

**IN THE HIGH COURT OF TANZANIA**

**(IN THE DISTRICT REGISTRY)**

**AT MWANZA**

**MISC. CIVIL APPLICATION NO.37 OF 2021**

*(Originating from the Ruling of execution cause No.11 of 2020 Before No. Ndyekobora (RM). Also a Decree of the District Court in Case No. 29 of 2018)*

**FIDELIS LUCAS CHAGULA ..... APPLICANT**

**VERSUS**

**REBECCA PETRO LUDONDIJE .....RESPONDENT**

**RULING**

*Date of last Order: 04.06.2021*

*Date of Ruling 08.06.2021*

**A.Z.MGEYEKWA, J**

The applicant has lodged an application which is brought under section 14 (1) & (2) of the Law of Limitation Act, Cap.89 [R.E 2019]. The Order sought is for an extension of time to file an appeal out of time against the Ruling of the Resident Magistrate Court of Mwanza. The application is supported by an affidavit deposed by Fidelis Lucas Chagula, the applicant. The application has encountered formidable opposition from the respondent

by filing a counter affidavit deposed by Rebecca Petro Lupondije, the respondent.

In prosecuting this application, the applicant enjoyed the legal service of Mr. Kashepa, learned counsel while the respondent enjoyed the legal service of Mr. Mhingo, learned counsel.

Submitting on the application, the counsel for the applicant urged this court to adopt the applicant's affidavit and form part of his submission. Mr. Kashepa stated that the applicant intends to challenge the decisions of both Resident Magistrate Court in Execution Application No.11 of 2020. The learned counsel for the applicant contended in respect of illegality. He claimed that the order of execution differs from the award issued by the District Court. Mr. Kashepa stated that illegality is sufficiently covered in paragraph 2 of the affidavit. In his view, the said illegality is the main reason which merits the applicant's application. Fortifying his submission he referred this court to the case of **Juto Ally v Lucas Komba & Others**, Civil Application No. 484 /17 of 2019 the Court of Appeal of Tanzania cited with approval the case of **Kashinde Machibya v Hafidhi Said**, Civil Application No. 44 of 2019 (unreported).

In view of the said grounds, the applicant urged this Court to grant an extension of time since the applicant has chances of success.

Rebutting to the applicant's Advocate contention, Mr. Mhingo, learned counsel for the respondent shrugged off the applicant's contention and held that the decision that is intended to be appealed through the application for extension of time is not valid. He argued that the Decree and Resident Magistrate order does not vary. Given this fact, he stated that the applicant was ordered to pay the outstanding loan and the same was reflected in both decisions. He stated that the applicant did not account for days of delay. The learned counsel for the respondent contended that the applicant was required to file an appeal but he did not.

The learned counsel for the respondent continued to state that the applicant lodged an application for execution and its ruling was delivered on 03<sup>rd</sup> September, 2020. He went on to state that the applicant applied for an extension of time before this court on 27<sup>th</sup> April, 2021 without accounting for the days of delay. He valiantly contended that the applicant is praying delaying techniques while the bank wants to sell the respondent's property.

On the strength of the above, Mr. Mhingo beckoned upon this court to dismiss the applicant's application to allow the respondent to proceed with execution.

In his brief rejoinder, the applicant's Advocate maintained that the impugned decision is tainted with illegality and that they want the upper to rectify the alleged illegality.

In conclusion, he urged this court to consider the point of law raised by the applicant and urged this court to allow the application.

From the above rival submissions of both learned counsels, the question for this Court's determination is *whether the applicant's application is meritorious*.

To begin with, I wish to restate that granting or refusing to grant an application like the one at hand is entirely in the discretion of the Court. However, that discretion is judicial and so it must be exercised according to the rules of reason and justice. There are a plethora of legal authorities in this respect. As it was decided in numerous decisions of the Court of Appeal of Tanzania, in the case of **M.B Business Limited v Amos David Kassanda & 2 others**, Civil Application No.48/17/2018 and the case of

**Benedict Mumelo v Bank of Tanzania** [2006] 1 EA 227 the Court of Appeal of Tanzania.

The applicant raised an issue of illegality, the gravamen of the complaint is that the Resident Magistrate Court order varies from the Decree issued by the Decree of District Court of Nyamagana. Hence it was a product of illegality. It is worth noting that although the issue of illegality is considered as a sufficient ground in applications of extension of time, however, the same does not mean that any illegality raised by a party intending to appeal constitutes a point of law.

In the case of **Lyamuya Construction Company Limited v Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No.2 of 2010 (unreported), the Court of Appeal of Tanzania held that:-

*“ Since every party intending to appeal seeks to challenge a decision either on points of law or facts, **it cannot in my view be said that in Valambhia’s case the Court meant to draw a general rule** that every applicant who demonstrates that his intended appeal raises points of law **should, as of right, be granted an 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, (but), not one that would be discovered by a long drawn argument or process.” [Emphasis added].*

Equally, in the case of **the Commissioner of Transport v The Attorney General of Uganda and Another** [1959] E. A 329, the Court of Appeal held that:-

*“ In other words, the Court refused to extend time because the point of law at issue was not of sufficient importance to justify the extension. **The corollary of that is that in some cases a point of law may be of sufficient importance to warrant extension of time while in others it may not.** ”[Emphasis added].*

Applying the above authorities, it cannot in my view, be said that the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for it. Each case has to be determined on its own merit and all pertinent circumstances must be considered.

After taking into consideration what has been stated in the affidavit and the applicant's Advocate submission I would like to make an observation that in the applicant's affidavit particular paragraph 4, the applicant complained that there is a serious point of law that merit his application. In his submission, the learned counsel for the applicant stated that there is a variation in the Decree dated 03<sup>rd</sup> September, 2020 issued by the Resident Magistrate in the Execution Cause No.11 of 2020 and the District Court order dated 24<sup>th</sup> December, 2019. Both Orders were related to the applicant's properties, whereby the applicant's properties mentioned in exhibit P2 was declared as a security for the loan he took from the bank and the bank was ordered to attach the applicant's property which was deposited as security. In my view, Mr. Kashepa is looking for excuses, he was supposed to account for the days of delay on which he did not. Instead, he has raised an issue of illegality that does not exist.

Guided by the above findings, I am in accord with the respondent Advocate submission that, the question of illegality, in this case, does not arise. This is a kind of case where a point of law is not of sufficient importance. The same cannot, as a matter of law, be termed as illegality thus cannot be a ground for applying for extension of time. It should be noted that extension of time is not a right of a litigant against a Court but a discretionary

power of courts which litigants have to lay a basis [for] where they seek [grant of it] the same was held by the Supreme Court of Kenya in the case of **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others**, Sup. Ct. Application No. 16 of 2014. I recapitulate that I accede to Mr. Mhingo's views that the applicant's application is devoid of merit.

The upshot of the above is that I am inclined to disallow the application for extension of time to file an appeal against the District Land and Housing Tribunal for Mwanza. No order as to the costs.

Order accordingly.

Dated at Mwanza this 8<sup>th</sup> June, 2021.



  
A.Z.MGEYEKWA

**JUDGE**

08.06.2021

Ruling delivered on 8<sup>th</sup> June, 2021 via audio teleconference whereas both learned counsels for the applicant and respondent respectively were remotely present.

  
A.Z.MGEYEKWA

**JUDGE**

08.06.2021

Right to appeal fully explained.