

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

MISC. CIVIL APPLICATION NO. 95 OF 2021

(Arising from the Ruling of the District Court Kinondoni dated 13/09/2004, in Civil Appeal No.77/2002 before Hon. Kisseto, SDM and Madai No.10 /2002 of Kinondoni Primary Court)

HASSAN OMARY MFAUME suing as Attorney of Fatuma Said APPLICANT

VERSUS

ABDALLAH KHATIBU.....RESPONDENT

RULING

Date of last order: 01/06/2022

Date of Ruling: 24/06/2022

E.E. KAKOLAKI, J.

The applicant in this application is seeking for an order of extension of time to within which to file an appeal out of time against the ruling of the District Court of Kinondoni, dated 13/09/2004. The application is supported by affidavit of Hassan Omary Mfaule attorney of Fatuma Said and has been preferred under Rule 3 of the Civil Procedure (Appeals in proceedings originating in Primary Courts) Rules, GN.No.312 of 1964 and section 25(1)(b) of the Magistrates Courts Act, [Cap 11 R.E 2019].

The application is however resisted by the respondent who filed his counter affidavit in opposition. Both parties agreed to proceed by way of written

submission as the applicant appeared unrepresented while the respondent had his submissions prepared and filed by Mr. Costantine Makala, learned advocate. Nevertheless, the applicant found it not pleasing to file his rejoinder submission, thus this ruling will not cover it.

The material facts that prompted the filling of the application as deposed by the applicant in his affidavit can be reduced thus; in 2002 the Applicant instituted the land dispute against the respondent at Mwananyamala ward Conciliation Tribunal within Kinondoni District which failed to resolve their dispute, before the applicant unsuccessfully instituted as Civil Case No. 10 of 2002 before Kinondoni Primary Court as judgment was entered in favour of the Respondent. Discontented the Applicant successfully appealed the District Court Kinondoni vide Civil Appeal No. 77 of 2002, which overturned the primary court decision on 21/03/2003, this time declaring the applicant a lawful owner of the suit land. Aggrieved with the District Court's decision the respondent unsuccessfully appealed to the High Court through PC. Civil Appeal No. 37 of 2003 as his appeal was dismissed on 02/04/2005 on the ground that the decision of the District Court on any matter originating from the Ward Conciliation Tribunal was final and could not be appealed against to the High Court. Undaunted the Respondent came back to the District

Court again using Civil Appeal No. 77 of 2002, this time around inviting the District Court, to review its decision in the said civil appeal case, the prayer which was worked on as the matter was heard and decided on 13/09/2004 without involving parties, by quashing its earlier decision of 21/03/2002, restore and confirm the Primary Court's decision in the respondent's favour. It is from that decision which the applicant is unhappy with this application has been preferred by the applicant seeking an extension of time to challenge it.

This court under the cited provisions of the law by the applicant in his chamber summons, has discretionary powers to grant the application upon good cause shown. It is the law that since there is no standard measure to gauge good cause, the applicant has to give reasonable ground that prevented him from pursuing his action with the prescribe time limitation of the law. See the cases of **Republic Vs. Yona Kaponda and 9 Others** (1985) T.L.R 84, **Oswald Masatu Mwizarubi Vs. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010, (CAT-unreported) and **Jumane Hussein Bilingi Vs. Republic** (Criminal Application 2014 [2015]TZCA 65 (16 July 2015);www.tanzlii.org.tz. But in assigning good cause or reasons the applicant is also duty bound to account for each and

every day of his delay. See the case of **Bushiri Hassan Vs. Latina Lukio, Mashayo**, Civil Application No. 3 of 2007 and **Julius Francis Kessy and 2 Others Vs. Tanzania Commissioner for Science and Technology**, Civil Application No. 59/17 of 2018 (CAT-unreported). Other factors to be considered include but not limited to the applicant's diligence shown and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take, and the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged. See the cases of **Tanga Cement Company Limited vs. Jumanne Masangwa & Another**, Civil Application No. 6 of 2001, **Lyamuya Construction Company Ltd Vs. Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No, 2 of 2010 and **The international Airline of the United Arab Emirates Vs. Nassor Nassor**, Civil Application No.569 /01 of 2019 (all CAT-unreported)

In the present matter the applicant has raised two grounds namely sickness of the applicant and illegality of the decision sought to be challenged. To start with the first ground of sickness, the applicant who is the attorney of her mother averred in his affidavit that his mother underwent vision complication that subjected her to admission and operation at CCBRT

Hospital between May and June 2001, before she turned completely blind in the year 2004 when the ruling sought to be impugned was delivered. It was his submission that, since her mother could not make a follow up of the case on the reason of blindness as the only son to her who was away and returned from Mwanza in 2019, started making follow up for the case on her behalf. He said, as a result of the sought to be impugned ruling the respondent resisted to enter vacant possession of the suit land, thus on 06/03/2019 he had to apply for the copies of judgment and decree from this court which were supplied to him 23/03/2019. Further to that he argued since the copies of the sought to be challenged decision was also important document which were supplied late to him on 21/04/2020, he was delayed to file this application, hence prayed the court to exclude all the days for the reason of sickness and find the applicant has accounted for the delayed period and proceed to grant the application. To fortify his prayer on the ground of sickness the court was referred to the case of **Emmanuel R. Maira Vs. The District Executive Director, Bunda District Council**, Civil Application No.66 /2020 (CAT-unreported).

In his reply submission Mr. Makala contended that, the applicant has failed materially to account for the delayed period, as even the reason of sickness

has not been sufficiently established since the attached medical chit is a discharge card not indicating whether the applicant's mother became blind after successful operation. He said as per the discharge card annexure FHS 06 to the affidavit, the claimed sickness lasted for one day from 09/05/2001 to 10/05/2001, hence the case of **Emmanuel R. Maira** (supra) relied on by the applicant is inapplicable in the circumstances of this case, as in the absence of evidence of blindness of applicant's mother, the excluded time ought to be one day only hence failure of the applicant to account for each and every day of delay which according to him is mandatory. He relied on the case of **Hassan Bushiri** (supra) and **Kibo Hotel Kilimanjaro Limited Vs. The Treasury Registrar (being the legal successor of PRSC) and Another**, Civil Application No.6 of 2001 (CAT-unreported), and prayed this court to dismiss the application for want of merit.

It is true and I agree with Mr. Makala that the applicant has totally failed to account for the delayed days from 2004 when the sought to be impugned was delivered on 13/09/2004 to the time of filing this application on 03/03/2021, more than sixteen (16) years past for three good reasons. One, apart from the discharge card showing the appellant's mother was admitted and operated on 09/05/2001 and discharged on 10/05/2001 there is no any

other evidence proving the assertion that she became blind hence her failure to pursue the where about to the case sought to be impugned. Second, there is no proof that the applicant returned from Mwanza in the year 2019 apart from relying on mere words. One would expect to produced evidence of his residence in Mwanza for all that period from 2001 to 2019 and the date of return to Dar es salaam. Third, even if it is to be believed that the applicant was in Mwanza and came Dar es salaam in 2019 and issued with all the necessary documents for attaching to this applicant lastly on 20/04/2020, still the days from that date up to 03/08/2021 which is inordinate period remained unaccounted for. Thought the reason of sickness counts in considering whether to exclude that period where the applicant was sick as stated in **Emmanuel R. Maira** (supra), in this case I hold was not only sufficiently but also totally unestablished. Thus this ground of sickness fails.

As regard to the second ground of illegality, it was the appellant's submission that, illegality of the decision is noted rightly from the case number of the decision sought to be impugned as the same was registered as Civil Appeal No. 77 of 2002 instead of reflecting the application for review. He said wrongly registered case number contravened the provisions of Order XLII Rule 3 of the CPC, which requires the application for review to be registered

and numbered independently. That aside he argued, even the decision therein was entered without according the applicant with his right to be heard which is prejudicial to the applicant's rights as the act contravened the provisions of Order XLII Rule 4(2) of the CPC. He thus invited the court to allow the application on that ground as illegality of the decision in itself constitutes sufficient ground for extension of time. Mr. Makala for the respondent while citing the decision of **Kibo Hotel Kilimanjaro Limited** and admitting that illegality of the decision in itself constitute good ground for extension of time countered the applicant's contention that, the citation of case as Civil Appeal instead of reflecting that it was an application for review was a slight anomaly cured under section 96 of the CPC. He argued that, since the applicant failed to act diligently and promptly to cure the said anomaly within the past seventeen (17) years and bring the appeal with time, there is no good ground extended by him for him to benefit from the prayer sought. As regard to the complaint of violation of the right to be heard by the applicant Mr. Makala did not respond to, instead he asked the court to dismiss the application with costs.

It is true and I agree with Mr. Makala that the applicant had all the time within 17 years to make good the said anomaly of wrong citation of the

matter as Civil Appeal instead of Miscellaneous Application, but failed without reason to make it good. Hence such wrong citation of the case number under the circumstances of this matter does not constitute an illegality apparent on the face of record as the law dictates.

With regard to the complaint of violation of right to be heard, it is noted conspicuously when perusing the intended to be impugned that hearing and determination of the said review proceeded without notifying the applicant. Failure of the court to afford a party an opportunity of exercising his right to be heard constitutes an illegality. In the case of **Andrew Athumani Ntandu and Another Vs. Dustan Peter Rima** (As Legal Administrator of the Estates of the Late Peter Joseph Rima), Civil Application No. 551/01 of 2019 (CAT-unreported) the Court of Appeal on failure of the trial court to afford parties the right to be heard had this to say:

"The right to be heard is one of the fundamental rights of litigants in a trial and therefore, failure by the trial court to give the parties the right to be heard is an illegality. Moreover, it is settled law that a claim of illegality of the impugned decision constitutes good cause for extension of time regardless of whether or not reasonable explanation has been given by the applicant to account for delay."

In this matter since right to be heard is fronted by the applicant as a point of illegality of the decision, then the issue as to whether such act contravened proviso (a) of the provision of Order XLII Rule 4(2) of the CPC, is the question to be discussed by the appellate court. In view of the foregoing it is the findings of this court that, the ground of illegality of the decision has been established by the applicant. It is the law as stated in a number of cases cited above and repeated in case of **Principal Secretary, Ministry of Defence Vs. D.P Valambia** [1992] TLR 185 at page 189 that, when the illegality of the decision is the point at issue, then the court has a duty to extend the time for the purpose to ascertain the point.

Basing on the above position of the law which is binding to this Court and having satisfied that the point of illegality is established by the applicant in this matter, I do not hesitate to hold that, this application is meritorious and proceed to grant it, as I hereby do. Time is extended to the applicant for twenty one (21) days from the date of this ruling, within which to file an appeal out of time to this Court against the ruling of the District Court of Kinondoni in Civil Appeal No. 77 of 2004, handed down on 13/09/2004.

I do so without costs to any party.

It is so ordered.

DATED at Dar es Salaam this 24th day of June, 2022



E. E. KAKOLAKI

JUDGE

24/06/2022.

The Ruling has been delivered at Dar es Salaam today on 24th day of June, 2022 in the presence of both the Applicant and Respondents in person and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

24/06/2022

