THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

MISC. LAND APPLICATION NO. 36 OF 2019.

(Arising from Application No. 107 of 2014, in the District Land and Housing Tribunal of Mbeya, at Mbeya).

1. MSESULE VILLAGE COUNCIL.....1ST APPLICANT
2. ADAMSON MWASUBILA.....2ND APPLICANT

VERSUS

MAHALALA IRRIGATION COOPERATIVE SOCIETY.....RESPONDENT

RULING

23/07 & 20/10/2020.

UTAMWA, J:

The two applicants in this application, MSESULE VILLAGE COUNCIL and ADAMSON MWASUBILA (first and second applicant respectively) moved this court for extension of time to file an appeal out of time against the judgement (impugned judgment) of the District Land and Housing Tribunal of Mbeya, at Mbeya (the DLHT) in Application No. 107 of 2014. They also prayed for costs and any other order this court will deem fit to grant. The application is made by way of chamber summons supported by

an affidavit sworn by the second applicant who is also the chairman of the first applicant. It was preferred under section 41 (2) of the Land Disputes Courts Act, Cap. 216 R. E. 2002 (Now R. E. 2019) as amended by Act No. 2 of 2016.

The respondent, MAHALALA IRRIGATION COOPERATIVE SOCIETY objected the application through a counter affidavit. The application was argued by way of written submissions. The applicants were represented Ms. Marry Gatuna. On the other side, the respondents were represented by Mr. Isaya Mwanri, learned counsel.

The affidavit supporting the application essentially stated that, the impugned judgment was delivered on 16th December, 2017. The applicants were aggrieved by it and applied for certified copies of the judgment, decree and proceedings (the copies) for purposes of the intended appeal. When the execution process had been launched through the police, they learnt, on 5th January, 2018, that, the copies had been ready for collection on 20th December, 2017. They collected the same and lodged the appeal to this court on 2nd February, 2018 (Appeal No. 12 of 2018). The appeal however, was struck out on 24th April, 2018 for being time barred. They thus, promptly lodged this application on the 6th May, 2019. There are also serious irregularities and arguable points in the impugned judgement as shown in the intended grounds of appeal. The granting of the application will not prejudice the respondent and the appeal has overwhelming chances of success.

In her written submissions in chief supporting the application, the learned counsel for the applicants adopted the contents of the affidavit. She further contended as follows: that, in computing the time limitation, the applicants are entitled to exclude the time spent in obtaining the copies as per section 19 (2) of the Time Limitation Act, Cap. 89 R. E. 2002 (Now R. E. 2019). They were also entitled to exclude the time spent in prosecuting the other proceedings, to wit; the struck out appeal. They were so entitled under the umbrella of the doctrine of technical delay. She supported this particular contention by citing the decision of the Court of Appeal of Tanzania (CAT) in the case of **Elly Petter Sanya v. Ester Nelson, Civil Appeal No. 151 of 2018, CAT, at Mbeya** (unreported).

The learned counsel for the applicant further submitted that, as indicated under paragraph 8 of the supporting affidavit, the record of the DLHT were tainted with irregularities and illegalities. Firstly, the assessors of the DLHT were not fully involved in the determination of the matter. This was due to the fact that, its record does not show that the assessors were invited by the chairman to give their respective opinion as require by section 23 (2) of Cap. 216. Their opinions were also not read to parties in court as required by Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 as construed by the CAT in the case of **Edina Adam Kibona v. Absolom Swebe, Civil Appeal No. 286 of 2017, CAT, at Mbeya** (unreported). She added that, the remedy for the irregularities shown above is to nullify the entire proceedings and the impugned judgment as guided in the **Edina Case** (supra).

It was also the contention by the learned counsel for the applicant that, the matter was instituted before the DLHT without any prior statutory notice of 30 days showing the intention to sue the first defendant who is basically a local government. The requirement was set under section 190 of the Local Government (District Authorities) Act, R. E. 2002. This was the legal requirement before the amendment of that law made by in 2020. The amendments raised the statutory notice to 90 days.

The learned counsel for the applicant thus, urged this court to consider the allegations of the above highlighted illegalities alone, as constituting a sufficient cause for extending time as guided by law. She cited the decision of the CAT in the case of **The Principal Secretary, Ministry of Defence and National service v. Devran Valambia [1992] TLR 387** to support that position of the law. She further cemented that position of the law by citing the cases of **Tanzania Brewereies Limited v. Herman Bildad Minja, Civil Application no. 11/18 of 2019, CAT, at Dar es Salaam** (unreported) and **Geofrey Laiton Kyando v. Dalma Nyandindi and 20 others v. Henry Nyandidi, Misc. Civil Application No. 88 of 2018, High Court of Tanzania (HCT), at Mbeya** (unreported).

The learned counsel for the applicant thus, urged this court to grant the application at hand so as to have an opportunity for rectifying the defects discussed above in the intended appeal.

The counter affidavit sworn by one Mr. Vickson Chaula, Principal Officer of the respondent, essentially did not dispute some facts in the affidavit. It however, indicated that, after the delivery of the impugned

judgment the applicants relaxed and took no necessary steps. They did not also account for each date of their delay in filing this appeal. There are also no any irregularities committed by the DLHT. The respondent will suffer irreparable loss if the application is granted. The intended appeal thus, has no overwhelming chances of success.

In his replying submissions, the learned counsel for the respondent argued that, in law, reasons for extension of time have to be in the counter affidavit. He supported this argument by the decision of the CAT in the case of **The Registered Trustees of the Archdiocese of Dare es Salaam, v. the Chairman Bunju Village Government and 5 others, Civil Appeal No. 147 of 2006, CAT at Dar es Salaam** (unreported). The applicants however, did not disclose the allegations of illegalities in the affidavit. They did so in the submissions by their counsel. Paragraph 8 of the affidavit relied upon by the counsel for the applicants mentioned nothing on the issue of illegalities. This was thus, an afterthought and abuse of court process.

The learned counsel for the respondent further submitted that, the law requires an applicant for extension of time to account for each day of delay. He cited the case of **Dar es Salaam City Council v. Group Security Co. Ltd, Civil Application No. 234 of 2015, CAT, at Dar es Salaam** (unreported) to support the argument. Nonetheless, he contended, the applicants in the matter at hand did not discharge this duty.

In her rejoinder submissions, the learned counsel for the applicants basically reiterated the contents of her submissions in chief. She further

argued that, matters of illegalities were sufficiently stated under paragraph 8 of the affidavit. The applicants also accounted for each date of delay as shown above.

I have considered the affidavit, the counter affidavit, the entire record, the submissions from both sides and the law. In my view, since this is an application for extension of time, my decision will base on the law on extension of time. Owing to this law, an application of this nature can be granted on the discretion of the court to be exercised judicially and upon the applicant adducing sufficient reasons.

The major issue here is therefore, *whether or not the applicants have adduced sufficient reasons in the matter at hand for this court to grant the application*. According to the affidavit and the submissions by the applicant, the major reasons for this application are three. The first is that, the applicants were not supplied with the copies timely. The second reason is that, the applicants got delayed in prosecuting the struck-out appeal, hence entitled to the benefits of the doctrine of technical delay. The third reason is that, the alleged illegalities in the proceedings and impugned judgment of the DLHT constitute a sufficient cause for granting the application.

I will now test the merits of the three reasons for the application under consideration. I prefer to begin with the third reasons related to the allegations of illegalities. In case I will find it insufficient, I will also test the rest of the reasons. However, in case I will find it sufficient, I will make necessary orders. This adjudication plan is based on the fact that,

according to our law, this reason alone is capable of disposing of the entire matter if it will be upheld by this court.

Now, regarding the third reason on illegalities, I am of the view that, the applicant's counsel clearly pointed out the illegalities in the proceedings and impugned judgment of the DLHT. They are related to non-involvement of the assessors and the failure by the respondent to issue the prior statutory notice of the intention to sue the first respondent as a local government. These allegations are vindicated in the record of the DLDH. According to the replying submissions by the respondent's counsel, he does not seriously dispute the existence of the illegalities. What he argues the most is that, the applicant did not mention them in the affidavit.

In my view, paragraph 8 of the affidavit supporting the application, clearly shows that, there are serious irregularities and arguable points in the judgement of the trial tribunal (meaning the DLHT). According to the submissions by the learned counsel for the applicant, it is clear that she relied upon these words in the affidavit and believed that they also meant that there were illegalities in the proceedings and the impugned judgment. It is nevertheless, apparent that, the learned counsel for the respondent does not appreciate that the term "irregularities" also means "illegalities," hence the contention that the applicants did not mention about the illegalities in the affidavit supporting the application.

In my settled opinion, the stance taken by the applicant's counsel on the meaning of the term "irregularities" is convincing for the following reasons; in the first place, The Black's Law Dictionary, 9th Edition, West Publishing Company, St. Paul, 2009, at page 906, defines the word "Irregularity" as

something irregular; especially an act or practice that varies from the normal conduct of an action. It further describes the term "irregular" as an adjective depicting something which is not in accordance with law, method, or usage or which is not regular. Additionally, the Chambers 21st Century Dictionary, Version 1. 0, Chambers Harrap Publishers, 2003 describes the word "irregular" as something not conforming to rules, custom, accepted or normal behaviour, or to routine. The same dictionary, at page 815 defines the term "illegality" as an act that is not authorized by law or the state of not being legally authorized.

Furthermore, it is the practice in our jurisdiction that, the term "irregularity" is also commonly used to connote illegality. The two terms are thus, sometimes used interchangeably depending on the circumstances of the case. When they are so used, they both signify non-compliance with the law. This is the case in both civil and criminal proceedings. In the case of **Rashid Nkungu v. Ally Mohamed [1984] TLR 46**, at page 47 for example, a primary court magistrate summed up a case to assessors and made a judgement though no evidence had been adduced before it as required by the law. On appeal, this court (Lugakingira, J. as he then was), held thus; and I quote him for a readymade reference;

> "What there was were just pleadings, but pleadings are not evidence and cannot be the basis of a decision except where they amount to admissions, which was not the case here. I am of the view that **the irregularity** went to the root of the entire proceeding for, in effect, there was no trial at all..." (Bold emphasis is mine).

In another case of **Juma Mushi v. Republic [1988] TLR 182** (HC), the appellant was convicted of a criminal offence in a District Court and sentenced accordingly. Nonetheless, the judgment was neither dated nor

signed as required by the law (i. e. section 312(1) of the Criminal Procedure Act, Cap. 20). This court (Kazimoto, J. as he then was), held, and I also quote the passage for ease of reference;

> "I respectfully disagree with the decision in Mugema's case that the mere omission to sign and date a judgment constitutes **gross irregularity** which cannot be cured.... It is **an irregularity** which does not go to the root of the contents of a judgment and can never occasion a failure of justice." (Bold emphasis is added).

As to the word "illegality", this court (Msumi, J. as he then was), in the case of **Yasini Mikwanga v. Republic [1984] TLR 10,** at page 15 considered an appeal in which a subordinate court had sentenced a convict to six months imprisonment though the maximum legal sentence was only one month. The Court held thus, and I reproduce the relevant passaged for a quick orientation:

> "...The sentence of six months' imprisonment imposed against the appellant is **illegal**. In conclusion, appeal against conviction is dismissed. But on the ground of **illegality**, appeal against sentence is allowed..." (Bold text is provided for emphasis).

The **Rashid Nkungu case** (supra), the **Juma Mushi Case** (supra) and the **Yasini Mikwanga case** (cited above) thus, demonstrate well that, in our practice, the term "irregularity" may refer to non-compliance of the law just like the word "illegality" do.

I therefore, find that, the applicants well showed the non-compliance of the law or the illegalities at issue under paragraph 8 of the affidavit though the termed the same as irregularities. The applicants' counsel also expounded the illegalities in her written submissions. The contentions by the learned counsel for the respondent are thus, not forceful enough.

Now, since I have found herein above that the irregularities complained of by the learned counsel for the applicants are vindicated by the record, I also find that, the contention by the learned counsel for the applicant is also supported by the law that, allegations of illegalities alone constitute a sufficient ground for extending time to appeal out of time so that the same can be rectified on the intended appeal. Apart from the precedents cited by the applicants' counsel to support this stance of the law, the CAT underscored it in many other precedents including the case of **CRDB Bank Ltd v. Serengeti Road Services, CAT Civil Appeal No. 12 of 2009, at Dar es Salaam** (unreported). In fact, the law is to the effect that, not every allegations on illegalities can constitute good cause for extending time. However, according to the circumstances of the case at hand and the nature of the illegalities involved, I find the contention by the applicants' counsel tenable. The nature of the illegalities in my view, has a lethal effect and may lead to the nullification of the proceedings and or the setting aside of the impugned judgement. I thus, agree with the learned counsel for the applicant that, the illegalities at issue constitute a sufficient ground.

The findings I have just made above, make it unnecessary to consider the rest of the grounds of this application. This is because, they are capable of disposing of the entire matter. The major issue posed herein above is therefore, answered affirmatively that, the applicants have adduced sufficient reason in the matter at hand for this court to grant the application. I therefore, grant the extension of time prayed by the applicants. They shall file their intended appeal within two weeks (14 days) from the date of delivering this ruling. Each party shall bear his own costs

since the DLHT contributed instrumentally in committing the illegalities at issue. It is so ordered.

J.H.K. UTAMWA

JUDGE

20/10/2020.

20/10/2020.

CORAM; Hon. JHK. Utamwa, J.

For applicants: 2nd applicant and Ms. Marry Gatuna, advocate.

For the respondent: Mr. Vickson Chaula (Principal Officer) and Ms. Marry Gatuna, advocate, holding briefs for Mr. Isaya Mwanry, advocate for the respondent.

BC; Mr. Patrick, RMA.

Court: Ruling delivered in the presence of the second applicant, Mr. Vickson Chaula (Principal Officer of the respondent) and Ms. Marry Gatuna, advocate for the applicants who also holds briefs for the respondent, in court, this 20th October, 2020.

JHK. UTAMWA.

JUDGE

20/10/2020.