

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

MISC. LAND APPLICATION NO. 25 OF 2022

(Arising from Mbunda Ward Tribunal Case No.....of 2017, Ngara District Land and Housing Tribunal Land Appeal No. 06 of 2018, this court's Appeal No. 28 of 2019 and Misc. Land Application No. 125/2021)

JULIAN PASTORY RUBAVU.....APPLICANT

VERSUS

JUMA ILDEPHONCE ODAS CHALUKWAYA.....RESPONDENT

RULING

Date of Ruling: 02.09.2022

A.Y. Mwenda, J.

By a chamber summons made under section 11 (1) of the Appellate jurisdiction Act, [Cap 141 RE 2019], the applicant is seeking leave for extension of time to file Notice of Appeal to the Court of Appeal, extension of time to file leave to appeal to the court of appeal and for extension of time to seek a certificate on point(s) of law to be determined by the court of appeal of Tanzania. This application is supported by an affidavit affirmed by Mr. Alli Chamani, learned advocate.

Opposing the present application, the respondent filed a counter affidavit.

At the hearing of the present application, both parties were legally represented.

The applicant was represented by Mr. Fahad, learned counsel while the respondent was represented by Mr. Dickson Laurent, learned counsel.

Invited to submit in support to the present application, Mr. Fahad submitted that the gist of this application is Civil Appeal No. 28 of 2019 which was decided on 05.03.2021. He said, being aggrieved by such decision, the applicant filed notice of intention of appeal to the Court of Appeal on 11.03.2021 and on 27.03.2021 he filed Misc. Application No. 26 of 2021 seeking leave to appeal to the Court of Appeal and craving for certificate on the point of law. The learned counsel said, this application was struck out by the court following discrepancy in the names of the parties, which automatically affected the notice of appeal.

The learned counsel stated further that after the order striking out Misc. Application No. 26 of 2021 was issued, the applicant filed Misc. Land Application No. 75/2021 which was later withdrawn on 13.10.2021 on technical grounds for being omnibus. The applicant then filed Misc. Land Application No. 125/2021 which was also struck out for want of proper citation of the enabling provision. The learned counsel said, two days later the applicant wrote a letter applying for a ruling of Misc. Land Application No. 125/2021 and the same was issued on 17.02.2022.

Mr. Fahad said, having received the said ruling i.e on 18.02.2022, the applicant filed the present application. According to Mr. Fahad this flow of events is a purely technical delay as the applicant have, ever since the decision in Civil Appeal No. 28/2019 was delivered on 05.03.2021, been in the court's premises looking for justice. He said, after the pronouncement of the said judgment, the applicant acted promptly and this alone is one of the grounds for extension of time. In support to

this point Mr. Fahad cited the case of FORTUNATUS MOSHA V. WILLIAM SHIJA AND ANOTHER [1997 TLR at page 124 where the court drew a distinction between actual delay and technical delay. With this submission, the learned counsel prayed the present application to be granted.

Further to that, Mr. Fahad, submitted that the Ward Tribunal's records are tainted with illegality for want of proper composition of the tribunal. He said, the coram in the proceedings is missing and as such it is not known if the tribunal was properly composed. He said, although in the copy of judgment the coram is recorded, it cannot be assumed that the same members were also involved in the hearing. The learned counsel submitted that this anomaly is illegality which is sufficient reason for extension of time. To support this argument, he cited the case of the PRINCIPAL SECRETARY, MINISTRY OF DECENCE AND NATIONAL SERVICE V. DELVAN VALAMBIA [1992] TLR, 82.

In concluding his submission the learned counsel for the applicant prayed the present application to be granted.

Given room to respond to the submissions by the learned counsel for the applicant, Mr. Dickson Laurent, learned counsel for the respondent began with a prayer to have the respondent's counter affidavit adopted as part to his oral submissions.

Mr. Laurent then started his submission by stating that there was negligence on the part of the applicant which led to withdrawal and sticking out his application. He said the final ruling which led to the present application was delivered on 08.02.2022 and it was ready for collection on the same date as it was signed on

the same date. He said, strangely, instead of collecting it on the same date, the applicant chose to write a letter applying for its copy, a letter which was submitted on 10.02.2022. He said there is no reasons advanced for his delay to submit the said letter on the same day.

The learned counsel for the respondent further submitted that the applicant said that he received a copy of the ruling on 17.02.2022 but that assertion is not supported by any evidence. He said the applicant ought to have collected the said copy on 08.02.2022 when it was read and added that after all, there is no law which compel the applicant to annex the copy of ruling in his application. He said the applicant had 10 days of delay which he failed to account for.

With regard to submissions by the learned counsel for the applicant that the Ward Tribunal's records are tainted with illegality, Mr. Laurent submitted that Annexure "J" to the applicant's affidavit which purports to contain the same is not part of the applicant's affidavit. He said, illegality was not pleaded in the affidavit and as such, the court is prevented to act on it. To support this argument, the learned counsel cited the case of FARIDA F. MBARAKA AND ANOTHER V. DOMINA KAGARUKI AND ANOTHER, CIVIL REFERENCE NO. 14/2019 at page 19.

The learned counsel submitted further to the effect that since the members to the Ward Tribunal signed in the copy of judgment then there is no injustice occasioned on either party as the ward Tribunal is empowered regulate its own procedure. He also added that the case of VALAMBHIA (supra) cited by the learned counsel for the applicant is distinguishable. He then concluded his submission with a prayer

to have this application dismissed as the applicant failed to account for each and every day of delay.

In a rejoinder submission Mr. Fahad stated that regarding argument by the counsel for the respondent that there is no law requiring attachment of the ruling in the affidavit, the affidavit being evidence it should then be sufficient and for that matter the applicant needed it in a bid to prove his claims. In support thereof he made reference to the case of FARIDA F. MBARAKA AND ANOTHER (supra) at page 19.

With regard to submission by the learned counsel for the respondent that the applicant failed to account for each and every day of delay from 08/02/2022 – 18/02/2022 which is almost 10 days delay, Mr. Fahad stated that the same was undertaken (accounted for) at paragraph 10 of the applicant's affidavit. He said that they received a copy of ruling on 17/02/2022 despite applying for it on 10/2/2022 and for that matter, the said copy bearing a signature of the day when it was read, by itself does not necessarily mean it was prepared on the same day as was alleged by the learned counsel for the respondent. He said, it has been a practice of the court that even when the copy of judgment is prepared three months later from the date of the judgment, the same shall bear the signature and the date when it was read. He added that if the said ruling was ready on the same date when it was read, one would expect the applicant to be supplied with its copy on the date when he forwarded the letter applying for the same. He said furnishing

him with the same later, entail it was not ready by the time the letter requesting for the said copy was forwarded.

With regard to the submissions by the learned counsel for the respondent that the issue of illegality was not stated in the applicant's affidavit, Mr. Fahad submitted that the same was stated in annexure J which is part of the applicant's affidavit.

On the argument by the learned counsel for the respondent that the applicant was negligent, Mr. Fahad said that it is the advocate of the applicant who was negligent that is why Hon. Kilekamajenga J, in Land Application No. 125/2021 was of the view that there was negligence on the part of the applicant's advocate. For that matter, Mr. Fahad said it won't be fair if the applicant is going to be condemned for his advocate's negligence.

On the argument by the counsel for the respondent that the composition of the tribunal was proper as long as they signed in the copy of judgment, Mr. Fahad was of the view that it is not clear if those who endorsed signatures in a copy of the judgment are the ones who were involved in the hearing. The learned counsel for the applicant concluded his rejoinder by repeating to his previous prayer to the court to grant the prayers as stated in the chamber application.

I have keenly gone through the submissions of both parties and the records. It is thus my turn to deliberate on the present application. To do so the issue for determination is whether or not the applicant advanced sufficient reasons for extension of time.

Before going into the root of the matter it is pertinent to point out that this court has a discretion to grant or refuse applications for extension of time. Such discretion has to be exercised judiciously in accordance to the rule of and principle of justice. The guiding principles in applications of this nature is that the said discretion can only be exercised if good cause is shown.

In providing insight on what good cause entails, the court of appeal in the case of ZAWADI MSEMAKWELI V. NMB PLC, CIVIL APPLICATION NO. 221/18/2018 held inter alia that;

"Where as it may not be possible to lay down an invariable definition of good cause so as to guide the exercise of the court's discretion under rule 10, the court must consider factors such as the length of the delay, the reasons for the delay, the degree of prejudice the respondent stands to suffer if time is extended, whether the applicant was diligent, whether there is a point of law of sufficient importance such as illegality of the decision sought to be challenged and the overall importance of complying with the prescribed timeline"

In the present application, the learned counsel for the applicant brought forward two points for consideration by the court in order to exercise its discretion. These are firstly, technical delay where the applicant narrated what befell his appeal and applications from when the decision in Land Appeal No. 28/2019 was made to the

time when the present application was filed and secondly the illegality on the face of the ward Tribunal's records. In a bid to deliberate the matters raised I am going to start with the second point which is illegality of the ward Tribunal's records.

While submitting in support to this issues the learned counsel for the applicant stated that the records of the ward Tribunal's proceedings do not show the composition of the members. The learned counsel said that although in the copy of judgment there is a list of members who appear to append their signatures that alone does not mean they were involved in the hearing of the application. On the other hand the learned counsel for respondent was of the view that the issue of illegality cannot be raised now as it was not raised in the applicant's affidavit. I have gone through the applicant's affidavit and noted, as it was rightly submitted by the learned counsel for the applicant, the issue on illegality of ward Tribunal's records was raised at paragraph 10 of the applicant's affidavit and features in Annexure "J" which is part of the applicant's affidavit.

Even if the same was not stated or raised in the applicant's affidavit, much as the records are clear that such illegality exist and the respondent is not disputing that fact, then this court is bound to look at it and deal with it accordingly. This is so because a claim of illegality can be raised at any time even if it is not raised in the applicant's affidavit. In the case of B. 9532 CPL EDWARD MALIMA V. THE REPUBLIC, CRIMINAL APPEAL NO. 15 PF 1989, CAT (unreported) the court held;

"...we are satisfied that it is elementary law that an appellate court is duty bound to take judicial notice of

matters of law relevant to the case even if such matters are not raised in the notice of appeal or in the memorandum of appeal. This is so because such court is a court of law and not a court of the parties."

That being said, since it is evident that there is illegality on the ward Tribunal proceedings then that alone constitute sufficient reason for extension of time. In the case of the ATTORNEY GENERAL V. TANZANIA PORTS AUTHORITY AND ANOTHER, CIVIL APPLICATION NO. 87 OF 2016 CAT (unreported) the court held;

"It is settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay".

Basing on the above decision, this court finds merits in the present application and it is hereby granted. The applicant is thus granted extension of time to file notice of appeal to the court of appeal, leave to appeal to the court of appeal and to seek a certificate on point(s) of law to be determined by the court of appeal. He shall do so within fourteen days from the date of receipt of the copy of this ruling. Since the fate of this application is determined basing on illegality of the ward Tribunal's records, I find no reasons to discuss the applicant's technical delay.

Each party shall bear its own costs.

It is so ordered.




A.Y. Mwenda

Judge

02.09.2022

Ruling delivered in chamber under the seal of this court in the absence of the Applicant and in the presence of Mr. Dickson Laurent, learned counsel for the Respondent.




A.Y. Mwenda

Judge

02.09.2022