

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY**

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

MISCELLANEOUS LAND APPLICATION NO. 49 OF 2020

*(From the District Land and Housing Tribunal for Mbeya at Mbeya in Land
Appeal No. 172 of 2018.)*

LIVING OSIAH KAPWILI.....APPLICANT

VERSUS

RAPHAEL S. SIMENGA.....RESPONDENT

RULING

Date of Last Order: 26/08/2020
Date of Ruling : 16/10/2020

MONGELLA, J.

This application is made under section 41 (2) of the Land Disputes Courts Act, Cap 216 R.E. 2019. The applicant is seeking to be granted extension of time to file an appeal out time against the decision of the District Land and Housing Tribunal for Mbeya (the Tribunal) in Land Application No. 172 of 2018 delivered on 15th August 2019. He was represented by Mr. Faraja Msuya, learned advocate. The application was argued by written submissions.

Before embarking on the main application, Mr. Msuya raised a legal issue with regard to the competence of the counter affidavit filed by the

respondent. He contended that the jurat of attestation is incurably defective as it offends the mandatory provisions of section 10 of the Oaths and Statutory Declarations Act, Cap 34 R.E. 2019. He was of this position arguing that the Commissioner for oaths before whom the oath was administered has not indicated whether he knew the respondent personally or whether the respondent was identified to him by somebody whom the Commissioner for oaths personally knew. He referred to the case of **Simplisius Felix Kijuu Issaka v. National Bank of Commerce Limited**, Civil Appeal No. 24 of 2003, (CAT, unreported) in which an affidavit was struck out for being defective on the ground that the Commissioner for oaths before whom the oath was administered did not indicate whether he knew the deponent personally or whether the deponent was introduced to him by somebody he personally knew.

Mr. Msuya also pointed another defect in the respondent's counter affidavit. He contended that the counter affidavit also offends the provisions of section 8 of the Notaries Public and Commissioner for Oaths Act, Cap 12 R.E. 2019 in the sense that it does not indicate in the jurat of attestation the date and place the oath was taken. To bolster his point, he referred to the case of **Mohamed Hassan v. Peter Lema** [2005] TLR 383 in which it was insisted that the place and date of attestation must be shown in the jurat.

He also pointed another defect in the counter affidavit being that the same offends the provisions of Order XIX Rule 3 (1) of the Civil Procedure Code, Cap 33 R.E. 2019 by containing extraneous matters such as evidence, allegations, submissions, legal arguments and conclusions. He

specifically pointed paragraphs 4 and 7 as containing legal arguments, paragraph 8 as containing conclusion and paragraph 9 as containing evidence and prayers. He referred to the case of **Attorney General v. National Housing Corporation & Others**, Misc. Land Application No. 945 of 2017 (HC at DSM, unreported) in which the court ruled an affidavit containing objections, prayers, legal arguments or conclusion to be incurably defective and thus struck it out.

Lastly, he contended that the respondent's counter affidavit offends the provisions of Order VI Rule 15 (2) of the Civil Procedure Code which requires the person verifying to specify by reference to the numbered paragraphs of the pleading what he verifies of his own knowledge and what he verifies upon information received and believed to be true. With the pointed defects, he prayed for the court not to act upon the counter affidavit and proceed to entertain the applicant's application as if it was never contested.

Coming to the main application, Mr. Msuya advanced two reasons to be granted extension. First he said that the delay was not occasioned by the applicant but by the Tribunal which delayed in issuing the copies of proceedings. He said that the applicant was supplied with the copy of proceedings on 14th November 2019 and on 13th December 2019 his appeal was dismissed for being filed out of time. He said that the court did not consider the automatic exclusion of days spent for waiting for copies of the proceedings, hence this application for extension of time. In support of his argument, he referred to the case of **Luka Kaziyaure v. Raha Bakari & Another**, Misc. Land Application No. 226 of 2019 (HC at

DSM, unreported) in which the delay by the Land Tribunal to issue copies of documents for appeal was considered as sufficient to grant the extension of time.

Second, he pointed two illegalities in the impugned Tribunal decision. He first submitted that the Hon. Tribunal Chairman invited the former applicant to tender exhibits after he had already closed his case, the respondent (applicant herein) objected to the tendering of the said exhibits, but the Hon. Chairman recorded that there was no any objection. The other illegality that he pointed out is to the effect that the Hon. Chairman based his reasoning for the decision on facts not testified by the parties. He said that a fact on forgery was not stated and proved by the respondent, but was considered by the Hon. Chairman. Under the circumstances, he argued that the applicant has overwhelming chances of success in the appeal and thus prayed for the application to be granted.

The respondent on the other hand appeared in person and opposed the application. He first replied to the legal issues raised by Mr. Msuya in his submission. Essentially, he conceded to the defects in the counter affidavit raised by Mr. Msuya. However, he proceeded to defend arguing that the courts in this country have already settled positions regarding such defects. Referring to the case of **Makamba Kigome and Gregory Matheyo v. Ubungo Farm Implements Limited & PSRC**, Civil Case No. 109 of 2005 (HC at DSM, unreported) he argued that a preliminary objection on point of law can be raised at any stage in proceedings if it only relates to jurisdiction and limitation of time. He thus challenged the legal issues

raised by the applicant's advocate on the ground that they do not fall under aspects of jurisdiction or limitation of time.

He further argued that even if the counter affidavit is defective and is struck out, it does not mean that the application is not contested. Supporting this stance, he referred to the case of ***The Editor Msanii Africa Newspaper v. Zacharia Kabengwe***, Civil Application No. 2 of 2009 (CAT at Dar es Salaam, unreported) in which it was held that:

"... in the absence of an affidavit in reply the respondent may still appear and contest the application. In this context, even if I were to hold that the Respondent's affidavit in reply is defective and thereby expunged from the records that would not necessarily mean that the application is uncontested."

To this point, I wish first to deliberate of the legal issues raised by the applicant's counsel concerning the defects in the counter affidavit. As the matter stands, there is no dispute as to the defects pointed out by Mr. Msuya. This is because the respondent has conceded to the same. His only contention lies on the argument that the said defects are not based on legal issues touching the jurisdiction of the court or limitation of time and thus could not be raised at this stage of proceedings and that if the counter affidavit is rejected, it does not take away the respondent's right to defend.

In my view, the issue regarding defective affidavit touches on the jurisdiction of the court because the court is not empowered to entertain an affidavit which is incurably defective like the one in the case at hand.

Therefore the same could be raised at any stage of the proceedings. Regarding the second argument that striking out of the counter affidavit does not take away the respondent's right to contest the application, I wish first to consider the applicant's arguments in rejoinder. Mr. Msuya challenged the argument and the cited case of **Editor Msanii Africa Newspaper** (supra) by the respondent. He contended that in this case, the Court dealt with the old Court of Appeal Rules of 1979, particularly Rule 53 (1). He said that this rule did not make it mandatory for the respondent to file counter affidavit. He argued that this position of the law has now changed.

In my considered view, apart from Mr. Msuya's argument, an affidavit, counter affidavit and reply thereto, if any, filed in an application amounts to pleadings. See: **Mbeya-Rukwa Autoparts and Transport Ltd. v. Jestina George Mwakyoma** [2003] TLR 251. On those basis therefore, the consequences for non-filing or filing a defective written statement of defense by the defendant in a main suit also befalls the respondent in non-filing or filing of a defective affidavit in an application. In consideration thereof I agree with the applicant that the respondent's counter affidavit is defective and is struck out accordingly. I proceed to deliberate on the application in consideration of the applicant's affidavit and submissions only.

The applicant claims to have delayed in obtaining the copies of proceedings. The law however, does not require attachment of proceedings as among the necessary documents for appeal. It only makes it mandatory to accompany the petition or memorandum of

appeal with a copy of judgment and decree. Mr. Msuya has relied on section 19 (5) of the Law of Limitation Act, Cap 89 R.E. 2019. With all due respect, I think he has misconceived the application of this provision. This provision is only applicable where the court hearing the appeal is satisfied that it was necessary for a copy of proceedings to be filed along with the appeal. It does not make it mandatory for the proceedings to be filed along with the appeal. In fact, the practice of the court has been to postpone the hearing of the appeal while calling for records of the trial court, which contains the proceedings. I therefore do not buy the argument that the applicant was waiting for copies of proceedings to lodge his appeal. This reason is quite insufficient.

On the other hand however, the applicant has pointed out an illegality in the impugned decision. Among the reasons that may constitute sufficient reason to be awarded extension of time is the existence of illegality in the impugned decision. This has been decided in a number of cases from this Court and the Court of Appeal. In the case of ***Tropical Air (TZ) Limited v. Godson Eliona Moshi***, Civil Application No. 09 of 2017 (CAT at Arusha, unreported) which cited in approval the case of ***VIP Engineering and Marketing Limited, Tanzania Revenue Authority and the Liquidator of Tri-Telecommunication (T) Ltd v. Citibank of Tanzania Limited***, Consolidated References No. 6, 7 and 8 of 2006 (unreported) it was held:

"It is settled law that, a claim of illegality of the challenged decision, constitutes sufficient reasons for extension of time...regardless of whether or not a reasonable explanation has been given by the applicant..."

In ***Shelina Midas Jahanger & 4 Others v. Nyakutonya NPF Co. Ltd.***, Civil Application No. 186 of 2015 (CAT at Mwanza, unreported) it was also held:

"...The Court therefore, has a duty to ascertain this point of law and if established to make the appropriate measures to rectify the situation. This would be possible if the Court will grant extension of time to the applicant to lodge an application for leave to appeal out of time, so as to pursue her appeal. We take this to be a point of law of great public importance to be decided by this Court whatever its consequences."

The illegality however, can only be entertained if it meets the required 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. Balози Ibrahim Abubakar & Another***, Civil Application No. 79 of 2016

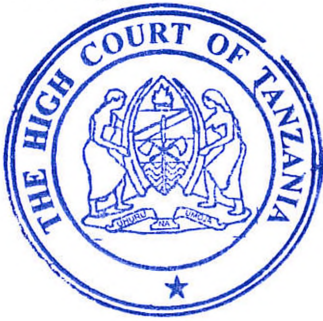
The illegality raised by the applicant is to the effect that the Hon. Chairman allowed the respondent to tender documentary evidence after the prosecution case was closed. In my view, this illegality is an error on face of record and is of sufficient importance as it touches principles of fair hearing. The anomaly can therefore not be cured unless the same is tested in an appeal. On these bases, I grant the applicant extension of

time to lodge his appeal as prayed in the application. The applicant is given twenty one (21) days from the date of this ruling to lodge his appeal in this Court. Each party shall bear his own costs of the suit.

Dated at Mbeya on this 16th day of October 2020.


L. M. MONGELLA
JUDGE

Court: Ruling delivered in Mbeya in Chambers on this 16th day of October 2020 in the presence of Mr. Faraja Msuya, learned advocate for the applicant.




L. M. MONGELLA
JUDGE