

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

PC. CRIMINAL APPEAL NO.01 OF 2021

(Arising from Misc Criminal Application No. 6 of 2020 of Bunda District Court)

NYAKAMELA MAGOTI.....APPELLANT

VERSUS

MADARAKA MASANJA RESPONDENT

JUDGMENT

4th & 25th August, 2021

Kahyoza, J.

The district court of Bunda dismissed **Nyakamela Magoti's** application for extension of time to appeal against the decision of the primary court. Aggrieved, **Nyakamela Magoti** (the appellant) appealed to this Court complaining that the district court failed to consider the point of illegality as a ground for extension of time. **Madaraka Masanja**, (the respondent) opposed the application contending that the law does not provide for an appeal against the ruling dismissing an application for extension of time, that the appellant failed to account for the period of delay of four years, that the alleged illegality is unfounded and that the issue of illegality cannot stand alone to support an application for extension of time.

The issues are whether the party aggrieved by the decision of the district court refusing to extend time may appeal to the High Court and whether the appellant adduced sufficient reason for extending time within which to appeal.

Briefly, the background of this matter is that **Madaraka Masanja** and **Nyakamela Magoti** had a land dispute before the ward tribunal. The ward tribunal decided in favour of **Madaraka Masanja**, ordering **Nyakamela Magoti** to vacate. **Nyakamela Magoti** did not vacate the disputed land or appeal against the decision of the ward tribunal. After the decision of the ward tribunal, **Madaraka Masanja** instituted criminal trespass proceedings against **Nyakamela Magoti** in the primary court. The primary court found **Nyakamela Magoti** guilty, convicted and sentenced him to three months' imprisonment for the offence of criminal trespass. **Nyakamela Magoti** did not appeal.

It is on record that after **Nyakamela Magoti** was convicted with the offence of criminal trespass, she did not vacate the disputed land. In 2017 **Nyakamela Magoti** was again charged and convicted with the offence of disobedience of lawful order, convicted and sentenced to pay a fine or serve an imprisonment of three months. **Nyakamela Magoti** did not appeal against that decision. Yet, in 2020 **Nyakamela Magoti** appeared before the primary court charged with the offence of disobedience of lawful order. The primary court convicted her and sentenced her to pay a fine of 200,000/= or serve an imprisonment term of three months.

Four years after the primary court delivered its judgment, **Nyakamela Magoti** instituted an application for extension of time to appeal against the decision of the primary court. **Nyakamela Magoti** intends to appeal against the conviction and sentence in the charges of criminal trespass.

Is this Court clothed with jurisdiction to entertain an appeal against the decision of the district court refusing to extend time to appeal?

Before this Court is an appeal lodged by **Nyakamela Magoti** against the decision of the district court refusing to extend to time for her to appeal against the decision of the primary court. Mr. Makowe, the respondent's advocate opposed the appeal on the ground that there is no law which gives this Court mandate to entertain the appeal. During the hearing, Mr. Makowe submitted that this Court has no jurisdiction to entertain an appeal from the decision of the district court refusing to extend time. He referred this Court to section 25(1) of the Magistrates' Courts Act, [Cap. 11 R.E. 2019] (the MCA).

The appellant's advocate Ms. Mary Joachim replied that this Court has mandate to determine the appeal as the person aggrieved by the decision of the court has a right to appeal.

The district court has mandate to hear an application for extension of time to appeal against the decision of the primary court. See section 20 (4) of the MCA, which states-

20.-(4) Notwithstanding the provisions of subsection (3)-

(a) the district court may extend the time for filing an appeal either before or after such period has expired; and

In this case, the district court exercised its jurisdiction to hear and determine the application of extension of time and dismissed it. The respondent's advocate's contention is that this Court has no mandate to entertain the appeal. I examined section 25 of the MCA referred to this Court by the respondent's advocate and found that this Court has power to entertain appeals from the decision of the district court in its appellate or revision jurisdiction. It is true that the decision of the district court, which is being challenged on the face of it is not the decision of the district court in its appellate or revision jurisdiction. However, upon scrutiny, I found that the decision of the district court was made under section 20(4) of the MCA. Section 20(4) is under subpart (b) titled "*Appellate and Revisional Jurisdiction of District Courts*" of Part III of the **MCA**. Thus, the power of the district court to entertain an application for extension of time is among its appellate and revisional jurisdiction powers.

The law generally permits the person aggrieved by the decision of the district court ***exercising its appellate or revisional jurisdiction*** to appeal to the High Court. See section 25(1) (b) of the MCA, which stipulates that-

"25.-(1) Save as hereinafter provided-

(a).....

*(b) In any other proceedings any party, **if aggrieved by the decision or order of a district court in the exercise of its***

appellate or revisional jurisdiction may, within thirty days after the date of the decision or order, appeal there from to the High Court; and the High Court may extend the time for filing an appeal either before or after such period of thirty days has expired.” (emphasis added)

In the upshot, I find that this Court is clothed with jurisdiction to entertain an appeal against the decision of the district court refusing to extend time to appeal.

Did the district court err not to extend time?

Given the appellant’s advocate submitted that the appellant was convicted and sentenced on the 14th April, 2015. She decided not to appeal until October 2020 when she raised from deep slumber and lodged an application for extension of time to appeal out of time. She initiated the appeal process 5 years and 5 months after she was convicted.

The appellant’s ground to support the application for extension of time is that the decision of the primary court was tainted by illegality. She prayed time to be extended so that the district court may deal with the illegality.

The appellant’s advocate Ms. Mary Joachim submitted with vigor and authority that there was illegality in the decision of the primary court as the primary court had no jurisdiction to hear land disputes. She submitted that it is trite law that where an illegality of the decision is raised time must be extended to give an opportunity to the party making such allegation to have the issue considered.

She added that the once the issue of illegality is raised as the ground for extending time, the applying party is not required to account for all days of delay. To support her arguments, she cited the case of **Arunaben Chaggan Mistry v. Naushad Mohamed Hussein and 3 Others**, Civ. Application No. 6/2016 at Arusha.

The respondent's advocate Mr. Makowe submitted that there is no any illegality. He contended that there was no land dispute involving the parties pending. He submitted that the parties had a land dispute before the ward tribunal which was decided in favour of the respondent. The appellant trespassed criminally to the respondent's a land after the ward tribunal's decision. He added that the appellant did not appeal or apply for revision to the district land and housing tribunal.

Mr. Makowe contended further that the delay was inordinate and the appellant did not account for the period of delay. He submitted that illegality cannot stand alone as a ground of delay. He contended that where the court finds that there is illegality but the applicant did not account for an inordinate delay, it holds that illegality is not sufficient to support an application for extension of time. He anchored his arguments to the decisions in the cases of **Jacob Shija v. M/S Regent Food & Drinks Limited v. The Mwanza City**, Civ. Application No. 440/08 of 2017 CAT (unreported) and **Jamila Majala v. Hamza Abasi and 2 Others** Civ. Application No. 585/01 of 2018 CAT (unreported).

In her rejoinder, Ms. Mary advocate submitted that it was true that the parties had a land dispute before the DLHT and the respondent won the

case. She contended that the party who wins a land dispute must apply for execution and not otherwise.

In deed the delay is inordinate. A delay of five years and five months to take action is by all means inordinate. It is an established position of the law that litigation has to come to an end. It cannot be an open ended, otherwise the respondent would be prejudiced. See **Stephen M. Wasira v. Joseph Sinde Warioba and Attorney General** [1999] TLR 334 and **ArunabenChaggan Mistry v. Naushad Mohamed Hussein and 3 Others**, Civ. Application No. 6/2016 at Arusha.

It is trite law that litigants must follow procedural rules of the court to act timely and when they fail to so should not show unnecessary delay when seeking extension of time. This stance was pronounced in the case of **Jacob Shija v. M/S Regent Food & Drinks Limited v. The Mwanza City**, Civ. Application No. 440/08 of 2017 CAT (unreported). It is also settled that those who come to court must not show unnecessary delay in doing so; they must show great diligence. See the case of **Dr. Ally Shabbay v. Tanzania Bohora Jamaat** [1997] TLR 290. **The law serves the vigilant, not those who sleep.** This maxim was derived from the Latin maxim **"vigilantibus non dormientibus jura subvernunt"**. The maxim is in four walls with the decision in **Luswaki Village Council and Paresui Ole Shuaka Vs Shibesh Abebe**, Civ application No 23/1997 (Unreported) where the Court underscored a need for parties to be diligent and vigilant by stating that-

"...those who seeks the aid of the law by instituting proceedings in court of law must file such proceedings within the period prescribed

by law...Those who seeks the protection of the law in the court of justice must demonstrate diligence”

The above notwithstanding, time may be extended as submitted by the appellant’s advocate if the decisions sought to be challenged is tainted with illegality. see the case of **Arunaben Chaggan Mistry v. Naushad Mohamed Hussein and 3 Others** (supra) where the Court of Appeal held that-

“The legal position is settled. When there is an allegation of illegality, it is important to give an opportunity to the party making such allegation to have the issue considered.”

The Court of Appeal cited its earlier decision in the case of the **Principal Secretary, Ministry of Defence and National Service v. Devram Valambia** [1992] T.L.R. 182 it was stated thus: -

“In our view when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty even if it means extending the time for the purpose to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record right.”

Reading the decisions of the Court of Appeal, it is implied that where **there is illegality in the impugned decision**, time must be extended regardless of the length of delay to rectify the illegality. However, the alleged illegality *must be that of sufficient importance and must be apparent on the face of the record*. Thus, the alleged illegality must be something, which can be proved from the face of record. This stance was alluded in **Ngolo Godwin Losero v Julius Mwarabu** Civil Application No. 10/2015 CAT at

Arusha (unreported), where the Court of Appeal reiterated its decision in **Lyamuya Construction Company Ltd Vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application 2/2010 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 Valambia 's case, the court meant to draw a general principle 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 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 Court in the case Certainly, it will take a long drawn process to decipher from the impugned decision the alleged misdirection or non-directions on the points of law."* (emphasis is added)

The appellant's advocate alleged that the primary court's decision was illegal as it had no jurisdiction over land matter. The respondent's advocate argued that there was no land dispute. He stated that the primary court entertained criminal proceedings of trespass after the ward tribunal had determined ownership. The appellant's advocate conceded that the ward tribunal resolved the land dispute between the appellant and the respondent in favour of the respondent.

I am alive of the fact that, it is not the task of this Court at this stage to determine the illegality but to find out whether there exists the alleged illegality on the face of record. It is settled, as shown above, that the alleged illegality must be clearly apparent on the face of the impugned decision. The primary court entertained the case of criminal trespass and not the land dispute. The ward tribunal determined the land dispute in the respondent's favour prior to the institution of the criminal proceedings. The appellant did not appeal against the decision of the ward tribunal. She was satisfied that the disputed land did not belong to her.

I am unable to appreciate the contention that the primary court's decision is tainted with illegality. Further to that I facts to establish that the alleged illegality is apparent on the face of record and is *of sufficient importance* to warrant for extension of time. I am therefore, of the considered view that the alleged illegality, if does exist, is neither apparent on the face of judgment to be appealed against nor of sufficient importance to warrant extension of time.

In the end result, I find the appeal without merit and dismiss it with costs.

It is ordered accordingly.

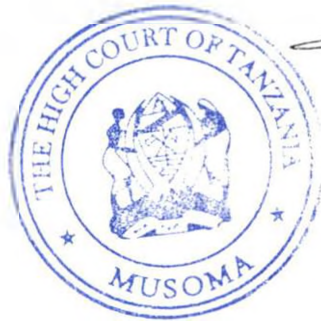


J.R. Kahyoza,

Judge

25/8/2021

Court: Judgments delivered in the presence of Mr. Paul Mng'arwe, the appellant's advocate and Mr. Makowe, the respondent's advocate. B/C Makunja present.



J.R. Kahyoza

Judge

25/8/2021