

IN THE HIGH COURT OF TANZANIA

SHINYANGA DISTRICT REGISTRY

AT SHINYANGA

MISC. LAND APPLICATION NO. 57 OF 2021

(Arising from Land Application No. 40 of 2019 and Misc. Application No.

526 of 2019 of the District Land and Housing Tribunal of Kahama)

JOYCE LEONARD..... APPLICANT

VERSUS

ALEXANDER MASUMBUKO JOSHUA.....1st RESPONDENT

**DEOGRATUS MWANGOKA (Administrator of
the Estate of the late Joshua Lyaki Nyilili)2nd RESPONDENT**

RULING

5th May & 5th July, 2022.

S.M. KULITA, J.

This is an application for extension of time to appeal against the decision of the District Land and Housing Tribunal of Kahama. It has been filed by the Applicant by way of chamber summons in terms of the provisions of sections 14(1) of the Law of limitation Act [Cap. 89 RE 2002]. In the chamber summons, the Applicant prays for this Court to grant extension of time to appeal against the decision of the Misc. Land Application No. 526 of 2019 dated 21st August, 2020. The application is

supported with an affidavit sworn by the Applicant on the 30th day of December, 2021.

In a nut shell, the Applicant was a Respondent in the Land Application No. 40 of 2019. The same was heard *ex-parte* as against her and it was delivered in favor of the Respondents herein. That was on 9th October, 2019. In order to set aside the said *ex-parte* judgment the Applicant herein filed a Misc. Land Application No. 526 of 2019. The same was dismissed for being filed out of time and with no merits. Still eager to challenge the same, the Applicant filed Misc. Application No. 143 of 2020, praying for extension of time to set aside the *ex-parte* judgment for the Land Application No. 40 of 2019. Again, this also was dismissed for having followed improper procedure. This was on 19th November, 2021. Upon going through all the above narrated circumstances, the Applicant has now decided to apply for extension of time to appeal against the ruling for the said Misc. Application No. 526 of 2019.

In this Application, Ms. Godfrida William Simba, learned Advocate represented the Applicant, whereas Mr. Martine Masanja, Advocate represented the Respondents. On 24th March, 2022, the matter was scheduled for hearing through written submissions. Both parties complied with the scheduling orders.

Submitting in support of the application, Ms. Godfrida gave the reason that, the Applicant herein was not served with summons purposely to deprive her when Land Application No. 40 of 2019 was instituted to its finality. She stated that, the Applicant came to know the existence of that case during the execution proceedings.

On another reason Ms. Godfrida stated that, the Applicant applied to set aside the *ex-parte* judgment through Misc. Land Application No. 526 of 2019. The same was dismissed for lack of merits and for being time barred. On this, she said that due to lack of diligence and negligence of the Advocate that the Applicant had consulted, she wrongly filed Misc. Application No. 143 of 2020 in the trial tribunal seeking for extension of time to set aside an *ex-parte* judgment, instead of applying for extension of time to appeal at High Court against the dismissal decision of the Misc. Land Application No. 526 of 2019.

To her, the delay was caused by the Advocate that the Applicant had consulted. She cited the case of **Felix Tumbo Kisima v. Tanzania Telecommunication Co. Limited and Another [1997] TLR 57** contending that, such cause of delay constitutes a sufficient reason for extension of time.

Again, Ms. Godfrida raised a point of illegality for extension of time. To this, she stated that, during the course of hearing the Misc. Land Application No. 526 of 2019, to its finality between the year 2019 and 2020, the trial tribunal committed serious illegality. She contended that, the matter before the court was for rectification of the title, but hearing proceeded while the title for the land in dispute had already been rectified by the Assistant Commissioner for Lands, the act which the Applicant's Counsel regarded fatal. She referred us to Annexure "A" and Annexure "A5". To her, the tribunal's act of proceeding to determine the Misc. Land Application No. 526 of 2019 while the title of the land in dispute has already been rectified is an abuse of the court process and the same nullifies all decisions on it including the *ex-parte* judgment in Misc. Land Application No. 526 of 2019 and the ruling for Misc. Application No. 143 of 2020.

In reply thereto Mr. Masanja submitted firstly that, this application by the Applicant has been brought under section 14(1) of Cap 89 RE 2002 instead of RE 2019. Again, he stated that, it has been brought under the Law of Limitation Act instead of the Land Disputes Courts Act. He said that the application is incompetent.

Mr. Masanja went ahead contending that, from 19th November, 2021 when the Misc. Application No. 143 of 2020 was dismissed to 30th December, 2021 when the present application was filed, the Applicant has not accounted for each day of delay.

Mr. Masanja further submitted to the effect that; the cited case of **Felix Tumbo** (supra) is distinguished to the case at hand. He provided the reason being, in the later case, Dr. Lamwai lied to his client and never attended her, while in this case the Applicant's Advocate attended the Applicant. On the same point, Mr. Masanja insisted that, this point should fail as the Applicant never mentioned even the name of the Advocate that she refers to, and there is nowhere he/she is mentioned in the proceedings. He cited the case of **Gracious Mwanguya v. Treasure Registrar (Official Receiver of Tanzania Tractors Manufacturing Co. Ltd, The AG and CRDB, Misc. Civil Application No. 585 of 2020, High Court, DSM District Registry** (unreported) contending that, ignorance of the Applicant or his Advocate does not constitute good cause to warrant extension of time.

On another move, Mr. Masanja submitted that, one cannot appeal against the *ex-parte* judgment before attempting to set it aside. Concerning the issue of service, Mr. Masanja observed that, the Applicant

used to abscond deliberately. He added that, service to the Applicant was done through affixing a copy of summons on the conspicuous place and publishing in Uhuru newspaper dated of 12th June, 2019.

Concerning the ground of illegality, Mr. Masanja stated that, the letters from the Commissioner for Lands were not tendered in the trial courts, he was thus of views that, the same cannot be relied upon at this time.

In rejoinder Ms. Godfrida submitted that, objections cannot be raised during the submission of the case. On the issue of accounting for days of delay, she submitted that, whenever there is illegality as reason for extension of time, the issue of accounting for days of delay seizes. Concerning the case of **Felix Tumbo** she stated that, like the present one, both concerns Advocates misleading their clients. To this end, she was firm that, it is relevant.

As for the issue of negligence of Advocates to constitute sufficient cause for extension of time, Ms. Godfrida cited the recent case of Court of Appeal namely **Stephen Ngalambe v. Onesmo Ezekia Chaula and another, Civil Appeal No. 27 of 2020, CAT at Iringa** stating that it constitute a sufficient reason for extension of time. Ms. Godfrida also

stated that, name of the Advocate who misled the Applicant is clearly found in annexure A-3.

Concerning the point that, one cannot appeal against an *ex-parte* judgment, Ms. Godfrida put it clear that, the Applicant herein seeks to appeal against Misc. Land Application No. 526 of 2020, not the Land Application No. 40 of 2009 which was determined *ex-parte* as against her.

Regarding the issue of service, Ms. Godfrida submitted that, the Respondents decided to issue the substituted summons while they were aware of the place that the Applicant was residing. Concerning the title deed being rectified Ms. Godfrida stated that, the Applicant had notified the court, but it continued determining the case in her absence.

This was the end of both parties' submissions.

I have taken into consideration the parties' submissions, pleadings, annexures, supplied authorities, together with the entire records. The issue for determination is whether the Applicant has shown good and sufficient cause for delay to warrant extension of time.

Upon going through the parties' submissions, it is not in dispute that the Applicant has not accounted for days of delay from 19th November, 2021 when the Misc. Application No. 143 of 2020 was dismissed at the

District Land and Housing Tribunal up to 30th December, 2021 when the present application was filed in this court. I understand that, in arguing on the period of delay and the rest, the Applicant seeks to cover it through illegality as reason for extension of time. I entirely agree with her that, once illegality has been proved, there is no need for accounting for each day of delay. The issue is, illegality, as a ground for the court to warrant extension of time, does it exist?

In the case of **VIP Engineering and Marketing Limited and Two Others VS. Citibank Tanzania Limited, Consolidated Civil Reference No. 6, 7 and 8 of 2006** (unreported) it was held:

"It is settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under Rule 8 (now Rule 10) of the Court of Appeal Rules regardless of whether or not a reasonable explanation has been given by the applicant under the Rules to account for the delay".

With the above quoted paragraph, it goes without saying that, the alleged illegality must be on the record of the case that the Applicant seeks for extension of time to challenge it.

Further in the Court of Appeal case namely **Lyamuya Construction Company Ltd vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, it was observed 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."

With this above quoted too, it follows that for illegality to stand as point for extension of time, such point must be of sufficient importance and must be apparent on the face of the records. The question is whether the point of illegality as raised by the Applicant contains all the three

mentioned qualities, namely; **one**, it must be on the record that the Applicant seeks extension of time to challenge it, **two**, such point must be of sufficient importance and, **three**, it must be apparent on the face of the records.

The Applicant alleged that, by the time Misc. Land Application No. 526 of 2019 was proceeding at the District Land and Housing Tribunal, the title for the land in dispute was rectified. He thus formed an opinion that, all what went through was a nullity, thus illegal. He went ahead contending that, though she informed the trial tribunal yet it proceeded to determine the same.

I have passed through the whole record including the decision in the Misc. Land Application No. 526 of 2019, I have not seen such illegality appearing in any page. This shows too that, the said illegality is not apparent on the face of the records. That is why, the Applicant in this Application has put some annexures in the pleadings she has filed at High Court to explain her point of illegality. It means they are not in a position to be seen on the face of the record which is subject to this appeal.

Those annexures, though fainted, they show that, the title for the disputed land was taken by the Assistant Commissioner for Lands on 27/3//2020 for rectification, subject to the decision of the court/tribunal

in the Misc. Land Application No. 526 of 2019. The said case which is subject to this appeal was instituted in 2019. That is before the said title deed had been withheld by the Assistant Commissioner for Lands on that 27/3//2020. Further, annexure "A5" shows that, the said temporally seizure of the title by the Assistant Commissioner for Lands, was done so as to wait for the conclusion of the case between the parties, before the Commissioner has rectified it by bearing the name of the winner.

Upon referring the above situation, the question is, can that be regarded the illegality? if the answer is yes, whether it is of sufficient importance to warrant the higher court to determine it through appeal?

As long as the withhold of the title by the Assistant Commissioner was for him to wait for registration of the name of the winner in the case between the parties, I am firm that, there is totally no illegality to warrant the higher court to interfere and determine the issue.

Further, the Applicant is the one who instituted the Misc. Land Application No. 526 of 2019 at the trial tribunal. Had the Commissioner rectified the said title into her name, the Applicant herein could have just withdrawn her application, instead of being silent while the matter proceeds before the tribunal. It follows thus, the Applicant having observed the rectification and she did not withdraw her application, the

implication is that she knew there was no illegality, but the on-going proceedings thereat were lawful.

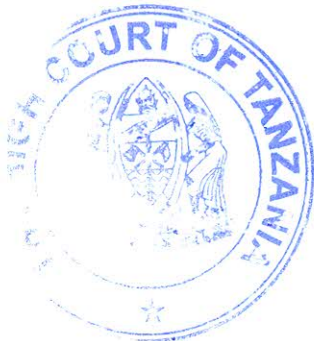
With this observation, I am of settled mind that, illegality as point for extension of time has failed. Further, as alluded earlier, that the Applicant has not accounted for each day of delay from the date that Misc. Application 143 of 2020 was dismissed on 19th November, 2021 to the date that this present application was filed on 30th December, 2021.

In upshot, the Applicant has failed to give sufficient reason for extension of time. I therefore dismiss this application for being unmeritorious. As the application originates from the family matter, I grant no order as to cost.



S.M. KULITA
JUDGE
05/07/2022

DATED at SHINYANGA this 5th day of July, 2022.



S.M. KULITA
JUDGE
05/07/2022