

**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**IRINGA DISTRICT REGISTRY**

**AT IRINGA**

**MISC. LAND APPLICATION NO. 8 OF 2022**

**(Originating from Land Appeal No. 14 of 2019, in the High Court of Tanzania, at Iringa, Original Application No. 1 of 2016, in the District Land and Housing Tribunal for Iringa, at Iringa).**

**BETWEEN**

**1. RABIETH S/O MPEMBENI..... 1<sup>st</sup> APPLICANT**

**2. NIPANEEMA D/O MSEMO .....2<sup>nd</sup> APPLICANT**

**AND**

**BONITHA D/O MLYELYE..... RESPONDENT**

**RULING**

**6<sup>th</sup> August & 5<sup>th</sup> December, 2022.**

**UTAMWA, J:**

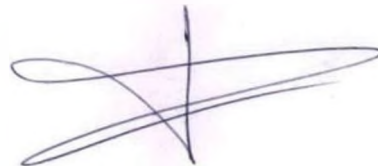
The applicants, RABIETH S/O MPEMBENI and NIPANEEMA D/O MSEMO (first and second applicant respectively) filed the present application under section 11(1) of the Appellate Jurisdiction Act, Cap. 141



RE 2019 seeking the following orders, which I reproduce for quick reference:

- i. That, this Honourable Court be pleased to grant an order for extension of time within which the applicants to file an application for leave to appeal to the Court of Appeal of Tanzania (The CAT).
- ii. That, this Honourable Court be pleased to grant an order for extension of time within which the applicants to file a notice of appeal.
- iii. Costs of the application to follow the event.
- iv. Any other relief(s) this Court deems fit and just to grant.

The applicants' application is supported by the affidavit of Mr. Marco J. Kisakali, the applicants' counsel. The affidavit basically deposed that, the applicants were the respondents in the District Land and Housing Tribunal for Iringa, at Iringa (The DLHT) in Application No. 01 of 2016. The same was decided in favour of the respondent. The applicants were aggrieved by the said decision of the DLHT and appealed to this court via Land Appeal No. 14 of 2019. This court (before another judge) also made a judgement (impugned judgment) in favour of the respondent. The applicants' advocate was absent on the day the impugned judgement was delivered. This was due to his father's sickness who was hospitalized in Mwanza. The applicants then made efforts to have another advocate, but time for appealing had already lapsed. The affidavit stated further that, the

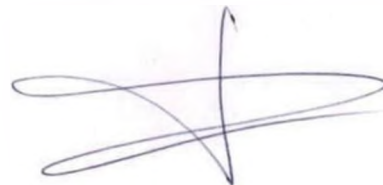


judgement of the DLHT was tainted with illegalities since the assessors who opined did not hear all the parties in the case.

The respondent, BONITHA D/O MLYELYE resisted the application by filing her counter affidavit. The same was sworn by Mr. Lazaro Hukumu, the respondent's counsel. The counter affidavit refuted the fact that the applicants' former counsel was nursing his sick father. It further stated that, the judgment and proceedings of the DLHT were determined according to the law, and no any illegality was committed by it.

The matter was heard by way of written submissions and the parties were represented by their respective advocates mentioned above.

In his submissions in chief, the advocate for the applicants adopted the prayers in the chamber summons and the contents of the affidavit as part of the submissions. He further submitted that, the applicants have four reasons to be considered by the court in exercising its discretionary and judicious powers in deciding the present application. These are; the sickness of the father of the previous advocate for the applicants, illegalities in the proceedings of the DLHT, the fact that there are great chances of success for the intended appeal and the fact that an appeal is a constitutional right for the applicants. He added that, guiding principles have been established for determination of applications like the present one, though the principles are not limited. They sometimes depend on the circumstances of each case. The principles were stipulated in various precedents including **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women's Christian**





**Association of Tanzania, Civil Application No. 2 of 2010, CAT at Arusha** (unreported) and **Stephen Ngalambe v. Onesmo Ezekia Chaula and Another, Civil Appeal No. 27 of 2020, CAT at Iringa** (unreported).

The learned advocate for the applicants also contended that, as to the sickness of the father of the previous advocate for the applicants, the said advocate affirmed an affidavit which proves that he did not attend this court when the impugned judgment was delivered. This was due to the fact that he was nursing his sick father at Bugando Hospital, in Mwanza. He therefore, failed to notify the applicants to take necessary steps including the institution of the present application.

Regarding the irregularities in the DLHT proceedings, the counsel for the applicants argued that, the assessor who opined in the judgment was not invited to ask questions for clarification on 11<sup>th</sup> September 2018. Another assessor who was not in the quorum was invited to ask and participated in the proceedings to contradict the DW.1. The intervention therefore, affected the proceedings and the ultimate judgment. There was also a failure to describe the disputed land as per the law. In the entire record of the DLHT, the respondent failed to describe the disputed land although this was not raised in the appeal before the High Court. This court however, ought to have raised it *suo moto* since it is a point of law. It is trite practice in our jurisdiction that, once there is allegation on illegality, extension of time is granted for purposes of ascertaining and rectifying it. He cited the cases of **Principal Secretary, Ministry of Defence and**

A handwritten signature in blue ink, consisting of a series of loops and a vertical line, positioned at the bottom center of the page.

**National Service v. Devram Valambhia [1992] TLR 185 and Makambako Saccos & Another v. Petro Mwandemele & Another, Misc. Land Application no. 8 of 2021, High Court of Tanzania (HCT) at Iringa** (unreported) to support the contention.

In relation to the great chances of success for the intended appeal and the argument that an appeal is a constitutional right for the applicants, the applicants' counsel argued thus; that, an appeal is a constitutional right and the applicants have a great chance of success in the intended appeal if this application will be granted. Granting this application will also not prejudice the respondent. This is because, if the intended appeal will not succeed, the respondent will be healed by being paid the costs. He thus, urged the court to grant the application so that the rights of the parties can be determined accordingly.

By way of replying submissions, the respondent's counsel prayed to adopt the contents of his counter affidavit so as to form part of the replying submissions. He also argued that, principles governing applications of this nature were underscored in the **Lyamuya Construction case** (supra). Rules 45 (a) and 83(a) of the Tanzania Court of Appeal Rules, 2009 also provide for a room for every aggrieved party by a decision of the High Court of Tanzania to file Notice of Appeal and apply for leave to Appeal to the CAT within 30 days from the date of the decision to be challenged.

It was also the contention by respondent's counsel that, in the present matter the decision sought to be challenged before the CAT was



delivered on 23<sup>rd</sup> November 2021. Nonetheless, until 23<sup>rd</sup> December 2021 the applicants had neither filed their notice of appeal nor applied for the leave to appeal. They thus, decided to sit on their rights and lodged this application after the lapse of 82 days from the last day they were supposed to file their notice of appeal and application for leave. It is a principle of law that, a party seeking extension of time must account for each day of delay. He supported this particular contention by citing the precedents in **Hawa Issa Nchriya v. Ramadhani Iddi Nchriya, Civil Application No. 27/03 of 2021, CAT at Dodoma** (unreported), **Sebastian Ndaula v. Grace Rwamafa (Legal Personal Representative of Joshwa Rwamafa), Civil Application No. 4 of 2014, Court of Appeal of Tanzania at Bukoba** (unreported) and **Omari R. Ibrahim v. Ndege Commercial Secrvices Ltd, Civil Application No. 83/01 of 2020, CAT at Dar es Salaam** (unreported).

The respondent's counsel also argued that, the applicants' excuse that the father of their previous advocate was sick is baseless since it cannot be relied upon in the present application. The applicants had an obligation to make a follow up of their case and not to dump the same in the hands of their advocate only. He cited the case of **Lim Hang Yung & Another v. Lucy Treseas Kristense, Civil Appeal No. 219 of 2019, CAT at Dar es Salaam** (unreported) to support this particular argument. He added that, the applicants have not provided any evidence to support the alleged sickness of the father of their former advocate. There is also no any medical report or travelling ticket presented by the said former

A handwritten signature in blue ink, consisting of a large, stylized 'S' or 'Z' shape with a vertical line crossing it.




advocate verifying the applicants' claim. It is therefore, difficult for this court to believe that the sickness prevented the applicants from acting promptly. He further argued that, where an applicant for extension of time claims that the delay was due to illness, he/she must show how the illness contributed to the delay. He cemented this particular argument by citing the **Hawa Issa case** (supra).

On the aspect of illegalities in the proceedings of the DLHT, the learned advocate for the respondent contended that, there is no any illegality on the face of record. The trial proceedings were conducted in accordance with the law, especially on the issue of quorum. The Chairman adhered to the rules and procedure and delivered a fair and just decision.

Regarding the claim on the failure to describe the suit land properly, the respondent's counsel also argued that, the same was baseless and an afterthought. This was because, the issue was not raised in the first appellate court. This court therefore, lacks jurisdiction in adjudicating that legal point. The applicants have not also shown as to how the alleged illegality prejudiced their rights as required by the law. He cited the case of **Simon Godson Macha (Administrator of the estate of Godson Macha) v. Mary Kimambo (Administratrix of the estate of the late Kesia Zebedayo Tenga), Civil Appeal No. 393 of 2019, CAT at Tanga** (unreported) to support the contention.

In relation to the claim that the right to appeal is a constitutional right for the applicants, the respondent's counsel contended that, the same does not constitute any sufficient reason for extending time. The right of



appeal being a constitutional right, cannot be used as a ground for seeking extension of time by a negligent party. Granting this application will prejudice the respondent since she has been in court corridors pursuing her rights since 2016, but the suit land is being used by the applicants. He thus, urged this court to dismiss the application with costs for lack of merits.

In rejoinder submissions, the applicants' advocate argued that the previous advocate for the applicants affirmed an affidavit as evidence for his father's sickness. That fact cannot thus, be refuted by simple submissions from the bar. On the issue of illegality, the applicants' counsel underlined the contention that the same can be raised at any time and the court of records has to ensure that the law is followed. The fact that the legal point was not raised at the first appeal cannot therefore, bar the applicants from raising it at this stage. The illegalities complained of by the applicants are neither disputed nor decided in the impugned judgment. They cannot therefore, be ignored. He thus, urged the court to allow the application.

I have considered the affidavit, counter affidavit, rival submissions by the parties, the record and the law. This matter, being an application for extension of time, has to be governed by the branch of law on that area. The law on extension of time provides, *inter alia* that, such extension of time is granted at the discretion of the court exercised judiciously upon the applicant adducing sufficient reasons or good cause for the prayed extension; see the **Lyamuya Construction case** (supra). In fact, what





constitutes a good cause is a question of fact which depends on the circumstances of each case. Amongst the factors to be considered in applications of this nature were underscored in the **Lyamuya Construction case**. They include the following: to account for the whole period of delay, the delay should not be inordinate, the applicant must show diligence, and not apathy, negligence or sloppiness in prosecution of the action that he intends to take, and the existence of a point of law of sufficient importance such as the illegality of the decision sought to be appealed against. The principles were also emphasized in the cases of **Yusuph Same and Hawa Dada v. Hadija Yusuf, CAT at Dar es Salaam, Civil Appeal No. 1 of 2002** (unreported) and **Benedict Mumello v. Bank of Tanzania, Civil Appeal No. 12 of 2002, CAT at Dar es Salaam** (unreported).

In determining this application, I will firstly consider the second prayer for extension of time to file the notice of appeal. This is because, filing such notice of appeal is in law, a pre-condition for one to file an application for leave to appeal. The issue at this point is therefore, *whether the applicant has shown good cause for this court to extend the time to file the notice of appeal*. The applicants in the present application mainly relied upon two grounds; **one**, was the absence of their former advocate who was nursing his sick father in Mwanza. **Two**, was the point of illegality.

I will firstly consider the ground of illegality because, if this ground will succeed it will have the effect of disposing of the entire matter. The sub-issue here is therefore, *whether under the circumstances of the case*



*at hand the point of illegalities raised by the applicants constitutes any good cause for granting the application.* Apart from the precedents cited by the parties above on the sub-issue, there are other decisions of the CAT which considered the issue of illegality as one of the grounds for extending time. In the case of **TanESCO v. Mufungo Leonard Majura and 15 Others, Civil Application No. 94 of 2016, CAT at Dar es Salaam** (unreported) for example, the CAT held thus;

"Notwithstanding the fact that, the applicant in the instant application has failed to sufficiently account for the delay in lodging the application, the fact that, there is a complaint of illegality in the decision intended to be impugned..... suffices to move the Court to grant extension of time so that, the alleged illegality can be addressed by the Court."

However, it must be noted at this juncture that, not every allegation of illegality will, in law, constitute a good cause for extending time. In the **Lyamuya Construction case** (supra), the CAT set one of the important conditions for accepting an allegation on illegality as a good cause. It observed thus, and I let it speak by its own terms:

"Since every party intending to appeal seeks to challenge a decision either on points of law or fact, it cannot in my view, be said that in VALAMBIAH's case, the Court meant to draw a general rule that every applicant who demonstrate 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 "of sufficient importance" and I would add that it must also be apparent on the face of record such as a question of jurisdiction; not one that would be discovered by a long-drawn argument or process."

From the above cited precedents, it is clear that, alleging illegalities in the decision to be challenged and in the manner so suggested, constitutes a

A handwritten signature in blue ink, consisting of a large, stylized 'X' or star-like shape with a horizontal loop on the left and a vertical line on the right.



good cause for the court to grant an extension of time. This is for the purposes of correcting the illegality in that decision.

In the present application, the applicants claimed that, the illegalities complained of are in the proceedings before the DLHT. One of them was that, the assessor who participated from the beginning of the case was not the one who concluded the trial. The record of the DLHT in fact, shows that the assessor who sat from the beginning of the trial died on 23<sup>rd</sup> June 2018. The trial thus, proceeded with another new assessor, one Mr. Chalamila.

Section 23(3) of the Land Disputes Courts Act, Cap. 216 RE. 2019 provides thus, and I reproduce it for ease of reference;

"Notwithstanding the provisions of sub-section (2), if in the course of any proceedings before the Tribunal either or both members of the Tribunal who were present at the commencement of proceedings is or are absent, the Chairman and the remaining member (if any) may continue and conclude the proceedings notwithstanding such absence."

The cited provisions clearly indicate that, at least one of the assessors must be among the assessors who must be in attendance throughout the trial so as to enable the assessors to make an informed and rational opinion. The consequences of unclear involvement of assessors in the trial before a DLHT as it was in the matter at hand, renders such trial a nullity; see the cases of **Awiniel Mtui and 3 others v. Stanley Ephata Kimambo and another, Civil Appeal No. 97 of 2015, CAT** (unreported) and **Samson Njarai and another v. Jacob Mesoviro, Civil Appeal No. 98 of 2015, CAT** (unreported). The participation of another assessor who had not

A handwritten signature in blue ink, consisting of a large, stylized 'S' or 'Z' shape with a vertical line crossing it.



heard the evidence of PW. 1 and PW. 2 in the trial under consideration therefore, vitiated the trial for offending the above cited law.

The rationale for the above legal requirement is that, the law intended to avoid injustice which may be occasioned by an assessor who gives opinion on the trial basing on the evidence he did not hear. In fact, such assessor lacks ability to opine justly in the case. This omission cannot therefore, be saved by the principle of overriding objective which essentially requires courts to decide matters before them justly and without being overwhelmed by procedural technicalities.

Furthermore, in its impugned judgment on appeal, this court did not consider and decide on the above mentioned irregularity committed by the DLHT though it had the duty to do so *suo motu*. It is in fact, a firm principle of law that, courts in this land are enjoined to decide matters before them according to the law and the Constitution, and not otherwise. This position was underlined in the case of **John Magendo v. N. E. Govan (1973) LRT n. 60**. Furthermore, the CAT emphasized it in the case of **Tryphone Elias @ Ryphone Elias and another v. Majaliwa Daudi Mayaya, Civil Appeal No. 186 of 2017, CAT at Mwanza**, (unreported Ruling). In that precedent, the CAT held, *inter alia* that, the duty of courts is to apply and interpret the laws of the country. It added that, superior courts have the additional duty of ensuring proper application of the laws by the courts below. The CAT underscored the same principles in the case of Joseph **Wasonga Otieno v. Assumpter**

A handwritten signature in blue ink, consisting of a large, stylized 'S' or 'Z' shape with a vertical line crossing it.

**Nshunju Mshama, Civil Appeal No. 97 of 2016, CAT at Dar es Salaam (Unreported).**

From the above observations, one can safely conclude that the applicants' allegations on illegalities is apparent on the face of the records for both the record of the DLHT and of this court. This court thus, has the duty to consider such allegations in deciding this application. The contention by the respondent's counsel that the applicants could not raise this legal issue at this stage since it was not raised in the appeal is actually unsustainable. This is because, in law such a point of law can be raised at any stage of proceeding, even on appeal; see the case of **Richard Julius Rukambura v. Issack Ntwa Mwakajila and another, CAT Civil Application No. 3 of 2004, at Mwanza** (unreported).

On the alleged illegality related to the failure by the applicants to describe the disputed land properly before the DLHT, I am of the settled opinion that, the same is also untenable. The record of the DLHT shows that, the applicants, in the application and during its hearing described the house in dispute as house number (NG/164), situated at Ilula, Ngelango ward, Nyalumbu Street. This description, in my settled opinion, was adequate enough to identify the suit land from other houses.

Owing to the above reasons, I answer the sub-issue posed above in the affirmative that, the illegality raised by the applicants constitutes good cause for extending time for filing the notice of appeal. Due to this finding, I find myself not legally obliged to consider the second reason on the sickness of the father for the former advocate of the applicants since such



finding suffices to answer the major issue posed above. I consequently, also answer the major issue affirmatively. I accordingly grant the prayer by the applicants for extending the time for filing the notice of appeal.

Now, since I have just granted the prayer by the applicants for extend time to file the notice of appeal, I am also enjoined, for the same reasons, to grant the applicants' second prayer for extending time to apply for the leave to appeal to the CAT. This is because, the two prayers are based on the same law on extension of time and on the same reasons. I accordingly grant the entire application and extend the prayed extension of time for performing both acts; being for filing the notice of appeal and for applying for leave to appeal to the CAT. The applicants shall file the notice of appeal within 30 (thirty) days from the date hereof. They shall file the application for leave within the time prescribed by the law upon filing the notice of appeal. Each party shall bear its own costs since the respondent who has lost in this matter bears no blameworthiness for necessitating the filing of the present application. It is so ordered.

  
JHK UTAMWA  
JUDGE  
05/12/2022



**COURT:** Ruling delivered in the presence of Mr. Kisakali, learned advocate for the applicants and Mr. Hukumu, learned advocate for the respondent. The first applicant and Ms. Gloria Makundi (clerk) also present.



**MALEWO M. A.**  
**DEPUTY REGISTRAR**

**05/12/2022**

Right of appeal explained.



**MALEWO M. A.**  
**DEPUTY REGISTRAR**

**05/12/2022**