

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: KOROSSO, J.A., KITUSI, J.A. And KHAMIS, J.A.)

CIVIL APPEAL NO. 115 OF 2021

CORNEL NAIMAN MATERU APPELLANT

VERSUS

CORDIAN MATEI AKARO RESPONDENT

**(Appeal from the decision of the High Court of Tanzania (Land Division)
at Dar es Salaam)**

(Makani, J.)

Dated 28th day of February, 2020

in

Misc. Land Application No. 682 of 2018

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JUDGMENT OF THE COURT

19th February & 5th March, 2024

KOROSSO, J.A.:

The appeal is against the decision of the High Court (Land Division) in Misc. Land Application No. 682 of 2018 dated 28/2/2020 disallowing the application filed by the appellant for an extension of time to appeal against the decision of the District Land and Housing Tribunal for Kinondoni (DLHT/trial Tribunal) in Land Application No. 16 of 2009.

The record reveals that the appellant sued the respondent in the DLHT claiming among other reliefs, ownership of Plot No. 807, Block "A" located at Kijitonyama Kwa Ali Maua area within Kinondoni District (the

suit land). It was the appellant's evidence that the suit land was allocated to him through a letter of offer, Reference No. D/KN/A/27014/2/SOM of 7/11/1986. He pleaded that it was in the year 2000 when he became aware that the suit land was invaded by the respondent, and thereafter all efforts to resolve the matter amicably were barren of fruits.

The respondent (DW1) resisted the appellant's claims alleging that he legally owned the suit land having purchased it from the appellant in 1986 and possessed it peacefully thereafter. He further stated that in 1991 he started developing the suit land and built a residential house where he resides. According to him, the dispute commenced in the year 2008 while constructing a fence. The respondent conceded the fact that the sale of the suit land was by way of an oral agreement and no sale agreement was executed because he did not pay the purchase price in full. The respondent raised a counterclaim for the court to order a subdivision of the land to demarcate the suit land for the two of them since it was still governed by one letter of offer. Alternatively, he claimed compensation of Tshs. 35,000,000/= for the unexhausted improvement and Tshs. 10,000,000/= for general damages.

After hearing the parties, the trial tribunal, decided not to proceed with determining the issues framed for determination, instead, it raised the issue of time limitation *suo motu* and held that the suit was time-

barred since it was filed beyond the time limitation legally prescribed in suits for recovery of land, that is, twelve years. In consequence, the suit was dismissed.

The appellant was aggrieved by the decision of the trial Tribunal however, he delayed filing an appeal within the time prescribed, which prompted him to file Misc. Land Application No. 682 of 2018 before the High Court to seek an extension of time to file his appeal. As stated earlier, the High Court on 28/2/2020 dismissed the application, holding that, the appellant did not account for the delay in filing his appeal within time. It is against this decision that this appeal lies, where a memorandum of appeal with 3 grounds has been filed before the Court, faulting the trial court that;

- 1. The High Court erred in law to hold that the applicant failed to establish sufficient reasons for extension of time.*
- 2. The High Court erred in law for failing to analyze and consider the ground of illegality established by the appellant in his affidavit and the applicant's submission.*
- 3. The High Court erred in law for reaching a decision based on a wrong finding.*

On 19/2/2024 when the appeal was called on for hearing before us, the appellant enjoyed the services of Ms. Yusta P. Kibuga, learned

advocate, whereas, Mr. Rajabu Mrindoko, learned advocate, represented the respondent.

Ms. Kibuga kickstarted her submission by adopting the appellant's written submission filed on 7/6/2021. Amplifying on the first and third grounds jointly, she contended that, the issue for consideration is whether the High Court properly considered and analyzed the causes of delay in filing the appeal within the time found in the affidavit supporting the appellant's application in Misc. Land Application No. 682 of 2018. She argued that the decision of the High Court does not reflect consideration of the reasons advanced for the delay. According to her, the appellant's reason for the delay in filing the appeal on time included the late supply of copies of the impugned judgment, decree, and proceedings of the DLHT together with the ruling, order, and proceedings of the High Court in Misc. Application No. 297 of 2017 for extension of time that was struck out and essential to his intended appeal.

She submitted further that, the law is well settled that delay in the supply of the essential documents for appeal is a valid reason in consideration of whether or not to grant an extension of time to appeal and cited the case of **Tanzania China Friendship Textile Co. Ltd v. Charles Kabweza and Others**, Civil Application No. 62 of 2015 (unreported) to augment her contention. As such, she submitted further

that the failure by the High Court to consider it was erroneous and urged us to also hold the same and allow the ground of appeal.

Regarding the third ground of appeal, the learned counsel argued that the High Court did not deliberate on the pertinent illegalities apparent in the decision of the trial tribunal. She conceded to the fact that there is no word illegality in the affidavit supporting the application. However, she contended that illegality in the decision can be discerned from the averments found in paragraphs 8 to 12 and the last paragraph of the affidavit supporting the appellant's application before the High Court. She argued that the illegalities are apparent in the decision of the DLHT and had the High Court properly examined the said decision it would have drawn and then considered them when determining the application.

The learned counsel further argued that the illegality in the proceedings and decision of the High Court included the fact that the decision of the DLHT did not determine who was the rightful owner of the suit land instead, it raised the issue of time limitation of the suit *suo motu*, and decided it without affording the parties time to address it. Another matter which she argued was irregular and requires the Court's intervention, is the fact that the trial Tribunal held that the appellant is time-barred from recovering back his land since he left it in possession of the adverse possessor, a holding which she argued is erroneous since it

did not consider that issues of adverse possession cannot be raised on disputes involving surveyed land.

The learned counsel for the appellant thus urged us to consider the same and find that there were patent illegalities in the proceedings and judgment of the DLHT and that the High Court erred in not granting an extension of time to file an appeal as prayed to allow the said illegalities to be addressed. Her prayer was founded on the decisions of the Court in **Principal Secretary Ministry of Defence and Another v. Devram Valambia** (1992) T.L.R 185; **Lyamuya Construction Company Ltd v. Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010; and **Charles Christopher Humphrey Kombe v. Kinondoni Municipal Council**, Civil Appeal No. 19 of 2019 (both unreported).

She concluded by praying that an extension of time to file the appeal be granted and the Court take into account the fact that the delay in filing the appeal was only for 11 days and not founded on any negligence on the appellant's part.

Mr. Mrindoko's response commenced by informing the Court that the appeal is resisted. He impressed on us the fact that granting an extension of time to a party to appeal out of time is a discretionary

mandate bestowed on a court and that the Court may only interfere or disturb the exercise of a mandate of a lower court under rare circumstances prescribed by the law. In his words, these include where upon scrutiny of the record of the lower courts it determines that the discretion was improperly exercised arriving at an erroneous decision prompted by failure to consider relevant matters and addressing irrelevancies (See, **Njile Samwel @John v. Republic**, Criminal Appeal No. 31 of 2018 and **Pangea Minerals Ltd v. Gwandu Majali**, Civil Appeal No. 504 of 2020 (both unreported).

According to the learned counsel for the respondent, the first ground of appeal lacks merit since there is nowhere on record where it has been shown that the High Court's exercise of its discretion to or not to grant an extension of time to appeal was faulty in the circumstances. He contended that, the impugned judgment of the trial court was ready for collection on 1/2/2017 and certified copies of the proceedings were ready by 7/2/2017. That, in the affidavit supporting the application for an extension of time to appeal, the appellant had raised only one ground that caused the delay in filing the appeal, that is, delay in supply of the impugned judgment and proceedings, a reason which was not supported by evidence. He contended further that, while the appellant had claimed to have written a letter seeking the essential documents to appeal soon

after the delivery of the judgment, the said letter was not attached to the supporting affidavit to support the contention, nor was any receipt attached to show the date of applying so as to provide the High Court with evidence to confirm the appellant's assertions emanating from the submissions of his counsel. He argued that the appellant failed to account for the delay in filing the appeal and in the absence of any evidence to the contrary, the High Court properly exercised its discretion in not granting an extension of time sought.

Responding to the second ground of appeal, the learned counsel submitted that, the concern on illegalities in the decision of the DLHT was not clearly advanced by the appellant in the affidavit supporting his application in the High Court and thus denied the Hon Judge an opportunity to consider this. He argued that the issue was raised by the counsel for the appellant in his submission before the High Court, and it was thus raised from the bar and not in the appellant's pleadings before the High Court. He asserted that, in the circumstances, it was proper for the High Court Judge not to give any consideration to the claims advanced by the appellant on illegalities in the decision of DLHT and delayed notification to collect essential documents for intended appeal, which were raised during the submissions by the counsel and not averred in the

affidavit supporting the application. Mr. Mrindoko thus prayed that the appeal be dismissed since it lacks merit.

Ms. Kibuga's rejoinder was brief. She acknowledged that whether or not to grant an extension of time to the appellant to appeal was an exercise of the High Court's discretionary power. She argued that, nonetheless, in the instant case, the High Court failed to exercise those powers judiciously and that even for the sake of argument, if it is to be taken that the appellant failed to explain the delay to file on time or to show the alleged illegalities in the affidavit supporting the application, the High Court should have drawn them from the learned counsel submissions since they were apparent on the face of the record and considered in its decision. She then reiterated the appellant's prayer to be granted an extension of time to file the appeal as pleaded.

We have carefully delved into the rival submissions from the learned counsel for the parties before us, the notice of motion and supporting documents, and are of the view that the main issue before us is whether the High Court holding that the appellant had no sufficient cause to be granted an extension of time to file an appeal was erroneous. Certainly, from the record we gather that the appellant failed to submit for the scrutiny of the High Court, the letter requesting essential documents with his application. This would have clearly shown that he promptly initiated

the process to appeal and we thus cannot fault the High Court's findings that the appellant failed to account for the delay. We discerned from the record that the appellant did not account for the days between 1/2/2017, when the impugned DLHT judgment was delivered to 23/3/2017 when the appellant was availed with the requested copies of essential documents for appeal upon his request. In the case of **Hassan Bushiri v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported), the Court held that:

"Delay, of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken."

Consequently, in those circumstances, we cannot fault the High Court for its findings on this, and therefore, the first ground fails.

The second ground of appeal essentially requires us to consider the prayers sought in light of alleged illegalities in the proceedings and decision of the DLHT which it is alleged the High Court failed to consider when rejecting the application for an extension of time to appeal. The respondent counsel invited us not to buy the submission by the appellant's counsel since the High Court was not availed of the alleged incidences of illegality now before the Court for consideration. Mr. Mrindoko argued that

the High Court cannot be faulted when there was nothing before it to determine whether such illegalities took place in the DLHT. On the other hand, the learned counsel for the appellant while conceding that there were no particular averments in the affidavit supporting the application for extension of time addressing the issue of illegality in the proceedings and decision of the DLHT, asserted that, the said illegalities are patent on the face of the record and had the High Court carefully scrutinized the record of the application, it would not have failed to see them.

We find it pertinent to first address the claims by the appellant's counsel conceded by the respondent's counsel that there was no specific ground before the High Court addressing the issue of illegalities in the proceedings and the decision of the DLHT to move it to address and determine the issue when considering the application before it. We are of the view that the learned counsel for the respondent position is misconceived. This concern has been deliberated before, and in the case of **Lyamuya Construction Company** (supra), a single justice of the Court, relying on the decision of the Court in **Devram Valambhia case** (supra) observed that; *"the omission to state the grounds as in the present case, from which one may conclude that, it too, is not necessarily fatal, if the grounds are shown in the accompanying affidavit."*

Flowing from that and applying it to the instant application, the follow-up issue is to address whether the accompanying affidavit to the notice of motion disclosed the alleged illegalities and was sufficient cause to grant an extension of time prerequisite for the High Court when considering whether or not to exercise discretion to grant the same. Having scrutinized the record of appeal we are of the view that paragraph 9 of the affidavit and the submission by the appellant's counsel found on page 101 of the record leave no doubt that the important matters the High Court was called upon to consider were indeed the incidences of alleged illegality which are before us for consideration. The High Court was therefore moved to consider the same and had it considered the said illegalities it might have arrived at a different finding.

Numerous decisions of this Court have settled the position that claims of illegality of a challenged decision are sufficient reasons to extend time regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay. (**See VIP Engineering & Marketing Ltd & 2 Others vs. Citibank Tanzania Ltd**, Consolidated Civil Reference No. 6, 7 & 8 of 2006, **Theresia Mahoza Mganga v. The Administrator General RITA**, Civil Application No. 85 of 2015, and **Said Nasso.³ Zahor & 3 Others v. Nassor Zahor**

Abdallah El Nabahany, Civil Application No. 278/15 of 2016 (all unreported)).

In the case of **Devram Valambhia** (supra) it was stated as under:

"In our view when 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 right".

Having perused the record of appeal, undoubtedly the learned trial Tribunal in its judgment on page 85 of the record of appeal states:

"Having gone through the evidence adduced by both sides and their submissions to this court, I found a legal issue which determines this suit without going around the bush. According to evidence, the matter seems to be time-barred."

Thereafter, the trial Tribunal proceeded to dismiss the suit. Undoubtedly, the record of appeal reveals that the Trial Tribunal did not accord the parties an opportunity to address it on the point of law it raised *suo motu* regarding the suit being time-barred. This denied the parties an opportunity to present their cases on whether or not the suit was time-barred. It is well established that during hearings, parties are to be heard

on such new or additional issues raised in line with Article 13(6) (a) of the Constitution of the United Republic of Tanzania, Cap 2, a position which has been restated by the Court in numerous decisions including; **Mbeya Rukwa Autoparts and Transport Limited v. Jestina George Mwakyoma** [2003] TLR 25; **Samson Ngwaliela v. The Commissioner General Tanzania Revenue Authority**, Civil Appeal NO. 86 of 2008; and **Wegesa Joseph Nyanda v. Chacha Muhogo**, Civil Appeal No. 161 of 2016 (both unreported).

We also are of the view that the discerned anomalies, apparent in the decision of the trial Tribunal, should themselves have prompted the High Court to find them to be sufficient reasons to grant an extension of time to appeal against the decision of DLHT as prayed to allow further consideration and appropriate steps to be taken on appeal. Furthermore, we are also of the view that an appeal will provide an opportunity for consideration of the other alleged infractions. These include the holding by the DLHT that the respondent is the rightful adverse possessor of the suit land whilst the same is surveyed land and the DLHT having failed to make a declaration on who is the rightful owner of the suit land as pleaded by the parties.

Flowing from above, we find merit in the appeal and allow it accordingly. The time to file the appeal against the decision of the DLHT

in Land Application No. 16 of 2009 is extended. The appeal is to be lodged within thirty (30) days reckoned from the date of delivery of this ruling. Costs in the Cause.

DATED at DAR ES SALAAM this 4th day of March, 2024.

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

The Judgment delivered this 5th day of March, 2024 in the presence of Ms. Yusta Kibuga, learned counsel for the appellant also holding brief of Mr. Rajabu Mrindoko, learned counsel for the respondent is hereby certified as a true copy of the original.




R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL