

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
IN AT SHINYANGA**

MISC. LAND APPLICATION NO. 4 OF 2020

(Arising from the land Appeal No.26 of 2016 of the High Court at Shinyanga originated from the Land Application No. 17 of 2015 Shinyanga District Land and Housing tribunal).

SHIJA MHEKELA.....APPLICANT

VERSUS

GASPAR MBAGALA SIGALA @ MALYOHE.....RESPONDENT

RULING

Date of the last Order: 30th June, 2020

Date of the Ruling: 28th August, 2020

MKWIZU, J.:

The applicant one Shija Mhekela moved this Court under the provisions of section 11 (1) of the Appellate Jurisdiction Act, [Cap 141 R:E 2002], section 47 (2) of the Land Disputes Court Act [Cap 216 RE 2002] as amended by the Written Laws (Miscellaneous Amendments (No, 2) Act, 2016 Act No. 4 of 2016 for the following two main orders:

1. Extension of time to apply for leave to appeal to the Court of Appeal against the Judgment of the High Court in Land Appeal No. 26/2016.

2. Leave to appeal to the court of Appeal of Tanzania against the Judgment of the High Court in Land Appeal No. 26/2016.

The application is supported by the applicant's own affidavit sworn on 21st February, 2020. The application was opposed by the respondent.

When the matter came for hearing on 30th June, 2020, Mr. Musa Kassim learned advocate appeared for the applicant and the respondent enjoyed the services of Mr. Audax Constantine, also learned advocate.

In support of the application, Mr. Kassim argued one prayer after the other. On the first prayer for extension of time to file leave to appeal to the Court of Appeal, two reasons were given, technical delay caused by the striking out by the court of applicant's application for leave to appeal and illegality in the impugned decision. On technical delay, Mr. Kassim

submitted that, the decision in Land Appeal No. 26/2016 was delivered on 23/9/2016 and on 5/10/2016 applicant registered a notice of appeal and prayed for necessary document for the preparation of the appeal. Applicant also timely filed an application for leave to appeal, Miscellaneous Land Application No. 36 of 2016 which was faulted for being incompetent hence struck out on 20/4/2018 by Makani J. He then filed another application registered as Land Application No. 17/2018 which was also struck out on 11/2/2020 before he filed the present application.

On the issue of illegality Mr. Kassim explained that the original case at the District Land and Housing Tribunal, Land Application No.17/2017 was about trespass to Land. However, at pages 19,20 and 23 of the decision in Land appeal No 26 of 2016 this court was of the view that the dispute between the parties concerned trespass in tort and therefore the District Land and housing Tribunal have no jurisdiction. The counsel submitted that; this is an illegality on the face of the records which needs to be attended by the Court of Appeal. He therefore prayed to have the time extended to allow the applicant to file leave to appeal to the court of

Appeal. The case of **Ettiennes Hotel V. NHC** Civil Reference No. 32 of 2005 was cited for reference.

On the second prayer, the applicant is asking for leave to appeal to the Court of Appeal on the intended grounds listed in paragraph 8 (i-iii) of the affidavit in support of the application to wit:

- (i) *That, while the Applicant's claim the Respondent herein is for trespass to land, the land on the other hand the Respondent claims to belong him then the learned judge erred in law to nullify the trial tribunal proceedings, decision and orders thereto that the District Land and Housing Tribunal lacks jurisdiction to hear and determine dispute of trespass to land on the ground that tort of trespass to land is tried by ordinal court.*
- (ii) *That, the learned judge of the High Court erred in law to determined the Respondent's second ground of appeal raised before the High Court to the effect that the trial tribunal did not analyse and evaluate evidence of both*

parties, whereby upon affirmatively determining the ground, failed to discharge his duty as the first appellate court to re-evaluate the trial tribunal evidence and come up with his own findings whereby basing on the evidence on trial tribunal record the Appellant's evidence is cogent and heavier as when compare to that of the Respondent herein.

(iii) That, in presence of the appellant's cogent evidence on record whereby visiting the locus quo was just to justify by eye seeing what was testified by the parties before that tribunal, then the learned judge of the High Court erred in law to decide in favour of the Respondent herein while there is no any miscarriage of justice was ever caused instead the same enhanced justice.

He cited the case of **Hamis Mdida & Others V. the registered Trustee of Islam Foundation** Civil Appeal No. 232 /2018 where guidance on how to consider application for leave to appeal was outlined. Finally, Mr. Kassim prayed that both prayers be granted.

In rebuttal, Mr. Audax contended that, applicant failed to account for each day of the delay. He faulted the supporting affidavit for not indicating the time when the two struck out applications were filed.

On the issue of illegality, Mr. Audax submitted that the illegality raised is not apparent on the face of the records. Honourable Kibela J, (as he then was) said the matter involved trespass to land which is triable by the ordinary courts. To see this point one need to go to the pleadings to understand the bases and therefore do not qualify to be a ground for extension of time.

Mr. Audax concluded by asking the court to reject both application. He was however, of the view that should the court find the first prayer tenable, it should proceed to grant an application for leave to appeal to Court of Appeal.

Having reviewed the application, submission for the parties and the records of the court in which this application emanates, I find two issues for determination

- i. whether applicants have given sufficient grounds for this court to grant extension of time to file leave to appeal
- ii. Whether application for leave is justified.

It is a trite law that in an application for extension of time, what the applicant is required of, is to explain away the delay accounting for each day of the delay. However, in the case of **Principal Secretary, Ministry of Defence and National Service v Devram Valambhia** [1992] TLR 182 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".

This position was recapped in **VIP Engineering and Marketing Limited and Three Others v Citibank Tanzania Limited**, consolidated Civil

Reference No. 6,7 and 8 of 2006 (unreported) where Court of Appeal stated:

"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" within the meaning of rule 8 of the Rules for extending time"

Page 19 paragraph 4 of the judgment in Land Appeal No 26 of 2016 reads:

"...I am in agreement with Mr Audax, learned counsel for the appellant that, the Shinyanga District Land and Housing Tribunal lacked jurisdiction to determine matters arising from tort law i.e tort of trespass to land. The same out to be heard and determined by ordinary courts as afore stated. The issue of jurisdiction of any courts is fundamental and can be raised even at an appeal stage as in the instance of this matter before this court. the only remedy for the proceedings and decision

reached by any tribunal or court in want of jurisdiction is to declare the proceedings and the decision as null and void."

I am aware of the position of the law that, if a part alleges an issue of illegality, then the illegality in the impugned decision should be of sufficient importance and must clearly be visible on the face of the record. See for instance, the decision in the case of **Moto Matiko Mabanga V. Ophir Energy PLC and two others**, Civil Application No. 463/01 of 2017. The issue raised here is that, the High Court committed an error declaring the Dispute that was tabled before the District Land and Housing Tribunal Tort *of trespass to land* and that the tribunal lacks jurisdiction to entertain the same. The pointed illegality is clearly evident from the records. I think it is an issue worth consideration by the court of Appeal.

In view of above, I find it appropriate to allow the first prayer to allow the court of Appeal to consider the issue raised. This takes me to the second application for leave to appeal.

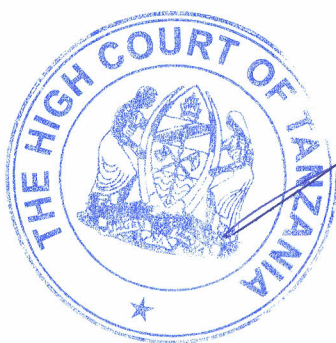
Generally, respondent's counsel had no objection to the prayer for leave to appeal. Therefore, guided by the decision in the cited case of **Hamis Mdida & Others V. the registered Trustee of Islam Foundation (supra)**. I hereby proceed to grant applicant's second prayer for leave to appeal to the court of appeal against the decision of this court in Land appeal No 26 of 2016. Each part to bear its own costs.

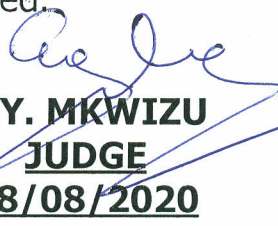
It is so ordered.

DATED at **SHINYANGA** this 28th day of **AUGUST**, 2020.


E.Y. MKWIZU
JUDGE
28/08/2020

COURT: Right of appeal explained.




E.Y. MKWIZU
JUDGE
28/08/2020