

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA**

AT MUSOMA

PC. CRIMINAL APPEAL NO. 5 OF 2020

(Arising from the ruling of the District Court of Bunda at Bunda (Hon. J.J. Rugemalila, SRM), dated 1/02/2020 in Misc. Criminal Application No. 2 of 2019)

1. NYEGANA COSMAS NDARO 1ST APPELLANT

2. NYAMAGEE NDARO 2ND RESPONDENT

VERSUS

MAFWORO NDARO RESPONDENT

JUDGEMENT

Date of Last Order: 29th April, 2020

Date of Ruling: 19th May, 2020

KISANYA, J.:

This appeal originates from the ruling of the District Court of Bunda at Bunda in Mis. Criminal Application No. 2 of 2019. In the said ruling, the District Court dismissed the appellant's application for extension of time to file appeal against the decision of the Bunda Urban Primary Court at Bunda in Criminal Case No. 253 of 2014. The ground advanced by the appellant in the petition of appeal before this Court is as follows:

THAT, the District Court erred in law and fact in failing to take into consideration that illegality is a sufficient ground for extension of time within which to file revision out of time.

The brief facts leading to this appeal is that: The appellants, Nyegana Cosmass Ndarro and Nyamagee Ndarro were arraigned before the Bunda Urban Primary Court for offence of malicious damage to property contrary, to section 326(1) of the Penal, Cap. 16, R.E. 2002. It was alleged that, on 12/5/2014, the appellants destroyed and pulled out the respondent's fence and beacons. On 16/9/2015, both appellants were convicted of the charged offence and sentenced to 10 months conditional discharge and compensation of TZS 300,000/= each.

Five years later, the appellants filed an application for extension of time to file appeal out against the said decision. That application was filed in the District Court of Bunda at Bunda on 16/7/2019. The appellants advanced one ground on illegality. In its decision dated 11/02/2020, the District Court dismissed the application for want of merit, and hence this appeal.

At the hearing of this matter, Mr. Emmanuel Mng'arwe, learned advocate appeared for both appellants. On the other hand, the respondent appeared in person, legally unrepresented.

Submitting in support of the appeal, Mr. Emanuel argued that, the District Court erred in law and fact in failing to consider that the ground of illegality advanced by the appellant was sufficient to extend the time to appeal. He pointed out that the trial court (primary court) had adjudicated matter related to ownership land while it had no jurisdiction to try land issues. The learned counsel was of the considered view that illegality is a sufficient cause for the Court to extend time to appeal. Counsel Emanuel amplified his argument by citing the decision of the Court of Appeal in **Arunanen Chaggan Mistry vs Naushad Mohamed Hussein and 3 Others**, Civil Application No. 6 of 2016 (unreported) and **Ammour Habib Salim vs Hussein Bafagi**, Civil Application No. 52 of 2009 (unreported). The learned counsel closed his submission in chief by urging me to allow the appeal.

Protesting the appeal, the respondent argued that, the appellants were charged with offence of malicious damage to property and not ownership of land. He submitted further that the appellants had not advanced the reason for failing to appeal in time. Therefore, the respondent prayed that this appeal be dismissed for want of merit.

I have considered the evidence on record and the rival arguments by the parties. The issue is whether the District Court was justified to dismiss the application for extension of time. It is important to note that, pursuant to section 20(3) of the Magistrates Court Act, Cap. 11, R.E. 2019 (MCA), the time to appeal against the decision of the primary is thirty (30) days from the date of the decision or order to be challenged. However, section 20(4) (a) of the Magistrates Court Act, Cap. 11, R.E. 2019 (MCA), empowers the District Court to extend the time before or after expiration of the time limitation. The provision of section 20(4) (a) of the MCA which was cited in the application before the District Court reads as follows:

“Notwithstanding the provisions of subsection (3)-

(a) the district court may extend the time for filing an appeal either before or after such period has expired;”

The above section does not specify the factors to be taken into account by the District Court in extending the time. However, it is settled law that the Court must be satisfied that there is sufficient or good cause for extending the time limitation. Again, what constitutes to sufficient or good cause differ from one case to another. As rightly argued by counsel Emmanuel, one of the factors considered in deciding whether there is sufficient or good is illegality. It is trite law that. where the ground of illegality is at issue that is in itself a sufficient or good cause for extending the time. This has been stated in many cases including, **Amour Habib Salim** (*supra*) and **Aruban Chaggan Mistry** (*supra*) cited by the counsel for the appellant. In both cases, the Court of Appeal cited with approval its decision in **VIP Engineering and Marketing Limited vs Citibank Tanzania Limited**, Consolidated Civil References No. 6, 7 and 8 of 2006 (unreported) that:

“We have already accepted it as established law in this country that where the point of law at issue is the illegality or otherwise of the decision being challenged, that by itself constitutes “sufficient reasons” ...for extending time”

However, in order the ground of illegality to stand, the Court must be satisfied that the said illegality is apparent on face of record. It is not enough for the applicant to state that there is illegality without proving the same before the court. I hold so basing on the decision in **Damas Asses and Another vs Raymond Mgonda Paula**, Civil Application No. 32/17 of 2018, CAT at Dar es Salaam (unreported) where the Court Appeal cited with approval its decision **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 02 of 2010, (unreported) 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 supplied]. "

Having refreshed ourselves on the position of the law, it is time to look at the appeal before us. In the application before the District Court, the

appellant raised the ground of illegality as per paragraph 5 of the affidavit in support of the application, which reads:

“THAT, the decision of the trial Primary Court is tainted with illegality as the said Court acted without jurisdiction in proceeding to pronounce the judgement without first referring the matter to the Courts/ Tribunals of competent jurisdiction for ascertaining the ownership of the disputed land.”

It appears that the learned Resident Magistrate was convinced that there was illegality. However, learned Magistrate went on to consider the length of delay. Indeed, the application was dismissed on the ground that the appellant had failed to account for the delay of four years. With respect, if the learned Resident Magistrate was satisfied that, the ground of illegality was apparent on face record, she was required to grant the extension of time without considering other factors. This is because illegality is in itself a sufficient or good cause for extending the time. Granting the application on that ground enables the Court to inquire or examine on the alleged and correct the court records if the illegality is proved.

I have noted that, the ground of illegality in the case at hand is based on the impugned judgement of the trial court where it was held that the

appellant had failed to establish or prove ownership of land. Since the matter before the trial court was offence of malicious damage of property on land there is a need for the District Court to examine and satisfy itself on whether the trial court had jurisdiction to try the matter.

For the reasons stated herein, this appeal is allowed. The application for extension of time to appeal is hereby granted. The appellants to file their appeal within thirty (30) days from the date 22/5/2020 which was scheduled for ruling. Order accordingly.

Dated at MUSOMA this 19st day of May, 2020.




E. S. Kisanya
JUDGE
19/5/2020

Court Ruling is delivered this 19th day of May, 2020 in the absence of the appellants and the respondent. Parties to be notified accordingly.


E. S. Kisanya
JUDGE
19/5/2020