

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB - REGISTRY OF MWANZA
AT MWANZA**

MISC. LAND APPLICATION NO. 86 OF 2021

*(Arising from Misc. Application No. 697C of 2017 in the District Court for Mwanza at
Mwanza)*

RHODA HENRY (*the administratrix of the estate
of the late Henry Thobias*) **APPLICANT**

VERSUS

SAMWEL S. LYANDE **1ST RESPONDENT**
JAMES MWAKABULA **2ND RESPONDENT**
MANUMBA KASOMELO **3RD RESPONDENT**
SOSTHENES EMMANUEL **4TH RESPONDENT**
SIMON JAMES **5TH RESPONDENT**
MASHAKA EMMANUEL **6TH RESPONDENT**
THOBIAS HENRY **7TH RESPONDENT**
BAFUNE MASHAMBA **8TH RESPONDENT**
KAHIND KASAKULILO **9TH RESPONDENT**
KALWENZE MASANYIWA **10TH RESPONDENT**

RULING

23th March & 5th May, 2022

Kahyoza, J.:

This ruling is in respect of **Rhoda Henry's** application for extension of time to appeal against the decision of the District Land and Housing

Tribunal (the **DLHT**). **Rhoda Henry** is the administratrix of the estate of the late Henry Thobias. The all respondents except the seventh respondent resisted the application by filing counter affidavits contending that the applicant had no good cause for delay. They added that she negligently delayed to appeal. The issue is whether the applicant delayed for good cause.

Mwita Samwel learned advocate represented the applicant. Mr. Kilale learned friend appeared for first, second, third fourth and fifth respondents while Mr. Akram, learned advocate appeared for sixth, eighth, ninth and tenth respondents. Thomas Henry, the seventh respondent fended for himself. He did not file a counter affidavit and was absent at the hearing of the application.

Brief background is that; **Rhoda Henry**, the administratrix of the late Henry Thobias' estate sued the respondents before the DLHT. The DLHT dismissed the application. **Rhoda Henry** sought to restore the application in vain. Aggrieved, she failed to appeal on time against the decision of the DLHT refusing to set aside the dismissal order. She had to institute the current application.

It is on record that the DLHT delivered the ruling declining to set aside its dismissal order on the 13th day of November, 2020 in the presence of **Rhoda Henry**, the respondents, and their advocates. The Ruling was available for collection from 7th of January, 2021. The record further shows that **Rhoda Henry** instituted the instant application on the 6th day of September, 2021. Thus, **Rhoda Henry** applied for extension of time 9 months and 18 days from the date of the ruling. It is evident from the record that **Rhoda Henry** applied for extension of time after the respondents instituted the bill of costs. The respondents instituted the bill of costs against **Rhoda Henry** before February, 2021. On the 26th February, 2021 **Rhoda Henry** appeared to the DLHT in answer to the bill of costs.

Given the above uncontested facts, I proceed to determine the issue whether the applicant has adduced sufficient reason for delay.

Has the applicant adduced sufficient reasons for delay?

It is a settled principle of law that courts have discretion to extend time but that discretion must be judiciously exercised. Thus, it may be granted where the applicant adduces sufficient cause for the delay and not out of sympathy. See ***Mumello Vs Bank of Tanzania [2006]*** E.A 227.

The applicant seeks for extension of time on two grounds; **one**, that she was sick, hence, unable to appeal on time; and **two**, that she stands a great chance of succeeding as the respondents procured land from a person who had no authority to dispose it.

Is sickness of the applicant sufficient reason for extending time in the circumstances of this case?

One of the reasons advanced by the applicant is that she was seriously sick and admitted at first at Geita Regional hospital from 13th December 2020 to 27th July 2021, when she was discharged. As a result, she was unable to initiate the appeal immediately. She produced a letter from the medical doctor in charge of Geita Hospital showing that she was admitted from 13th December 2020 to 27th July 2021. She averred further that on her way home she fell sick and admitted a second time. This time she was admitted at Songwa Health Centre from 2nd to 25th August, 2021. After she recovered, she followed up a copy of the ruling and instituted the current application.

In support of the contention that sickness is a ground for extending time, **Rhoda Henry's** advocate cited the case of **Mwana Mohamed V. Ilala District Council**, Misc. Land Case No. 12/2020. In that case, the

High Court Judge stated that *"if the medical chit supported by an applicant's affidavit, demonstrates that the applicant suffered some form of disease or illness, then the court should consider the same. The Court quoted the observation of the court of Appeal in **John David Kashekya vs. AG**, Civil application No. 1/2012 (CAT- unreported) that-*

"...sickness is condition which is experienced by the person who is sick. It is not a shared experience. Except for children who are not yet in a position to express their feelings, it is the sick person who can express his or her condition whether he or 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 reported to a doctor for checkup for one year. There is no evidence from the respondent to show that after that period, his condition immediately became better and he was able to come to Court and pursue his case. Under such circumstances, I do not see reasons for doubting his health condition. I find the reason of sickness given by the applicant to be sufficient reason for granting the application for extension of time.."

The respondents deposed that **Rhoda Henry** was not sick and in alternative they added that if she sick then she was not admitted at Geita Hospital. They also contended that a letter from Geita Hospital shows that **Rhoda** was attended and not admitted. The respondents deposed further

that **Rhoda Henry** lied that she was admitted from 13th December 2020 to 27th July 2021 while on the 26th February, 2021 she attended the DLHT to answer to the bill of costs. The respondents annexed a copy of the proceedings on the 26th February, 2021 before the DLHT.

Mr. Kitale, the first, second, third fourth and fifth respondents' advocate, submitted that while considering to extend time the Court should take into account factor for extending time stated in **Leo Sira Mtiso v. Hellen Mwangali Mwangi** [1999] 2 E.A at 231. He submitted that one of the factors to be considered is the length of delay. He argued that the applicant delayed for 8 months and 27 days to apply for extension of time. He added that **Rhoda Henry** did not account for the period of delay. He argued vehemently that **Rhoda Henry** was not admitted but attended.

He submitted further that Rodha failed to prove that she was sick as she did not present a medical chit. He asserted that it is the position of the law that in the absence of a medical chit showing that a person was excused from duty because of sickness no sufficient reason would be shown. To support his stance, he cited the case of **Varerian Fiita v. Issa Said Qanaay**, Misc. Land Appeal No. 15/2020 HC at Arusha (Unreported) where the Court referred to the decision of the Court of Appeal in **K.V**

Construction LTD v. Mwananchi Engineering Ltd & Constructions,
Civil Application No. 50/ The Court of held in **K.V Construction LTD's**
case that-

"In the absence of medical chits showing that the advocate was excused from duty because of illness then no sufficient reasons had been shown."

Mr. Akram, the for sixth, eighth, ninth and tenth respondents' advocate, concurred with Mr. Kitare advocate's submission and added that the letter from Geita Hospital was required to be supported by an affidavit of the medical officer. In the absence of an affidavit the letter has no value. He added the applicant deponed false facts in the affidavit. He prayed paragraphs containing false averment to be expunged and once that is done the remaining paragraphs cannot support the application for extension of time.

I am of the firm view that once a person proves that ill health prevented him to take legal action, that amounts to a good cause for delay. See **Emanuel R. Maira vs The District Executive Director of Bunda,** Civil Application No. 66 of 2010 (unreported), where it was held that:

"Health matters in most cases are not the choice of a human being; cannot be shelved and nor can anyone be held to blame when they strike."

I must also state at outset that to prove that the applicant was sick, hence, unable to take steps required under the law to prosecute his case, he must tender a medical chit. He may also tender other documents which may prove that he was attended by a given hospital such as EFD receipts issued by a given hospital for paying hospital services in his name, supported with discharge sheet. I do not share the applicant's advocate's view that an applicant would prove that he was sick and admitted by tendering an administrative letter. I associate myself with the decision of the Court of Appeal in **K.V Construction LTD's** case that-

"In the absence of medical chits showing that the advocate was excused from duty because of illness then no sufficient reasons had been shown."

In the absence of a medical chit, I do not find it proved that **Rhoda Henry** was sick and admitted at Geita hospital from 13th December 2020 to 27th July 2021. Not only that but also, am unable to believed that the applicant was admitted as averred in the affidavit as the letter from Geita hospital states that the applicant was attended and it does not state that **Rhoda Henry** was admitted on 13th December 2020.

The applicant averred in her affidavit that she fell sick and the doctor at Geita Hospital admitted her from 13th December 2020 to 27th July. I wish to reproduce her own averment for the sake of clarity-

"That before the applicant complying with the procedure of appealing against the said ruling she suddenly suffered with long-term sickness and she was admitted at Geita Regional hospital on 13th December 2020, and discharged on 27th July 2021 under the medical supervision. (Copy of the discharge letter from Geita Regional hospital is attached and marked as AP-02) to form part of this affidavit)."

Rhoda Henry's averment that she was sick and admitted from 13th December 2020 to 27th July 2021 contradicts the evidence given the counter affidavit that she attended the DLHT on the 26th February, 2021 to answer to the bill of costs. The respondents averred in their counter affidavit that **Rhoda Henry** attended the tribunal and attached a copy of the proceedings on the 26th February, 2021 before the DLHT. **Rhoda Henry** did not counter her attendance before the DLHT on the 26th February, 2021. **Rhoda Henry** therefore gave false averment in her affidavit that she was admitted from 13th December 2020 to 27th July 2021 while she knew it was false as she attended the DLHT on the 26th February, 2021. **Rhoda Henry** lied on oath.

The law is settled that an affidavit containing false information cannot be relied upon by the Court to decide the matter. The Court of Appeal pronounced itself in **Damas Assey and Another vs Raymond Mgonda Paula and 8 Others**, Civil Application No. 32/17 of 2018, where it cited with approval its decision in **Ignazio Messina vs Willow Investments SPRL**, Civil Application No. 21 of 2001 that:

"An affidavit which is tainted with untruths is no affidavit at all and cannot be relied upon to support an application. False evidence cannot be acted upon to resolve any issue."

Given the position of the law demonstrated above, **Rhoda Henry's** affidavit containing untruthful information cannot be acted upon to support the application for extension of time. Thus, there is no affidavit to support an application. An application without an affidavit is incompetent.

The above position notwithstanding, let me turn to the other aspect that extension of time be granted on account of illegality. **Rhoda Henry** deponed that her appeal stands a great chance of succeeding as the respondents are occupying land, which is a part of the late Henry Thobias's estate having procured it from an authorized person. She requested this court to intervene as the dispute is over land ownership which ought to be determined on merit to end the long outstanding dispute. **Rhoda Henry's**

advocate submitted that once illegality is raised it is a sufficient ground to extend time. He submitted that **Rhoda Henry** deposed regarding the issue of illegality in paragraphs 9 and 10 of the affidavit. He added that the applicant stands a great chance of succeeding on appeal as the respondents procured the suit land from a person who had no mandate.

The first, second, third fourth and fifth respondents' advocate, Mr. Kitale, submitted that the applicant did not prove that the decision of the DLHT was tainted with illegality. He contended the law requires that the issue of illegality must 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. To anchor his position, he cited the case of **FINCA (T) Ltd & Another v. Boniface Mwlukisa**, Civ. Appl. No. 589/12 of 2018.

Mr. Akram, the advocate acting for sixth, eighth, ninth and tenth respondents, added to Mr. Kitale's submission that illegality to be ground to support an application for extension of time, it should emanate from the proceedings or judgment sought to be challenged.

I concur with the applicant's advocate that illegality is a good ground for extension of time. I wish to add, however that the alleged illegality

must in respect of the impugned judgment to amount to a good ground to extend time. This Court of Appeal took that stance in **the Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] TLR 185 and many others, where it held that-

"where "the point of law at issue is the illegality or otherwise of the decision being challenged, that is of sufficient importance to constitute 'sufficient reason..'"

The Court of Appeal, however added that the alleged point of illegality must be of sufficient importance and **must be apparent on the face of the record**, such as the question of jurisdiction; not one that would be discovered by a long-drawn argument or process. The Court of Appeal pronounced itself in **Ngolo Godwin Losero v Julius Mwarabu** Civil Application No. 10/2015 CAT at Arusha (unreported), where the Court of Appeal reiterated its decision in **Lyamuya Construction Company Ltd Vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application 2/2010 that-

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

The Court in the case Certainly, it will take a long drawn process to decipher from the impugned decision the alleged misdirection or non-directions on the points of law."

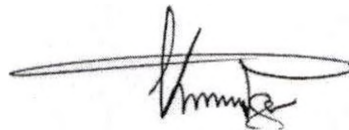
Given the above position of the law, I wish to insist that illegality to amount to a sufficient reason for extension of time, it must be clearly apparent on the face of the impugned decision. The illegality in the present case, is deduced is that respondents obtained the suit land illegally. All respondents save for the seventh respondent, procured land which belonged to the late Henry Thobias from a person who was not the administrator of the estate. Thus, the applicant and her advocate do not contend that the decision of the DLHT, which the applicant intends to impugn is tainted with illegality. The illegality therefore, is not be apparent on the face of the record of the impugned decision.

I, therefore, find no illegality to warrant this Court to extend time as the alleged illegality is not apparent on the face of the impugned decision of the DLHT. Consequently, I find the second ground advanced to support an application for extension without merit.

Eventually, I find the application without merit as the applicant did not adduce good cause for delay. I also find it incompetent for want of an affidavit to support the application as the affidavit contained false averment, for that reason it cannot support an application. Consequently, I dismissed the application with costs.

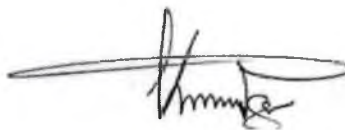
It is ordered accordingly.

DATED at Mwanza this 5th day of May, 2022.



J. R. Kahyoza
JUDGE

Court: Ruling delivered in the presence of Mr. Kitale advocate for the 1st, 2nd 3rd and 4th Respondents and holding brief for Mr. Mwita advocate and Mr. Akram advocate, for the applicant and for the 6th, 8th 9th and 10th respondents, respectively. The 7th Respondent was absent. B/C Martina (RMA) Present.



J. R. Kahyoza
JUDGE
5/5/2022