

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

MISCELLANEOUS LAND CASE APPLICATION NO. 13 OF 2020

*(Originating from Misc. Land Application No. 104 of 2018 of the District Land and
Housing Tribunal for Ruvuma at Songea)*

BAKARI SHABAN SIKA APPLICANT

VERSUS

NIKITA JOHN KIBOPILE RESPONDENT

Date of Last Hearing: 15/04/2021

Date of Ruling: 22/06/2021

RULING

I. ARUFANI, J.

The applicant filed in this court the application at hand seeking for extension of time to file in the court an appeal out of time. The applicant wish to appeal against the judgment and decree of the District Land and Housing Tribunal for Ruvuma at Songea (hereinafter referred as the tribunal) delivered vide Land Application No. 104 of 2018 dated 02nd June, 2020. The application is made under section 41 (2) of the Land Disputes Courts Act, Cap 216 R.E. 2019, section 19 (2) of the Law of Limitation Act,

Cap 89 R.E 2019 and section 95 of the Civil Procedure Code, Cap 33 R.E 2019.

The application is supported by the affidavit sworn by Maurice Seleman Mwamwenda, learned counsel for the applicant and the respondent opposed the application by filing in the court a counter affidavit sworn by him. When the application came for hearing the applicant was represented by Mr. Maurice Seleman Mwamwenda, learned advocate and the respondent was represented by Mr. Zuberi Maulidi, learned advocate.

The counsel for the applicant prayed the court to adopt the affidavit supporting the application and continue to state that, the applicant filed in this court another application seeking for extension of time to appeal out of time but they prayed to withdraw the same and filed the instant application in the court. He argued that, as stated in the case of **Emmanuel Bilinge V. Praxeda Ogweya and Another**, Misc. Civil Application No. 168 of 2012 HC at DSM cited by this court in the case of **Burkard Kayombo V. Mwanakombo Athumani**, Misc. Civil Application No. 3 of 2019 (both unreported) grant of extension of time is on the discretion of the court.

He went on arguing that, as deposed at paragraph 3 of his affidavit the applicant delayed to lodge appeal in the court within the time prescribed by the law because he delayed to get from the tribunal the necessary documents for lodging appeal in the court. He stated that, the current position of the law as stated in the case of **Lewina Benard Mgala V. Lojasi Mutuka Mkondya and Two Others**, Land Appeal No. 33 of 2017, HC at Mbeya (unreported) is that, there is no automatic exclusion of time spent in awaiting necessary documents for preparation of an appeal. He said that caused the applicant to file the instant application in the court to seek for extension of time to appeal out of time.

He argued that, the court is not required to base only on the reason for the delay contained in an application in considering whether to grant extension of time or not because as stated in the case of **Victoria Real Estate Ltd V. Tanzania Investment Bank and Others**, Misc. Civil Application No. 225 of 2014, CAT at DSM (unreported) the court is required to be satisfied there is sufficient reasons for extending the time. He told the court that, another reason caused the applicant to file the instant application in the court is the conspicuous errors and illegality of the

decision which if the application is not granted the applicant will suffer irreparable loss economically and psychologically.

He stated that, the illegality contained in the decision of the tribunal is that the application was filed in unknown jurisdiction as it was filed in the District Land and Housing Tribunal for Ruvuma at Songea while there is no such a tribunal. He said another illegality is about misjoinder of parties in the application. He said he believes the court has power to grant the applicant extension of time to file appeal in the court out of time and said the delay was not done intentionally or deliberately but was due to unforeseen reasons. At the end he prayed the application to be granted.

The counsel for the respondent prayed the court to adopt the counter affidavit of the respondent and told the court that, they are in agreement with the counsel for the applicant that extension of time to do anything required to be done under the law is on discretion of courts. He however stated that, the said discretion is required to be exercised judiciously. He said the court is required to exercise its discretionary power after the applicant demonstrates good cause for the delay.

The counsel for the respondent told the court that, although the applicant was required to account for each day of the delay but he has not done so in the affidavit supporting the application and in the submission made to the court by his counsel. He stated that, as deposed in the affidavit of the counsel for the applicant the decision which the applicant want to challenge if he will be granted extension of time was delivered on 10th June, 2020. He stated that, the applicant was required to account for all the period of the delay from the date when the decision was delivered until when the application was filed in the court.

He went on arguing that, after the applicant failed to account for each day of the delay the counsel for the applicant prayed the court to use another ground of illegality in the impugned decision of the tribunal. He argued that, the case of **Victoria** cited by the counsel for the applicant to support his argument is distinguishable from the circumstances of the application before the court. He said that case did not lay a general rule that the court is required to rely on other reason apart from the reason for the delay to appeal to grant extension of time.

He argued further that, although the counsel for the applicant has deposed at paragraph 7 of his affidavit that there is illegality in the

impugned decision of the tribunal but it is the position of the law that the alleged illegality is required to be apparent on the face of the record. He submitted that, despite the fact that it is deposed at paragraph 5, 6 and 8 of the affidavit supporting the application that there are conspicuous error and fraud in the impugned decision of the tribunal but the alleged error has not been pleaded in the affidavit supporting the application.

He argued that, the argument by the counsel for the applicant that there is illegality of the dispute to be filed in unknown jurisdiction was not raised in the affidavit supporting the application. He submitted that, the application was filed in a known jurisdiction that is why the counsel for the applicant did not raise the alleged point of illegality before the tribunal.

The counsel for the respondent submitted further that, the issue of accounting for each day of the delay to appeal within the time and the fact that if the applicant will not be granted extension of time he will suffer irreparable loss are the facts which are not within the knowledge of the counsel for the applicant but on the knowledge of the applicant himself. He prayed the court to base on the above stated reasons to find the applicant and his counsel have failed to demonstrate good cause for the delay to appeal within the time and dismiss the application with costs.

In his rejoinder the counsel for the applicant reiterated his submission in chief and stated that, it is a discretion of the court to grant or refuse to grant extension of time by exercising its discretionary power. He said the case of **Victoria** (supra) states clearly that, the court is required to see not only the reason for the delay but the reason for granting extension of time. He prayed the court to expunge the reasons which will be found are not meritorious and stick on the reasons which have merits. He stated that, being an advocate he is working on the information he received from the applicant and prayed the court to base on those reasons to grant the applicant extension of time to appeal out of time.

After carefully considered the rival submissions from the counsel for the parties the court has found the issue to determine in this application is whether the applicant was delayed by good cause to lodge his appeal in this court within the time prescribed by the law. The court has framed the above issue after seeing the proviso to section 41 (2) of the Land Disputes Courts Act upon which the application is made requires the court to be satisfied the applicant was prevented by good cause to file the appeal in

the court within the time prescribed by the law. For clarity purpose the stated proviso of the cited provision of the law states as follows:-

"Provided that, the High Court may, for the good cause, extend the time for filing an appeal either before or after the expiration of such period of forty five days."

From the wording of the above quoted provision of the law and as rightly stated to the court by the counsel for the parties, refusal or grant of extension of time to appeal out of time under the cited provision of the law is on the discretion of the court. That is because the word used in the cited provision of the law is the word "may" which when used in a provision of the law to confer function to be performed it connotes discretion and not mandatory. The court has also arrived to the above view after seeing it was stated by the Court of Appeal of Tanzania in the case of **Alliance Insurance Corporation V. Arusha Art Limited**, Civil Application No. 512/2 of 2016 (unreported) that:

"It is apparent that an application for enlargement of time within which to take any step in legal proceedings is entirely in the discretion of the court to grant or not to grant it."

The court is also in agreement with the counsel for the respondent that, the stated discretionary power of the court to grant or not to grant extension of time is supposed to be exercised judiciously. That position of the law can be seen in the case of **Ngao Godwin Losero V. Julius Mwarabu**, civil application no. 10 of 2015. CAT at Arusha (unreported), where the Court of Appeal of Tanzania stated that:-

"As the matter of general principle that whether to grant or refuse an application ... is entirely on the discretion of the court, but that discretion is judicial and so it must be exercised according to the rules of reason and justice"

The question to determine here is what is the meaning of the term "good cause" required to be shown to move the court to exercise its discretionary power to grant extension of time to appeal out of time? The meaning of the term "good cause" was given by the Court of Appeal of Tanzania in the case of **Bertha V. Alex Maganga**, Civil Reference No. 7 of 2016 (unreported) where the Court of Appeal 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 the factors the court is enjoined to consider in granting or refusing to grant extension of time the court has found the counsel for the applicant deposed in the affidavit supporting the application and argued in the submission he made to the court that, the applicant delayed to lodge appeal in the court within the time prescribed by the law because he delayed to get the necessary documents from the tribunal for lodging the appeal in the court. The counsel for the applicant deposed at paragraphs 2, 3 and 4 of his affidavit that, although the impugned decision was delivered on 02nd June, 2020 but the applicant was supplied with the proceedings of the impugned decision on 14th July, 2020, he was supplied with the judgment on 29th June, 2020 and the decree was supplied to him on 29th July, 2020.

The court has found that, although the applicant was supplied with the copy of the decree which was an important document for lodging the appeal in the court on 29th July, 2020 but the current application was filed in the court on 14th October, 2020 which is after the passing of a period of about 77 days. The court has found there is nowhere in the affidavit

supporting the application deposed what the applicant was doing for all the period from when he got the copy of the decree and other necessary documents for lodging appeal in the court to when the application at hand was filed in the court. The court has found as rightly stated by the counsel for the respondent the applicant was required to account for what he was doing for all days of his delay to file the appeal in the court.

The requirement to account for each day of the delay was emphasized in the case of **Bariki Israel V. R**, Criminal Application No. 4 of 2011 (Unreported) which was quoted by the Court of Appeal of Tanzania in the case of **Tanzania Coffee Board V. Rombo Millers Ltd**, Civil Application No. 13 of 2015 (Unreported) where it was stated inter alia that, in an application for extension of time, the applicant is required to account for each day of the delay.

The court has seeing it is indicated at the title of the affidavit supporting the application and it was also stated by the counsel for the applicant in his submission that, the applicant filed in the court Miscellaneous Land Application No. 9 of 2020 but that application was withdrawn from the court on 29th September, 2020. However, the stated fact was not deposed in the affidavit supporting the application. To the

view of this court the stated fact was supposed to be deposed in the affidavit and not to be hanged on the title of the affidavit.

The court has also found that, although the deponent of the affidavit supporting the application deposed at paragraph 4 of the affidavit that the blame for the applicant's delay to appeal within the time prescribed by the law should be thrown to the tribunal which delayed to supply him with the necessary documents for lodging appeal in the court but there are some days the applicant has not stated what he was doing to show he acted diligently and without undue delay as stated in the case of **Bertha** (supra).

The court has come to the above finding after seeing that, although it is deposed in the affidavit supporting the application that the last document to be supplied to applicant was a decree which was supplied to him on 29th July, 2020 but Miscellaneous Land Application No. 9 of 2020 which was withdrawn from the court by the applicant was filed in the court on 21st August, 2020 which is after the elapse of 23 days. In addition to that the court has found that, although the said application was withdrawn from the court on 29th September. 2020 but the current application was filed in the court on 8th October, 2020 which is after the elapse of about 10

days and the applicant has not accounted for all those days as required by the law stated in the case of **Tanzania Coffee Board** (supra).

Therefore although it might be accepted the applicant was delayed by the tribunal to file the appeal in the court within the time but he has a share of blame to bear as he has not stated what caused him to fail to file the previous applications in the court immediately after getting the required documents and what delayed him to file the current application in the court immediately after withdrawn the previous application from the court. That makes the court to agree with the counsel for the respondent that, the applicant has not accounted for each day of his delay to take the required steps.

Although the court has found the applicant has not accounted for each day of the delay as required by the law but it is in agreement with his counsel that, as stated in the case of **Victoria** (supra) the court is not required to see only the reason for the delay has been shown but also to see whether there is sufficient reason for granting extension of time. While being guided by the stated principle of the law the court has found it is deposed at paragraphs 5, 6 and 7 of the affidavit supporting the application and it was argued before the court by the counsel for the

applicant that, there are conspicuous error and illegalities in the impugned decision of the tribunal and the decision was fraudulently obtained.

Despite the fact that the counsel for the respondent distinguished the cited case of **Victoria** from the case at hand by stating it did not lay a general principle that the court is not required to see only there is good cause for the delay but also to determine whether there is good cause for extending the time but find the stated principle of the law was laid in other cases cited in the case of **Victoria**. The court has found it was stated in the case of **Victoria** that, the court seized with duty to consider an application for extension of time is required to decide not only there are sufficient reasons for the delay but also for extending the time to take the intended steps.

To the view of this court one of the reasons which can be used to grant extension of time is when is found there is illegality in the impugned decision as deposed in the affidavit supporting the application and argued before the court by the counsel for the applicant. That principle of the law has been stated by our courts in numerous cases which some of them are **The Principal Secretary, Ministry of Defence and National Service V. Devram Valambia**, [1992] TLR 185 and **VIP Engineering and**

Marketing Ltd & Others V. Citibank Tanzania Ltd, Consolidated Civil References No. 6, 7 and 8 of 2006 CAT at DSM (unreported) cited in the stated case that, illegality may in a fit cases, constitute good cause for granting extension of time.

The position of the law in relation to the use of illegality alleged is in an impugned decision is as rightly argued by the counsel for the respondent that, in order for ground of illegality to be relied upon to grant extension of time it must be apparent on the face of the record. That position of the law was stated clearly by the Court of Appeal of Tanzania in the case of **Lyamuya Construction Ltd V. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) where it was stated that:-

"Since every party intending to appeal seeks to challenge a decision either on point of law or facts, it cannot in 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 points 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.”

While being guided by the position of the law stated in the above quoted excerpt the court has found that, the counsel for the applicant told the court the error and illegalities the applicant is alleging is in the impugned decision of the tribunal is that, the dispute was filed in unknown jurisdiction, there is misjoinder of parties in the matter and the decision was obtained fraudulently. The court has found the alleged error and illegalities, especially the one relating to jurisdiction of the tribunal to entertain the matter are serious allegations which cannot be ignored and said are not apparent on the face of the record.

To the view of this court they are serious allegations which have make the court to find it is proper to invoke its discretionary power in the current application to grant the applicant extension of time to lodge in the court an appeal out of time. To the view of this court the intended appeal will enable the court to determine whether the impugned decision of the tribunal contain the alleged error and illegalities and if the answer will be in affirmative the decision and record of the tribunal will be put right. The court has also arrived to the above view after seeing that, it has not been

stated anywhere if the applicant will be granted extension of time is seeking from the court the respondent will be prejudiced in any manner.

In the premises the application of the applicant is hereby granted. The applicant is given fifteen (15) days from the date of this ruling to file in the court his intended appeal and each party to bear his own costs in this application. It is so ordered.

Dated at Songea this 22nd day of June, 2021



I. Arufani
I. ARUFANI

JUDGE

22/06/2021

Court:

Ruling delivered today 22nd day of June, 2021 in the presence of the applicant in person and in the presence of Mr. Eliseus Ndunguru, advocate for the respondent. Right of appeal is fully explained.



I. Arufani
I. ARUFANI

JUDGE

22/06/2021