THE UNITED REPUBLIC OF TANZANIA
JUDICIARY

IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA

MISCELLANEOUS LAND APPLICATION NO. 55 OF 2019
(From the District Land and Housing Tribunal for Mbeya in Land Application No. 05 of 2013)

EMMANUEL MDEKA.....APPLICANT

VERSUS

EPHRAIM MBENJA.....1ST RESPONDENT

FAIDA MBENJA.....2ND RESPONDENT

SADI MWAIFWANI.....3RD RESPONDENT

RULING

Date of Last Order: 24/06/2020
Date of Ruling : 30/07/2020

MONGELLA, J.

In this application, the applicant is seeking to be granted extension of time within which to file an appeal against the decision of the District Land and Housing Tribunal for Mbeya (Tribunal). The impugned decision was delivered on 16th June 2017 in Land Application No. 05 of 2013. The application is brought under section 41 (2) of the Land Disputes Courts Act, Cap 216 R.E. 2002 as amended by the Written Laws (Misc. Amendment) Act, No. 2 of 2016. It is supported by the applicant's affidavit.

The applicant was represented by Mr. Imani Mbwiga, learned advocate while the respondents appeared in person. For interest of justice to the unrepresented respondents, the application was argued by written submissions.

In his affidavit in support of the application, the applicant raised two grounds for the delay. First he said that the delay was caused by the Tribunal which failed to supply the requested documents on time. Second he said that the period between 8th November 2017 and 31st July 2019 was spent pursuing his appeal which was struck out. In his submission, Mr. Mbwiga expounded on these two grounds and added an issue of illegality in the impugned decision.

On the first ground, he submitted that after the judgment was delivered on 16th June 2017, the appellant made due diligence to obtain copies of judgment by writing a letter dated 19th June 2017. However, despite several follow ups the copy of judgment was not delivered until 17th October 2017. He provided a copy of the exchequer receipt with No. 99000515213 to support his assertion. Citing the case of ***Lewin Bernard Mgala v. Lojas Mutuka Mkondya and 2 Others***, Land Appeal No. 33 of 2017 (unreported), he argued that it has been the position of the courts in this land that the time a party spends awaiting for the copies of judgment and decree should be excluded from computation of time.

On the second reason, Mr. Mbwiga argued that the applicant was then under technical delay whereby between 8th November 2017 and 31st July 2019 he was pursuing his appeal in this court but the same was struck out

for being incompetent. He said that two days after the said appeal was struck out he filed this application. In support of his argument he cited the case of ***Fortunatus Masha v. William Shija & Another*** [1997] TLR 154 in which the Court of Appeal held:

> *"... a distinction should be made between cases involving real or actual delays and those like the present on which only involve what can be called technical delay in the sense that the original appeal was lodged in time but the present situation arose only because the original appeal for one reason or another has been found to be incompetent and a fresh appeal has to be instituted..."*

He also cited the case of ***Elly Peter Sanya v. Ester Nelson***, Civil Appeal No. 151 of 2018 (CAT, unreported) in which the Court stated:

> *"... it appears that it escaped the mind of the learned Judge that a delay that occurs when one is diligently prosecuting a matter in court constituted a technical delay which amounts to good and sufficient reason to grant extension of time..."*

On the issue of illegality, Mr. Mbwiga argued that the illegality on the impugned decision is apparent on the face of record whereby the assessors did not effectively participate in determining the matter in the Tribunal. He said that the impugned judgment lacks the opinion of the wise assessors. He cited the case of ***Ameir Mbarak & Azania Bank Corporation Ltd v. Edgar Kahwili***, Civil Appeal No. 154 of 2015 (CAT, unreported) in which the Court insisted on the participation of assessors as a mandatory requirement of the law.

He argued further that the law has been settled to the effect that where there is an illegality apparent on face of record, the same amounts to

sufficient reason warranting the grant of extension of time. To bolster his argument he cited the case of ***Robatia Mwinuka v. Kikundi cha Kinda (Nancy Sanga)***, Misc. Civil Application No. 15 of 2018 (unreported) and that of ***Serengeti Breweries Limited v. Hector Seguiraa***, Civil Application No. 373/18 of 2018 (CAT, unreported). With these reasons he prayed for the application to be granted.

The respondents vehemently opposed the application. On the first reason advanced by the applicant, they argued that the Tribunal did not contribute in any way on the applicant's delay. They contended that the fault is by the applicant who did not make a follow up on the necessary documents to lodge his appeal. They submitted that the judgment was ready for collection on 11th September 2017 in accordance with the certification stamp of the Tribunal, but the applicant paid for collection on 18th October 2020. They argued further that even after collecting the copy of judgment, the applicant through his advocate filed the appeal which was struck out, that is, Appeal No. 52 of 2017 on 8th November 2017 whereby 22 days had already elapsed.

On the second reason, the respondents argued that the argument that the appellant was under technical delay has no base as the appealed filed was already time barred and was struck out on those reasons. They cited the case of ***Daniel Njago & Another v. Kombe Robert Mwampeta & Another***, Misc. Land Application No. 80 of 2018 (HC at Mbeya, unreported) and argued that the applicant was supposed to account for the further delay which he did not.

Regarding the issue on illegality, they argued that the applicant has raised a new issue not raised in the affidavit. They said that there is no proof that the applicant prayed to amend the affidavit and thus bringing the issue at this stage is an afterthought. They cited the case of ***Raphael Mkondya v. Francis Mhagama***, Misc. Land Application No. 120 of 2017 (HC at Mbeya, unreported). They prayed for the court to disregard this issue.

I have considered the arguments by both parties. The law is settled to the effect that it is purely in the discretion of the court to grant extension of time. However, the same has to be exercised judiciously taking into account the sufficient reasons for the delay advanced by the applicant. This position has been set in a plethora of decisions. For instance, in ***Benedict Mumello v. Bank of Tanzania***, Civil Appeal No. 12 of 2002 (unreported), the Court of Appeal ruled:

> *"It is trite law that an application for extension of time is entirely in the discretion of the court to grant or refuse it, and that extension of time is where it has been sufficiently established that the delay was with sufficient cause."*

In another case of ***Jaluma General Supplies Limited v. Stanbic Bank Limited***, Civil Application No. 48 of 2014 (unreported) it was held:

> *"All that the applicant should be concerned is showing sufficient reason why he should be given more time and the most persuasive reason that he can show is that the delay has not been caused or contributed by the dilatory conduct on his part."*

The applicant and his advocate have advanced three main reasons for this Court to grant the extension of time. Starting with the first issue, the

applicant claims to have delayed while waiting for copies of judgment and decree from the Tribunal. Under section 19 (2) of the Law of Limitation Act, Cap 89 R.E. 2002 the time spent waiting for copies of judgment has to be excluded in computation of time. The arguments from both parties and the records indicate that the copies of judgment were ready for collection on 11th September 2017, but the applicant collected the same on 17th October 2017. Thereafter he filed the initial appeal on 8th November 2017.

The law requires the appeal to be filed within 45 days. A recent decision from the Court of Appeal in the case of ***Samuel Emmanuel Fulgence v. The Republic***, Criminal Appeal No. 4 of 2018 (CAT at Mtwara, unreported) elaborates on computation of time to the effect that the time should start from the date the copies of judgment were ready for collection, which is the date the copies were certified. The copy of judgement annexed to the application indicates that it was certified on 11th September 2017, meaning it was ready for collection on that date. From this date to the date of filing the initial appeal, that is, on 8th November 2017, fifty seven days had already elapsed. Excluding the 45 days limit, the appellant appears to have delayed in filing the initial appeal for 12 days. I therefore agree with the respondents that the applicant cannot shield on the delay by the Tribunal in issuing the copies of judgment because he further delayed for 12 days and did not account for the further delay as required under the law. See: ***Lyamuya Construction Company Ltd. v. Board of Registered Trustees of Young Women's Christian Association of Tanzania***, Civil Application No. 2 of 2010 (unreported).

On the reason that the applicant was under technical delay, I agree that the law is settled to the effect that a party who is technically delayed is entitled to be granted extension of time to re-file his matter in court. However, as argued by the respondents, the appellant cannot be saved by this principle because his initial appeal was time barred. The law underlying the principle of technical delay is settled to the effect that a party will be granted extension of time if the matter he filed in court initially was filed within time. See: ***Fortunatus Masha*** (supra) cited by the applicant; ***Salvand K. A. Rwegasira v. China Henan International Group Co. Ltd***, Civil Reference no.18 of 2006 (CAT decision); ***Luhumbo Investment Limited v. National Bank of Commerce Limited***, Misc. Civil Application no.17 of 2018 (HC Tabora, Utamwa J.) and ***Mohamed Enterprises (T) Ltd v. Mussa Shabani Chekechea***, Misc. Civil Application no. 81 of 2017 (HC Tabora, Utamwa, J.).

Regarding the issue of illegality in the impugned decision, it is my view that, among the reasons that may constitute sufficient reason to be awarded extension of time is the existence of illegality in the impugned decision. This has been decided in a number of cases from this Court and the Court of Appeal. For instance in ***VIP Engineering and Marketing Limited, Tanzania Revenue Authority and the Liquidator of Tri-Telecommunication (T) Ltd v. Citibank of Tanzania Limited***, Consolidated References No. 6, 7 and 8 of 2006 (unreported) it was held:

> *"It is settled law that, a claim of illegality of the challenged decision, constitutes sufficient reasons for extension of time...regardless of whether or not a reasonable explanation had been given by the applicant..."*

From the above decision it is clear that a claim if illegality amounts to sufficient reason for extension of time. The appellant raised an issue of illegality to the effect that the Tribunal assessors were not effectively involved in adjudication of the matter before it. The respondents did not address this issue on its merit but argued that the same was not pleaded in the affidavit. The issue of illegality raised by the applicant is a legal issue. In my considered view, a point of law can be raised at any stage of the proceedings by either any of the parties or by the court *suo motu* so long as the parties are accorded the opportunity to address the court on the same. In the matter at hand the respondents had the opportunity and ample time to respond on the issue because the application was argued by written submissions. See: ***Hassani Ally Sandali v. Asha Ally***, Civil Appeal No. No. 246 of 2019 (CAT at Mtwara, unreported) and ***Oil Com Tanzania Ltd v. Christopher Letson Mgalla***, Land Case No. 29 of 2015 (HC at Mbeya, unreported). The case of ***Raphael Mkondya*** (supra) cited by the respondents is distinguishable because the new issue raised was based on facts and not law.

However, a claim on illegality can only be entertained if it meets certain criteria. That is, if the illegality is apparent on face of record, is of sufficient importance and the determination of it shall not involve a long drawn process of argument. These criteria were settled by the Court of Appeal in the case of ***Lyamuya Construction Company Ltd. v. Board of Registered Trustees of Young Women's Christian Association of Tanzania*** (supra). See also: See: ***Kalunga and Company Advocates v. National Bank of Commerce Ltd***, Civil Application No. 124 of 2005; ***Aruwaben Chagan Mistry v. Naushad Mohamed Hussein & 3 Others***, Civil Application No. 6 of

2016 ***Jehangir Aziz Abubakar v. Balozi Ibrahim Abubakar & Another***, Civil Application No. 79 of 2016

In my settled view, the illegality raised in this application on effective involvement of assessors meets the criteria settled in ***Lyamuya Construction*** (supra). The law as settled is to the effect that the opinion of assessors has to be filed in writing in the Tribunal and the proceedings and judgment have to clearly show the assessors' active participation in the matter. See: ***Edina Adam Kibona v. Absalom Swebe (Sheli)***, Civil Appeal No. 286 of 2017 and that of ***Tubone Mwambeta v. Mbeya City Council***, Civil Appeal No. 287 of 2017. The illegality raised is therefore of sufficient importance because it is mandatorily provided under the law to the extent that non-compliance thereof vitiates the whole Tribunal proceedings. It shall also not involve a long drawn process of argument because it is an error that is apparent on face of record. The illegality cannot be rectified unless the same is tested on appeal.

In the upshot, I grant the applicant's application for extension of time basing on the point of illegality in the impugned Tribunal decision. The applicant shall lodge his appeal within 14 days from the date of this ruling.

Dated at Mbeya on this 30th day of July 2020

THE HIGH COURT OF TANZANIA

L. M. MONGELLA

JUDGE

Court: Ruling delivered in Mbeya in Chambers on this 30th day of July 2020 in the presence of the parties.

L. M. MONGELLA

JUDGE