

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**LAND DIVISION**

**AT MOSHI**

**MISC.LAND APPLICATION NO. 4 OF 2022**

*(C/F Application No. 60 of 2021 of the District Land and Housing  
Tribunal for Moshi at Moshi)*

**YUSUFU ELITETERA LEMA..... 1<sup>ST</sup> APPLICANT**

**EMMANUEL LEMA..... 2<sup>ND</sup> APPLICANT**

**VERSUS**

**MARIA ELITETERA NKYA..... RESPONDENT**

**RULING**

*25/4/2022 & 22/6/2022*

**SIMFUKWE, J.**

The above applicants filed this application seeking among other things, an order for extension of time to file revision against the ruling of the District Land and Housing Tribunal in Application No.60 of 2021 dated 25/10/2022; and Misc. Application No. 293 of 2021. The application was filed under **section 14(1) of the Law of Limitation Act, Cap 89 R.E 2019**. It was supported by an affidavit of Elia John Kiwia, the learned advocate for the applicants which was contested by the counter affidavit of the respondent.

The background of the dispute is to the effect that, before the District Land and Housing Tribunal (The Tribunal), the Respondent successfully instituted the land dispute (Application No. 160 of 2014) against Boniface



Kinga and Wilfred Elitetera. Since the suit was decided in her favour, the Respondent made application for Execution through Misc. Application No. 16 of 2021 and the Tribunal issued execution order.

Following such execution order, the Applicants herein believing that they have right over the suit land, decided to lodge a fresh Application No. 60 of 2021 before the Tribunal for the same to determine the ownership of the suit land against the respondent herein. While Application No. 60 of 2021 was still pending, the Applicants also filed Misc. Application No. 293 of 2021 praying the trial Tribunal to order a temporary injunction of execution No. 16 of 2021 which was executing Application No. 160 of 2014. However, the applicants faced objection from the respondent that Application No.60 of 2021 was res judicata to Application No. 160 of 2014. Consequently, the tribunal dismissed the case hence this application.

During hearing of this application, the applicants were represented by the learned counsel Mr. Elia Kiwia, while the respondent was represented by Joseph Moses Oleshangay, learned advocate from Legal and Human Rights Centre.

Mr. Kiwia adopted the prayers in the chamber summons together with his affidavit to form part of his submission.

In support of the application, it was submitted by Mr. Kiwia that as per the records of the Tribunal and in respect of paragraph 9 of the affidavit, it is undisputed facts that at paragraph 8 of the counter affidavit of the respondent, the respondent admitted that she filed Application No. 160 of 2014 against two respondents namely Boniface Kingu and Wilfred Elitetera where judgment was delivered in her favour. Also, at paragraphs 6 and 7 of the Counter affidavit the respondent admitted facts found at



paragraphs 4, 5, 6 and 7 of the affidavit which is to the effect that when the matter was called for hearing inter parties, it was claimed that the Application No.60 of 2021 filed before the tribunal was unmaintainable for being res judicata and that if the respondent wanted to challenge the decision in Application No. 160 of 2014 they had to file objection proceedings. Also, Mr. Kiwia stated that it is undisputed fact that Mr. Elikunda Kipoko who was the advocate for the Applicants by then, contested the issue by arguing that parties in Application No. 160 of 2014 which was decided in favour of the respondent were not the same parties in Application No. 60 of 2021 for the matter to be res judicata. Therefore, the Applicants had right to be heard. That, in the said application, the learned Advocate Kipoko, further submitted that, it was not mandatory for the Applicant to file objection proceeding, but they could file Application in alternative to objection proceedings. In support of such argument, Mr. Kipoko cited the case of **Omoke Oloo v Werema Magira, Civil Appeal No. 43 of 1981 [1983] TLR 144 (HC)**.

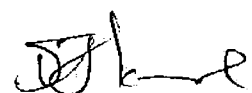
Furthermore, Mr. Kiwia contended that as per Tribunal records, the dismissal order was delivered through Misc. Application No. 293 of 2021, while the main Application No. 60 of 2021 was still unattended and the last order of "**mention**" is still intact to date. Therefore, since the applicants were aggrieved with the decision of the Tribunal and with intention to revise such impugned order, on 11/11/2021 within prescribed time limit for revision, the learned counsel for the applicants filed a letter before the Tribunal requesting the copy of the order unsuccessfully where he was given the reason that the case file was not found. On 15/12/2021 the advocate for the Applicants for the second time filed reminding letter, but the reply was the same. However, on 2/3/2022 he received the copy

of the ruling after the third reminder letter dated 20/1/2022 which was followed by several oral follow-ups until when the copy was supplied to him with information that the file was misplaced by being inserted inside another file in the registry.

Basing on such story, Mr. Kiwia averred that the Applicants were out of time in filing the revision of the impugned order in Misc. Application No. 293 of 2021 together with irregularities found in Application No. 60 of 2021, hence, this application. Thus, the applicants are hereby praying the Court to extend time to file the revision out of time. The learned advocate referred to the case of **Lyamuya Construction Limited vs Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Appeal No. 2 of 2010, CAT** (unreported) at page 6 and 7 where the Court had this to say in respect of factors warranting extension of time:

- (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 prosecution of the (sic) that he intends to take*
- (d) If the court feels that there are sufficient reasons, such as the existence of point of law of sufficient importance, such as illegality of the decision sought to be challenged.*

Basing on what has been established above, it was the learned advocate's opinion that the Applicants have sufficient reasons to be granted extension of time to file revision out of time as they managed to account



for every day of delay from the date of the ruling until when they filed this application.

In addition, the learned advocate argued that, it is apparent in the records that, immediately after the ruling, the Applicants promptly and diligently applied for the copy of the ruling, but the problem was not on their part, but on the Tribunal as they did not supply the ruling on time due to un-avoided circumstances.

Mr. Kiwia also stated that although the Applicants managed to account for every day of delay, but even if they failed to account for the same, the ground of illegality alone found in Application No. 60 of 2021 and Misc. Application No. 293 of 2021 as submitted above, suffice to warrant extension of time without considering whether the applicants managed to account for every day of delay or not. He supported the point of illegality by referring to the case of **Mohamed Salum v. Elizabeth Jeremia, Civil Reference no. 14 of 2017** (CAT) (unreported) at page 7 where it was held that:

*"We say so because the law is fairly settled that in applications of this nature, once an issue of illegality in the decision thought to be challenged is raised that amount of good cause and the court, even if every day of delay is not accounted for, would grant an extension sought so as to rectify the illegality on appeal."*

Expounding more on the point of illegality, he re-cited the case of **Omonke Oloo v. Werema Magera** (supra) and argued that the principle of res judicata is provided for under **section 9 of the Civil Procedure Code Cap 33, R.E 2019**, that, for a suit to be res judicata, parties in the former

suit should be the same in the subsequent suit and the former suit should have been determined to its finality by the court of competent jurisdiction.

Basing on the above provision, Mr. Kiwia said that, it was illegal for the tribunal Chairman to dismiss a case on the ground that the case was res judicata while parties in a former Application No. 160 of 2014 were not the same parties in the Application No. 60 of 2021, the same Application No. 160 of 2014 was determine to its finality in favour of the respondent while Application No. 60 of 2021 was just in the preliminary stage. He added that, as per the records, parties in Application No. 160 of 2014 were the Respondent Maria Elitetera who by then was an Applicant against the respondents Boniface Kingu and Wilfred Elitetera. In Application No. 60 of 2021 parties were the Applicant herein one Yusufu Elitetera Lema and Emmanuel Lema as Applicants against the Respondent Maria Elitetera Nkya.

Mr. Kiwia also stated that it was not proper for the tribunal to refuse to proceed with the application and dismiss the matter on allegation that if the Applicants wanted to challenge the suit, they had to file with Objection proceeding while the law through the case of **Omoke Oloo v Werema Magare** (supra) is straight forward that the Applicant may file a fresh suit. The learned counsel was of the view that it was very irregular for the tribunal to dispose the case through miscellaneous Application. That, it was the tribunal's obligation to give necessary order in respect of the main application and not living it unattended with the order of MENTION still intact as it did. In support of these arguments, the learned advocate cited the case of **Mrs. Fakhria Shamji v. The Registered Trustees of Khoja Shia and another, Civil Appeal No. 143 of 2019 (unreported)**, where at pg 10, the Court had held that:



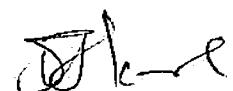
*"What is more, the dismissal order was, in our view, premature as there was another pending order dated 6<sup>th</sup> December 2016, to determine. Had judge taken the time and peruse the record, (sic) he would not have come with dismissal order; which he initiated."*

Lastly Mr. Kiwia submitted that the applicants not only have advanced sufficient reasons warranting extension of time to file the revision out of time, but also raised illegalities in respect of Application No. 60 of 2021 and Misc. Application No. 293 of 2021 which need outmost urgency to be corrected so as to put the matter and the record right in line with the principle of law as established in the case of **The Grand Alliance Limited v. Mr. Wilfred Lucas Tarimo and 4 Others, Civil Application No. 84/16 of 2018** (Unreported) at page 8 which held that:

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

He further argued that the intended application for revision deserves serious consideration of the court so as to keep the record right. Mr. Kiwia was hoping that the court will allow the application.

In reply, Mr. Joseph for the respondent also started by giving the background of the application which I will not reproduce it as the same has been narrated herein above.



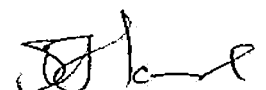
Contesting the application, Mr. Joseph submitted that the reasons adduced by the advocate for the Applicants are not plausible for the court to grant the application. He condemned the applicants' counsel for failure to account for all period of delay.

Concerning the applicants' counsel averment as found at paragraphs 10,11 and 12 of his affidavits that he made several follow ups, it was stated that the same is still not plausible reason to account for the delay to file revision. That, the Receipts attached to the affidavit by the counsel for the Applicants is also not proof on whether payment was made for perusal of the file or other services offered by the tribunal.

The Respondent's advocate submitted further that the claims by the Applicant counsel under paragraphs 11 and 12 of his affidavits that the case file was misplaced cannot be relied upon without proof by the tribunal itself. That, no evidence from the tribunal that delay to get copy of proceedings of Application No. 60 of 2021 was due to misplacement of files.

Also, Mr. Joseph submitted that the applicants' counsel claims as found under paragraph 12 of his affidavit that he made oral follow up to the copies of proceedings of Application No. 60 of 2021 is not reliable without proof.

He insisted that, the Applicants had failed to account cogent reasons for the delay in filing application for revision out of time. It was Mr. Joseph argument that the case law jurisprudence-developed some tests which the court should satisfy itself before granting application for extension of time. He referred to the case of **LYAMUYA CONSTRUCTION COMPANY LTD v. BOARD OF REGISTERED TRUSTEES OF YOUNG**





**WOMEN'S CHRISTIAN ASSOCIATION OF TANZANIA** (supra) in which the court held that:

*"The applicant must account for all days of the delay, (b) The delay must 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: (d) If the court feels that there are other reasons, such as the existence of point of law of sufficient importance, such as the illegality of the decision sought to be challenged."*

In respect of the cited authority, Mr. Joseph stated that the Applicants' application falls short of the above tests. That, they failed to meet the requirement of **section 14 and Paragraph 21 Part III of the schedule of the Law of Limitation Act**, (supra)

In the alternative, it was submitted that even if the Applicants managed to account for the same still the case is unmaintainable since he has no an arguable case even when extension of time to file revision is granted. That, Application No. 60 of 2021 was dismissed for being res judicata and thus the Applicants have no arguable case.

Further to that, it was stated that according to the case law jurisprudence in Tanzania, granting extension of time by court is judicial one and the same must be exercised according to the rules of reason and justice. He cemented his point by referring to the case of **NGAO GODWIN LOSERO v. JULIUS MWARABU, CAT, Civil Application No. 10 of 2015** (Unreported) which held that: -

*"As a matter of general principle that whether to grant or refuse an application like the one at hand is entirely in the discretion of the*

*Court. But that discretion is judicial and so it must be exercised according to the rules of reason and justice. "*

That, as per the authority above, granting extension of time is in the discretion of the court but the same must be exercised in a manner that does not prejudice very existence of justice.

Mr. Joseph continued to argue that the court also considers the factors like whether granting extension of time prejudice the opposite party, whether there is an arguable case when extension of time is granted and reasons for the delay. To substantiate this point he referred the court to the case of **Mbogo and Another vs Shah [1968] 1 E.A 93** where the defunct Court of Appeal for Eastern Africa held that: -

*"All relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reason for the delay, whether there is an arguable case on the appeal and the degree of prejudice to the defendant if time is extended."*

It was emphasized by Mr. Joseph that the applicant not only failed to adduce reasons for the delay, but also there was no arguable case as Application No. 60 Of 2021 was dismissed for being res judicata to Application No. 160 of 2014. Further, he stated that granting extension of time by the court will prejudice to the Respondent who has been restrained from peaceful enjoyment of the suit land due to the Applicants' delaying tactics.

Replying on the point of illegality, the Respondent's counsel stated that there is no any illegality in Application No. 60. of 2021 since the Tribunal ruled that Application No. 60 of 2021 is res judicata to Application No. 160

of 2014. That, the subject matter is the same, with similar cause of action and the former suit was decided to finality by the tribunal. That, The Applicants are sons of WILFRED ELITETERA who was party to Application No. 160 of 2014 against the Respondent. That, Application No. 60 of 2021 was dismissed on merit for being res judicata to Application No.160 of 2014 following Objection on a point of law by the Respondent.

Mr. Joseph further submitted in respect of res judicata to the effect that res judicata is a serious point of law which dispose the case. It was the learned advocate's opinion that it was proper for the tribunal to dispose Application No. 60 of 2021 for being res judicata. To support this argument, he cited the case of **MUKISA BISCUIT MANUFACTURING CO LTD v. WEST END DISTRIBUTORS LTD (1969)1 EA 696**; which held that:

*"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which, if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by "the contract giving (sic) to the suit to refer the dispute to arbitration"*

He also referred to the case of **LEGAL AND HUMAN RIGHTS CENTRE AND ANOTHER VS. HON. MIZENGO PINDA AND ANOTHER, Misc. Cause No. 24 of 2013** (Unreported) to that effect.

Mr. Joseph also faulted the Applicants for wrongly preferring a fresh suit instead of resorting to other available remedies in challenging Application No. 160. Of 2014. That, lodging Application No. 60 of 2021 as a fresh suit



renders the same res judicata which deserve nothing than dismissal. He cemented this point by the case of **MIJA MAGANGA vs. MOHAMED MRISHO MLANGA, HC, Land Appeal No. 225 of 2021** (unreported)

The learned advocate reiterated that there was no illegality in Application No. 60 of 2021 as the same was properly dismissed for being Res judicata to Application No. 160 of 2014.

In conclusion, Mr. Joseph faulted the Applicants for failure to adduce plausible reasons for the delay to file application for revision out of time. He said that it is just a delaying tactics to bar the Respondent from enjoying her landed property peacefully. He thus prayed for dismissal of the application with costs.

In rejoinder, Mr. Kiwia faulted the respondent for failure to oppose the reasons for delay in filing revision on time against the impugned orders of Misc. Application No. 293 of 2021 and Application No. 60 Of 2021 of the Tribunal.

Mr. Kiwia noted the following points from the respondent's advocate. That the Applicant failed to account on each day of delay; that, the Respondent admitted that illegality of impugned decision warrant extension of time even if the applicant will fail to account for each day of delay, though she alleged that there are no arguable issues of illegality to warrant the application at hand to be granted by insisting that the Application No. 60 of 2021 was res judicata, and that, the applicants were not supposed to file fresh suit but they were to file revision.

The learned counsel for the applicants insisted that through a series of diligent ordinate oral and letters filed to the Tribunal requesting the ruling of Application No. 60 of 2021 and Misc. Application No. 293 of 2021

dismissing the Application, the applicant managed to account on each day of delay.

Concerning the allegation that the Applicants had no proof that the delay was caused by failure for the tribunal in supplying copy of orders, Mr. Kiwia was of the view that the proof had to come from the tribunal. He added that the Respondent did not dispute that all letters were stamped with the tribunal rubber stamp evidencing to be received by the tribunal together with the signature acknowledging to be received by the Tribunal Clerk. Therefore, the tribunal could not receive subsequent letters requesting the same document if it had previously supplied it to the Applicants. In that respect, Mr. Kiwia commented that the respondent allegations that the applicant failed to account each day of delay crumbles.

Concerning the challenged annexed perusal receipt in the affidavit it was replied to the effect that it is trite law that a person who alleges must prove. That, it is the duty of the respondent to prove that the receipt was not for perusal, she had to prove what it was for. Thus, provided that all records are before the court, there is no doubt that, a letter requesting perusal will be found in the records. In other way around, it was Mr. Kiwia's argument that the proof of the said receipt has no any significant role in this application for the reasons that, as per the affidavit the reasons for perusal made by the applicant's counsel were to read the file and ascertain the position of the cases at that time but not otherwise. So, it has no any legal implication in the application.

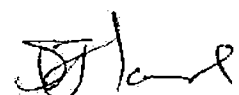
The applicants advocate reiterated what has been submitted in respect of the illegality. He faulted the case of **Mija Maganga** (supra) which was cited by the respondent advocate on the reason that the respondent is



misleading the court that the Applicants were not obliged to file fresh suit, but the alternative remedy available was for them to file revision. Mr. Kiwia contended that notwithstanding that the respondent argument was not part of the Tribunal ruling or Applicants' counsel affidavit or Respondent's counter affidavit or position of the law provided in the case of **Omoke Oloo** (supra), still allowing a party to file suit to recover his wrongly seized property is not only a matter of precedent as provided therein above, but also it is a matter of law as provided under **Order XXI Rule 62 of CPC** (supra)

Mr. Kiwia also contended that though the case of **Miji Maganga v. Mohamed Mrisho** (supra) was not supplied to them, but they took effort and read the same and found that the same is distinguishable to the case at hand since in the said case the applicants were brothers and one of them was a party in the former suit while the other was not. Thus, since one of the parties to the subsequent suit was the party in the former suit, then parties were barred from instituting a fresh suit that's why the Hon. Chairman concluded that the matter was res judicata and dismissed filed fresh suit for being res judicata and ruled out that the party who was not in the former suit had to file revision. That, the circumstance is different from the case at hand since the applicants herein were not party to the former case which could render Application No.60 of 2021 to be res judicata to bar the applicants from filing fresh suit.

Also, Mr. Kiwia condemned the respondent for failure to oppose whether it was proper for the Tribunal Chairman to dismiss Application No. 60 of 2021 through Misc. Application No.293 of 2021 something which left pending order of mention in Application No.60 of 2021 to date. Thus, it implied admission of the illegality to be considered in the intended revision



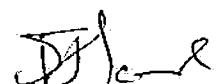
so that it could be corrected. Mr. Kiwia implored the court to grant their prayers.

Having studied intensely the records of this application, the parties' submissions and their respective affidavits, the following are the court's observations. From the applicant's affidavit, the applicants' reasons for the delay to file revision are two, the first ground is illegality as found at paragraph 8 of the applicants' affidavit which reads:

*"That, after dismissal order of Misc. Application No.293 of 2021, the main Application No.60 of 2021 remained stagnant un attended in the tribunal with an order of last Mention date intact until today without any further order."*

The second reason is found from paragraphs 10 to 12 of the applicants' counsel affidavit that the applicants were lately supplied with the copies of the impugned proceedings and orders. I will thus deal with one reason after another. However, before scrutinizing these reasons, from the outset it is a trite law that granting the application of this nature is on the discretion of the court. Such discretion has to be exercised judiciously. However, the law doesn't exonerate the applicant from accounting every day of delay. In the case of **Keroi Madule vs Mepukor Mbelekeni, Civil Application No. 13 of 2016 (CAT)** it was held that:

*"As a matter of general principle, it is entirely in discretion of court to decide whether to grant or to refuse an application for extension of time. That discretion is however judicial and so, it must be exercised according to the rule of reason and justice. The deciding factors being showing "good cause" by the applicants, and good cause*



*depend on variety of factors including the length of delay, the reason for delay, the chances of appeal succeeding if application granted and degree of prejudice to respondents, if the application is granted."*

Also, **section 19(1)(2) of the Law of Limitation Act, Cap 89** the law provides that:

*"In computing the period of limitation for any proceeding, the day from which such period is to be computed shall be excluded. In computing the period of limitation prescribed for an appeal..., the day on which the judgment complained of was delivered, and the period of time requisite for obtaining a copy of the decree or order appealed from ..., shall be excluded."*

Starting with the second reason that the copies were lately supplied to the applicants, it is on record that the impugned ruling was delivered on 25/10/202 and on 11/11/2021 the applicants through their advocate wrote a letter requesting for the copy of the ruling and proceedings. It seems to me that the same were not granted since the learned counsel reminded the Tribunal through the letter dated 15/12/2021 and on 20/1/202 he also reminded the court to be supplied with the copies.

It is undisputed fact that the applicants through their advocate made follow up of the required documents to institute Revision within time. Also, as per paragraph 12 of the affidavit, the copies were supplied to them on 2/2/2022 and on the same date the applicants instituted the instant application. This fact was admitted in the counter affidavit of the respondent. Basing on this trend of story which was not disputed, it is my





considered view that this ground is sufficient to grant extension of time since the applicants accounted for the delay and their delay was not inordinate.

The second ground is found at paragraph 8 of the affidavit which I have already quoted above. The legal position is settled that whenever there is an allegation of illegality, then it is important to give an opportunity to the party making such allegation to have the issue considered. In the case of **The Principal Secretary, Ministry of Defence and National Service v. Devram Valambia (1992) TLR 182** it stated inter alia 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 of ascertaining the point and if the alleged illegality be established to make appropriate measures to put the matter and record right."*

In the instant matter, I hasten to conclude that the pointed illegality is worth consideration since the same is on the face of record. It was undisputed fact that Application No. 60 of 2021 was dismissed for being res judicata through Misc. Application No.293 of 2021. The learned advocates had misplaced their submission as they were trying to submit in respect of res judicata while this application is for extension of time to file revision.

For the foregoing reasons, I find the applicants' reasons for delay to file revision to be genuine to grant extension of time sought in the chamber summons. Therefore, I hereby grant 21 days from the date of being



supplied with the copy of ruling to the applicants, to file their application for revision as sought.

No order as to the costs.

It is so ordered.

Dated at Moshi this 22<sup>nd</sup> day of June ,2022.



  
**S.H. SIMFUKWE**  
**JUDGE**  
**22/6/2022**