

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

MISCELLANEOUS LAND CASE APPLICATION NO. 49 OF 2019

(Originating from Misc. Land Application No. 26 of 2016 of the District Land and Housing Tribunal for Ruvuma at Songea)

SIXMUND LUAMBANO APPLICANT

VERSUS

VODACOM TANZANIA LTD 1ST RESPONDENT

HTT INFRACO LTD..... 2ND RESPONDENT

MANSETUS SETONGATHIRD PARTY

Date of Last Order: 21/07/2020

Date of Ruling: 20/10/2020

RULING

I. ARUFANI, J.

The applicant filed in this court the application at hand seeking for extension of time to file his appeal in this court out of time. The applicant wish to appeal against the ruling of the District Land and Housing Tribunal for Ruvuma at Songea (hereinafter referred as the tribunal) delivered vide Land Application No. 26 of 2016 dated 1st August, 2018. The application is made under section 41 (2) of the Land Disputes Courts Act, Cap 216 R. E.

2002 as amended by section 41 of the Written Laws (Miscellaneous Amendments) Act No. 2 of 2016 and is supported by the affidavit sworn by the applicant. The first and second respondents filed in the court their counter affidavits to oppose the application and although the third respondent was duly served but he neither filed his counter affidavit nor appeared in the court to oppose the application.

When the application came for hearing the applicant was represented by Mr. Edson Mbogoro, learned advocate. While the first respondent was represented by Mr. Boniventura Masesa, learned advocate the 2nd respondent enjoyed the service of Mr. Majura Magafu learned advocate. By consent of the counsel for the parties the application was argued by way of written submissions.

The counsel for the applicant prayed to adopt the affidavit of the applicant filed in the court to support the application and went on submitting briefly that, there are interesting legal issues in the ruling of the tribunal. He argued that, the stated legal issues arose particularly on the interpretation of the schedule to the law of limitation Act, Cap 89 R.E 2019 which crave for guidance by this court. He stated that, the question is what is the period of limitation for trespass on land? Is it 12 years as is the case with all land suits or is it 3 years because trespass is tortious? He submitted that, a principle of law is involved here which deserve to be stated or restated by this honourable court, being a court of record. He prayed the foregoing reason to be deemed is a sufficient cause to warrant granting the application.

In reply the counsel for the respondents filed in court their written submissions separately. Each of them started his submission by a brief background of the matter and cited several cases in their submissions which laid down the principles governing determination of application for extension of time. For the purpose of avoiding making this ruling unnecessarily long I will deal with the submissions of the counsel for the respondents jointly except on arguments which are not interrelated.

What the counsel for the respondents state in their submissions is that, the decision the applicant wish to appeal against was delivered on 1st August, 2018 and the application at hand was filed in the court on 26th November, 2019 which is almost after the elapse of one year and three months. They argued that, extension of time may only be granted where reasonable cause or sufficient reason for the delay has been shown and each day of the delay has been accounted for.

To support his submission the counsel for the first respondent referred the court to section 14 (1) of the Law of Limitation Act, Cap 89 R.E 2019 which to my view is not relevant in the application at hand as the application is governed by section 41 (2) of the Land Disputes Courts Act and not the Law of Limitation Act. He also cited in his submission the case of **Diamond Shipping Service Ltd V. Zarau Towela**, Misc. Civil Application No. 484 of 2016, HC at DSM (unreported) where is stated that, grant of extension of time is entirely on discretion of the court and may be granted only where reasonable or sufficient cause for the delay has been established.

He also referred the court to the case of **Kalyango Construction and Building Contractors Ltd, V. China Changguing International Construction Corporation**, Civil Appeal No. 85 of 2009, **Safari Petro V. Boay Tlemu**, Civil Application No. 320 of 2017 CAT at Arusha and **Zawadi Msemakweli V. NMB PLC**, Revision No. 427 of 2016 HC Lab. Div. at DSM (both unreported) where it was stated that, in an application for extension of time the applicant is required to account for each day of the delay.

The counsel for the second respondent referred the court to the case of **DR. Ally Shabhay V. Tanga Bohora Jamaat**, [1997] TLR 305 where it was stated that, those who come to court of law must not show unnecessary delay in doing so; they must show great diligence. He also referred the court to the case of **Vodacom Foundation V. Commissioner General (TRA)**, Civil Application 107 of 2017, CAT at DSM where the applicant delayed to file the application in court for nine days and found it has unveil lack of diligence.

The counsel for the respondents argued in their submissions that, although the applicant tried to convince the court the inordinate delay to file the appeal in the court within the time was caused by the delay of the tribunal to supply him with the drawn order on time but his argument is not supported by any evidence. The counsel for the respondents submitted that, there is no evidence like even a letter adduced to the court to show the applicant requested for the copies of the ruling and drawn order from the tribunal. The counsel for the second respondent stated that exhibits lack of diligence and negligence on the part of the applicant which cannot constitute ground for granting extension of time. To support his argument

he referred the court to the case of **Puma Energy Tanzania Ltd V. Spec-Check Enterprises Ltd**, Consolidated Com. Case Nos. 233 and 252 of 2014 HC Com. Div. at DSM (unreported).

The counsel for the first respondent argued that, the stamp on page 8 of the ruling of the tribunal attached to the applicant's affidavit shows the counsel for the applicant received the copy of the ruling on 29th January, 2019 but the application at hand was filed in the court after the elapse of more than ten months. On his side the counsel for the second respondent submitted that, although the applicant filed another application in this court which was Miscellaneous Civil Application No. 5 of 2019 but the same was struck out on 24th October, 2019. He argued that, from when the above application was struck out up to when the application at hand was filed in the court on 26th November, 2019 about thirty days had elapsed and the affidavit of the applicant is silent on accounting for those days.

The counsel for the respondents argued further that, although the counsel for the respondent argued in his submission that there are interesting legal issues that requires court's direction but there is no fact deposed in the affidavit of the applicant in relation to the so called "interesting legal issues". They argued that, the alleged legal issue is a new fact from the bar which does not deserve to be entertained by the court. The counsel for the second respondent referred the court to the case of **Juma Jaffer Juma V. Manager PBZ Ltd & Others**, Civil Appeal No. 7 of 2002 and **Georgia Mtikila V. The Registered Trustees of Dar es Salaam Nursery School & Another**, [1998] TLR 512 where it was stated that, parties are bound by their pleadings and court cannot consider

issue raised in a submission of a party which is not featuring in his pleadings.

The counsel for the second respondent went on arguing that, it is not every alleged claim of illegality constitutes ground for granting extension of time. To support his submission he cited in his submission the case of **Ngao Godwin Losero V. Julius Mwarabu**, Civil Application No. 10 of 2015 CAT at Arusha (unreported) where the case of the **Principal Secretary Ministry of Defence and National Service V. Devram Valambia**, [1992] TLR 387 was discussed and stated that, the court did not meant to draw a general rule that wherever a point of illegality is raised in an application for extension of time it should as of right be granted. He submitted that, illegality or point of law used by the applicant as a ground for being granted extension of time is not apparent on the face of the record and prayed the application to be dismissed.

In his rejoinder the counsel for the applicant argued that, the illegality he has raised in relation to the limitation of time can be raised at any time even at the appellate stage and even the court can raise and rectify the same suo moto in the course of exercising its revisionary and supervisory powers. To support his argument he has cited in his submission the cases of **Tropical Air (TZ) Ltd V. Godson Eliona Moshi**, Civil Application No. 9 of 2017, CAT at Arusha, **VIP Engineering and Marketing Ltd and Two Others V. Citibank Tanzania Ltd**, Consolidated References No. 6, 7 and 8 of 2006 and **Selina Chibago V. Finhas Chibago**, Civil Application No. 182 of 2007 (All unreported) where it was stated that, a claim of illegality constitutes sufficient reason for

extension of time. In fine he submitted that, the applicant has made out a case warranting the court to grant extension of time and prayed the application be granted.

After carefully considered the submissions filed in this court by both sides and after going through the affidavit and counter affidavits filed in the court by the counsel for the parties, the court has found the issue to determine in this application is whether the applicant has shown good cause for granting him extension of time to file his appeal in the court out of time. The reason for framing the above issue is because that is what is required by section 41 (2) of the Land Disputes Courts Act upon which the application at hand is made. For clarity purpose the proviso part of that provision of the law states as follows: -

“The High Court may for **good cause**, extend the time for filing an appeal either before or after the expiration of such period of forty-five days.”

The term “good cause” used in the above cited provision of the law is not defined in the Land Disputes Courts Act or any other law but our courts have tried to define it in numerous cases. One of the cases is **Omary Ally Nyamalege (as the administrator of the estate of the late Ally Nyamalege) and Two Others V. Mwanza Engineering Works**, Civil Application No. 94 of 2017, CAT at Mwanza (unreported) where when the Court of Appeal was looking into what constitute the term “good cause” used in Rule 10 of the Court of Appeal Rules, 2009 it stated as follows:-

"... The Court invariably considers factors such as the length of the delay, the reasons for the delay, the degree of prejudice the respondent stands to suffer if time is extended, whether the applicant was diligent, whether there is point of law of sufficient importance such as the illegality of the decision sought to be challenged".

The similar position was stated in the case of **Bertha V. Alex Maganga**, Civil Reference No. 7 of 2016 (unreported) whereby the Court of Appeal of Tanzania stated as follows:-

*"Whilst it may not be possible to lay down an invariable definition of **good cause** so as to guide the exercise of the court discretion, the court is enjoined to consider, inter alia the reasons for the delay, the length of the delay, whether the applicant was diligent and the degree of prejudice to the respondent if time is extended."*[Emphasis added].

That being what the court is required to consider in deciding whether the applicant in the application at hand was delayed by good cause the court has found that, it is deposed in the affidavit of the applicant which his counsel prayed to be adopted that, the applicant delayed to get the copies of the ruling and drawn order from the tribunal. Another cause used by the counsel for applicant to seek for extension of time for the applicant to appeal out of time as raised in his written submission is that, there are interesting legal issues in the impugned decision of the tribunal.

Starting with the cause of delay to get the copy of the ruling and the drawn order from the tribunal the court has found that, it is deposed at paragraph 3 of the affidavit of the applicant and without being disputed by the respondents that, the impugned ruling of the tribunal was delivered on 1st August, 2018. The applicant deposed at paragraph 4 of his affidavit that, on 13th August, 2018 he applied for the copies of the ruling and the drawn order from the tribunal with a view of appealing against the said ruling. He deposed further at paragraph 5 of his affidavit that, on 7th September, 2018 the copy of the ruling was ready for collection but it was discovered the name of the third party was missing in the title of the ruling.

He went on deposing at paragraph 6 of his affidavit that, after several follow ups of rectification of the stated omission the correct drawn order was supplied to his counsel on 13th February, 2019. He deposed more at paragraph 7 of his affidavit that, by the time when his counsel was supplied with the copy of the drawn order the time within which to appeal had long expired. The applicant went on deposing at paragraph 8 of his affidavit that, after being supplied with the copy of the drawn order his advocate prepared an application for extension of time within two days and filed the same in the court. The said application was struck out after being found it was made under wrong citation of chapter of the law and it was not bearing the name of the person who drew the same.

With exception of what is deposed at paragraph 3 of the affidavit of the applicant which the court has found is not disputed, the rest of what are deposed at the paragraphs referred hereinabove are disputed in the

counter affidavits of the first and second respondents. The court has found as rightly argued by the counsel for the respondents, the deposition at paragraph 4 of the affidavit of the applicant that he applied for the copies of the ruling and drawn order from the tribunal is not supported by any evidence. The court has found that, as argued by the counsel for the first respondent there is no even a letter or any other evidence to show the applicant applied for the copies of the ruling and drawn order from the tribunal.

The court has also found that, although it is true that the stamp affixed in the copy of the drawn order attached to the affidavit of the applicant shows it was supplied to the counsel for the applicant on 13th February, 2019 and the applicant filed in this court Misc. Land Application No. 5 of 2019 which was struck out on 24th October, 2019 but the application at hand was filed in the court on 26th November, 2019. The court has found as rightly argued by the counsel for the second respondent that was over 30 days from when the stated application was struck out. The court has also found that, as rightly argued by the counsel for the second respondent there is no any account made by the applicant in relation to the stated period of over thirty days of the delay.

The position of the law as laid by this court and the Court of Appeal of Tanzania in numerous cases which some of them are **Safari Petro, Kalyango Construction and Buildings Contractors Ltd** and **Zawadiel Msemakweli** cited in the submissions of the counsel for the parties is very clear that, a person seeking for extension of time is required to explain or account for each day of the delay. The above stated position of the law

was also emphasized in the case of **Lyamuya Construction Company Limited V. The Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) where it was stated inter alia that, one of the factors to be looked at in considering good cause has been established is for the applicant to account for all period of the delay.

From the above stated position of the law the court has found that, even if it would have been taken the applicant delayed to get copies of the ruling and drawn order from the tribunal and he was prosecuting Misc. Land Application No. 5 of 2019 which was struck out on 24th October, 2019 but he has not accounted for the period from when the first application was struck out up to when the application at hand was filed in the court which is a period of over thirty days. In the premises the court has found that, as rightly argued by the counsel for the respondents the applicant has not accounted for the period of the delay to file in the court the application for extension of time from when the first application was struck out up to when the application at hand was filed in the court.

Coming to the ground of illegality alleged is in the impugned decision of the tribunal the court has found that, as rightly argued by the counsel for the respondents the stated ground is not deposed at all in the affidavit of the applicant which is supporting the application. The court has found proper to start with the argument raised by counsel for the respondents that, as the said ground of illegality is not supported by any evidence deposed in the affidavit of the applicant the court cannot entertain it. The court is in agreement with the counsel for the respondents that, once a

party has decided to move the court formally he is required to be bound by what he has raised in the documents he has filed in court to move it.

He is not expected to come up with new issues at the hearing of the matter which were not deposed in the affidavit he has filed in court. To do so, will be taking the other party and the court by surprise and this is not allowed in law. The above view of this court is taking inference from the case of **Astepro Investment Co. Ltd V. Jawinga Investment Limited**, Civil Appeal No. 8 of 2015, (unreported) where the Court of Appeal of Tanzania stated that:

"... parties are bound by their own pleadings ... the function of the pleadings is to give notice of the case which is to be met. A party must therefore, so state his case that his opponent will not be taken by surprise. It is also to define with precision the matters on which the parties differ and the points on which they agree, thereby to identify with clarity the issue on which the court will be called to adjudicate and determine the matter in dispute."

Although the above quoted excerpt is talking of pleadings which as defined under Order VI Rule 1 of the Civil Procedure Code, Cap 33 R.E 2019 is normally related to the documents filed in court to initiate a suit and its reply and is not including an affidavit but to the view of this court, the principle of the law stated in the above cited case is supposed to be extended to cover applications which are initiated by chamber summons and supported by an affidavit like the one at hand. The above view of this

court is getting support from the case of **Elfazi Nyatega & 3 others V. Caspian Mining Ltd**, Civil Application No. 44 of 2017, CAT at Mwanza (unreported) where it was stated inter alia that, a fact not contained in an affidavit cannot be considered by the court.

Therefore a party who wish to rely on any fact or ground to support his application is required to depose that fact or ground in his affidavit and not to raise it in a submission. The question is whether the point of illegality alleged is in the decision of the tribunal and raised in the submission of the counsel for the applicant while is not deposed in the affidavit of the applicant can be used as a good cause for granting the applicant extension of time to appeal out of time or not. The counsel for the applicant argued that, the stated point can be taken as a good cause for granting the applicant extension of time as is based on illegality of the decision intended to be challenged while the counsel for the respondents argued it cannot be considered and used to grant the applicant extension of time.

The court has gone through all the cases cited in the submissions of the counsel for the parties in relation to the use of the point of illegality alleged is in the impugned decision of the tribunal to grant the applicant extension of time and find it has been a stance of our courts that, a claim of illegality of the impugned decision constitutes sufficient reason for granting extension of time. The court has found the stated stance was laid in the case of the **Principal Secretary, Minister of Defence and National Service V. Devram Valambia** [1992] TLR 185 where the Court of Appeal of Tanzania held inter alia that:-

"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."

The same position of the law was restated in the case of the **Principal Secretary, Minister of Defence and National Service V. Devram Valambia** [1992] TLR 387 cited in the submission of the counsel for the second respondent. The similar stance was stated in the case of **Lyamuya Construction Company Limited** (supra) where it was stated inter alia that, one of the factors which can be used to grant extension of time is where the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as the illegality of the decision to be challenged.

The court is in agreement with the counsel for the second respondent that, the position of the law as stated in the case of **Ngao Godwin Losero** (supra) and other cases is that, it is not every allegation of existence of illegality in a decision intended to be challenged can move the court to grant extension of time to appeal out of time. It must be a point of sufficient importance and it must be apparent on the face of the record. That position was made clear in the case of **Lyamuya Construction Company Limited** (supra) where it was stated inter alia that:-

*"Since every intending appeal seeks to challenge a decision on points of law or facts, it cannot on 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 of importance and I would add that it must also be apparent on the face of record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process.**"*

[Emphasis added].

Applying the above stated principle of the law in the case at hand the court has found the illegality alleged is in the decision of the tribunal is about jurisdiction of the tribunal to entertain the applicant's claim which was based on trespass to land. The court has found the decision of the tribunal annexed in the affidavit of the applicant shows the applicant's claim was dismissed on the ground that it was filed in the court out of time. The counsel for the applicant argued in his submission was stated earlier in this ruling that, the decision of the tribunal raises interesting legal issues like what is the period of limitation for trespass on land. Is it 12 years as is the case with all land suits or is 3 years because trespass is tortious.

To the view of this court that is a point of law of sufficient importance which is not requiring long drawn argument or process to see it. That being the position the court has found as stated in the case of

Devram Valambia and **Lyamuya Construction Company Ltd** cited hereinabove the court has a duty and is justified to grant the applicant extension of time is seeking from this court for the purpose of getting a chance of looking at the alleged illegality and if it will be ascertained to put the record of the tribunal right.

Therefore despite the fact the alleged point of illegality was not deposed in the affidavit of the applicant but as is point of law relating to the jurisdiction of the tribunal to entertain the applicant's claim then as rightly argued by the counsel for the applicant that point of law can be entertained at this stage to grant the application at hand. The court has also come to the above view as it has not seen the respondents will be prejudiced if the applicant will be granted extension of time is seeking from this court.

In the premises the court has come to the settled finding that, despite the fact that the applicant failed to account for all period of the delay and the point of illegality used to support the application was not raised in the affidavit of the applicant and it was raised in the affidavit but that point is of sufficient importance which justifies grant of extension of time to the applicant to appeal out of time. In the upshot the applicant's application is hereby granted and the applicant is given fourteen (14) days from the date of delivery of this ruling to file his intended appeal in the court and each party to bear his or her own costs. It is so ordered.

Dated at Songea this 20th day of October, 2020




I. ARUFANI

JUDGE

20/10/2020

Court:

Ruling delivered today 20th day of October, 2020 in the presence of Mr. Edson Mbogoro, Advocate for the applicant and in the presence of Mr. Mohamed Yusufu Advocate for the first respondent but in the absence of the second and third respondent. Right of appeal to the court of Appeal is fully explained.




I. ARUFANI

JUDGE

20/10/2020