THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISC. LAND CASE APPLICATION No. 30 OF 2021

(Originating from the judgment of District Land and Housing Tribunal for Arusha at arusha, Civil Case No. 54 of 2019)

KCB BANK TANZANIA LIMITED..... APPLICANT

VERSUS

SARA JOEL MAHANYU..... ..... RESPONDENT

RULING

20th July & 9th September, 2022

TIGANGA, J.

This is an application for extension of time filed by the applicant asking to be allowed to appeal against the judgment and decree of the District Land and Housing Tribunal for Arusha at Arusha herein known as "DLHT" in Land Application No. 54 of 2019.

In brief, the applicant together with two others namely; MEM Auctioneers & General Brokers and Joshua John Julius were defendants in the abovementioned application. After the matter was heard on merits, the DLHT inferred its findings that the applicant herein and his then then co-defendants had to loose the case against the respondent

herein. The dispute between them was about the house on the Plot No. 181 Block GG, CT No. 29496 located at Ngulelo in the City of Arusha. The respondent alleged before the DLHT that, the mortgaged agreement entered into between the husband of the respondent herein and the applicant over the house in question in order to secure the loan of 147,000,000/= in total was not consented by her. That, she only consented to the loan of sixty million shillings (60,000,000/=) loaned from NIC Bank. Because of that, the respondent herein prayed the following orders before the DLHT:

1. That the order for injunction be given to the respondents from selling in auction the said disputed house.
2. That, the order be given to the applicant that, the husband of the respondent be enlarged time for realization the debt
3. Costs of the application.

As said, the DLHT was satisfied that the respondent herein did not consent on the mortgaging of the disputed land and declared the mortgage a nullity. The DLHT further declared that, the appellant should opt other means of realization of the debt loaned to the husband of the respondent. The applicant was aggrieved by such decision and therefore

prepared for appealing. Unfortunately, at the time she thought of such remedy already the web of time limit was up. She was out of time. As a matter of law and procedure, the only available relief was to ask for the discretionary power of the court in order to enlarge time so that the applicant can proceed with the process of appeal. Hence, this application.

The application was lodged before this court under section 41(2) of the Land Disputes Act, [Cap. 216 R.E 2019], section 93 of the Civil Procedure Code, [Cap. 33 R.E 2019] and Section 15 of the Law of Limitation Act, [Cap. 89 R.E 2019]. It was made under the chamber application supported by an affidavit duly sworn by Moses Zebadia Mmbando, learned Advocate for the applicant in which the grounds of application were presented.

However, the affidavit was counteracted by the respondent herein through counter affidavit sworn by Mr. Haruni Idi Msangi, learned Advocate. The applicant was required to prove the contents of the rival paragraphs strictly. Owing to that, this court is now invited to determine the bone of contention between the parties.

In filing the written submissions as ordered by the Court, Mr. Moses Mmbando, learned Advocate represented the applicant whereas Haruni Idi Msangi appeared for the respondent.

In order to convince this court to grant the prayers, Mr. Mmbando argued his submission in line with the chamber summons and affidavit filed for the applicant. In fact, the epicentre of the arguments is on two limbs. **One**, illegality on the impugned decision and **two**, technical delay. These two limbs of arguments are reflected in paragraphs 4, 5, 6, 7, 8 and 9 which were all counter argued by the respondent.

On the first limb Mr. Mmbando contended that, the judgment of DLHT was delivered on 25th February 2021 thus, 45 days within which the appeal was to be filed counted from the date of judgment, was expiring on 11th April, 2021. He went on saying that, the appeal was filed on 6th April 2021 within the prescribed time but due to hindrance of the online filing in the High Court of Tanzania Land Division, the matter was delayed. That after making close follow up and meeting with the Court Registrar they were informed that she had no access over the system on the High Court Land Division account. That is when the applicant realised that he filed the appeal in the wrong account. After so realising, on 03rd May, 2021 the appellant decided to lodge this

application for extension of time. According to the counsel on the 1st and 2nd May 2021 were weekends. In his view, the applicant filed the appeal in time, but due to technical problem beyond his control of the applicant, it was not successfully because it landed onto the wrong registry. To buttress the point, Mr. Mmbando cited the case of **Nuru Emmanuel Mpimbi vrs The Republic**, HC at Dodoma Misc. Criminal Application No. 39 of 2021(unreported). In this case, it was held that, the delay caused by technical problem on filing application online despite several efforts is a good cause depending on the circumstances. Also, on the same technical problem specifically on network unstable the case of **Ndovu Adventures Ltd vrs Elibarick Lorry,** Misc. Civil Application No. 95 of 2020, HC at Arusha (Unreported). That, the said appeal remains unadmitted today due to technical problems. Also, the case of **Ntinga Ng'hambi Masalu vrs The Republic**, Criminal Application No. 43 of 2021, HC at Mwanza (unreported).

Regarding the limb of illegality Mr. Mmbando argued that, under Section 114(1)(a) and (b) provides that the mortgage to be valid must have the consent of the spouse. That in the DLHT the spouse consent was produced as exhibit D-1 but the DLHT declared it not to qualify as a spouse consent as it was in the form of affidavit and therefore invalid.

To fortify the contention, the cases of **Principal Secretary, Ministry of Defence and National Service versus Devran Valambhia** (1992) TLR 182 and **Hamza Hatibu and Others versus Salima Saidi Juma,** Misc. Land Application No. 41 of 2021, HC at Arusha (unreported).

Lastly, Mr. Mbando rested his submission in chief by citing the case of **Mobrama Gold Corporation Limited versus Minister for Energy and 2 Others** (1998) TLR 425 in which it was held that, granting extension of time to file appeal out of time will never prejudice the respondent at any rate but the contrary shall stifle the applicant's rights.

On his part, Mr. Msangi contended that, the fourth page of the submission in chief should be expunged because the applicant did not observe court order by exceeding the pages which were limited to three pages. Mr. Msangi also argued that, paragraphs 6,7,8,11,12 and 13 of the affidavit must be expunged as they contravene Order XIX rule 3(1) of the Civil Procedure Code, [Cap. 33 R.E 2019] which states that, the affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove except on interlocutory applications on which statements of his belief may be admitted. That the verification clause

does not specify source of information in paragraphs 6, 7 and 8 of the affidavit which contain information from other person which was not in the knowledge of the applicant. Also, that paragraphs 11 and 12 contain arguments and paragraph 13 contain a prayer and conclusions contrary to the law.

To cement on the argument, he cited the case of **Salima Vuai Foum versus Registrar of Co-operative Societies & Three Others** (1995) TLR 75 where it was held that, where an affidavit is made of information, it should not be acted upon by any court unless the sources of the information are specified and that failure to disclose the source of information renders the affidavit defective.

On the issue of good cause to extend time for filing appeal, Mr. Msangi argued that, there is no one given by the applicant and the delay was due to negligence, apathy and ignorance of law. He also submitted that, rule 21(1) of the Judicature and Application of Laws (Electronic Filing) Rules, 2018 GN No. 148 of 2018 provides that, a document shall be considered to have been filed if it is submitted through the electronic filing system before midnight, East African time, on the date it is submitted, unless specific time is set by the court or it is rejected. To such effect he cited the case of **Mohamed Hashil versus National**

Microfinance Bank Ltd (NMB), Revision No. 106 of 2020. Mr. Msangi argued further that, due to annexure KCB to the affidavit shows that the applicant filed an appeal electronically on 6th April 2021 which is within 45 days, the prescribed time for appeal, but due to negligence and ignorance the applicant filed this application (with due respect to Mr. Msangi I think, he did not understand the argument advanced by Mr. Mmbando on this part, I will explain later in this Ruling).

Mr. Msangi went on saying that the appeal was filed on 06th April, 2021 but the follow-up started on 22nd April, 2021 after the lapse of sixteen (16) days. He said the applicant had not accounted for each of the days delayed. He further submitted that, the applicant was supposed to account for eleven days (11) which he failed. That the days to be accounted for, start from 11th April 2021 when the appeal was submitted electronically to 22nd April, 2021 when she wrote a letter to the Deputy Registrar to inquire the status of her appeal.

On the limb of illegality, Mr. Msangi contended that, it is not reflected in the affidavit, he argued that, without the limb being reflected in the affidavit filed in support of the application, it cannot be good cause because, submissions are not evidence. And that since in

this case the ground of illegality feature in the submission without first being part of affidavit, it cannot be acted upon.

In rejoinder, although Mr. Mmbando reiterated his position in the submission in chief he added that, on the issue of exceeding the number of pages ordered the respondent will never be prejudice anyhow and he said leave was sought in the written submission in chief because no way out they could have sought the same before. On the expungement of paragraphs 6, 7 and 8 of the affidavit, Mr. Mmbando argued that because they contain the information not in the knowledge of the applicant, he said the same should be disregarded because the affidavit was not deposed by the applicant but rather her Advocate who had knowledge of the facts deponed.

On paragraphs 11 and 12 of the affidavit Mr. Mmbando argued that, the paragraphs do not have arguments because the deponent did not provide reasoning to what was stated. He submitted that in his view, that arguments are composed of reasoning to establish the brief stated which is not the case in these paragraph. On paragraph 13 he said, it does not contain prayers because it does not pray for the application to succeed but rather showing that justice will be done if the application succeeds. The remaining part of the rejoinder will not be analysed here

owing to that it is a repetition of what was argued in the submission in chief.

After such thorough deliberation on the application, I think, the issues for determination are two, **first**, owing the pinpointed defects in the affidavit, the same makes a meaningful affidavit worth to support the application? **Second**, is whether the applicant has shown good cause for the application to be granted.

Before indulging to the merit of this application it is very apt to first determine the issues of defective affidavit as posed in the first issue. As ably argued by Mr. Msangi, Order XIX, Rule 3(1) of the CPC provides for the minimum requirements. It in effect provide that, affidavit shall be confined to such facts as the deponent is able of his knowledge to prove, it states: -

> *"3(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted: Provided that, the grounds thereof are stated."*

As said by Mr. Mmbando, the affidavit was deponed by himself and not the applicant as adduced by Mr. Msangi. Looking at all those three paragraphs 6,7 and 8 it is obvious that, the one who was making

follow ups with the office of Deputy Registrar is Mr. Mmbando himself who deponed the affidavit. In this circumstance, one cannot be heard saying that the deponent had no facts on his finger tips to the extent of verifying to where he received from.

Paragraphs 11 and 12 respectively relates to illegality of the impugned judgment on spousal consent and the date of awareness of the deponent that, the Deputy Registrar had no access to the account of the High Court Land Division to allow her to admit the appeal. In my view, such kind of facts are in possession of the deponent because he is the one who was making a follow up with the Deputy Registrar in both physically and written.

Also is the one who read the impugned judgment and discover the alleged illegality. Condemning him of being not factual based person is completely bringing new issue which this court cannot entertain. Closely looking at the way these paragraphs are crafted facts, I find no arguments in them.

The claim on paragraph 13 is to the fact that, it includes prayers contrary to the dictates of the law. For ease of reference, I will reproduce that paragraph. It reads:

*"That in view of the foregoing it is in the interests of justice that the **orders prayed for in the chamber summons** be granted to afford me an opportunity to be heard". (Emphasis added)*

The orders prayed in the chamber summons are; extension of time to file an appeal out of time against the judgment of the DLHT, costs of the application and any other orders and reliefs. In my settled opinion, paragraph 13 of the affidavit summons with all these reasons, I find that does not contain defect which render it unworthy a name on that base the objection like posed has no merits. It is dismissed.

Having resolved the objection against the affidavit, let me now come to the merit of the application. As indulged above, the limbs of the application are on two. **One,** technical delay and **two,** illegality of the impugned decision.

I prefer to start with the second limb, illegality of the impugned decision. In the case of **Elias Masija Nyang'oro and 2 Others vs Mwananchi Insurance Company Limited**, Civil application No. 552/16 of 2017 CAT at Dar es Salam observed that:

"With respect, I wish to observe right away that having gone through the record, am not persuaded with the grounds of illegality raised by the applicants. The

reason behind being that the claimed ***illegality is not apparent on the face of record and therefore does not meet the settled threshold****".*

Guided by the above cited authority, it is crystal clear that for the ground of illegality to stand, it must be apparent on record. It does not require a long-drawn process to be marked. In this application, the complained illegality is a spousal consent which was marked exhibit D-1 whereby the DLHT declared the said spousal consent not to qualify the standard to be termed so for the reasons adduced. In my view, this complained illegality does not meet a threshold set in the case set above. I am so certain because, determining as to whether the said spousal consent was valid or otherwise it requires evidence to substantiate it. Therefore, it is not apparent on the face of record therefore cannot be an illegality worth a name to constitute good cause for extension of time. It is hereby dismissed.

The second limb is on technical delay; the applicant is claiming that he filed the appeal on time but admittedly on wrong registry. The appeal was filed in the High Court of Tanzania Land Division instead of filing it in the High Court of Tanzania Arusha District Registry. It is certain that the intended appeal was filed online on 6th April, 2021. The impugned decision was delivered by the DLHT on 25th February, 2021

and the copy of judgment and decree were supplied to the applicant in time. These facts have not disputed. The question here is whether filing the appeal in a wrong forum constitutes technical delay and thus, a good cause for enlargement of time for filing appeal out of time.

In the case of **Christmas Elimikia Swai and 2 Others versus Tanzania Electric Supply Co. Ltd**, Civil Application No. 559/01 of 2018 CAT at Dar es Salaam (unreported) it was held that:

> *"I am mindful of the fact that reasons for delay is not the only factor to be considered in applications for extension of time, as no particular grounds or reasons have been set out as good cause as stated in* ***Abdallah Salanga and 63 Others vs Tanzania Harbours Authority****, Civil Application No. 4 of 2001 (unreported)."*

I am aware that filling the appeal in wrong registry does especially where done by an Advocate who knows forum of law it does not constitute good cause. However, looking at this application, the said appeal was filed on 6th April, 2021 though in wrong forum. 45 days were to elapse on 11th April 2021. Which means the wrong forum of appeal received the appeal in time whereby five days were still on. In the circumstance of this nature condemning the applicant on the basis of

negligence and sloppiness not his Advocate does not hold water. The applicant cannot be punished so easily on the mistakes made by the Advocate. Doing so is as good as curtailing her rights, a mistake which this court is not prepared to make. After realising that the application was filed in wrong forum, the applicant was correct to apply for extension of time and put that fact as one of the ground of delay.

For the above stated reasons, I find that, under the circumstances there is no other option but to grant extension of time to file an appeal as prayed. That said and done, time for the applicant to file the appeal is hereby extended for twenty-one days from the date of this ruling. Having considered the circumstances of this case, I order the costs of this application to follow event in the main appeal.

It is accordingly ordered.

DATED at **ARUSHA** on the 09th day of September 2022.

J.C. TIGANGA

JUDGE.