

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

**MISC. LAND APPLICATION NO. 28 OF 2018**

*(Arising from the ruling of land application No.123 of 2008 of the Shinyanga District  
Land and Housing Tribunal dated 7<sup>th</sup> day of December 2017).*

**ABDI RAHMANI MOHAMUD DARMA .....APPLICANT**

**VERSUS**

**HERSI WARSAMA MOHAMEDI.....RESPONDENT**

**RULING**

*Date of the last Order: 19<sup>th</sup> June, 2020*

*Date of the Ruling: 14<sup>th</sup> August, 2020*

**MKWIZU, J.:**

The applicant moved this Court under the provisions of section 41 (2) proviso of the Land Disputes Court Act [Cap 216 RE 2002] as amended by the Written Laws (Miscellaneous Amendments) Act NO. 2, 2016 and Act No. 4 of 2016 praying for the following orders:

1. The time for filing an appeal be extended;
2. Costs of this application be provided for; and

3. Any other and further relief as this Honourable Court may deem fit and just to grant.

The application is supported by an affidavit by the applicant's Advocate Johannes Mutabingwa Mbatina.

This application was heard by way written submissions as well as orally. After parties had filed their written submissions, the court learnt that parties' submission did not touch on the issue of the jurisdiction of this court over this matter particularly after the dismissal of Land Appeal No 3 of 2018 for being time barred. In this respect, parties were on 19/6/2020 re- called to address the court on this pertinent point.

The applicant was represented by Mr. Johannes Mutabingwa Mbatina, and Mr. Rugaimukamu the learned Advocates whereas the respondent had the services of Mr. Kasim S. Gilla also learned Advocate. I thank both counsel for their detailed submissions.

Reading the affidavit in support of the application for extension of time, two reasons for the grant of the application were advanced. First, that there was a technical delay caused by the dismissal of the Land Appeal No 3 of 2018 on 17<sup>th</sup> August 2018 for being time barred. Secondly that, there are issues of illegalities in the decision sought to be impugned.

In support of the application, Mr. Mbatina submitted that the District Land and Housing Tribunal gave its decision in Land Application No 123 of 2008 on 07/12/2017 and copies of the original decision were certified on 28/12/2017 followed by the filing of Land Appeal No. 3 of 2018 before the High Court of Tanzania at Shinyanga, which was dismissed for being barred by time limitation.

Mr. Mbatina went on submitting that, the dismissal of Land Appeal No. 3 of 2018 created a technical delay which constitutes good cause for extension of time, he cited the case of **Bharya Engineering & Contracting Co. Ltd Vs Ahamed Nassor**, Civil Application No.342/1 of 2017 CA at Tabora (Unreported), where the court held that:

*"I subscribed to the view taken by the court in the above case, Applicant in the present applicant, having been duly penalized by striking out civil Appeal No. 148 of 2015, and dismissing Miscellaneous Civil Case Application No. 20 of 2016 as well as striking out civil Application no. 148 Of 2015, the same cannot be used yet again determine the timeousness of applying for filing fresh notice of appeal in a bid to file a fresh appeal. That was a technical delay on the other party of the applicant which constitutes good cause under rule 10 of the rules. That is to say, I take it that the applicant has explained to my satisfaction the period of delay between 17.10.2016 when the civil Appeal No. 148 of 2015 was struck out and 19/07/2017 when the court struck out civil Application No. 70/11 of 2017 prior to the lodgment of the present application. "*

Mr. Mbatina submitted that, applicant spent the six days to obtain a copy of the ruling in respect of Land Appeal No. 3 of 2018 before he could file the present application on 15/01/2018.



In relation to the ground of illegality, the learned counsel submitted that, the Tribunal had no jurisdiction to hear and entertain the application because the trial tribunal did order the ratification of the land register which is within the jurisdiction of the High Court as provided for under section 99 of the Land Registration Act.

Apart from the aforesaid illegality, Mr. Mbatina said, the trial chairman recorded parts of witnesses evidence in a form of question and answer contrary to the mandatory provision of Order **XVIII Rule 5 of the Civil Procedure Code** (Cap 33 RE 2019). The counsel cited to the court the case of **Mang'ombe Kuselabamja vs. Focus Luponjela**, Land Appeal No. 5 of 2015 HC Shinyanga (unreported) where it was held :

*"Under Order XVIII Rule 5 of the CPC the law commands the trial Judge or Magistrate and Tribunal's Chairperson for the matter, to only put on record what the witness says and not what that examining person asks. The law forbids in mandatory terms, recording of evidence in form of question and answers. In terms of the law, the manner in which the trial chairman recorded the evidence of witness was obviously wrong and contravention of*

*law. Nowhere does the record indicate that trial chairman signed the evidence in compliance of the dictation of the law. For failure of the trial chairman to comply with the mandatory provision of Order XVIII rule 5 of the CPC, the Trial tribunal's proceedings are therefore held nullity. I hereby quash the same. The resultant judgment and decree are set aside."*

Mr. Mbatina also cited the case of **Tanzania Breweries Limited V. Helman Bildad Minja**, Civil Appeal No. 11/18 of 2019 where the court quoted with approval the case of **VIP Engineering and Marketing Limited Limited and Others V. Citbank Tanzania Limited** Consolidated, Civil Reference No. 6, 7 and 8 of 2006 CAT (Unreported) to the effect that a claim of legality of the challenged decision constitutes sufficient reason for extension of time regardless of whether or not a reasonable explanation has been given by the applicant to account for the delay.

He asked the court to allow the application with costs.

Mr. Kasim opposed the application. He submitted that though this court has discretion under section 41 (2) of the Land Disputes Court Act to extend time but in the exercise of such discretion the court needs to consider the length of the delay, reasons for the delay and the degree of prejudice that the respondent may suffer if the application is granted and the question of illegality if any in the impugned decision. He cited the case of **Moto Matiko Mabanga V. Ophir Energy PLC and two others**, Civil Application No. 463/01 of 2017 Court of Appeal, Dar es salaam and the case of **Bharya Engineering & Contracting Co Ltd** (Supra).

Mr. Gilla explained that the decision sought to the impugned was delivered on 7/12/2017. On 25/1/2018 the applicant filed civil appeal No 3 of 2018 which was dismissed on 17/8/2018 for being time barred. On 23/08/2018, eight months from the date of decision, the applicant filed the present application for extension of time. Respondent's counsel submitted further that, applicant failed to account for each day of the delay particularly from 20<sup>th</sup> January 2018 the last day for filing his Land Appeal No. 3 of 2018 to 25<sup>th</sup> January 2018 when the said Land



Appeal No. 3 was filed and the time between 17/08/2018 when land appeal No 3 of 2018 was dismissed to 23/08/2018 when the instant application was filed. He said neither the affidavit nor the supplementary affidavit indicate the date when the applicant applied for the certified copies and when was the said copies availed to him. The respondent's counsel cited a decision in the case of **Wambele Mtumwa Shahame vs. Mohamed Hamis**, (The Administrator of the estate of the late Asha Juma) Civil Application No. 197 of 2014, CAT at Dar es salaam at page 7 and 8.

On the reason that the said Land Appeal No.3 of 2018 was dismissed on technical ground, Mr. Kasim submitted that, the proceedings in respect to Land Appeal No. 3/2018 indicate that applicant had the services of two learned Advocates to wit, Mr. P. R. K. Rugaimukamu and Mr. Johannes Mutabingwa Mbatina and were both negligent as they failed to check the law properly with regard to time limit for filing appeal against the decision of the District Land and Housing Tribunal, and therefore applicant had no good cause for the delay. The case of **Maneno Mengi Ltd and three others v. Farida Said Nyamachum**



**and the Registrar of Companies** [2002] TLR 391 and **Fortunatus Masha v William Shija**, [1997] TLR 154 were cited on this point.

Distinguishing the facts in the case of Bharya (supra) and the present case, the counsel for the respondent said, in Bharyas's case the Court of Appeal held that ***"an appeal which was timely filed but later on struck out on other grounds of incompetence, then if at all a fresh appeal had to be instituted, then such a delay may be considered as a technical delay as the original/ former appeal was filed within the required time"*** but the applicant in the instant application cannot be served by the decision in Bharyas case as his Land appeal No 3 of 2018 was from the outset time barred.

On the issue of illegalities raised in paragraph 3 (a) and (b) of the supplementary affidavit, Mr. Kasim contended that, it is 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, and as such it should not take a long process to decipher from the impugned decision to find the

allege illegalities. He relied on the earlier on cited case of **Moto Matiko Mabanga V. Ophir Energy PLC and two others**, (supra) and **Bharya's case** (supra). The counsel invited the court to dismiss the application with costs.

On the status of the present application taking into account that this court dismissed Land appeal No 3 of 2018, Mr Gilla, counsel for the respondent said, it is a trite law that, a party who is aggrieved by the decision for dismissal on time limitation under section 3 (1) of the law of limitation Act ought to appeal to the Court of Appeal, Review or apply for revision as the case may be but not to file a fresh application before the same court. The filing of a fresh application in this court amounts to res judicata as this court is functus official. He cited the case of **The east African development Bank V. Blueline Enterprises Ltd**, Civil appeal No. 101 of 2009 page 8-10 and **Regnold George Malyi V. Jazira Athuman Nguluko**, High Court Misc. Civil Application no. 343 of 2019 page 8( All unreported). Mr Gilla urged that the application is misplaced, it should be dismissed with no order as to costs.

On the other hand, Mr. Mbatina argued that the application is properly before the court because the matter was not heard on merit. He cited the case of **Blue star services station Vs Jackson Muset t/a Muset Enterprises** (1999) TLR,80. He clarified that the decision in **East African Bank** ( supra) was pericurium decided as this matter cannot be termed as res judicata as what was before the court was an appeal and now applicant has brought an application.

On his party Mr. Rugaimukamu also, counsel for the applicant argued that the cited cases are distinguishable as the present matter is an application while the dismissed matter was an appeal.

I will start with the last point raise by the court and addressed by the parties. Section 3 (1) lays down the general rule that if any suit, appeal or application is brought before the Court after the expiry of the prescribed time then the court shall dismiss such suit, appeal or application as time-barred. This is what happened in Land appeal No 3 of 2018. As agreed to by the parties herein, the said appeal was file outside the time prescribed by the law, this



Court (Makani, J) on 17/8/2018 dismissed the same under section 3 (1) of the Law of Limitation Act.

The issue for deliberation is the effect of the dismissal order under section 3(1) of the Law of limitation Act. Dealing with a more less similar situation like the one at hand, the Court of Appeal in **East African Development Bank V, Blueline Enterprises Ltd** (supra) said, once the applicant had been caught in the web of section 3 (1) of the law of Limitation Act, the only remedy available to the applicant after the dismissal order is to appeal to the Court of Appeal against the dismissal. Applicant counsel, Mr. Mbatina argued that this court has jurisdiction. His reason was simple, he said, what was before the court was an appeal, which after all was not heard on merit and what is now before the court is an application for extension of time. Similar submissions were made in the case of **East African development Bank** (supra) , however, after going through several decision of the court including the case of **Tanzania Cotton marketing Board V, Cogecot Cotton Company** (1997) TLR 63, **Olam Uganda limited suing through its Attorney United Youth Shipping Co Limited V. Tanzania Harbours Authority**, Civil Appeal No. 57 of 2002 (unreported) and **Hashim Matengo**



**and Two Others V. Minister for industry and trade and two others,**

Civil Appeal No. 27 of 2003, the Court of appeal stated :

*"Applying the principles discerned from the above authorities, it follows that once an order of dismissal is made under section 3(1) it is not open to an aggrieved party to go back to the same court and institute an application for extension of time. The remedy is to seek review before the same court or to lodge an appeal or a revision before the Higher Court. **The rationale is simple. That is, as far as the court is concerned the issue of time limitation has been determined. So the party cannot go back to the same court on the same issue...**" (Emphasis added).*

Guided by the above case law I am of the view that a dismissed appeal cannot be revived by the same court by extending time. It would amount to correcting what was earlier on found to be incorrect. The only remedy available to the applicant after the dismissal order was to appeal, apply for revision to the court of Appeal, or else file review before the same court that issued a dismissal order.

This point alone is sufficient to dispose of the application, thus I restrain myself from determining the rest of the grounds as doing so would be an academic exercise.

All said and done, the application is nothing but a misconception, it is hereby dismissed with costs.

Order accordingly.

**Dated at Shinyanga this 14<sup>th</sup> day of August, 2020**

  


**E.Y.MKWIZU**  
**JUDGE**  
**14/8/2020**