IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

MISC. LAND APPLICATION NO. 140 OF 2021

(Arising from Misc. Land Application No. 86 of 2020 and Land Case Appeal No. 74 of 2018 of the High Court of Tanzania at Bukoba originating from Land application No. 81 of 2016 of Muleba District Land and Housing Tribunal)

JOSEPH RWAKASHENYI.....APPLICANT

VERSUS

1. **RWANGANILO VILLAGE COUNCIL.....1ST RESPONDENT**
2. **KIKUKU VILLAGE COUNCIL.....2ND RESPONDENT**
3. **GOZIBERT TIRUHWA.....3RD RESPONDENT**
4. **FATUMA AMADA.....4TH RESPONDENT**
5. **MASTURA AMADA.....5TH RESPONDENT**
6. **FRAISKA GODWIN.....6TH RESPONDENT**
7. **WILLIAMINA GOZIBERT.....7TH RESPONDENT**
8. **ZULIATI JUMA.....8TH RESPONDENT**
9. **DEVOTHA RWEYEMAMU.....9TH RESPONDENT**
10. **ROZIMARY ALISI.....10TH RESPONDENT**
11. **REONIDA MARICK.....11TH RESPONDENT**
12. **DUSIANA PASKARI.....12TH RESPONDENT**
13. **REVINA MAKADI.....13TH RESPONDENT**
14. **ZAITUNI JUMA.....14TH RESPONDENT**
15. **GRAIDESI GOSBERT.....15TH RESPONDENT**
16. **BAHATI SIX.....16TH RESPONDENT**
17. **NYAKATO NIKSON.....17TH RESPONDENT**
18. **GODERIVA RUTINWA.....18TH RESPONDENT**

19. JANETH HAMIMU.....19TH RESPONDENT

20. ASTEI CHARLES.....20TH RESPONDENT

21. HAPPINES FURE.....21ST RESPONDENT

22. NAZIRA SULEIMAIN.....22ND RESPONDENT

RULING

18/07/2022 & 19/08/2022

E. L. NGIGWANA, J.

This is an omnibus application. It combines two applications to wit;

(i) Application for extension of time to apply for leave to appeal to the Court Appeal.

(ii) Application for leave to appeal to the Court of Appeal.

The application has been preferred under section 5 (1) (c) and 11 (1) of the Appellate Jurisdiction Act Cap. 141 R: E 2019, section 47 (2), (4) and 48 (2) of the Land disputes Courts Act Cap. 216 R: E 2019 and Rule 45 (a) of the Court of Appeal Rules. The application is supported by an affidavit deposed by the applicant. Counter affidavits were filed by the respondents contesting the application.

At the outset, I would like to state that, it is not automatically fatal to combine more than one prayer in one chamber summons. The Court of Appeal in the case of **Mic Tanzania Ltd versus Minister for Labour and Youth Development**, Civil Appeal No. 103 of 2004 had this to say;

"*The combination of the applications is not bad in law otherwise the parties would find themselves wasting more money and time on avoidable applications which would have been* ***conveniently combined****.... Unless there is a specific law barring the combination of more than one prayer in*

one chamber summons, the court should encourage this procedure rather than thwart it for fanciful reasons.

In the case of Tanzania **Pride Ltd versus Mwanzani Kasatu,** Misc. Commercial Cause No.230 of 2015 it was held that;

"In the circumstances in Tanzania where the vision of the judiciary is to administer justice effectively, efficiently and timely, it will be inappropriate for courts of law to encourage multiplicity of proceedings because this course would defeat the very goal of which the vision is intended to achieve."

See also **Project Manager Es-Ko International INC Kigoma versus Vicent Ndugumbi,** Civil Appeal No. 22 of 2009. There are factors to be considered whether the prayers can be conveniently combined or otherwise. For instance, in the case of **Gervas Mwakafwala and 5 Others versus The Registered Trustees of Morovian Church in Southern Tanganyika,** Land Case No. 12 of 2013 HC (unreported) where the court when faced with issue of omnibus application had this to say;

"*I must hasten to say, however, that I am aware of the possibility of an application being defeated for being omnibus especially where it contains prayers which are not interlinked or interdependent. I think, where combined prayers are apparently incompatible or discordant, the omnibus application may be inevitably rendered irregular and incompetent*".

See also **First Assurance Co. Ltd versus Aron Kaseke Mwansonzwe and another,** Civil Revision No.1 of 2020. In the matter at hand, the applicant is seeking extension of time to apply for leave to appeal to the

Court of Appeal as the first prayer, and leave to appeal to the Court of Appeal as the second prayer. The 2nd prayer is subject to the grant of the first prayer. With no doubt, the two prayers, are interrelated in the sense that, upon granting one, the other will follow. Leave to appeal cannot be granted if the 1st prayer has not been granted. Being guided by the decision of the Court of Appeal in **Mic Tanzania Ltd versus Minister for Labour and Youth Development (Supra),** and the principle that, each case has to be determined on its own facts, merits and circumstances, the combination done in this application is not fatal for the reasons stated herein above.

As depicted from the applicant's affidavit, the background which gave rise to this application may be recounted as follows; in Land Application No. 81 of 2016 of the District Land and Housing Tribunal for Muleba at Muleba, the Applicant Joseph Rwakashenyi successfully sued Rwanganilo Village Council and 21 others for trespassing into the Land he alleged to own since 1988. Being aggrieved, Rwanganilo Village and 21 others lodged an appeal this court to wit; Land Appeal No. 74 of 2018.

After hearing the appeal, the same was allowed with costs. Consequently, the respondent, now applicant was ordered to vacate from the suit land as soon as possible.

The applicant was aggrieved by the decision of this court, thus on 07/12/2020, he filed the Notice of Intention to Appeal to the Court of Appeal- Bukoba sub-registry and on 12/12/2020, he filed Misc. Application seeking for leave to appeal to the Court of Appeal, but the same ended

being struck out on 27/12/2021 for being incompetent, hence this application.

In his affidavit, the applicant has raised **technical delay, sickness** and **illegality** as reasons justifying extension of time.

With leave of the court, the hearing proceeded by way of written submissions. The applicant was unrepresented but his submission was drawn by Mr. Pereus Mutasingwa Sarapion, learned counsel who was engaged for drawing only, the 1st and 2nd respondents were represented by Mr. Muyengi Muyengi, learned State Attorney, while the rest of the respondents were not represented, but their submission save for 11 respondent were drawn and filed by the 4th respondent, Fatuma Amada.

Submitting on the issue of technical delay, the applicant stated that, he filed Misc. Application No. 86 of 2020 within time seeking for leave to appeal to the Court of Appeal against the decision of this court but the same was struck out on 27/12/2021 and was supplied the copy of the ruling on 05/11/2021 despite the two letters he wrote requesting to be supplied with the same. To support the ground of technical delay, the applicant cited several cases including **Fortunatus Masha versus William Shija and Another** [1997] TLR 154, **Vodacom Tanzania Public Co. Ltd versus Commission General (TRA)**, Civil Application 465 /20 of 2019, **Hamis Mohamed** (As administrator of the estate of the late Risasi Ngawe**) versus Mtumwa Moshi** (As the Administratix of the estates of the late Moshi Mdale), Civil Application No.107/17 of 2019, **Director General LAPF Pensions Fund versus Pascal Ngalo**, Civil Application No. 76/08 of 2018, and **Emmanuel R. Maira versus The**

District Executive Director of Bunda District Council, Civil application No. 66 of 2010 where technical delay was emphasized as a ground of extension of time.

As regard, the issue of sickness, the applicant submitted that, after being supplied with a copy of the ruling, he became sick from 08/11/2021 where he had to undergo medical treatment which took him up to 29/11/2021, and when he became a little bit better, he prepared the present application on 30/11/2021, and filed it in court on 02/12/2021. In support of this ground, the applicant referred this court to the case of **Emmanuel R. Maira versus The District Executive Director, Bunda District Council (supra)** where sickness was found to be a sufficient cause for extension of time. He also made reference to the case of **Miraji Salehe versus KBC Bank Tanzania Ltd**, Civil Application No. 118/16 of 2018.

Arguing the ground of illegality, the applicant submitted that the impugned judgment of this court contained illegalities, and the position of the law is that, where the issue of illegality is raised as a ground for applying an extension of time, such ground amounts to sufficient cause.

To support this ground, the Applicant made reference to several cases including; **The Principal Secretary, Ministry of Defence and National Service versus Devram Valambia** [1992] TLR 185, **Kabunga and Company Advocates versus National Bank of Commerce Ltd** [2006] TLR 235, **Harban Haji Mosi and another versus Omari Hilal Seif and Another** [2001] TLR 409, and **VIP Engineering and Marketing Ltd and Two (2) Others versus City Bank Tanzania Ltd,** Consolidated Civil References No. 6, 7 and 8 of 2006 where it was maintained that a

claim of illegality by itself constitutes sufficient reason for extension of time where the same is apparent on the face of the record.

Mr. Muyengi Muyengi, learned State Attorney for the 1st and 2nd respondents submitted that, the applicant has not demonstrated sufficient reasons for his delay and has failed to account for each day of delay. He referred this court to the case of **Tanzania Habours Authority (THA) versus Mohamed R. Mohamed,** (2003) TLR 76 and **Kabunga and Co. Advocates Ltd versus NBC** [2006] TLR 235. He further submitted that the medical chit annexed to the affidavit does not exactly reveal exactly if the applicant was seriously sick to be incapacitated in the way that he was unable to take the intended action timely. He further stated that, what has been demonstrated by the applicant is nothing but negligence, and as a matter of law, negligence does not constitute sufficient reason for extension of time.

Submission by the rests of the respondents save for 11th respondent who filed no written submission, is similar to that of the 1st and 2nd respondents and the cases cited are also the same. They contended that the applicant has not demonstrated sufficient cause for extension of time.

Illegality as a ground for extension of time was not challenged by the respondents.

Having considered submissions, affidavit in support of the application and counter affidavits against the application, the first issue for determination is whether the applicant has demonstrated sufficient cause to warrant extension of time.

Section 11(1) of the Appellate Jurisdiction Act, Cap 141 R: E 2019 which provides that;

"*Subject to subsection (2), the High Court or, where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned,* ***may extend the time*** *for giving notice of intention to appeal from a judgment of the High Court or of the subordinate court concerned,* ***for making an application for leave to appeal*** *or for a certificate that the case is a fit case for appeal,* ***notwithstanding that the time for giving the notice or making the application has already expired"***

It is settled that an application for extension of time can only be granted upon the applicant adducing good cause or sufficient reason(s) for delay. This principle was clearly stated **in Mumello v. Bank of Tanzania** [2006] E.A. 227 that;

"... *an application for extension of time is entirely in the discretion of court to grant or refuse and that extension of time may only be granted where it has been sufficiently established that the delay was due to sufficient cause"*

In **Regional Manager TANROAD Kagera versus Ruaha Concrete Company Ltd**, Civil application No. 96 of 2007 CAT (unreported) the court held that;

"*The test for determining an application for extension of time is whether the applicant has established some material amounting sufficient or good cause as to why the sought application is to be granted.*

What amounts to sufficient cause or good cause is not defined in the statutes. However, in the case of **Lyamuya Construction versus Board**

of Registered Trustees, Civil Application No.2 of 2010 CAT (Unreported), factors to be considered before granting or refusing extension of time are; whether the applicant has accounted all days delayed, whether the delay is inordinate or not, whether the applicant has shown diligence, and not apathy negligence or sloppiness in prosecution of the action that he intends to be taken. Last but not least, if the court feels that there is any point of law of sufficient importance such as the illegality involved in the decision sought to be challenged.

Furthermore, the court of appeal of Tanzania in the case of **Masalu versus Tanzania Processing Ltd**, Civil Application No. 13 of 2020 held that-

"*What constitute good cause cannot be laid down by any hard and fast rules. The term good cause is a relative one, is dependent upon a party seeking extension to prove the relevant material in order to move the court to exercise its discretion*".

Generally, from the herein above Court of Appeal authorities, it can be learnt that extension of time is not a right of a party but an equitable remedy that is only available to a deserving party at the discretion of the court. That, the law does not set any minimum or maximum period of delay. The applicant must give valid, clear and sufficient reasons upon which the discretion can be favorably exercised.

In the instant application it is apparent that, the decision of this court in Land case No.74 of 2018 was delivered on 13/11/2020. The copy of

judgment was annexed to the affidavit as **"A1"** while the decree as **"A".** It is also true that on 07/12/2020, the applicant filed the Notice of Appeal. Its copy was annexed to the applicant's affidavit as **"C"**. It is also true that on 24/11/2020 and 30/11/2020 respectively, the applicant wrote letters requesting to be supplied with the copy of judgment. The letters were annexed to the applicant's affidavit as **"B" and "B1.** It is again clear that the applicant filed Misc. Application No. 86 of 2020, and he did so on 12/12/2020 that is to say; before the expiry of 30 days from the date of the decision of this court.

Rule 45(a) of the Tanzania Court of Appeal Rules, 2009 as amended read; "In Civil matters-

(a) *Notwithstanding the provisions of rule 46 (1), where an appeal lies with the leave of the High Court, application for leave may be made informally, when the decision against which it is desired to appeal is given, or by chamber summons according to the practice of the High Court* ***within thirty days of the decision---***".

It is again undisputed that on 27/09/2021, the said application was struck out for being incompetent. It is on record that on 27/09/2021, the Applicant through the office of **Chamani and Co. Advocates** wrote a letter requesting to be supplied with the copy of the ruling, and on 20/10/2021, he personally wrote another letter requesting to be supplied with the same. The two letters were annexed to the plaint as **"E" and "E1".** According to the Applicant, he was supplied with the copy of the ruling on 5/11/2021.

The respondents argued that the ruling was ready for collection on the date of its delivery, but this argument has no base owing to the reason that the this court received and stamped the said letters for the same to be acted upon, and that is evident that the copy was not supplied to the applicant on the day it was read. From the date when the ruling was delivered that is to say 27/09/2021 until 5/11/2021 when the copy of the ruling was supplied to the applicant constitutes technical delay since it is settled that delays which arise as a result of pursuing matters that are subsequently adjudged defective or through a procedure that is wrong, is excusable. See the case of **Fortunatus Masha versus William Shija and another** (Supra).

I now turn to the issue of sickness. The respondents' argument is that the medical chit annexed to the affidavit does not show that the applicant was incapacitated from filing the application promptly since he was an outpatient. In my considered view, the fact that the applicant was an out-patient does not mean that he was not sick since sickness is a condition which is experienced by the person who is sick. It is not a shared experience. Addressing the question of sickness, the Court of Appeal of Tanzania in the case of **John David Kashankya versus the Attorney General**, Civil Application No. 1 of 2012 (unreported) had this to say;

"*Sickness is a condition which is experienced by the person who is sick. It is not shared. Except for children who are not yet in position to express their feelings, it is the sick person who can express his/her condition whether he/**she has strength to move, work and do whatever kind of work he is required to do**. In this regard, it is the applicant who says*

he was sick and he produced medical chits to show that he responded to a doctor for checkup for one year. There is no evidence from the respondent to show that after the period, his condition immediately became better and he was able to come to court to pursue his case. Under such circumstances I do not see reasons from doubting his health condition. I find the reason of sickness given by the applicant sufficient reason for granting the application for the extension of time."

Being guided by the herein above Court of Appeal decision, it is the finding of this court that there is no evidence provided by the respondents to show that the applicant being an out-patient, could move, work, and do whatever kind of work he was required to do. The medical chit annexed to the affidavit as "F" revealed that the applicant was attended at Kiagara Health Centre on 8/11/2021, 15/11/2021 and 29/11/2021 whereon 29/11/2021, the Medical Doctor indicated that the patient had improved.

Indeed, the applicant has managed to demonstrate that from the date when the copy of the ruling in Application No.86 of 2020 was supplied to him, he became sick whereas, upon improvement, he prepared the present application and filed it in court on 3/12/2021 upon payment of the necessary filing fee.

The last ground rose for extension of time is illegality, but since the two grounds sufficed for the grant of extension of time, I find no compelling reasons to address the ground of illegality. In the event, extension of time within which to apply for leave to the Court Appeal is hereby granted.

Coming to the second prayer to wit; leave to appeal to the Court of Appeal, the issue for determination is whether the applicant has demonstrated

serious and contentious issues of law or fact fit for consideration by the Court of Appeal.

Section 47(2) of the Land Disputes Courts Act Cap 216 R: E 2019 provides that;

"A person who is aggrieved by the decision of the High Court in the exercise of its revisional or appellate jurisdiction may, with leave of the High Court or Court of Appeal, appeal to the Court of Appeal"

The discretionary powers of the court in granting leave and the exercise of that discretion is as stated in the excerpt below from the **British Broadcasting Corporation versus Eric Sikujua Ngi'ymaro,** Civil Application No.133 of 2004 (CAT).

"Needless to say, leave to appeal is not automatic. It is within the discretion of the court to grant or refuse leave. The discretion must, however judiciously exercised and on the materials before the court. As a matter of general principle, leave to appeal will be granted where the grounds of appeals raise issues of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal"

In the case **of Ramadhani Mnyanga versus Abdala Selehe [**1996] it was held that;

"For leave to be granted the application must demonstrate that there are serious and contentious issues of law or fact fit for consideration of appeal"

In the case of **Rweyemamu Constantine and two Others versus UWATEDA Group and Another**, Civil Application No. 563/17 of 2019 CAT (Unreported) the Court held that;

"It should be understood that, in an application for leave to appeal, what is required of the court hearing such an application, is to determine whether or not the decision sought to be challenged on appeal raises any legal point deserving consideration by the Court of Appeal. That is what is cardinal in any application of the present nature. (see ***National Bank of Commerce V. Maisha Musa Uredi (Life Business Centre)*** *[2020] 1 TLR 524."*

From the above authorities, we can learn that there are conditions to be met for the grant of leave to appeal to the Court of Appeal, amongst them being that; there are compelling reasons why the appeal should be heard, including; conflicting judgments on the matter under consideration or where the decision sought to be appealed did not dispose of all the issues in the case or where the proceedings as a whole reveal disturbing features requiring the Court of Appeal intervention and provision of guidance or where there is point of law or point of public importance detected from the appealed decision.

The Court of Appeal in the case of **Jireys Nestory Mutalemwa versus Nyoronyoro Conservation Area Authority,** Civil Application No. 154 of 2016 CAT (unreported), had this to say;

"The duty of the court at this stage is to confine itself to the determination of whether the proposed grounds raise arguable issues before the court in the event leave is granted."

Applying the principle set in place in the case of **Jireys Nestory Mutalemwa versus Nyoronyoro Conservation Area Authority, (Supra),** to the instant application, I am convinced that the proposed

grounds stated in paragraph 11 of the applicant's affidavit raise arguable issues. The proposed grounds were coached as follows;

1. *Whether or not the impugned judgment is a satisfactory decision based on proper re-evaluation of adduced evidence.*

2. *Whether the Hon. judge was right to proceed and determine the respondents' all grounds of appeal instead of ordering to apply for setting aside the judgment passed exparte by the trial tribunal.*

3. *Whether it was correct for the Hon. Judge to allow the respondents' appeal with costs and ordering the applicant to vacate from the disputed land as soon as possible while the applicant's claim was not challenged by the respondents.*

4. *Whether or not the case was supposed to be determined basing on the principle of adverse possession.*

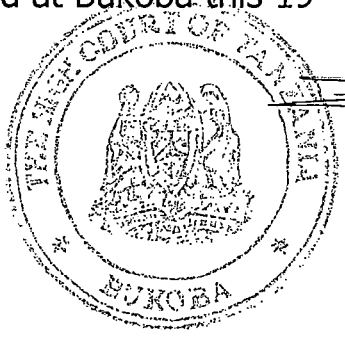
5. *Whether the learned Judge of the first appellate court acted reasonably to enter judgment without specifying the actual or real owner of the disputed land.*

6. *Whether there was any legal justification on the part of the Hon. Judge to hold that in the year 988 when the applicant was given the disputed land, Rwanganilo Village Council was in existence and a body corporate capable of owning the disputed land and allocate the same to the 3rd up to 22nd respondents.*

7. *Whether it was proper for the Hon. Judge to allow the appeal with costs and leave the judgment of the trial tribunal not quashed and set aside.*

While being guided by the stated principles stipulated in the herein above cases, I have gone through the judgment of this court as a whole, and the proposed grounds of the intended appeal deposed at paragraph 11 of the affidavit supporting the application and argued by the applicant and found that the applicant has managed to satisfy the court that there is a primafacie case or arguable appeal which deserve to be determined by the Court of Appeal of Tanzania against the decision of this court in Land Appeal No. 74 of 2018.In the event, leave to appeal to the Court of Appeal is hereby granted. Costs to be in the due course.

Dated at Bukoba this 19th day of August, 2022

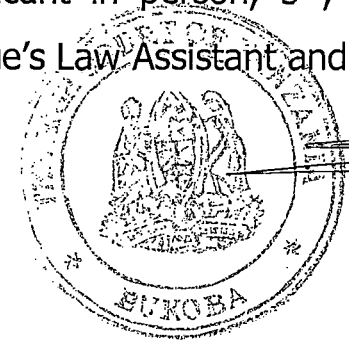


E. L. NGIGWANA

JUDGE

19/08/2022

Ruling delivered this 19th day of August 2022 in the presence of the applicant in person, 3rd, 4th and 18th respondents, Hon. E.M. Kamaleki, Judge's Law Assistant and Ms. Tumaini Hamidu, B/C.



E. L. NGIGWANA

JUDGE

19/08/2022