

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

MISC. LAND APPLICATION NO. 132 OF 2020

(Arising from Misc. Land Application No. 86 of 2018 and Misc. Land Appeal No. 11 of 2016 High Court of Tanzania, at Mbeya Originated in the District Land and Housing Tribunal for Kyela in Land Appeal No. 18 of 2015, Original Land Case No. 34 of 2015 in Kajunjumele Ward Tribunal)

RICHARD LUPOGO KATOKI.....APPLICANT

VERSUS

EDDAH KATOKI.....RESPONDENT

RULING

Date of last Order: 24.03.2022

Date of Ruling: 20.05.2022

Ebrahim, J.

The applicant RICHARD LUPOGO KATOKI instituted the instant application seeking for this court to grant an extension of time to lodge an application for a certificate on point of law so as to appeal to the Court of Appeal of Tanzania. The application was made under section 11 (1) of the Appellate Jurisdiction Act, Cap. 141 R.E 2019. It was supported by an affidavit sworn by the applicant himself.

Brief facts of the case are that; the respondent herein sued the applicant before the Ward Tribunal for invading a farm. The Ward Tribunal decided in favour of the respondent. The applicant unsuccessfully appealed to the District Land and Housing Tribunal for Kyela, at Kyela through Land Appeal No. 18 of 2015. Being aggrieved by the decision of the DLHT, the applicant filed a second appeal in this court vide Miscellaneous Land Appeal No. 11 of 2016. The appeal was dismissed for want of prosecution. Making sure that he pursues his right he made an application for setting aside of a dismissal order and restoration of the appeal vide Miscellaneous Land Application No. 86 of 2018. Unfortunately, on 23/12/2019 the same was dismissed for want of sufficient grounds.

Again, the applicant felt discontented, he lodged a notice of appeal to the Court of Appeal of Tanzania. He also applied for copies of ruling and proceedings. Understanding that, in order to appeal to the CAT, he has firstly required to apply for certificate on a point law he found himself late to do so. The applicant thus filed the instant application.

The application was heard by way of written submissions. When parties were appearing before the court for necessary

orders and on the date when the application was scheduled for written submissions, the applicant appeared in person and unrepresented whereas the respondent was represented by advocate Tumaini Amenye. However, it appears that both parties drafted and filed their respective submissions personally.

Submitting in support of the application, the applicant started by notifying this court that the respondent did not object the application since she did not file any counter affidavit as required by the law. The applicant thus, prayed for *ex parte* ruling.

Regarding the concern that the respondent did not file a counter affidavit, the respondent replied that she filed it as soon as she received the applicant's application.

I have perused the record; I did not find any counter affidavit. Though the respondent claims to have filed one, she did not state when the same was filed in court. She did not also state if she remained with a copy or tender the copy for court's approval. Nevertheless, the position of the law on the failure to file a counter affidavit is settled. The respondent is deemed to have not contested the factuality of the affidavit. The omission to file a counter affidavit does not render the application uncontested as to deny the respondent a right to address the court on the merit or

otherwise of the application on issue of law; see the observation of this court which I fully subscribe to in the case of **Fatuma Ally Mohamed vs Mohamed Salehe**, Misc. Land Application No. 365 of 2019 High Court (unreported).

In light of the above deliberation and position of the law, the respondent having failed to file a counter affidavit is not entitled to submit on factual issues of this application except on matter of law only.

In that circumstance, I move to consider the merits of the application by looking on the submissions of both parties with limitation to what is alluded herein above. The issue for determination is whether the applicant has established sufficient cause to warrant this application?

It is a settled principle that granting or refusing to grant extension of time is absolutely the court's discretion. Nevertheless, the same has to be judiciously exercised upon sufficient cause being shown. See the case of **Benedict Mumello vs Bank of Tanzania**, Civil Application No. 12 of 2012 CAT (unreported).

In the application at hand, the applicant has advanced two grounds for this court to grant the extension of time; **one** is sickness the result of which was failure to get money for pursuing the

processes of the court, and **two** is illegalities. The applicant in his affidavit and submissions claimed that he felt sick soon after lodging notice of appeal and after requesting for the copies of ruling and proceedings that is on 06/01/2020. He attached what he called medical certificate form Genesis Hospital at Kyela (i.e annexure RLK 4).

As to the illegalities which are contained under paragraph 9 of the affidavit, the applicant claimed that first illegality is the denial of this court to consider medical report in Miscellaneous application No. 11 of 2016. According to him medical report which he submitted when he had been seeking for restoration of Misc. Land Appeal No. 11 of 2016 was supposed to be acted upon than neglecting it as this court did in Misc. Land Application No. 86 of 2018.

Second illegality is that the DLHT gave its decision without the opinion of assessors. The applicant contended that the DLHT violated the requirement of **section 23 (2) of the Land Disputes Courts Act, Cap. 216 R.E 2019.**

Another illegality is that the Trial Ward Tribunal gave its decision without opinion of the members. It was the applicant's contention that in Land Case No. 34 of 2015 the trial Tribunal failed

to abide to section 4 (4) of the Ward Tribunal Act which requires members of the Tribunal to vote and the decision to be that of the majority.

On her part, the respondent generally argued that the applicant did not account for each day of delay as per the requirement of the law. She thus, prayed for this court to dismiss the application with costs.

Having considered the submissions by the parties, it is my concerted view that the applicant's reason of sickness does not constitute sufficient ground for grant of this application. This is because, the annexure RLK 4 shows that the applicant attended the hospital i.e Genesis Hospital on 6th and 7th day of January 2020. The present application was filed in court on 15th December 2020. This means it was filed after a lapse of eleven months. The applicant did not state what he was doing at all these months. Moreover, the applicant did not state how long the sickness persisted or when he recovered.

However, under paragraph 8 of the affidavit, the applicant deponed that he spent a lot of money in hospital and since court process needs money he had none. That reason by the applicant in my view is hard to prove and this court cannot consider as a

sufficient reason for the delay. This is because the applicant did not state how much money he used, and the extent it hindered him to file the application. He did not also state how expensive it was in filing the application or in prosecuting the same.

Regarding the ground of illegality, I am aware of the stance of the law that where an illegality is claimed, the court should readily grant the application. See the decisions in the cases of **Principal Secretary, Ministry of Defence and National Service vs. Devram Vallambia** [1992] TLR 185, **Motor Vessel Sepideh and Pemba Island Tours and Safaris vs. Yusuf Moh'd Yusuf and Ahmad Abdullah**, Civil Application No. 91 of 2013 and **Arunaben Chagan Mistry vs. Naushad Mohamed Hussein and 3 Others**, Civil Application No. 6 of 2016 (all unreported).

Nonetheless, it is also settled principle that illegality must be apparent on the face of the record. See the case of **Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) the CAT 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 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."

In the matter at hand the applicant's claim of illegality is rather farfetched seeking to hide behind her unsubstantiated delay. As alluded earlier, the applicant attached a medical certificate of January 2020 whilst the present application was filed in December 2020. The fact that illegality cannot be used on matters that require further consideration, interpretation and adjudication unlike issues of jurisdiction etc. Most importantly, illegality cannot be used by negligent parties or to relitigate cases which a party is clearly seen to have initially lost interest in like the instant case. Going through the reasons for the dismissal by hon. Ndunguru, J, it is clear that the applicant simply seeks to drag the other party into endless litigations.

Additionally, the first claimed illegality that is the non-considering of the medical report by this court does not constitute the issue of law which can be termed as illegality, rather it is the matter of fact which need be proved by evidence.

Furthermore, considering the period the applicant delayed, considering also one of the factors underscored in **Lyamuya's case** (supra), that is, the applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take, I find that the applicant has failed to demonstrate sufficient reason worth for this court to grant extension of time.

Owing to the above findings, I hereby dismiss the application with costs.

Ordered accordingly.



Mbeya
20.05.2022

A handwritten signature in blue ink, appearing to read "R.A. Ebrahim", is written over a horizontal line.

R.A. Ebrahim
JUDGE

Date: 20.05.2022.

Coram: Hon. P.A. Scout, Ag -DR.

Applicant: Present.

Respondent: Absent.

For the Respondent:

B/C: Patrick Nundwe.

Court: Ruling is delivered in the presence of the applicant with the absent of the respondent in Chamber Court on 20/05/2022.



A.P. Scout

Ag-Deputy Registrar

20/05/2022

**DEPUTY REGISTRAR
HIGH COURT OF TANZANIA
MOEVA**