

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA

MISC.LAND APPLICATION NO. 112 OF 2021

*(Originating from the District Land and Housing Tribunal for Rungwe at
Tukuyu, Appeal No.51 of 2019, Originating from Mpombo Ward Tribunal
Land Case No. 18 of 2019)*

OSIA MWALILINO..... APPLICANT

VERSUS

JONASI MWALYOJO.....RESPONDENT

RULING

NGUNYALE, J.

This is an application for extension of time, filed by the applicant. The application is brought by way of chamber summons under section 38 (1) of the Land Dispute Courts Act, Cap 216 R. E 2019. The applicant applied for the following orders;

- (a) That this honourable court be pleased to extend time within which the applicant can lodge his appeal out of time.*
- (b) Any relief this honourable court may deem fit and just to grant.*

The same was supported by an affidavit sworn by the applicant. In response the respondent filed his counter affidavit, sworn by the respondent where he resisted the application.

The parties argued the application by way of written submissions. The applicant was represented by the learned Counsel K.K.Gamba. In his submission the applicant counsel prayed the contents of the affidavit to form part of his submission. He argued that the applicant being dissatisfied with the decision and order of the DLHT before Mzerere (chairman) applied before this Court for extension of time but the same was dismissed. Hence this application for extension of time. The applicant counsel submitted that it is trite law in applications for extension of time the applicant is to meet conditions as stipulated in the case of **Lyamuya Construction Company Limited Vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application Np. 2 of 2010.

In this application the applicant has filed an application for extension of time on the 16 /12/2021 the day after the ruling was delivered before the parties. Therefore, the applicant was diligence and not showing any apathy or sloppiness in persuasion of his legal right to pursue his appeal before this honourable court. The counsel submitted further that the

applicant has accounted for every day of the delay, and that the delay was not inordinate.

He further submitted that when there is a technical delay, the Court has the power to allow the applicant to file his appeal out of time. In this application the applicant has filed the application for extension of time before this Court, and the matter was before Hon. Mongella, J. But when the matter was coming for mention on 28/7/2021 it was observed that the appeal is still within time and the application for extension of time was marked withdrawn and the appeal was filed in this court.

The appeal was filed and was before Ngunyale, J. the learned Judge did struck out the appeal for being time barred. He cited the case of **Fortunatus Masha Vs. William Shija and Another** [1997] T.L.R 154. And the case of **Haji Ali Bachoo Vs. Makunja C. B&Advocate**, Misc. Civil Application No.69 of 2020, in the High Court of Tanzania at Mwanza District Registry the decision of **Victor Rweyemamu Binamungu Vs. Geoffrey Kabaka &Another**, CAT, Civil Application No. 602 /2008(unreported). From the above cited cases the applicant counsel submitted that the struck out of the appeal by the High Court was not entirely by the way of negligent but it was due to a technical delay. That,

denying the applicant his application for extension of time is tantamount to denying the his right to be heard.

He further submitted that when there is a ground of illegality on the decision ought to be challenged, the Court has to allow the extension of time so that the applicant can challenge the said illegality claimed in the impugned decision. He referred the case of **The Principal Secretary, Ministry of Defence and National Service Vs. Devram Valambhia** (1992) T.L.R 182. In this case the applicant wants to challenge the decision of DLHT where there was illegality that the assessors were not invited and give out their opinion as required by the law. The applicant counsel prays before this Court to grant the application because the applicant was very diligent to pursue his case in this Court.

In reply the respondent who appeared in person, unrepresented submitted that the matter originates from the Mpombo ward tribunal in Land Case No. 18/2019, unsuccessful the appellant appealed before Rungwe DLHT at Tukuyu in land appeal no. 51/2019 where the matter was held in favour of the respondent. The decision was delivered on 27/3/2021, and the documents which the appellant intends to appeal was ready for collection on 27/5/2021. The applicant counsel said that he was engaged on 31/5/2021 almost 3 days after the applicant received the

Court documents. The learned counsel knowing that he was within time instead of lodging an appeal, negligently on 1/6/2021 he lodged an application no.37/2021 seeking leave for extension of time. When the matter was coming for mention on 28/7/2021 the Court raised the issue *suo mottu* that the application was pre mature.

He further submitted that the applicant's advocate negligently filed an appeal no.30/2021 which was before Hon. Ngunyale, J. the same was dismissed for being filed out of time. The learned advocate came again with this application no.112/2022 seeking leave for extension of time within which can file appeal out of time. That the applicant counsel in his submission cited irrelevant cases over the matter at hand. It is well settled principle that in order for the court to allow the application, the applicant should state sufficient reason. In this case the delay of the matter was caused by the advocates negligent which was done almost three times. The Court is aware that the applicant is represented by the learned advocate who knows the rules of procedure which are to be adhered to. Thus, the negligent made by the Counsel is fatal and there is no room for the Court to grant extension of time.

The respondent prayed the Court to dismiss the application with costs.

In his rejoinder the applicant's counsel reiterated what he submitted in the submission in chief. The only thing he argued is that the applicant lodged his appeal on time on 28/6/2021 he lodged his appeal online first. Unfortunately, the Court stamped the day the actual document was received on 4/8/2021 and not the date it was filed online. Therefore, the delay of the applicant was not made negligently.

Having summarised the submission of both parties, I find **two issues** to be determined, the first issue is whether there are sufficient reasons for the Court to grant extension of time, and the second issue is whether there is illegality on the decision of the DLHT.

Regarding the first issue, as to whether the applicant has adduced sufficient reasons for the Court to grant his application for extension of time. The law section 38(1) of the Land Disputes Court Act, cap 216 R.E.2019 provides;

"Any party who is aggrieved by a decision or order of the District Land and Housing Tribunal in the exercise of its appellate or revisional jurisdiction, may within sixty days after the date of the decision or order, appeal to the High Court

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

This means that the High Court upon establishing good cause may extend time for filing an appeal before or after expiration of 60 days which is the period limitation provided by the law.

It is settled law that grant of the application of extension of time is the discretion of the court. But the applicant who intends to move the court must show that there is good cause. What constitutes good cause depends on the circumstances of each particular case. There is no specific definition of it. In the case of **Oswald Masatu Mwaizarubi V. Tanzania Fish Processing Ltd**, Civil Application No.13 of 2010, Court of Appeal of Tanzania held that;

'...what constitutes good cause cannot be laid down by any hard and fast rules. The term good cause is a relative one and is dependent upon the party seeking extension of time to provide the relevant material in order to move the court to exercise its discretion...'

Also, there are certain conditions to be taken into account when determining whether the applicant has shown good cause. As it was stated in the case cited by the applicant counsel above, the case of **Lyamuya Construction Company Limited (supra)**;

(a) The applicant must account for all the period of delay,

(b) The delay should not be inordinate,

(c) The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take, and,

(d) If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged.

In this application at hand the applicant has adduced reasons for the delay to file his application as found in the sworn affidavit by the applicant. That the delay was technical one, on the ground that the judgement by the trial tribunal was delivered on 27/3/2021 and he was supplied with the copy of judgement and decree on 27/5/2021. That on 31/5/2021 he engaged an advocate who filed an application on 1/6/2021 for extension of time to file an appeal. On 28/10/2021 when the matter was scheduled for mention, it was noted that the intended appeal was within time, hence the application for extension of time was marked withdrawn before Hon, Mongella,J. On the same date the applicant's counsel filed an appeal and it was Misc. Land Appeal No.30/2021 before Ngunyale, J where the preliminary objection was raised by the respondent that appeal was time barred. On 15/12/2021 the respondent PO was sustained and the appeal was struck out. Therefore, the applicant stated that the delay was neither by negligence nor apathy but rather it was technical one.

In the case of **Yusuf Same and Another Vs. Hadija Yusuf**, Civil Appeal No. 45 of 1998(unreported) it was stated that;

*"Generally speaking, an error made by an advocate through negligence or lack of diligence is not sufficient cause for extension of time. This has been held in numerous decisions of the court and other similar jurisdiction...But there are times, depending on the overall circumstances surrounding the case, where extension of time may be granted even where there is some elements of negligence by the applicant's advocate as was held by a single justice of the court (Mfalila,J.A. as he then was) in **Felix Tumbo Kisima V.TTCL Limited and Another**, CAT, Civil Application No.1 of 1997(unreported)".*

Therefore, I am of the firm view with what was submitted by the applicant's counsel that the delay was technical one which attracts a different approach from the general rule stated in the case above.

In the issue of advocate negligence, the applicant from the date when he was supplied with the Tribunal records, he consulted his learned advocate, in order to assist him in pursuing his right. Therefore, in this case at hand it is my opinion that there is an exceptional circumstance because the alleged negligence on the part of the counsel may constitute a good cause for extension of time. In this case the applicant had made efforts in pursuing the matter and he travelled from Rungwe to Mbeya to seek legal assistance. Thus, the negligence done by the counsel, in the first instance of the application is not the fault of the applicant. I think the applicant will be prejudiced if the application will not be granted.

It was proved that the applicants advocate filed an application for extension of time while within time. This proved that the applicant's

counsel was negligent as submitted by the respondent counsel. This fault of the Counsel should not fault the applicant in seeking his right.

Therefore, the applicant has established good cause as he succeeded to account for each day of delay, and the delay was ordinate.

Regarding the second issue on the issue of illegality, that whether there was illegality on the judgement of DHLT.

It is a settled law that when the issue of illegality is raised as a reason for applying for extension of time, such reason amount to good cause. In the cited case by the applicant counsel, the case of **The Principal secretary, Ministry of Defence and National Service**(supra), the court held that;

"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".

Therefore, the issue of illegality by itself suffices for an extension of time. Such illegality must be on the face of record such as the question of jurisdiction, and not on what would be discovered by long drawn argument or process. As it was held in the case of **Lyamuya Construction Company Limited**(supra), that if the court feels that there are other sufficient reasons, such as the existence of a point of law

of sufficient important; such as illegality of the decision sought to be challenged. The Court may grant extension of time.

In this application at hand there is illegality on the issue of assessors. The applicant submitted that the assessors were not invited and give out their opinion as required by the law. The respondent did not submit in this issue of illegality. But having perused the trial tribunal record on 17/7/2020 it was ordered that there is no assessors opinion. On 14/8/2020 it was ordered that assessors opinion not availed to the parties as one of them did not write the opinion. On 9/10/2020 the Tribunal did set date of judgment to be on 30/10/2020. From 9/10/2020, there is no any other Coram. The records are silent about the opinion of the assessors. Surprisingly, the judgement was delivered on 27/03/2021 and the same was certified on 27/5/2021 without any Coram. Nowhere in the trial tribunal records showing the assessors opinions were availed before the parties. Certainly, there is illegality on point of law which need to be determined by the Court on appeal. It is a settled position of the law as stated by the Court of Appeal in **Tubone Mwambeta Vs. Mbeya City Council**, Civil Appeal No.287 of 2017(unreported) that;

".....such opinion must be availed in the presence of the parties so as to enable them to know the nature of the opinion and whether or not such opinion has been considered by the chairman in the final verdict".

For that reason, on prima facie basis illegality has been established by the applicant which warrants grant of extension of time. Therefore, the applicant has to be granted his application for the records to be made clear about role of assessors before the Tribunal.

Therefore, the applicant has adduced sufficient reason for the Court to grant extension of time, 30 days from today are given for the intended appeal to be filed out of time. No order to costs.



D. P. Ngunyale
Judge
31/05/2021

Ruling delivered this 31st day of May 2022 in presence of the applicant represented by Kelving K. Gamba learned Counsel and the respondent in person.



D. P. Ngunyale
Judge
31/05/2021