THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(IRINGA DISTRICT REGISTRY)

AT IRINGA

MISC. LAND APPLICATION NO. 08 OF 2021

(Originating from Land Application No. 24 of 2014 Njombe District and Housing Tribunal)

MAKAMBAKO SACCOS ..... 1ST APPLICANT

GAUDENCE HIRUKA ..... 2ND APPLICANT

VERSUS

PETRO MWANDEMELE ..... 1ST RESPONDENT

ELIDE A. SANGA ..... 2ND RESPONDENT

17/2 & 08/3/2022

RULING

MATOGOLO, J.

This is an application by the Applicants Makambako Saccos and Gaudence Hiruka for an order that this court be pleased to enlarge time to the applicants so that they can file an appeal out of time against the judgment in Application No. 24 of 2014 delivered on 23/06/2017. They also pray for costs and any other order as the court deems fit and just to grant.

The application is by chamber summons made under Section 41(2) of the Land Disputes Courts Act, (Cap. 216 R.E 2019). The same is supported by an affidavit sworn by the 2nd applicant one Gaudence Hiruka.

The application was argued by written submissions following the prayer by the parties, which was granted by the court.

The Applicants were represented by Mr. Emmanuel Clarence learned Advocate while Mr. Marco Kisakali learned Advocate appeared for the Respondents.

On the date case came before me for mention with a view of fixing date for hearing it was accompanied with another application, land Revision No. 1 of 2021, which was also filed the same day on 17/5/2021 seeking to revise the ruling in Misc. Application 24 of 2019, in execution proceedings of the decree now sought to be challenged. By considering the nature of each application, the same were heard separately. It is the submission by Mr. Clarence in support of this application that, it is a legal principle that, a court will grant extension of time to file an appeal out of time as it is a discretion which has to be exercised judiciously by the presiding magistrate or judge, if an applicant shows good cause (s) for his delay. He referred this court to the case of ***Michael Lessani Kweka vs. John Eliafye [1997] TLR 152.*** He submitted that, the Applicants in the present application have one major good cause to support their application for this court to grant extension of time for them to file their appeal out of time. He mentioned the major good cause to be illegality. He said that,

their submission on illegality of the decision as a good cause for extension will be guided with a number of principles.

The first principle is that affidavits are evidence and annexure thereto is intended to substantiate the allegation made in affidavit. To support his argument, he cited the cases of ***Bruno Wenceslaus Nyalifa versus The Permanent Secretary Ministry of Home Affairs and The Honourable Attorney General,*** Civil Appeal No. 82 of 2017 Court of Appeal of Tanzania at Arusha, (unreported).

The second principle is that, where a point of law at issue is the illegality or otherwise of the decision being challenged, that is a point of law of sufficient importance to constitute sufficient reason within rule 8 of Court of Appeal Rules to overlook non- compliance with the requirements of the Rules and to enlarge the time for such non- compliance, he referred the cases of ***Ministry of Defence and National Service V, Devram P.Valambhia, [1992] T.L.R387*** and ***Kalunga and Company Advocates vs. NBC Limited*** [2006] T.L.R 235 at p.240.

The third principle is that, apart from accounting for the delay, there are some exceptional circumstances particularly when illegality is raised as ground in the application for extension where, time can be extended regardless the extent and reasons for the delay. He referred the case of ***Enock Kalibwani versus Ayubu Ramadhani and Two Others,*** Civil Application No. 491/17 of 2018, Court of Appeal of Tanzania at Dar Es Salaam (unreported). He went on submitting that, applying the afore stated settled principles in the instant application, the affidavit in support of the application when read with annexures attached therein fall within

the principles that contents of affidavit are well substantiate in the present application.

He further contended that, their application under paragraphs 4, 5, 6 and 7 raised issues of illegalities to wit, one, assessor was not invited to give his opinion as required under Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003, he referred the case of ***Edina Adam Kibona versus Absolom Swebe (Sheli)*** Civil Appeal No. 286 of 2017, Court of Appeal of Tanzania at Mbeya (unreported), at page 6. He contended that, this become vivid on the face of record as per annexure MGI at page 35 and 38 of the trial Tribunal proceedings when defense by 1st, 2nd and 4th respondents were closed and at page 42 the tribunal set the date for judgment without inviting assessors to give their opinion after locus visit.

He went on submitting that, the assessor who has not heard all the evidence gave his opinion, he referred the case ***of Ameir Mbarak and Azania Bank Corp Ltd versus Edgar Kahwil,*** Civil Appeal No. 154 of 2015, Court of Appeal of Tanzania at Iringa (unreported) at page 7. He argued that, going through annexure MG1 at page 11 of the proceedings of the trial tribunal at the commencement of the prosecution case, Mtweve and Mwapinga featured as assessors where as at page 25 of the same proceedings upon commencement of defence case only Mrs. Mtweve featured while Mwapinga was not present. But when one read the trial Tribunal Judgment at pg.5 the trial chairman acknowledges to receive the opinion of Mwapinga, assessor who did not hear all the evidence.

He also argued that, assessor featured to conduct cross-examination during conduct of proceedings. He made reference to annexure MG1 at page 15 and 16 of the copy of the proceedings of the trial tribunal whereas it goes against the order of speech in that assessors conduct across and there after re- examination was followed.

He submitted that, it is undenied that, the above pointed paragraphs raised point of law of sufficient importance to constitute illegality and thus they invite this Court to be guided by the above stated principle as per ***Valambia's case.***

He went on submitting that, the illegality complained of is on the face of the records and the same goes to the root of the matter as it has effect on the jurisdiction matters emanated from composition of the tribunal which gave the decisions.

He submitted further that, the Respondents in their joint counter-affidavit they have stated that the Applicants failed to account for each day of delay. The general principle of accounting for each day of delay should not be applied without considering exceptional circumstances. The exceptional circumstance is when the point of law is raised to warrant illegality as the ground for extension, he argued that time can be extended regardless the extent and reason for delay, to support his argument he cited the case of ***Kalibwani's case*** (supra).

The Applicants counsel concluded by praying to this court to grant the present application as prayed by the Applicants.

In his reply submission counsel for the Respondents submitted that, the Applicants application mainly provides that, the delay was due to

illegality and irregularity done by the trial tribunal of which it is not the essence of the interpretation and application of the law of the limitation. He went on submitting that, the decision intended to be challenged by the Applicants was delivered on 23rd day of July by Hon. Musa Chairman and this application for extension of time was filed on 17th day of May, 2021, more than 1400 days lapsed.

Mr. Kisakali submitted that, this court can only exercise discretion to grant extension of time but that discretion must be exercised judiciously not by sympathy to the parties who relaxed for 4 years without taking any action. He said it is trite law that, in exercise of that discretion the court should look cumulatively and not only one point among these factors:-

> "*(a) The applicant must account for all the period of delay.*
>
> *(b) The delay should not be inordinate.*
>
> *(c) The applicant must show diligence and not apathy negligence or sloppiness in the prosecution of the action that he intends to take.*
>
> *(d) If the court feels that there are other sufficient reasons, such as existence of a point of law of sufficient importance"*

These guidelines above are well elaborated in the case of ***Lyamuya Construction Company Limited versus Board of Trustees of Young Women Christian Association of Tanzania***, Civil Application No. 02 of 2010 (unreported), at page 6 to 7.

Mr. Kiasakali was of the considered opinion that, the Applicants have failed to meet any of the above guidelines, as they did not account for all

those 1400 days plus days of delay and subsequent points as narrated above.

He further submitted that, on the facts that the Applicants failed to give reasons for delay for filing an appeal within prescribed time, the court said in the case of ***Reli Assets Holding Company Limited versus Anselimu Willium Mauki and Another,*** Misc. Land case Application No.11 of 2013 at page 10-11 inter alia that:-

> " *.... It is highly unfortunate that the counsel for the applicant has already declared the decision of the trial district land tribunal illegal without any mandate to do so. He is now attempting to convince this court to hold the same instead of giving reasons for the delay to file appeal within prescribed period. In actual facts the applicant is telling this court that one may be allowed to ride on his deep slumber in total disregard of the provision of the Limitation Act because, his intended appeal contains elements of illegality, and thereafter, when he decides to wake – up, walk straight to the court and plead illegality as a sufficient cause for delay and hence extension of time. That is not proper, in an application for extension of time the court is*

required to look into whether the applicant has showed sufficient cause of delay and not to predetermine the intended appeal..."

Mr. Kisakali submitted that, from the above quoted paragraph, it is obvious that, the court warned against the danger of opening Pandora box for all ill, that as long as there is purported illegality, then should be as a right to a party to be granted extension of time even though there is plenty of days lapsed without taking action, negligence and inordinate delay by the applicants. He contended further that, if that would be the essence of the court on point of illegality, then will be no reasons and purpose of having time limitation and that will emphasize an endless litigation of which was not the case at all.

He went on arguing that, their understanding on the point of illegality is that, will add or supplement on reasons already supplied for delay as why the court in ***Lyamuya's case*** use the phrase " ***if the curt feels that there are other sufficient reasons".***

He argued that in the case of ***Finca (T) Limited and Another versus Boniface Mwalukisa,*** Civil Application No. 589/12 of 2018 at page 10 held that;

"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 Valambia's case, the court meant to draw a

general rule that every applicant who demonstrates that his intended appeal raises points of law should, as right, be granted extension of time if he applies for one...."

Mr. Kisakali said the court had emphasized that, the point of law complained of should be apparent on face of record, such as issue of limitation of time or jurisdiction. According to the case at hand he said, the trial tribunal had jurisdiction in terms of all aspects and no limitation of time has pleaded contrary. The applicants allegation is not apparent on face of records but can be discovered by a long drawn process, where this court should read the entire trial court file in each page or paragraph so as, to see the complaints which is not the essence of the law on illegality.

He submitted further that, the court had stated in number of cases, time will not be extended in every situation whenever illegality is alleged as an issue by the Applicants as it depends on the circumstances of each case and material placed before the case. To support his argument he referred this case to the case of ***Tanzania Harbours Authority vs. Mohamed R. Mohamed [2003] TLR 76*** at 77 where it was held inter alia that:-

"(ii) This court has said in number of decision that time would be extended if there is an illegality to be rectified, however, this court has not said that time must be extended in every situation.

(ii) In this case the defence has been glossly negligent and surely cannot be heard now to claim that there is a point of law at stake".

He further argued that, from above holding, this court should not be convinced by the alleged illegality without due diligence and promptness of action by the Applicants in pursuing their rights for more than 1400 days without accounting for each day of delay. It is cardinal principles of laws that, no judgment attains perfection.

He submitted further that, the Applicants must prove that they have sufficient reasons for the delay, the length of delay must be reasonable, account each day of delay and that the order sought will not prejudice the Respondents who are for more than seven years are struggling for the rights in court. To cement his argument, he referred the case of ***Ngao Godwin Losero vs Julius Mwarabu,*** Civil Application No. 10 of 2015 (unreported).

Mr. Kisakali concluded by praying to this court to dismiss this application with costs.

Having read the respective submissions by the parties, the only issue to be determined here is whether the Applicants have advance sufficient reasons to warrant this court to exercise its discretion to grant the application.

It is principle of law, as correctly submitted by the learned counsel that, an application for extension of time is within the discretion of the court to grant or refuse. Extension may only be granted where it has been sufficiently established that the delay was with sufficient cause. (***Benedict Mumelo versus Bank of Tanzania (2006) 1 EA 227***).

In the case of ***Lyamuya Construction Company Limited versus Board of Trustees of Young Christian Association of Tanzania,*** (supra), the Court set out factors or conditions to be fulfilled before the court grant extension of time as quoted herein above.

In the instant application the Applicants have stated the reasons for extension of time in their affidavit particularly at paragraphs 4, 5, 6 and 7, mainly is illegality, that after the completion of the defence case the assessors were not invited to give their opinion, also they alleged that the trial Chairman acknowledge to receive the opinion of Mr. Mwapinga who did not hear all the evidence. Another illegality complained of is that, the assessors conducted cross-examination. Mr. Clarence was of the considered opinion that, the illegality complained of goes to the root of the matter and it is an exceptional to the principle of accounting for each day of delay.

Mr. Kisakali on his side did not buy that idea, he was of different view that, the Applicants have failed to meet any of the guidelines that were advanced in ***Lyamuya case*** (supra), as they did not account for 1400 days plus of delay.

And that, the illegality complained is not on face of records as it does not concern with time Limitation or jurisdiction.

Having carefully read through the trial tribunal records the same speaks louder that, after completion of defence case the assessors who heard the case were not invited to give their opinions as required by the law as can be seen at page 42 of the trial tribunal typed proceedings. There is nowhere the trial Chairman recorded that the case was fixed for the assessors to give their opinions. He only considered their opinion in his judgment.

Also, the District Land and Housing Tribunal record is silent on whether the written opinions of assessors were read in the presence of the parties. The trial tribunal chairman only considered the opinions of assessors in the judgment.

According to section 23(1) of the Land Disputes Courts Act (Cap 216 R.E 2019), the District Land and Housing Tribunal is composed of a Chairman and not less than two assessors

Furthermore regulation 19(2) of the Land Disputes Courts Act (District Land and Housing Tribunal) Regulations, 2002, G.N. No.174, states that:-

> *"Notwithstanding subsection (1) the chairman shall, before making his judgment, require every assessor present at the conclusion of the*

hearing to give opinion in writing and the assessor may give his opinion in Kiswahili".

In the case of ***Tubone Mwambeta versus Mbeya City Council***, Civil Appeal No. 286 of 2017 (unreported), the Court of Appeal of Tanzania held that:-

> *"In the view of the settled position of the law where the trial has be conducted with the aid of the assessors, they must actively and effectively participate in the proceedings so as to make meaningful their role of giving their opinion before the judgment is composed since Regulation 19(2) of the Regulations require every assessor present at the trial at the conclusion of the hearing to give his opinion in writing/such opinion must be availed in the presence of the parties so as to enable them to know the nature of the opinion and whether or not such opinion* has been considered by the chairman in the final verdict".

As the assessor(s) who fully participated the hearing were not invited to give opinion and cause their opinion be read in the presence of the parties, also as the assessor who did not hear all evidence was invited to give opinion, that vitiated the proceedings. It is an illegality that warrants

this court to extend time. (See also ***Tubone Mwambeta vs. Mbeya City Council,*** Civil Appeal No. 287 of 2007, CAT (unreported).

It is also a settled principle of law that where a point of law at issue is the illegality or otherwise of the decision being challenged, that is a point of law of sufficient importance to constitute sufficient reason, as it was held in the case of ***Valambhia case*** (supra).

Despite the arguments by Mr. Kisakali learned advocate for failure by the Applicants to observe conditions laid in ***Lyamuya Construction Company Ltd case,*** together with the authorities he cited in support of his arguments, but in my firm view presence of illegality in the complained of decision is very fatal. The same cannot be left to go uncorrected. In actual fact is a nullity.

Having so discussed, it is my considered opinion that, the illegality complained of is on the face of records and it is sufficient reason for extension of time. This application is granted, the Applicants to file their appeal within 45 days from today, no order as to costs.

It is so ordered.

THE HIGH COURT OF TANZANIA

F.N. MATOGOLO

JUDGE

08/3/2022.

Date:	08/03/2022
Coram:	Hon. F. N. Matogolo – Judge
1st Applicant:	
2nd Applicant:	Absent
1st Respondent:	
2nd Respondent:	Mr. Marco Kisakali – Advocate
C/C:	Charles

Mr. Marco Kisakali – Advocate:

My Lord I am representing the Respondents. My Lord the matter is for ruling of the preliminary object. We are ready.

COURT:

Ruling delivered.

THE HIGH COURT OF TANZANIA

F. N. MATOGOLO
JUDGE
08/03/2022