

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

MISC. CIVIL APPLICATION NO. 27 OF 2019

VUMILIA PRODUCERS AND

SHOPPING CENTRE LIMITED.....APPLICANT

VERSUS

TOWN DIRECTOR OF KAHAMA

TOWN COUNCIL

THE ATTORNEY GENERAL

.....**1ST RESPONDENT**

.....**2ND RESPONDENT**

RULING

14th January, 2021 & 19th February, 2021.

MDEMU, J.:

This civil application for extension of time to apply for leave for orders of certiorari, declaration and mandamus has been filed by the Applicant by way of chamber summons in terms of the provisions of sections 14(1) of the Law of limitation Act, Cap. 89, R.E 2002 and Rule 17 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2011. In the chamber summons, the Applicant prays for this Court to grant extension of time to apply for leave for orders of certiorari, declaration and mandamus against the decision of the Director of Kahama Town Council. The application is supported by an affidavit affirmed by one Mr. Ally Iddy Mitimangi on 13th December, 2019.

In a nut shell, the Applicant claims to own Plot No. 234 Block " A" with certificate of Title No. 60201 located at Kahama Urban. Sometimes in February, 2018, the Minister of Lands and Human Settlement Development revoked that certificate of occupancy. Following that revocation, the Applicant on 8th March, 2018 instituted application for leave to pursue judicial review remedies against the Minister. Paragraph 14 through 15 of the Applicant's affidavit provides that, leave was granted thereby the Applicant applied for judicial review remedies against the Minister on 1st November, 2018. We are told further that, around March, 2019 or early April, 2019 the first Respondent herein advertised tender No. **LGA/155/2018/2019/NC/03** in respect of the suit premises inviting the general public to bid for 250 rooms/units on or before 23rd April, 2019. It is on that respect that the Applicant prays for this Court to grant extension of time to apply for leave for orders of certiorari, declaration and mandamus against that decision by the Director of Kahama Town Council.

In this application, Mr. Paul Kaunda, learned Advocate represented the Applicant, whereas Mr. Solomon Lwenge, Senior State Attorney represented both Respondents. On 19th November, 2020, the matter was scheduled for hearing through written submissions. Both parties complied.

Submitting in support of the application, Mr. Kaunda started by adopting the affidavit in support of the application. He went on submitting that, the Applicant's basis on this application is illegality of the 1st Respondent's conduct. It was Mr. Kaunda's view that, such illegality is stated in paragraphs 14,15,17,18,19 and 20 of the Affidavit. He explained further that, the first Respondent while aware of the pending application for judicial review against the Minister's revocation order in Court, advertised tender No. **LGA/155/2018/2019/NC/03** in respect of the same suit premises inviting the general public to bid for 250 rooms/units. He supported his argument by citing the case of **Kambona Charles (As The Administrator of The Estate of the Late Charles Pangani) V. Elizabeth Charles, Civil Application No. 529/17 of 2019** (unreported)

Mr. Kaunda further submitted that, the doctrine of *res sub judice* is a common law principle but also is enshrined under Article 30(2)(d) of the Constitution of the United Republic of Tanzania, 1977 and stated that, the same prohibits interference to the legal proceedings pending in Court. To bolster this point, he cited the case of **Attorney General V. Times Newspaper (1973) 2 ALLER 54.**

On the last remark, Mr. Kaunda observed that, according to paragraphs 18,19 and 20 of the counter affidavit, the first Respondent concedes to interfere subjudice proceedings. It is on that account he prayed that, the Applicant's application be granted on illegality and further supported his position by citing the case of **Principal Secretary Minister of Defence and National Services V. Devram P. Valambhia (1992) TLR 387.**

In reply, Mr. Lwenge started by adopting their counter affidavit and resisted the applicant's application for reasons that, sufficient cause for delay has not been shown in terms of section 14(1) of the Law of Limitation Act and also as envisaged in the case of **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Momas' Christian Association of Tanzania, Civil Application No.2 of 2010** (unreported)

As to illegality alleged by the Applicant, the Respondent challenged it for the reason that, there is no injunction that prohibits the first Respondent from complying with the Minister's instructions of revisiting all procedures regarding allocation of the disputed plot and rectify the same due to fraud and misrepresentation.

Furthermore, Mr. Lwenge submitted on *res subjudice* and Article 30(2)(d) of the Constitution of the United Republic of Tanzania stating that the same do not apply on the Applicant's application. To him, he thought that *res subjudice* is enshrined in section 8 of the Civil Procedure Code, Cap. 33 R.E 2009 and in Sakar, Code of Civil Procedure (11th Edition) by Sudipto Sakar and VR Manohar at page 93.

Mr. Lwenge stated what he thought to be the essential conditions for doctrine of *res subjudice* to apply. He said **firstly**, the matter in issue in a second suit is also directly and substantially in issue in the first suit. **Secondly**, parties in the second suit are the same or parties under whom they or any of them claim litigating under the same title. **Thirdly**, the court in which the first suit is instituted should be competent to grant the relief claimed for in the subsequent suit and **lastly**, the previous instituted suit must be pending. He observed that, all the above ingredients are lacking in the applicant's case.

Again Mr. Lwenge stated that, according to paragraphs 11,13 and 14 of the applicant's affidavit, on 28th February,2018 is when the cause of action started. He observed that, as the Applicant filed this application on 17th December,2019, he delayed for 3 months and 15 days. To him that is inordinate. He added that, the disputed land was placed by the Minister

under the supervision of the Respondent. By that he meant, execution of the Minister's instructions cannot be unlawful to constitute illegality. Furthermore, Mr. Lwenge stated that, *sub judice* is not an illegality that constitutes a point of law of sufficient importance and is not apparently on the face of record. He emphasized that, the same needs one to do much on drawing argument of the conduct of the first Respondent as abusing court processes.

On the last remark, Mr. Lwenge submitted that, since all conducts done by the 1st Respondent were in compliance with the Minister's instructions, then he formed an opinion that, the Applicant has failed to establish an arguable case and has no sufficient interest to bring an application. He cited the case of **Tancan Mining Company Ltd v. Minister for Minerals and 2 Others, Misc. Civil Application No.2 of 2020**(unreported) to bolster his assertion. That marked the end of both parties' submissions.

I have considered; both parties' submissions and the records available as well. The issue before me is, whether this application for extension of time has merits.

From the records; there is no dispute that, the Applicant is out of time in seeking for leave to apply for prerogative orders, be it two months

as averred by the Applicant or three months as argued by the Respondents. Equally, the Applicant has not accounted for each day of delay, perhaps on the assumption that, illegality constitutes sufficient or good cause to extend time.

For one to rely on illegality extend time, conditions set in the case of **Principal Secretary Minister of Defence and National Services v. Devram P. Valambhia (1992) TLR 387** must be fulfilled. I quote hereunder the said principle for easy of reference:

".....the Court to draw a general rule that every Applicant who demonstrate that his intended Appeal raises a 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 that of sufficient importance" and I would add that, it must also be apparent on the face of the record, such as the question of jurisdiction, not one that would be discovered by a long-drawn argument or process."

The issue is whether, what the Applicant has raised as illegality falls within the ambit of the quoted principle above. The illegality the Applicant claims is the act of the 1st Respondent while aware of the pending

application (*res subjudice*) for judicial review against the Minister's revocation order in Court, advertised tender No. **LGA/155/2018/2019/NC/03** in respect of the same suit premises, thus inviting the general public to bid for 250 rooms/units. The question is, does this constitute an illegality?

The Applicant claims that *res subjudice* is enshrined in Article 30(2)(d) of the Constitution of the United Republic of Tanzania, 1977. The Applicant proceeded saying that, the same prohibits any one from interfering with legal proceedings which are pending. I hereunder quote it for easy of reference; -

"30(2) It is hereby declared that the provisions contained in this Part of this Constitution which set out the principles of rights, freedom and duties, does not render unlawful any existing law or prohibit the enactment of any law or the doing of any lawful act in accordance with such law for the purposes of (d) protecting the reputation, rights and freedoms of others or the privacy of persons involved in any court proceedings, prohibiting the disclosure of

*confidential information or safeguarding the dignity,
authority and independence of the courts;*

When reading between the lines the quoted article of Constution above, with much respect to the Applicant's counsel, does not mean prohibiting any one from interfering legal proceedings which are pending. It connotes that, laws will not be rendered unlawful only because of the existence of the provisions contained in the Constitution which set out the principles of rights, freedom and duties. With that stand, this point does not support the Applicant's argument.

However, in the same line, the Applicant's counsel cited the case of **Attorney General v. Times Newspaper (1973) 2 ALLER 54** most specifically on the part that stated as hereunder; -

".....once a dispute has been submitted to a court of law, they should be able to rely upon there being no usurpation by any other person of the function of that court to decide it according to law".

That is an English case, but as correctly submitted by the Respondents' counsel, the doctrine of *res subjudice* in Tanzania is

enshrined in section 8 of the Civil Procedure Code, Cap. 33 R.E 2019 as quoted for easy of reference:-

"8. No court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other court in Tanzania having jurisdiction to grant the relief claimed."

If we have to take that both laws as cited by the parties' talk of the doctrine of *res subjudice*, I am fully convinced to be bound and rely on section 8 of the CPC in deciding the definition of *res subjudice*. When bound by such stand, my duty is simple now, just to find whether what is claimed by the Applicant as an illegality falls within the meaning of section 8 of the CPC?

As the Applicant's pending suit is Misc. Civil Application No. 38/2018 between the Applicant, Minister for Lands and the Attorney General as parties, I find the conditions set in section 8 of the CPC for *res subjudice*

are not met at all. These are: **one**, the matter in issue in a second suit is not directly and substantially in issue in the first suit, **two**, the parties in the second suit are not the same or parties under whom they or any of them claim litigating under the same title, **three**, there is no previous instituted suit pending.

As res subjudice raised by the Applicant claiming to constitute an illegality has failed to be one as discussed above, then an application for extension of time that relies on such illegality has failed too. All said and done, I find the application devoid of merits and I proceed to dismiss the same. Both parties to bear own costs.

It is so ordered.



Gerson J. Mdemu
JUDGE
19/02/2021

DATED at SHINYANGA this 19th day of February, 2021.

Gerson J. Mdemu
JUDGE
19/02/2021