

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

MISC. LAND APPLICATION NO. 6 OF 2021

**(Originating from the Decision of The District Land and Housing Tribunal for
Njombe , at Njombe, in Land Application No. 11 of 2015).**

ELAY N. MAHAVA..... APPLICANT

VERSUS

EMILIA M. FUNGO.....RESPONDENT

RULING

5th May & 28th July, 2022.

UTAMWA, J:

In this application, the applicant ELAY N. MAHAVA prays for this court to extend time within which to file his appeal out of time against the judgment (impugned judgment) of the District Land and Housing Tribunal for Njombe, at Njombe (The DLHT). The application is made under section 41(2) of the Land Disputes Courts Act, Cap. 216 (LDCA) as amended by the Written Laws (Miscellaneous Amendments) Act, Act No. 2 of 2016. It is supported by an affidavit of the applicant himself. The respondent resisted

the application by filing her counter affidavit sworn by Mr. Marco Kisakali, learned counsel.

The brief background of this matter, according to the affidavit supporting the application goes thus; the applicant sued the respondent in the DLHT claiming that she had trespassed his land (The suit land). Before the DLHT, the respondent being the administratrix of the estate of the late Lutabiko claimed that, the applicant had invaded the suit land and cut down trees alleging to be the lawful owner of the suit land. The DLHT on 28th February 2018 decided in favour of the respondent. It held that, the applicant was a trespasser. Aggrieved by the impugned judgment the applicant applied for necessary documents from the DLHT for purposes of appealing. The documents were certified on 12th April, 2018 almost after the expiry of the time for appealing to this court. He collected the documents immediately thereafter and appealed to this court, which said appeal was registered as Appeal No. 9 of 2018. However, on 18th December 2019, his appeal was struck out by this court (Kente, J. as he then was) for being time barred. This happened in his absence when he was being medically attended, hence he lost communication with his counsel. His counsel did not also inform him of the fate of the appeal. He made a follow up of his appeal upon being summoned by the DLHT for an application for execution and for bill of costs. It was at that time when he discovered that the appeal had been struck out.

The affidavit further states that, the applicant now intends to appeal against the impugned judgment for being illegally pronounced, hence the application at hand. The illegalities involved in the impugned judgment are

that, the proceedings of the DLHT do not indicate that the assessors were involved in deciding the case and the trial chairman did not invite them to give their opinion. The applicant will thus, suffer for injustice if this application is not granted.

The counter affidavit did not dispute the background of this matter as narrated in the affidavit. It however, disputed the fact that the applicant had applied for necessary documents from the DLHT. It also disputed the fact that the documents were certified belatedly and that the applicant was being medically attended. The counter affidavit also stated that the applicant did not account for each date of delay and the impugned judgment is not tainted by any illegality. It also refuted the fact that, the applicant will suffer for injustice if this application is dismissed.

The application was disposed of by way of written submissions. During the hearing of the application, the applicant was represented by Mr. Tumaini Amenyee, learned advocate. On the other side, the respondent enjoyed the services of Mr. Marco Kisalika, learned advocate.

In his written submissions in chief, the applicant's counsel argued in support of the application. He firstly reiterated the contents of the affidavit. He further contended that, the applicant, being blind with the consequences of his appeal, lack of communication with his counsel, his age and having no phone, in 2021, started making follow ups of his case upon being served with summons for execution and bill of costs before the DLHT. These reasons led to a delay, hence the present application. He added that, the delay in filing the struck out appeal was contributed by

failure to be supplied with the necessary documents on time to enable him to appeal within time, lack of proper communication between the applicant and his counsel due to the applicant's sickness and social factors which included economic hardship and attending a diabetic clinic.

It was also the contention by the applicant's counsel that, an appeal from the DLHT to the High Court of Tanzania must be made within 45 days from the date of the decision to be challenged. It must be in conformity with Order XXXIX Rule 1(1) of the Civil Procedure Code, Cap. 33 R.E 2019 (CPC). In this matter, the impugned judgment was delivered on 28th February, 2018 and copies of necessary documents were supplied to the parties on 12th April, 2018. This was after a lapse of two months. He further argued that, section 19(2) of the Law of Limitation Act, Cap. 89 R.E 2019 (LLA) provides for an exclusion of time spent in waiting for necessary documents. To cement this argument, he cited the decision of the Court of Appeal of Tanzania (The CAT) in the case of **Benedict Mumello v. Bank of Tanzania, Civil Appeal No. 12 of 2002, CAT at Dar es Salaam** (unreported).

The learned counsel for the applicant went on to submit that, the applicant had engaged an advocate, and he vested his trust to represent his best interests to prosecute the said Civil Appeal No. 9 of 2018. Due to his sickness he had to move to Mbeya where he was attending a clinic. He was thus, surprised to be served with summons for execution. In his view these facts amount to sufficient reasons for this court to grant the prayed extension of time. It is more so considering the facts that the applicant is a layman, he is old by age and the nature of disease he is suffering from is

serious. He cited the cases of **Tanga Cement Company Limited v Jumanne D. Masangwa and Amos A. Mwalandwa, Civil Application No. 6 of 2001** (unreported) and **Samwel Munsiro v. Chacha Mwikwabe, Civil Application No. 539/9 of 2019, CAT at Mwanza** (unreported) to support the contention.

Furthermore, the applicant's counsel charged that, if this application is granted, he will challenge the decision of DLHT on the ground of illegalities. This is in law, another good cause for granting extension of time. To support his argument he cited the cases of **Republic v. Yona Kaponda & 9 Others (1985) TLR 84** and **Principal Secretary, Minister of Defence and National Service v. Devram Valambhia** which followed the case of **Victoria Real Estate Development Ltd v. Tanzania Investment Bank & 3 Others, Civil Application No. 225 of 2014, CAT at Dar es Salaam.**

The applicant's counsel thus, urged this court to grant the application so that the pointed out illegalities can be corrected.

In his replying submissions, the respondent's counsel submitted that, the impugned judgment was delivered on 28th February, 2018 and the copies were certified for collection on 12th April, 2018. The current application was filed on 19th February, 2021 which is a period of more than 427 days. The Land Appeal No. 9 of 2018 was struck out on 18th December, 2019 and the present application was filed on 19th February, 2021 after the lapse of almost 427 days. There is thus, no sufficient reasons for the delay.

The respondent's counsel further submitted that, the allegation by the applicant that he was supplied with necessary documents belatedly is untenable because, all the necessary documents were ready for collection since 24th April, 2018 and the applicant was aware. The DLHT cannot be blamed for his failure to appeal on time. On the argument that the applicant lost communication with his former advocate, the respondent's counsel contended that, it was not weighing. This is because, the applicant failed to attach the affidavit of his former advocate. There is also no evidential back up on change of advocates, and this has never been a reason for extension of time as it was held in the case of **Mussa S. Msangi and Another v Anna Peter Mkomea, Civil Application No. 188/17 of 2019, CAT at Dar es Salaam** (unreported).

It was a further submission by the respondent's counsel that, the allegation on illegalities are also weak because, in applications for extension of time, the court is bound only by the affidavit filed by the applicant and not by submissions from the bar. The applicant has not included the alleged illegalities in his affidavit. He cited the case of **Modestus Daudi Kangalawe (Administrator of the Estate of the Late Daudi Temaungi Kangalawe) v. Dominicus Utenga, Civil Application No. 139 of 2020, CAT at Iringa** (unreported) to cement the contention. In the light of the above authority, the respondent's counsel invited the court to act on the same position since the purported irregularities may be good ground for appeal, but not good reason for blocking the applicant from filing his appeal on time.

The respondent's counsel went on to submit that, the court has discretion to grant extension of time but, the discretion has to be exercised judiciously not by sympathy to the parties who relaxed for 4 years without any action. It is trite law that, in the exercise of its discretion the court has to look for the following factors in considering an application for extension of time: the applicant must account for all the period of delay, the delay should not be inordinate, the applicant must show diligence, not apathy, negligence or sloppiness in the prosecution of the action that he intends to take and if the court feels that there are other sufficient reasons such as the existence of a point of law of sufficient importance. These were factors elaborated in the case of **Lyamuya Construction Company Ltd v. The Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010, CAT at Arusha** (unreported). Nonetheless, the respondent's counsel contended, the applicant in the matter at hand has failed to meet any of the above factors.

It was also argued by the respondent's counsel that, the applicant has failed to give reasons for the delay in filing the appeal on time, and that, the court should refrain from opening Pandora's box. He cited the cases of **Reli Assets Holding Company Limited v. Anselimu William Mauki and Another, Misc. Land Case Application No. 11 of 2013** and **Finca (T) Limited and Another v. Boniface Mwalukisa, Civil Application No. 589/12 of 2018** to back up his contentions.

Additionally, the respondent's counsel contended that, the applicant filed this application as an afterthought upon receiving the summons for

the bill of costs and the execution process before the DLHT. This is lack of diligence and the court should not tolerate this as it was held in the case of **Tulanyilika Kihwele v. Stephani Kihwele, Misc. Land Application No. 49 of 2020**. The applicant's allegation that he was sick and attending treatment in Mbeya is not also backed up by any medical document. All the cited cases by the applicant's counsel are therefore, distinguishable from the current case.

In conclusion, the respondent's counsel urged this court to use its discretion wisely by considering the affidavit, counter affidavit and submissions by both parties and make a findings that the applicant has not adduced any sufficient reason to warrant the court to exercise its discretionary powers in his favour. He thus, prayed for the application to be dismissed with costs for being devoid of merits.

In his rejoinder submissions, the applicant's counsel argued that, the **Lyamuya Construction Case** (supra) mentions one of the guidelines that, if there is illegality as in the present application, the court shall extend the time. The point of law alleged by the applicant is that, there was no opinion of assessors on the judgment and the trial Chairperson did not invite assessors to give their opinion.

I have considered the rival submissions of both parties, the affidavit, the counter affidavit, the records and the law. In my view, since this is an application for extension of time, the branch of the law governing matters of this nature must be applicable. It is trite law that, granting an application for extension of time is in the discretion of the court which has

to be exercised judiciously. Extension of time may only be granted where the applicant has adduced sufficient reasons or good cause. However, what constitutes sufficient cause has not been directly defined, rather it depends on various factors as deliberated in various cases. Some of the factors to be considered in an application of this nature were highlighted by the CAT in the **Lyamuya Construction case** (supra) as listed above. The same CAT underlined those factors in the cases of **Yusuph Same and Hawa Dada v. Hadija Yusuf, Civil Appeal No. 1 of 2002** (unreported) and **Benedict Mumello v. Bank of Tanzania, Civil Appeal No. 12 of 2002** (unreported).

In the matter under consideration therefore, the major issue for consideration is *whether the applicant in the matter at hand has adduced sufficient reasons for this court to grant the prayed extension of time*. The grounds for the present application according to the affidavit of the applicant and his counsel's submissions can be categorised into two major clusters. The first is the applicant's illness which led to lack of communication with his counsel. The second reason is the point of illegalities which are listed under paragraph 9(i) and (ii). The argument by the respondent's counsel that the applicant did not depone the illegalities in his affidavit is thus, incorrect. In deciding this appeal, I, for the sake of convenience, prefer to firstly test the second reason on illegalities.

Regarding the reason on illegalities, the major complaints by the applicant are that, the assessors who sat with the chairman of the DLHT were not involved in the decision of the impugned judgement. This is because, the chairman did not require them to give their opinion after the

trial. Their opinion were not thus, made. In my settled opinion, it is trite law that, an allegation on illegality is sufficient cause for extending time; see the cases of **Andrew Athumani Ntandu & Another v Dustan Peter Rima, Civil Application No. 551/01 of 2019 CAT at Dar es Salaam** (unreported), **Republic v. Yona Kaponda, (1985) TLR 84** and **Victoria Real Estate Development Ltd v. Tanzania Investment Bank and Others, Civil Application No. 225 of 2014 CAT at Dar es Salaam** (unreported). However, the law also guides that, not every allegation of illegality should prompt the court to grant extension of time unless such alleged illegality is of sufficient importance and apparent on the face of the record. It should not be one that would be discovered by a long drawn argument or process; see the **Lyamuya Construction case** (supra).

The sub-issue at this juncture is therefore, *whether the illegalities complained of by the applicant in the matter at hand fall under the category of illegalities that constitute sufficient reason for extending time.* In my view, the circumstances of the present case attract a positive answer to the sub-issue. This view is based on the following reasons: In the first place, the record testify that, upon the completion of the trial, the chairman straight forward set the date of judgement to be on 28/02/2018. The record do not show that he required the assessors to give their opinion though it shows that he sat with two of them. The opinion of the assessors do not thus, feature in the proceedings of the DLHT (see at page 40 of the typed version of the proceedings of the DLHT). Further, the opinion of assessors do not feature in the impugned judgment.

Moreover, it is clear that, the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003, GN. No. 174 of 2003 (henceforth the GN) sets the procedure applicable before a DLHT when conducting original proceedings (like the ones under discussion). Regulation 19 (2) of the GN guides that, before making his judgement, the Chairman of a DLHT shall require every assessor present at the conclusion of hearing a dispute to give his opinion in writing, the opinion may be in Kiswahili. Indeed, these provisions go in tandem with those of section 23 (2) of LDCA which also guide that; a DLHT shall be duly constituted when held by a Chairman and two assessors who shall be required to give out their opinion before the Chairman reaches the judgement. The CAT has interpreted the above cited provisions of law as requiring the assessors to read their opinion in court and in the presence of the parties; see the cases of **Edina Adam Kibona v. Absolom Swebe (Sheli), Civil Appeal No. 286 of 2017, CAT at Mbeya** (unreported) and **Tubone Mwambeta Tubone Mwembeta v. Mbeya City Council, Civil Appeal No. 287** (unreported).

The two precedents just cited above, together with the case of **The General Manager Kikwengwa Stand Hotel v. Abdallah Said Musa, Civil Appeal No. 13 of 2012, CAT** (unreported) underscored further that; where a trial before a DLHT has to be conducted with the aid of assessors, they must actively and effectively participate in the proceedings so as to make meaningful their role of giving opinion before the judgement is composed. The precedents further underscored that, opinion of assessors 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.

According to the above cited precedents, where the proceedings of the DLHT do not follow the above highlighted procedure, they become a nullity and the resultant judgment cannot survive.

It follows thus, that, the illegalities complained of by the applicant in the present matter are on the face of the record of the DLHT and are of sufficient importance. They are thus, capable of constituting a sufficient reason as per the **Lyamuya Construction case** (supra). I accordingly answer the sub-issue posed above affirmatively that, the illegalities complained of by the applicant in the matter at hand fall under the category of illegalities that constitute sufficient reason for extending time.

In my further and concerted opinion, the finding I have just made regarding the sub-issue posed above is forceful enough to dispose of the entire matter at hand without considering the other reasons for it. I will not thus, test them because, doing so will amount to performing an academic or superfluous exercise which is not the core objective of the process of adjudication.

Owing to the above reasons, and having answered the sub-issue posed above affirmatively, I have no option other than answering the major issue positively too. I accordingly answer it that way, i.e. the applicant in the matter at hand has adduced sufficient reasons for this court to grant the prayed extension of time. Consequently I grant the application. The applicant shall file his appeal within 45 days from the date hereof. Each

party shall bear its own costs since the irregularities discussed above, which led to the granting of the present application were committed by the chairman of the DLHT. It is so ordered.


JHK UTAMWA
JUDGE
27/07/2022.

28/07/2022.

CORAM; JHK. Utamwa, J.

For Applicant: present in person.

For Respondent; Mr. Marco Kisakali, advocate.

BC; Gloria, M.

Court; Ruling delivered in the presence of the applicant in person and Mr. Marco Kisakali, learned counsel for the respondent, in court this 28th July, 2022.


JHK UTAMWA
JUDGE
28/07/2022.