

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

MISCELLANEOUS CRIMINAL APPLICATION NO. 17 OF 2022

ELINA DANIEL APPLICANT

VERSUS

**THE DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT
(Arising from Criminal Application No. 42 of 2021)**

RULING

25th and 29th July 2022

KISANYA, J;

The applicant, Elina Daniel filed this application by way of chamber summons, made under section 16(8) of the Proceeds of Crime Act [Cap. 259, R.E. 2019] (now R.E. 2022) [henceforth “the PCA”] and supported by an affidavit and supplementary affidavit sworn by the said applicant. In terms of the chamber summons, the applicant is in pursuit of extension of time to file an application for leave to apply for discharge of a property against which forfeiture order was made by this Court in Criminal Application No. 42 of 2019.

Briefly, on 7th May, 2019 this Court made an order of forfeiture of properties which were obtained through pyramid scheme operated by DECI (T) Ltd. Amongst the properties forfeited was a house described as Plot No.7, Block P, located at Unguja Street, Nyamagana, Mwanza (henceforth "the property"). The applicant claims to be the lawful owner of the property. She deposed to have acquired the same after dissolution of her marriage with one Michael Balenga on 28th August, 2018. It was further deposed by the applicant that she took possession of the property on 30th June, 2020, in the course of executing the decree of the District Court of Nyamagana in Matrimonial Cause No. 4 of 2018. The reason for extension of time is to the effect that the applicant was not made aware of the forfeiture order issued by this Court in Criminal Application No. 42 of 2019.

The Respondent contested the application by filing a counter affidavit sworn by Mr. Adolf Kisima, learned State Attorney.

When this matter was called for hearing on 4th July, 2022, it was agreed that hearing of the matter be by way of written submissions. Mr. Mussa Kiobya, learned advocate filed written submission in support of the application, whereas Ms Nura Manja, learned advocate filed written submission opposing the application.

In arguing the application, Mr. Kiobya first adopted the affidavit and supplementary affidavit as part of his submission. He restated the principle that in order for the court to grant extension of time, the applicant has to advance good cause for delay. He cited the case of **Samwel Munsiro vs Chacha Mwikabwe**, Civil Application No.539/08 of 2019 in which the Court of Appeal cited with approval its decision in **The Regional Manager, TANROADS Kagera vs Ruaha Concrete Company Ltd**, Civil Application No. 99 of 2007 where it was held that there is no fast and hard rule on what constitutes good cause. Referring further to the case of **Mr. Kamiz Abdullah M.D Kerma vs The Registrar or Building and Ms Hawa Bayona** (1998) TLR 199, the learned counsel submitted that the applicant was forced to file this application in order to safeguard her interest against the forfeiture order.

Mr. Kiobya went on to submit that the applicant failed to take steps within the time specified by the law because she was not aware of the forfeiture order. His submission was further based on the contention that the interested parties were not notified of the application for forfeiture as required by section 10(1)(1) of the Proceeds of Crime Act. He also urged this Court to grant extension of time on reason that the applicant was diligent by

filing this application after becoming aware of the forfeiture order. He bolstered his submission by citing the case of **Michale Lessani Kweka vs John Eliafye** (1997) TLR 152 in which it was held that:-

"...Although generally speaking a plea of inadvertence is not sufficient; nevertheless, I think that extension of time may be granted upon such pleas in certain cases, for example, where the party putting forward such plea is shown to have acted reasonably diligently to discover the omission and upon such discovery, he acted promptly to seek remedy for it."

It was Mr. Kiobya's further submission that the applicant was not given the right to defend her interest in the said property. As alluded earlier, his submission was based on the contention that the applicant was not a party to the Criminal Application No.42 of 2019 which gave rise to the forfeiture order. To cement his argument, the learned counsel cited the case of **R vs Yakobo Mbeguramula** (1951) EACA 207 where it was held that:

"Making an order of forfeiture of the property where the owner of the said property is known and is a person other than the accused person without the owner given the chance of being heard automatically will nullify the proceedings since the same is treated as violation and breach of natural justice."

Concluding, Mr. Kiobya cited the case of **Jesse Kimani vs Mc Cornell** and Another (1996) EA 547 and went on contending that rejection of the application is more prejudicial against the applicant than the respondent. He therefore urged this court to grant the application.

In her submission in reply, Ms. Manja conceded that the applicant was not a party to the application in which the forfeiture order was made. As regards the applicant's contention that she was not notified, the learned State Attorney submitted that the notice of the application was issued on 6th March, 2019 vide publication in Daily News, Uhuru and Habari newspapers. It was therefore her submission that section 10(1) and (2) of the PCA were complied with and that the applicant's contention that she was not aware of the said application lacks legs to stand on.

Making reference to the applicant's affidavit, the learned counsel submitted that the applicant became aware of the forfeiture order in September, 2020. She then argued that the applicant never took any steps until 15th December 2021 when she went to see the Street chairperson before filing the present application on 4th February, 2022. Therefore, Ms. Manja was of the view that the applicant has neither established the sufficient cause nor accounted for each day of delay to file the application.

To support her argument, she cited the case of **Moroga Mwita Moroga vs Republic**, Criminal Appeal No.181 of 2020, Court of Appeal.

Further to the argument on the cause of delay, Ms. Manja submitted that the test to establish sufficient cause by the applicant must be met for the court to extend time where in this application the applicant has not met the said test. Her argument was backed up by the cases of **Boniface Alisteds vs Republic**, Criminal Application No.06/2019 and **Bushiri Hassan vs Latifa Lukio Mashayo**, Civil Application No.3 of 2007.

In the light of the foregoing, Ms. Manja prayed for this court to dismiss the application for lack of sufficient cause.

I have carefully considered the affidavits in support and against this application and the rival submissions. The issue for determination is whether this application is meritorious.

It is common ground this application is premised on the forfeiture order issued by this Court on 7th May, 2019. In terms of section 16(2) (3), (6) of the PCA, a person having an interest in the property subject to the forfeiture order is required to file apply for leave to apply for the following order:-

"...an order for the transfer of the interest by the Permanent Secretary in the Ministry responsible for Treasury to the applicant or for the payment by the Permanent Secretary in the Ministry responsible for Treasury to the applicant of an amount equal to the value of the interest, as the court thinks fit."

It is further gleaned from section 16(7) of the PCA that, the application for the said leave was required to be lodged within six months commencing on the day on which the forfeiture order is made. However, this court has discretion of extending the time with which to apply for leave. The said discretion is exercised judiciously, the main consideration being whether the applicant's failure to make his or her application within the period set out by the law was not due to any neglect on his part. This is pursuant to section 16(8) of the PCA. It stipulates: -

*"Where a forfeiture order is made against property, the court that made the order may, on application being made to it, grant a person claiming an interest in the property leave to apply in terms of subsection (2), after the expiration of the period referred to in subsection (7) **if it is satisfied that the person's failure to make his application within that period was not due to any neglect on his part.**"* (Emphasize supplied).

Being guided by the foregoing provision, it is apparent that the applicant ought to have filed the application for leave on or before 6th November, 2019. However, it was on 4th February, 2022 when she filed the present application. That was almost after two (2) years and three (3) months. In view of the above cited provision, the issue for this Court's determination is whether the delay was not due to any neglect on the part of the applicant.

In addressing the above stated issue, I shall address the question whether the applicant has accounted for each delay. Apart from the case of **Moroga Mwita Moroga** (supra) cited by Ms. Manja, the requirement to account for each day of delay was stated in the case of **Finca (T) Limited & Another vs Boniface Mwalukisa**, Civil Application No. 589 of 2018 (unreported), where the Court of Appeal held thus: -

*The requirement of accounting for every day of delay has been emphasized by the Court in a numerous decision, examples are such cases of **Bushiri Hassan vs Latifa Lukio, Mashayo**, Civil Application No. 3 of 2007 (unreported) and **Karibu Textile Mills vs Commissioner General (TRA)**, Civil Application No. 192/20 of 2016 (unreported). In the **Bushiri Hassan** case, the Court stated:*

"Delay, of even a single day, has to be accounted for otherwise there would be no proof of having rules prescribing periods within which certain steps have to be taken"

The first ground advanced by the applicant is to the effect that she was not aware of the forfeiture order. However, as rightly submitted by Ms. Manja, the notice of application which gave rise to the forfeiture order was published in the newspapers. That fact was deposed in the respondent's counter affidavit and the applicant did not file her reply to contest the same.

The applicants contends in paragraph 7 of the supporting affidavit that she was in Kigoma when her street executive officer called her in mid-September, 2020 to inform her about "a message from government property reviewer" in respect of the property in dispute. What the Street Executive told the applicant is well deposed in paragraph 3 of the supplementary affidavit which reads:-

"That I received the information from my Unguja Street Executive Officer while I was in Kigoma, informing me about my house I am possession (sic) have been forfeited so that I have to attend his office for directive, upon my return on 15th December, 2021 he gave me a letter

signifying the same to have been acquired by the Government.”

Therefore, it can be glanced from paragraph 7 of the affidavit and paragraph 3 of the supplementary affidavit that the applicant became aware of the forfeiture order in Mid-September, 2020. She was then expected to act promptly and diligently in taking the necessary action against the said order. Neither the affidavit nor the supplementary affidavit shows the reasons for failure to take the necessary action from Mid-September, 2020 to 15th December, 2021 when she alleged to have returned to Mwanza or received the letter from the Street Executive Officer. For that reason, I hold the view that the delay from Mid-September, 2020 to 15th December, 2021 has not been accounted for.

It is also on record that after meeting her street executive officer, on 15th December, 2021, the applicant took about 50 days to file the present application on 4th February, 2022. Her contention that she engaged one Dorothes Method who informed her that the forfeiture order was issued in Criminal Application No. 42 of 2019 is not supported in evidence. The Court was not informed as to when the advocate was engaged and when the said advocate became aware of Criminal Application No. 42 of 2019. Further to

this, the affidavit of the advocate engaged by the applicant was not appended to the application.

On the foresaid reasons, I am inclined to agree with Ms. Manja that the applicant has not accounted for the delay after becoming aware of the forfeiture order.

I have further considered Mr. Kiobya's argument that the applicant was denied the right to be heard. In other words, the learned counsel invited this Court to extend time basing on the ground of illegality. I am alive to settled law that the point of illegality is a sufficient ground for extension of time. See the case of **The Principal Secretary Ministry of Defence and Notional Service vs. Devram Valambia** [1991] TLR 387, in which it was underlined 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, to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record straight"

However, the law is also settled that illegality of the decision stands as a ground of extension of time if it is on the face of record and attracts no a

long argument. This stance was stated in the case of **Moto Matiko Mabanga vs Ophir PLC and 2 Others**, Civil Application No. 463/01 of 2017 (unreported) in where the Court of Appeal restated: -

"...for the ground of illegality to stand, the challenged illegality of the decision must be clearly be visible on face of record, and the illegality in focus must be of sufficient importance."

In our case, the applicant did not depose that he was not accorded the right to be heard. What was deposed in the affidavit and supplementary is that she was not aware of the application which led to the forfeiture order. In that regard, Mr. Kiobya contended that the applicant was not notified of Criminal Application No.42 of 2019 as required by section 10 (1) & (2) of the PCA. As indicated earlier, the respondent deposed that the notice was duly issued. For clarity, I find it necessary to reproduce paragraph 5 of the counter affidavit as hereunder:

"That before the hearing of the application mentioned in paragraph 3 above publication was made in the national circulating newspaper to the general public for anyone with an interest on the listed properties which are subjected for forfeiture to appear to the court so as to exclude his or her interest."

The relevant copy of public notice published in the newspapers was appended to the counter-affidavit. Although the applicant was given time to file her reply to the counter-affidavit, she did not file the same. In any case, it is my considered view that the issue whether section 10 (1) & (2) of the PCA was complied with is not apparent on record. Thus, such ground cannot be registered as a point of illegality for this court to extend time.

Ultimately, I hold that the application is without merit and has to fail. It accordingly dismissed.

DATED at DAR ES SALAAM this 29th day July, 2022.



S.E. Kisanya
JUDGE