

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA
MISC. LAND APPLICATION NO. 08 OF 2018**

[Arising from Land Appeal No. 105/2015 which originated from the Decision of the District
Land and Housing Tribunal for Musoma in Land Application No. 02/2015]

NGECHE WAMBURA 1ST APPLICANT
THOMAS WAMBURA NGECHHE 2ND APPLICANT
VIJIJI MNIKO NSAME 3RD APPLICANT
WEREMA MACHAGE MIRUMBE 4TH APPLICANT
MSAMBA MWITA MEKOMA 5TH APPLICANT
JUMANNE WAISAGARA MNIKO 6TH APPLICANT

VERSUS

IBRAHIM CHACHA NCHAMA RESPONDENT

RULING

4th October 2018 & 24th January 2019

M.M. SIYANI, J.

This Application has been preferred under section 11 (1) of the Appellate Jurisdiction Act, Cap 141 RE 2002 as amended and section 47 (1) of the Land Disputes Courts Act Cap 216 RE 2002 for the following prayers.

- 1. That the honourable Court be pleased to extend time to file application for leave to appeal to the Court of Appeal of Tanzania.*

- 2. This honourable Court be pleased to grant leave to Appeal to the Court of Appeal of Tanzania*
- 3. Costs to follow the event.*

The background to this application as deponed in a joint affidavit supporting the application, indicates that previously, the applicants herein were among 50 Applicants in Land Application No. 2/2015 before Musoma District Land and Housing Tribunal where they lost the suit. The Tribunal declared the respondent herein, the legal owner of the disputed land. The applicants were ordered to pay the sum of Tshs 40,970,000/=, demolish their illegally built structures and vacate the area. Dissatisfied, they the appealed to this Court through Land Appeal No. 105 /2015. While in the course of hearing the appeal, the Applicants, who enjoyed the legal representation of Mr. Phillis, learned counsel, dropped all the grounds of appeal with exception to only one on assessment of damages. They contended that the sum of Tshs 40, 970,000/= awarded to the respondent herein was unjustifiable and invited the Court to set it aside.

Upon hearing the parties, this Court (Maige. J) partly allowed the applicant's appeal by reducing the sum of Tshs 40,970,000/= to Tshs 4,000,000/=. It would appear that the appellants were still aggrieved. They however delayed to take necessary legal steps. Their first attempt

to challenge the decision above through Misc. Land Application No. 239/2016 with similar prayers to this one, faced a stumbling block. The same was struck out on the reason that the application by fifty (50) applicants was supported by an affidavit sworn by only two applicants on behalf of the rest without their permission. This is therefore a second attempt by six (6) applicants out of fifty (50) appellants to get an order for extension of time and leave to appeal to the Court of Appeal.

Both parties had legal representation in this application. While the applicants secured the services of counsel Innocent Kisigiro, the respondent was represented by Counsel Constantine Mutalemwa. Submitting in support of the application, Mr. Kisigiro argued that while Land Appeal No. 105/2015 was determined on 29th July 2016, the requisite documents were availed to the applicants on 23rd September 2016. It was stated therefore that the delay to seek leave to appeal to Court of appeal was caused by failure to obtain on time necessary court documents.

Illegality was another point argued by counsel Kisigiro as a reason why the applicants wants to challenge both the decision of this Court in Land Appeal No. 105/2015 and that of the District Land and Housing Tribunal

Musoma in Land Application No. 2/2015. It was contended that the two decisions were tainted with illegality when declared the respondent, a lawful owner of the property in dispute contrary to what the title deed reveals. The learned counsel believed that the Court awarded ownership to someone who was not a litigant in the case as while the Respondent's names are Ibrahim Chacha Nchama, the title deed indicates the owner of the property is Ibrahim Chacha. That according to Mr. Kisigiro amounted to illegality.

In the same vein, it was argued as a second limb of Mr. Kisigiro's submissions on illegality, that despite taking testimonies from witnesses at the locus in quo, the trial tribunal failed to accord the same chance to those witness to testify in court. Mr. Kisigiro was of the view that constituted illegality as a sufficient ground for extension of time and invited me to subscribe to the Court of Appeal of Tanzania decision in **Principal Secretary, Ministry of Defense and National Service Vs Devram Valambhia** (1992) TLR 182.

Counsel Kisigiro went on to contend that, the Chairman of the Tribunal failed to consider opinions from assessors hence violating section 23 (2) of the Land Dispute Courts Act Cap 216 RE 2002. The learned counsel

was firm that failure to consider assessors opinion was a point of law which needs to be addressed by the Court of Appeal. To support his stance, Mr. Kisigiro referred this Court's decision in **Hersi Warsama Mohamed Vs Abdi Rahman Mohamed Darmar**, Land Appeal No. 61 of 2017

In his conclusion, the applicant's counsel invited this Court to grant leave to appeal on the ground whether it was right for the trial Tribunal to order the applicants to represents others when giving their testimonies. For this and the rest of the grounds above, counsel Kisuguro prayed the application be granted.

In reply, counsel Mutalemwa submitted that initially when Land Appeal No. 105/2015 was filed, the applicants had eleven (11) grounds of appeal. However, in the course of hearing, the applicants abandoned all those grounds with exception to one. It was contended that having abandoned most of their grounds of appeal, the applicants only remained with the fourth grounds on assessment of damages which the respondent was awarded the sum of Tshs 36, 970,000/= as the value of the destroyed crops and trees from his land. It also was ordered that the respondent be

compensated Tshs 4,000,000/= as general damages. The learned counsel submitted further that while on appeal to this Court, an award of compensation to the tune of Tshs 36,970,000/= was set aside, the sum of Tshs 4,000,000/= which were awarded as general damages was confirmed. According to counsel Mutalemwa, the appeal in this Court was therefore based on one ground on award of damages awarded and the Judgment thereof involved around the said ground.

The learned counsel contended that neither the questions of ownership raised by the applicants as a ground for extension of time and leave to appeal nor the issue of failure to consider assessor's opinion were raised and discussed by the parties in this Court. The same were not even reflected in the joint affidavit by the applicants. According to counsel Mutalemwa, having abandoned all grounds and opted to remain with issues of damages, the applicant could only legally appeal against that issue and as such arguments on illegality in the circumstances of this case were therefore misplaced and not well founded in law.

In his final analysis counsel Mutalemwa, submitted that the law under Rule 46 (1) of the Court of Appeal Rules 2009 requires that a notice of

appeal precedes an application for leave. The learned counsel was of the view that failure to include such notice in the chamber summons presupposes that there is none and for that reason, the application doomed to fail.

In rejoinder, counsel Kisigiro argued that illegality is a point which can be raised anytime and that the applicants lodged a notice indicating their intention to appeal before preferring this application.

Having summarized what was submitted before me by the learned counsels, I wish to start by appreciating the fact that in this application, the applicants have moved the Court to consider and grant two reliefs; first being extension of time within which to file an application for leave to appeal and if such prayer is granted then second; grant the applicant leave to appeal to the Court of Appeal of Tanzania. Two reasons has been advanced as grounds for extension of time. These are failure to get in time necessary documents from the Court Registry and illegality of the decision they intend to appeal against. As indicated earlier, the extension order is sought so that the applicants can file an application for leave to appeal against a decision of this court dated 22nd July 2017. Under

paragraphs 3, 4 and 7 of the joint affidavit, the applicants states the following:

- 3: *That the Judgment in the High Court was delivered on 29th July 2016 where our Appeal succeeded partly and the decree in appeal was issued on 23/9/2016.*
- 4: *That I swear and state that the delay to lodge an application for leave occasioned due to seeking to be issued with Court Judgment and Decree so that it can be translated to us but applied the copies in time.*
- 7: *That, we swear and state that we filed the Misc. Land Application No. 239/2016 for leave out of time but the same was strike out on 22.12.2017 before Hon. Ebrahim J.*

The above sworn evidence from the applicants show that initially they filed Misc. Land Application No. 239 of 2016 for extension of time to file an application for leave to appeal. The application was struck out on 22nd December 2017. So it can be correctly said, by the time the applicants filed their first application, they had all the necessary documents which according to them were a Judgment and a Decree. Nothing is said in the affidavit of the delay to be supplied with documents in Misc. Land Application No. 239/2016. This application was filed on the 18th day after

the first application was struck out. In my view, since the applicants had all the necessary documents to enable them lodge this application as it was the case for the first application, they ought to have accounted for each day delayed. Unfortunately, neither the affidavit nor what was submitted before me indicates why the applicants could not file their application immediately after the decision in Misc. Land Application No. 239/2016. The 18th days following that decision are therefore unaccounted for.

That said, I will now turn to the question of illegality. At the outset, I tend to agree with counsel Mutalemwa that following the applicants abandoning of ten out of eleven grounds of appeal; assessment of damages was the only ground of appeal which this court dealt with in Land Appeal No. 105 of 2015. Counsel Kisigiro persuaded the Court to extended time so that the applicants can challenge the illegality of the complained decisions on the reasons that first; both this Court and the trial Tribunal declared the respondent a lawful owner of the property in dispute contrary to what the title deed reveals, second that despite taking testimonies from witnesses at the locus in quo, the trial tribunal failed to accord the same chance to those witness to testify in court and finally that the tribunal did not consider assessors opinions. However, as noted

above, some of the above arguments which forms a claim of illegality like awarding ownership to someone who was not a litigant in the case and failure by the trial tribunal to accord the applicants the right to cross examine the witnesses who testified at the scene in quo were raised by the applicants as their third and seventh grounds of appeal in this Court before they abandoned them. By abandoning them, the applicants deprived this Court, a chance to hear the parties and determine those particular issues on merits

In my considered opinion, since the applicants themselves opted to abandon those grounds, advancing the same issues as grounds for extension of time and ultimately grounds for appeal at the Court of Appeal would be an abuse of a legal process. My position would have been different, had the same issues not been raised and abandoned. Therefore while a claim for illegality has always been a sufficient ground for extension of time, I am of the settled view that the circumstances in the case of **Principal Secretary, Ministry of Defense and National Service Vs Devram Valambhia** (supra) cited by Mr. Kisigiro, are distinguishable to this one on the above reasons.

In the upshot, the applicants have failed to advance sufficient reasons to enable this Court to excise its discretion and extend time for filing an application for leave to appeal. Consequently as a prayer for leave to appeal was subject to obtaining an extension order, the same cannot stand as well. As such and for the reasons above, this Application lacks merits and it is hereby dismissed with costs.

Order accordingly.

DATED at MWANZA this 24th January, 2019



M.M. SIYANI
JUDGE