appeal No. 184 of 2020 [2023] TZCA 17517: [22 August 2023: TanzLII]. He faulted the learned trial Judge for failure to invoke the overriding principle to do away with legal technicalities and ensure effective administration of justice. He then, finally, prayed for the application to be granted with costs.

In response, Mr. Philemon commenced his submission by challenging the competence of the application for being accompanied by a defective verification clause, as he said, the deponent erroneously indicated that the information contained in paragraphs 1 to 24 were to the best of his knowledge and belief, while it is clear that, the same was obtained from the applicant. In addition, he argued that, the said deponent indicated that the information contained in paragraphs 4, 5, 6, 7, 8, 9, 19, 20 and 21 was extracted from the plaint in Land Case No. 40 of 2020 and the ruling in Misc. Land Application No. 410 of 2022 and

Misc. Land Application No. 579 of 2022 without disclosing the modality used to access the said documents. As such, he urged me to find that the said paragraphs are offensive and deserve to be expunged. It was his further argument that after expunging the said offensive paragraphs, there will be no sufficient information in the affidavit to support the application. In the light of the said defects, he prayed for the application to be struck out with costs for being incompetent.

In the alternative, he argued that the applicant has completely failed to demonstrate good cause for extension of time. Starting with the first reason on the negligence of the applicant's former counsel, Mr. Philemon, cited the case of **Jubilee Insurance Company (T) Ltd v. Mohamed Sameer Khan**, Civil Application No. 439/01 of 2020 [2022] TZCA 623: [12 October 2022: TanzLII] and argued that the negligence of an advocate does not constitute sufficient cause for the delay. He argued further that, in her affidavit in support of the application, the applicant has also failed to account for the delay of each day. To reinforce his proposition, he cited the case of **Tanzania Coffee Board v. Rombo Millers Ltd**, Civil Application No. 13 of 2015 [2015] TZCA 327: [6 October 2015: TanzLII].

On the alleged illegality, Mr. Philemon argued that there is no any illegality as the medical chit was produced before the trial court as

evidence and the learned trial Judge properly considered it and found that it was not sufficient to justify the absence of the applicant's witness. To support his proposition, he cited **Lyamuya Construction Company Limited** (supra). He further argued that, even the principle of overriding objective relied upon by the applicant cannot apply as the same is not designed to disregard the mandatory provisions of the procedural law. Based on his submission, he urged me to dismiss the application with costs on account of failure by the applicant to demonstrate good cause for the delay.

For her part, Ms. Kapange adopted the joint reply affidavit by the second and third respondents together with their joint written submission lodged on 16th February, 2023 to form part of her oral submission. She then associated herself with the submissions made by Mr. Philemon and added the case of **Wambele Mtumwa Shabaan v. Mohamed Hamis**, Civil Reference No. 8 of 2016 [2018] TZCA 39: [6 August 2018: TanzLII]. She then also emphasized that, since the applicant has failed to account for the delay of each day as required by the law, the application deserves to be dismissed with costs.

In his brief rejoinder, Mr. James challenged the submission made by Mr. Philemon in relation to the competence of the application. He contended that the paragraphs pointed out are on the deponent's

statements of facts based on the best of his knowledge and beliefs as he was ably instructed by his client. He added that, even the verification clause was properly verified as the deponent clearly separated the paragraphs on matters of facts based on his personal knowledge and belief and those which he extracted from the court's documents availed to him by his client. As such, Mr. James urged me to disregard the submissions advanced by the learned counsel for the respondents on that aspect and find that the application is supported by a valid affidavit. As for the merit of the application, he reiterated their earlier submissions and, once again, prayed for the application to be granted.

Having heard the counsel for the parties, I wish to begin, right away, with the argument advanced by the learned counsel for the respondents on the competence of the application. It is my considered view that, determination of this point should not detain me. Having scrutinized the contents of the affidavit together with its verification clause, I agree with the submission of Mr. James, as, indeed, the said verification clause was properly verified as the deponent clearly separated the paragraphs on matters of facts based on his personal knowledge and belief and those which he extracted from the court's documents availed to him by his client. On the non-disclosure of the modality used to access the said documents, I also agree with Mr.

James that, since the deponent was duly instructed by his client who was privy to all courts' documents there was no need to indicate the same. I thus overrule the point of objection raised for being devoid of merit.

I will next address the merit of the application. For this, the main issue for my consideration is whether the applicant has demonstrated good cause for the delay to warrant grant of prayers sought in the notice of motion. Rule 10 of the Rules empowers the Court to exercise its discretion to grant an application for extension of time, if the applicant adduces good cause to justify the delay. Therefore, the requirement which the applicant has to satisfy is to show good cause for the delay in filing the application. There are numerous authorities to this effect and some of them include, **Kalunga & Company Advocates Ltd v. National Bank of Commerce Ltd** [2006] TLR 235 and **Lyamuya Construction Company Ltd** (supra).

It is also settled law that in applications of this nature that the applicant must show good cause by accounting for each and everyday of the delay. See for instance the cases of **Bushiri Hassan v. Latifa Lukio Mashayo,** Civil Application No. 3 of 2007 (unreported) and **Wambele Mtumwa Shabaan** (supra).

It has been also held in times without number that, a ground alleging illegality constitutes good cause for extension of time. Among the decisions include, **The Principal Secretary Ministry of Defence and National Service v. Devram P. Valambhia** [1992] TLR 387 and **Kalunga & Company Advocates Ltd** (supra). In **Principal Secretary Ministry of Defence and National Service,** (supra) the Court stated that:

> *"In our view* ***when the point at issue is one aiieging 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 right". [Emphasis added].*

In the instant application, the two reasons for the delay advanced in the affidavit and submission by Mr. Kikwasi are; **one,** the negligence of the applicant's former advocate who gave her improper advice; and **two**, illegality in the impugned decision.

Starting with the first reason, it is clear that, the applicant has attributed her delay to the negligence of her former advocate. The disposition on this reason is contained in paragraphs 8, 9, 10 and 11 of

the affidavit in supporting of the application. That, the applicant relied on the advice of her previous advocate believing that the High Court's order is not appealable and the only remedy was for the same to be set aside. That, unsuccessful, she filed Misc. Land Application No. 410 of 2022 which was struck out 16th September, 2022. Later, upon the proper advice given by the current counsel she decided to lodge an application for extension of time. By any standard, and as rightly argued by the learned counsel for the respondents, this cannot constitute sufficient reason for the delay and the same cannot bail out the applicant as per the established principles. See for instance the cases of **Mwananchi Engineering and Constructing Corporation v. Manna Investimates (PTY) Limited and Holtan Investments Company Limited**, Civil Application No. 5 of 2006 (unreported) and **Jubilee Insurance (T) Company Limited** (supra) where the Court refused to bless the negligence of the applicant's counsel.

I am mindful of the fact that, although, in his submission, Mr. Kikwasi also conceded that negligence of an advocate does not constitute sufficient cause for the delay, he relied on the cases of **Yusuph Same & Another** (supra), **Zuberi Mussa** (supra) and **Kambona Charles** (supra) to argue that, on special circumstances, it may be accepted. However, apart from making that blanket statement,

he did not reveal those entailed special circumstances in the instant application to justify his claim. In the event and being guided by the above authorities, I find no difficulty to agree with the submissions advanced by the learned counsel for the respondents on this aspect.

In addition, it is also on record that, in her affidavit in support of the application, the applicant has not accounted for the period of delay from 1st July, 2022 when the suit was dismissed to 25th July, 2022 when Misc. Land Application No. 410 of 2022 to set aside the dismissal order was filed. As intimated above, in the application of this nature, the applicant is required to account for the delay of each day. Indeed, the Court has reiterated that position in numerous cases – see for instance the cases of **Bushiri Hassan** (supra), **Wambele Mtumwa Shabaan** (supra) and **Sebastian Ndaula v. Grace Rwamafa**, Civil Application No. 04 of 2014 (unreported). In the event, I agree with the submissions of the learned counsel for the respondents that the applicant's first reason for the delay cannot stand.

Moving to the second reason on the alleged illegality. It is on record that under paragraphs 19, 20 and 21 of the affidavit, the applicant faulted the learned trial Judge for failure to appreciate and apply proper law and procedure in handling the medical chit. The submission by Mr. Kikwasi on this aspect was strenuously challenged by

the learned counsel for the respondents who argued that there is no any illegality as the said medical chit was produced before the trial court as evidence and the learned trial Judge properly considered it and found that it was not sufficient to justify the absence of the applicant's witnesses.

I am aware that, as a single Justice, I am not supposed to dig much on the alleged illegality but only to consider as to whether the same constitute good cause to warrant grant of this application. However, having closely looked at the alleged illegality, I am not persuaded that it really deserves to be termed so. I shall demonstrate.

It is on record that, on 1st July, 2022, when Land Case No. 40 of 2020 was called on for hearing, the learned counsel for the applicant, prayed for an adjournment on account of ill health of the two applicant's witnesses. To justify his prayer, among other things, the said counsel produced a medical chit to prove the same. The reasons for adjournment together with the medical chit were objected by the learned counsel for the respondents. Specifically, for the medical chit, they argued that the same does not indicate the date when the said witness was medically attended at that hospital, what was she suffering from, types of medication prescribed and whether she was admitted prior to the issuance of the said chit or not to justify the prayer made.

Having considered the arguments advanced and perused the contents of the said medical chit, the learned trial Judge sustained the objection and dismissed the applicant's suit under Order VIII Rule 21 (a) read together with Order IX Rule 1 and 5 of the Civil Procedure Code, Cap. 33 (the CPC).

Much as it can be appreciated that illegality is one of factors to be considered as good cause, the same is not an automatic right. For an illegality to be considered as a good cause for extension of time, it must be apparent on the face of record. In **Lyamuya Construction Company Ltd** (supra), the Court observed 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 VALAMBIA's case, the court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises point 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"* [Emphasis added].

Again, in **Ngao Godwin Losero v Julius Mwarabu**, Civil Application No. 10 of 2015, (unreported) the Court emphasized that, *the illegality in the impugned decision should be clearly visible on the face of record.*

Applying the foregoing principle to the application at hand, I am not persuaded that the alleged illegality is clearly apparent on the face of the record. Certainly, it will take a long-drawn process to decipher from the impugned decision the alleged misdirection or non-direction on the point of law. I therefore agree with the submission by the learned counsel for the respondents that the alleged illegality in this application does not constitutes a good cause. I equally find the cases of **Aloyce Chacha Kenganya** (supra) and **Suba Agro-Trading and Engineering Company Ltd & Another** (supra) relied by Mr. Kikwasi on this point to be distinguishable not applicable in the circumstances of this application. As in those cases, while considering the reasons for adjournment, the trial courts were not availed with medical chits as was the case herein.

I am increasingly of the view that, even the principle of overriding objective pointed out by Mr. Kikwasi in his written submission cannot be applied on this matter. See **Mondorosi Village Council and 2 Others**

v. Tanzania Breweries Limited and 4 Others, Civil Appeal No. 66 of 2017 [2018] TZCA 303: [13 December 2018: TanzLII].

In the event, it is my finding that the applicant has failed to advance good cause to justify the grant of extension of time. Consequently, the application is without merit and is accordingly dismissed with costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 13th day of November, 2023.

R. J. KEREFU
JUSTICE OF APPEAL

The Ruling delivered this 14th day of November, 2023 in the presence of Mr. John James, learned advocate for the applicant, Mr. Elipidius Philemon, learned advocate for the 1st respondent and Mr. Kalori Chami, learned State Attorney for the 2nd and 3rd respondents is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL