THE UNITED REPUBLIC OF TANZANIA
JUDICIARY

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

MISCELLANEOUS LAND APPLICATION NO. 68 OF 2019
(From the District Land and Housing Tribunal for Rungwe in Land Application No.10 of 2015)

SOLO MWANDOLONASHI.....APPLICANT

VERSUS

FREDY AMON NSHASHE (As Administrator of
The Deceased's Estate of NSHASHE MWASUPA).....RESPONDENT

RULING

Date of Last Order: 22/04/2020
Date of Ruling : 24/06/2020

MONGELLA, J.

The applicant herein is moving this Court for an order to extend time within which to lodge an appeal against the decision of the District Land and Housing Tribunal (Tribunal) for Rungwe in Land Application No. 10 of 2015. The application is brought under section 41 (2) of Cap 216 as amended by the Written Laws (Miscellaneous Amendment) Act No. 4 of 2016. It is supported by the affidavit of the applicant, Solo Mwandolonashi.

Both parties were represented whereby the applicant enjoyed the legal services of Mr. Adriano Mtafya, and the respondent enjoyed legal services

of Mr. Emmanuel Clarence, both learned counsels. The application was argued by written submissions.

In his written submission, Mr. Mtafya advanced four main reasons for seeking the extension of time. First he submitted that there was a delay of fifteen days by the trial Tribunal in issuing certified copies of judgment and decree which as per Order XXXIX Rule 1 of the Civil Procedure Code, Cap 33 R.E. 2019 are necessary for lodging the appeal. He referred to the case of ***Mary Kimaro v. Khalfani Mohamed*** [1995] TLR 202 in which it was held that the judgment and decree are necessary documents in framing the memorandum of appeal thus time should start to run from the time the same are supplied.

Second, he said that thereafter the applicant spent four days searching for a lawyer to assist in drafting the memorandum of appeal. He cited the case of ***Mase Simon Rhobin v. Green Star English Medium School***, Misc. Labour Application No. 09 of 2019 (HC at Shinyanga, unreported) whereby this Court, Mkwizu, J. faced with a similar situation held that the reason was sufficient.

Third, he stated that the applicant then filed Land Case Appeal No. 55 of 2018 in this Court, but the same was struck out for being time barred. He was therefore of the view that the applicant was under technical delay during all the time where he had filed his initial appeal. He cited the case of ***Keith Horan & Another v. Zameer Sherali Rashid & 2 Others***, Civil Application No. 105/15 of 2019, (CAT at Zanzibar) in which the Court of Appeal held:

> *"...the delay that arose from the applicant's pursuit of their first botched application for revision certainly amounted to an explicable technical delay. For the applicant having filed and pursued that initial application which was penalized by striking out, that fact cannot be used yet again to determine the aptness of applying for extension of time to lodge a fresh application for revision."*

Fourth, Mr. Mtafya contended that there is an illegality in the impugned decision to the effect that the record of the Tribunal does not indicate involvement of assessors. He cited the case of ***Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia*** [1992] TLR 185 and that of ***M.B. Business Limited v. Amos David Kassanda, Commissioner for Lands & Attorney General***, Civil Application No. 48/17 of 2018 (CAT at DSM, unreported) in which the Court was of the view that existence of illegality in the decision sought to be challenged constitutes sufficient reason for time to be extended.

In reply Mr. Clarence opposed the application. He challenged the applicant's contention that there was a delay in issuing certified copies of judgment and decree. He contended that the applicant has not shown any diligence in following up on the said copies. He challenged the letter presented by the applicant showing that he requested for copies of the judgment and decree. He said that the letter attached by the appellant in his affidavit has no connection to the matter at hand because it is with respect to Civil Case No. 34 of 2018 and not Civil Case No. 10 of 2015 to which this application originates. He as well challenged the submission by the applicant that for four days after receiving the certified copies of judgment and decree he was searching for a lawyer to assist him. He

argued that the reason lacks merit as there are 64 unaccounted days from the date of delivery of judgment to the date of filing the abortive appeal. He argued that the applicant has not provided any proof on what he was doing on each day he claims to be searching for a lawyer. He said that no proof has been provided as to when the applicant had consultations with an advocate and engaged him. Regarding technical delay, Mr. Clarence argued that the facts put forward by the applicant do not amount to sufficient reason. He said that after the initial appeal was struck out the applicant delayed for further twenty three days to file the application at hand and the same has not been accounted for. He prayed for the Court not to entertain the same.

On the point of illegality, Mr. Clarence argued that the principle of illegality that emanated from ***Valambhia's case*** (supra) was not meant to draw the general rule that every applicant who demonstrates in his intended appeal a point of law should, as of right, be granted extension of time if he applies for one. He referred to the case of ***Praygod Mbaga v, The Government of Kenya Criminal Investigation Department and the Hon. Attorney General of Tanzania***, Civil Reference No. 4 of 2019 (CAT at DSM, unreported) which set the rule that the ground alleging illegality must meet the following tests:

> *"(a) The illegality of the impugned decision should be clearly visible, must be apparent from the record.*
> *(b) There must be a prima facie fact to show how the impugned decision is tainted with the said illegalities.*
> *(c) There must be material explanation on how the said illegality prejudice the applicant."*

He argued further that the illegality alleged by the applicant is not apparent from the record. That it requires one to go through the proceeding which was not attached to form part of the applicant's affidavit. He argued further that the applicant has failed to provide material explanation on how the alleged illegality prejudiced the applicant. Basing on this submission he prayed for the Court to dismiss the application with costs.

I have considered the submissions from both counsels. The issue to be determined is whether there is sufficient reason to warrant the grant of extension of time to lodge an appeal. The applicant raised four reasons to wit: 1. Delay in obtaining certified copies of judgment and decree, 2. Searching for an advocate to represent him, 3. Being under technical delay whereby his initial appeal was struck out for being time barred, and 4. Illegality on the impugned decision to the effect that assessors were not fully involved.

In my view, where an issue of illegality has been raised it can suffice to determine the application without having to deliberate on the other reasons advanced. On this issue, I first agree with Mr. Clarence's position that not every illegality warrants the grant of extension of time. It can therefore 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***, Civil Application No. 2 of 2010

(unreported). See also: ***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 and the case of ***Praygod Mbaga*** (supra) cited by Mr. Clarence.

The applicant has argued that the illegality in the impugned Tribunal judgment is to the effect that the Tribunal assessors were not fully involved as the proceedings do not show when they were invited to file their written opinion and when the same were read over to the parties. Mr. Clarence challenged this assertion arguing that this illegality is not on face of record as it requires perusal of the proceedings. With all due respect, I do not subscribe to his line of argument. An error can be on face of record on the judgment or proceedings of which one has to read the documents to detect it. An error on face of record is the one which do not need legal arguments and interpretation, but which can be seen upon perusal of the documents, for instance where a mandatory procedure was skipped by the court in adjudicating the matter.

In my settled view therefore, the illegality raised in this application meets the criteria settled in ***Lyamuya Construction*** (supra) and other cases I have cited above. The law as settled in so many cases such as ***Edina Adam Kibona v. Absalom Swebe (Sheli)***, Civil Appeal No. 286 of 2017; ***S.D.A Church Keisangula v. Nyaikwabe Masare***, Civil Appeal No. 112 of 2015; ***Ameir Mbarak & Another v. Edgar Kahwili***, Civil Appeal No. 154 of 2015 and that of ***Tubone Mwambeta v. Mbeya City Council***, Civil Appeal

No. 287 of 2017 is to the effect that the opinion of assessors has to be filed in writing in the Tribunal and read out to the parties before judgment is delivered. The proceedings and judgment therefore have to clearly show the assessors' active participation in the matter. Failure to do so has an effect of vitiating the proceedings and the judgment as well. It renders the judgment issued a nullity. Mr. Clarence argued that the proceedings were not attached for this Court to scrutinize. I however, agree with Mr. Mtafya's argument that the moment this Court does that in this application it shall be dealing with a matter that ought to be dealt with in an appeal. In my settled opinion therefore, the illegality is of sufficient importance because it is mandatorily provided under the law to the extent that non-compliance thereof vitiates the whole Tribunal proceedings. It is as well an error 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. No orders as to costs.

Dated at Mbeya on this 24th day of June 2020

L. M. MONGELLA
JUDGE

Court: Ruling delivered in Mbeya in Chambers on this 24th day of June 2020 in the presence of both parties.

L. M. MONGELLA
JUDGE