IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

MISC. LAND APPLICATION NO. 05 OF 2020

(Originating from the Decision of the District Land and Housing Tribunal for Njombe at Njombe in Land Application No. 88 of 2016)

ATUWONEKYE MWENDA ....APPLICANT

VERSUS

HEZRON MANGULA...RESPONDENT

RULING

Date of Last Order: *17/02/2022*

Date of Ruling: *22/03/2022 at 11:05 am*

MLYAMBINA, J.

It is a well-established common law principle and immutable rule that the doctrine of *stare decisis* does not preclude a departure from precedent established by a series of decisions clearly seen erroneous, unless the reversal or fragrant breach of such established procedure and practice, by rule of reason, would cause a greater injury and injustice.[1] While recognizing such principle, the fascinating issue before the Court in this application is; *whether, the chamber application*

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[1] See, Dodhia v. National & Grindlays Bank Limited and Another, [1] [1970] E.A. 195, p. 200; Jumuiya ya Wafanyakazi Tanzania v. Kiwanda Cha Uchapishaji cha Taifa; [1988] TLR 146; Ophir Tanzania (Block 1) Limited v. Commissioner General Tanzania Revenue Authority, Civil Appeal No. 58 of 2020, Court of Appeal of Tanzania at Dar es Salaam (unreported); H.W. Humble, Departure from Precedent, 19Mich.L.Rev.608(1921) at https//repository.law.umich.edu/mlr/vol19/iss6/3 [lastly accessed on 22nd March, 2022].

supported with an affidavit should be dismissed for want of prosecution on ground of failure to file on time written submission in support of the application.

In other words, the issue is; *whether the chamber application supported with an affidavit, at the hearing date, in the absence of the Applicant and/or his Advocate, ought to be dismissed on default, instead of being decided on merits.* In order to bring the analysis at position, I will set out the two conflicting rules of practice and procedure, state what prompted this Court to come up with this decision, discuss the two rules, consider the factual issues of this matter and make a conclusion.

At the outset, it must be thrives recalled that; the phrase *"dismissal or struck out for want of prosecution or non-appearance of the Applicant"* occurs where the Applicant when required to appear at the hearing date or time, take certain course or action premised on a fixed date or time, fails to do so. However, the term "*dismissal*" and "*struck out*" have different repercussions which needs not be discussed in this ruling.

As a matter of principle, I note that; there is an established general rule of practice and procedure that; *an affidavit is a substitute of oral evidence.*[2] However, such principle has not been applied in instances

[2] See, Uganda v. Commissioner of Prison Exparte Matovu [1966] EA 514; Phantom Modern Transport (1985) Limited v. DT Dobie (TZ) Limited, Civil References Nos. 15 of 2001 and 3 of 2002, Court of Appeal of Tanzania (unreported); DP Shapriya and Company Limited v. Bish International, Civil Application No. 53 of 2002, Court

where the Applicant and/or his Advocate does not appear on the scheduled hearing date or does not file written submission in support of the application as per the Courts' schedule. The general practice has been to dismiss the application for either want of prosecution or for non-appearance of the Applicant and/ or his Advocate under the provisions of *Order IX Rule 8 or under Order IX Rule 2 of the Civil Procedure Code.*[3] The attendant consequences of failure to file written submissions has been equated to those of failure to appear and prosecute or defend as the case may be.[4] In other instances, the Court has been dismissing the matter for want of prosecution with leave to refile.[5] Sometimes, the application is struck out for want of prosecution

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of Appeal of Tanzania (unreported); Concrete and Structural Solution Limited v. Sebra Dinamik International Limited and Four Others, Civil Case No. 187 of 2020, High Court of Tanzania at Dar es Salaam District Registry (unreported).

[3] Cap 33 [R.E. 2019]; the cases of Ivan Mankobrad v. Miroslav Katik and Another, High Court Civil Case No. 321 of 1997 Dar es Salaam District Registry (unreported); Fredick A. M Mutafurwa v. CRDB 1996 Limited and Others, High Court of Tanzania, Land Case No. 146 of 2004; National Insurance Corporation of (T) Limited and Another v. Shengena Limited, Civil Application No. 20 of 2007 Dar es Salaam District Registry (unreported); P. 3525 LTCOL Idahya Maganga Gregory v. Judge Advocate General, Court Martial Criminal Appeal No. 2 of 2002, Dar es Salaam Main Registry (unreported).

[4] Brighton Mponji (Administrator of the estate of the late Theodora Masheyo v. Simon Paulo, Misc. Land Case Application No. 708 of 2020, High Court of Tanzania, Dar es Salaam Land Division (unreported).

[5] Karoli Sokia Obinga v. Adika Alila, Misc. Land Application No. 169 of 2013, High Court of Tanzania, Mwanza District Registry (unreported) as referred in Karoli Sokia Obinga v. Adika Alila, Misc. Land Application No. 73 of 2020, High Court of Tanzania, Mwanza District Registry p. 1 (unreported).

and non-appearance.[6] The resultant effect thereof has been to attract a thousands of chamber applications seeking to set aside the dismissal orders.

In nutshell, the Applicant in this matter is seeking for an extension of time to file an Appeal against the decision of the District Land and Housing Tribunal for Njombe at Njombe in *Land application No. 88 of 2016.* This Application has been brought under *Section 41(2) of the Land Disputes Courts Act,*[7] *as amended by the Written Laws (Miscellaneous Amendments) Act*[8] and it is supported with the affidavit of Meckson Kigunga. It was however, resisted by the Respondent through the counter affidavit sworn and filed by Hezron Mangula, the Respondent herein.

When the application came for hearing on 23rd November, 2021, by consent of both parties, it was agreed the application be disposed by way of written submissions. According to the agreed schedule, the Applicant was to file her written submissions by 7th day of November, 2021, the Respondent was to file a reply written submission by 21st December, 2021, rejoinder if any was to be filed by 28th December, 2021. The application was scheduled for mention on 17th February, 2022 with the view of scheduling Ruling date.

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[6]Independent Power Tanzania Limited v. Venerabilis Jigge and Hildephonce Mutembei, Miscellaneous Application No. 206 of 2017, High Court of Tanzania, Labour Division at Dar es Salaam (unreported).

[7] Cap 216 [R.E 2002].

[8] Act No. 02 of 2016.

It is unfortunate, neither the Applicant nor the Respondent appeared on 17th February, 2022 when the application was called on for mention. As a result, the Court had no other option than to fix the ruling date. Upon going through both parties' submissions, I noted the Respondent raised an alarm that the Applicant's written submission in chief was filed out of time contrary to the schedule issued by the Court. As such, the Respondent called upon the Court to dismiss the application.

If the Court is to agree, as raised by the Respondent, that the Applicant's written submission in chief was filed out of time contrary to the Court's schedule, what would be the remedy? Should the Court dismiss the suit for noncompliance of the Court's schedule or determine it on merits based on affidavit evidences?

Consistently with the above said, it seems to the Court almost inconceivable that there are two opposing schools of thought on; *whether the chamber summons supported with affidavit deserves to be dismissed or not for non-appearance or for want of prosecution by the Applicant and/or his Advocate at the scheduled hearing date or for failure to file written submissions as per the Courts' schedule*. The first school takes a stance that; in the absence of the Applicant and/or his Advocate, when the application is called for hearing, the application has to be dismissed on default instead of being decided on merits. It can be dismissed for either want of prosecution or non-appearance. It applies the same when the Applicant and/or his Advocate fails to file written submission as per the Court's order. I brand this school as

"affidavit nondependent substitution school of thought" or rather *"the doctrine of affidavit nondependent substitution"*.

Followers of the first school of thought do not act on an affidavit in the absence of oral submission by a Party or his Advocate at the hearing date. It is under this school of thought, applications made by way of chamber summons supported with affidavits are dismissed for either non-appearance of the Applicant and/ or his Advocate or for want of prosecution while the affidavit evidences are complete in Court.

The second school of thought, which I postulate, lays a supposition that; an application supported with an affidavit cannot be dismissed for want of prosecution or non-appearance of the Applicant and/ or his/her Advocate when the matter is called for hearing or when the Applicant fails to file written submissions as per the Courts' schedule. It has to be decided based on the available affidavit evidence. I call such school as *"affidavit sufficient substitution school of thought"* or rather *"the doctrine of affidavit sufficient substitution."* Under this school, I consider an affidavit to be a self-proving evidence to be acted upon by Courts in the absence of supplementary submission by a Party or his Advocate. This could also be termed as *"affidavit self-proving school of thought"* or *"the doctrine of affidavit self-proving"*.

I will start with the 1st school of thought. The legal basis of this school is essentially legal practice. Where in the circumstances of non-appearance of the Applicant, usually an application is dismissed for want of prosecution or non-appearance. Probably, this practice may

have been influenced by procedure under *Order IX Rule 8 of the Civil Procedure Code,* where suits are dismissed for want of prosecution on ground of non-appearance of the Plaintiff.[9] The same practice might also be influenced by the procedure under *Order IX Rule 2 the Civil Procedure Code* where suits are dismissed for none appearance of the parties or for want of prosecution by the Plaintiff.[10] There is a long line of authorities which supports such position, the case of **Kinondoni Municipal Council v. Antony Masanza and Stera Mponda** is merely one manifestation.[11] In that case, the Plaintiff herein sued the Defendants over ownership of a parcel of land. On 26th March, 2015 the suit was called for hearing before her Ladyship Mugasha, J. (as she then was) but none of the parties was present. Consequently, it was dismissed for non-appearance of the parties pursuant to *Order IX rule 2 of the Civil Procedure Code.*[12]

Also, the justification of the approach of dismissing the application for want of prosecution or non-appearance of the Applicant and/or his Advocate may be inferred under the provision of *Article 108 (2) of the Constitution of the United Republic of Tanzania* which appears to suggest that legal tradition exists in Tanzania as one of the source of law.[13] That practice may be treated as one of the legal tradition which

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[9] Cap 33 [R.E. 2019].

[10] *Ibid.*

[11] Land Case No. 67 of 2011 High Court of Tanzania at Dar es Salaam District Registry (unreported).

[12] Cap 33 *loc cit.*

[13] Cap 2 [R.E. 2002] as amended.

the Court has usually resorted to where it is faced with a situation of non-appearance of the Applicant and/ or his Advocate during hearing of the application where both the chamber summons, affidavit, counter affidavit and reply to counter affidavit (if any) are in the record of the Court.

Notably, one may still argue that there are dozens of Appellate Court decisions which have supported or confirmed dismissal order of the chamber application by the same Court or lower Court or Tribunal on non-appearance of the Applicant and/or his/her Advocate.[14] But such argument may be very weak, because to the best of my knowledge, in none of such decisions, the Court was asked to weigh or address the reasons in support of the second school of thought enunciated in this ruling.

Besides, one may be convinced to believe that this practice of dismissing the application on default of the Applicant and/or his Advocate at the hearing date or for failure to file written submissions as per the Court's schedule may have the legal base under *Section 2 (3) of Judicature and Application of Laws Act (JALA),*[15] this was a legal

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[14] Simon Pius Mwachilo v. Fred Edward and Two Others, Miscellaneous Land Case Application No. 662 of 2017, High Court of Tanzania, Land Division at Dar es Salaam (unreported); Michael Haule v. Bruno Msigala, Miscellaneous Land Application No. 775 of 2017, High Court of Tanzania Land Division at Dar es Salaam (unreported); Salumu Alaudin Hashim (*Administrator of the Estate of the late* Alaudin Ally Hasham v. Mohamed Magonga, Land Appeal No. 113 of 2020, High Court of Tanzania Land Division at Dar es Salaam (unreported); Independent Power Tanzania Limited, *loc cit.*

[15] Cap 358 [R.E. 2019].

practice in England on or before 22nd July, 1920. *Section 2 (3) of JALA* provides:

> Subject to the provisions of this Act, the jurisdiction of the High Court shall be exercised in conformity with the written laws which are in force in Tanzania on the date on which this Act comes into operation (including the laws applied by this Act) or which may hereafter be applied or enacted and, subject thereto and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the twenty-second day of July, 1920, and with the powers vested in and according to the procedure and practice observed by and before Courts of Justice and justices of the Peace in England according to their respective jurisdictions and authorities at that date, save in so far as the said common law, doctrines of equity and statutes of general application and the said powers, procedure and practice may, at any time before the date on which this Act comes into operation, have been modified, amended or replaced by other provision *in lieu* thereof by or under the authority of any Order of Her Majesty in Council, or by any Proclamation issued, or any Act or Acts passed in and for Tanzania, or may hereafter be modified, amended or

replaced by other provision in lieu thereof by or under any such Act or Acts of the Parliament of Tanzania:

But case law in which the first school of thought legal approach has been endorsed do not give proof of such practice in England before the date of the General Reception Clause. The orders have generally been recorded that; *the application is dismissed for non-appearance of the Applicant and/or his Advocate or for want of prosecution or struck out for want of prosecution or non-appearance.* There are no reasons being given as to why dismissal of the suit while there is affidavit evidence in record.

Next, the followers of the first school of thought may argue that; the chamber application must be dismissed for want of prosecution on non- appearance of the Applicant and/ or his Advocate because the Party has not appeared to move the Court to act on his supporting affidavit.

It can also be argued by the followers of the first school of thought that; chamber application should be dismissed because in some affidavits the deponent intimate that there are other facts which shall be adduced at the hearing date. Therefore, non- appearance at the hearing should attract dismissal of the application for want of prosecution.

Another possible argument by profounder of the first school of thought is that; non-appearance is discourteous to the Court and can never be

countenanced. Thus, dismissing the suit will discourage the tendency of non- appearance and will put the Court in disrepute.

Again, it can be argued by the profounder of the first school of thought that by dismissing an application for want of prosecution or non-appearance they are exercising their discretion in such a manner as would give effect to the primary intention of the law maker which is to ensure that matters filed in Courts are dealt with due expedition.

The followers of the first school of thought are likely to argue that law operates in binary system in which the only value is 0 or 1. The fact either happened or it did not. So, if the Applicant and/or his Advocate won't appear in Court at the hearing date or do not file written submissions as per the Court's order, the Court might be placed in possibilities of assuming facts due to non-clarification from the Applicant and/or his Advocate. If the Court is left in doubt, the doubt is resolved by a rule that the Chamber application has to be dismissed for want of prosecution.

Also, it is possible to argue that continuation on merits of an application in the absence of the Applicant and/or his Advocate on the scheduled hearing date may affect Court's power of controlling proceedings as no sanction will follow at the moment the Applicant and/or his Advocate fails to appear without justified reasons.

Additional possible argument to be made by profounder of the first school of thought is that the Court by virtue of *Section 95 of the Civil*

Procedure Code[16] has the inherent powers to regulate its own procedure. Thus, such powers include the right to prevent an abuse of its process in *inter alia* forms of inordinate or unreasonable delay in prosecuting one's application.

In escalating the first school of thought, it can be argued that; disposing the application based on affidavits due to the Advocate's absence will be facilitating exploitation to the client by the Advocate who is paid but does not attend the hearing. There will always be a feeling that non-appearance will not affect the Applicant anyhow in so far as there is already affidavit evidence in record of which the Court is bound to consider it in rendering its decision.

Worse indeed, it can be argued by the founder of the first school of thought that; disposal of the chamber application based on affidavit evidences while the Applicant and/ or his Advocate does not appear at the hearing date or do not file written submissions, will amount to breach of mandatory rules of procedure such as *Order IX Rule 8 or Order IX Rule 2 of the Civil Procedure Code*[17] and that the oxygen principle cannot be applied by ignoring rules of procedure as well laid

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[16] *Cap 33 loc cit.*

[17] Cap 33 [R.E. 2019]; the cases of Ivan Mankobrad v. Miroslav Katik and Another, High Court Civil Case No. 321 of 1997 Dar es Salaam District Registry (unreported); Fredick A. M Mutafurwa v. CRDB 1996 Limited and Others, High Court of Tanzania, Land Case No. 146 of 2004; National Insurance Corporation of (T) Limited and Another v. Shengena Limited, Civil Application No. 20 of 2007 Dar es Salaam District Registry (unreported); P. 3525 LTCOL Idahya Maganga Gregory v. Judge Advocate General, Court Martial Criminal Appeal No. 2 of 2002, Dar es Salaam Main Registry (unreported).

down by the Court of Appeal in the case of **Mondorosi Village Council and 2 Others v. Tanzania Breweries Limited and 2 Others.**[18]

Still, it can be argued by the founder of the first school of thought that; disposal of the chamber application based on affidavit evidences while the Applicant and/ or his Advocate does not appear at the hearing date or do not file written submissions, will encourage laziness on the part of the Advocate in complying with Courts' orders.

The last possible argument likely to be advanced by profounder of the first school of thought is significant. It demonstrates that the term "suit" has been defined through case law to include *inter alia* "applications". On that note, profounder of the first school of thought are likely to cite the case of **The Hon. Attorney General v. Reverend Christopher Mtikila,**[19] as cited in the case of **BURAFEX Limited formerly known as AMETAA Limited v. Registrar of Titles.**[20]

On the Second School of thought, the Court advances a legal proposition that; an application cannot be dismissed where the

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[18] Civil Appeal No 66 of 2017, Court of Appeal of Tanzania at Dar es Salaam (unreported).

[19] Civil Appeal No. 20 of 2007, Court of Appeal of Tanzania at Dar es Salaam (unreported).

[20] Civil Appeal No. 235 of 2019, High Court of Tanzania at Dar es Salaam District Registry (unreported).

affidavit and counter affidavit are records of the Court. The legal bases of this School are twelve:

One, the spirit of overriding objective mandatorily requires the Court to dispense substantive justice rather than technicalities. It will be wrong to dismiss an application for want of prosecution in the circumstances where there are affidavit evidences and prayers embodied in the chamber summons. In such circumstances, the objective should be to determine the application on merits upon consideration of the evidence and application of the law to such evidence thereto. Doing otherwise stands to defeat the doctrine of overriding objective as enshrined in the provisions of *Article 107 A (2) para (e) of the Constitution of the United Republic of Tanzania which provides:*[21]

> *(2) In delivering decisions in matters of civil and criminal matters in accordance with the laws, the Court shall observe the following principles, that is to say:*
>
> *(e) To dispense justice without being tied up with technicalities provisions which may obstruct dispensation of justice.*

Also, dismissing the application for want of prosecution or non-appearance while there are affidavit evidences in record is contrary to *Section 3A (1) of the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018.*[22] The overriding objective principle requires the Courts

[21] Cap 2, 1977 as amended

[22] Act No. 8 of 2018.

to deal with cases justly, expeditious, proportionate, in affordable manner and to have regard to substantive justice. The same principle has been judiciary considered in the *inter alia* cases of **Yakobo Magoiga Kichere v. Peninah Yusuph**.[23]

Two, issuing decision based on affidavit evidence in event the Applicant does not attend a hearing date discourages ex-parte orders. As noted earlier, it is not proper to dismiss a matter whose evidence forms record of the Court. Indeed, what proceeds from affidavit evidence in record is not ex-parte. My brethren his Lordship Makame, J. (as he then was) in the case of **Moshi Textile Mills v. B. J. De Voest**,[24] discountenanced a behavior of issuing ex-parte judgement while the Defendant has filed Written Statement of Defence (WSD) as follows:

> An ex-parte judgement is judgement given when there is no appearance if the Party has neither filed a Written Statement of Defence (WSD), nor appeared personally or by his Advocate.

It follows, therefore, that dismissing an application for want of prosecution or non-appearance of the Applicant at a hearing date is as equal as condemning the Parties ex-parte while his/her evidences are fully in record.

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[23] Civil Appeal No. 55 of 2017, Court of Appeal of Tanzania at Mwanza, p. 13 (unreported).

[24] Civil Revision 2-A-73 (1975) LRT No. 17.

Three, it is an established principle of law as stated in the case of **East African Cables (T) Limited v. Spenncon Services Limited,** that when the fact sworn to or affirmed is not controverted then it is deemed to be admitted. As such, the Court is supposed to grant the application as prayed.[25] Therefore, the principle of admission for non-filing of counter affidavit embodied in the case of **East African Cables (T) Limited** cements the established practical and procedural rule that an affidavit is a substitute of oral evidence.[26]

Four, judicial decision-making requires evidence. The purpose of affidavit is to bring litigant's admissible evidence before the Court. That is why, if the affidavit contains arguments, conclusions, hearsay, opinion, and irrelevancy, the adverse Party has the right to raise a preliminary objection. If established such paragraphs are expunged from the affidavit. As such, it sounds improper to dismiss a matter while the required evidence for decision is already in Court.

Five, what comes up during hearing is only final submission to the hearing which essentially is done through affidavit evidence. Failure to file final written submission cannot lead to the dismissal of the suit. In the case of **the Registered Trustees of the Archiodiocese of Dar**

[25] Misc. Application No. 61 of 2016, Court of Appeal of Tanzania at Dar es Salaam (unreported).
[26] *Ibid.*

es Salaam v. The Chairman Bunju Village Government and 11 Others, the Court of Appeal of Tanzania observed:[27]

> *submissions are generally meant to reflect the general features of a Party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence.*

The same position was maintained in the case of **Farida F. Mbarak and Farida Ahmed Mbaraka v. Dominica Kagaruki and Others**, where the Court had this to say:[28]

> *We find that the explanations of the delay given by the Applicants in their written submission before the single justice and also explanation by Messrs. Mbwando and Nyika in their respective submissions before us the 5 days were spent in preparing and filing application, to be Statements from the bar which cannot be acted upon.*

In **Karibu Textile Mills Limited v. Commissioner General Tanzania Revenue Authority,** the Court while faced with a similar scenario held that:[29]

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[27] Civil Appeal No. 147 of 2006, Court of Appeal of Tanzania at Dar es Salaam Registry (unreported).

[28] Civil Reference No. 14 of 2019, Court of Appeal of Tanzania at Dar es Salaam (unreported) p. 19.

[29] Civil Reference No. 21 of 2017, Court of Appeal of Tanzania at Dar es Salaam (unreported).

> *The explanation that he gave us in his written and oral submission, that the Applicant spent the thirty days period preparing, drawing up and filling the application for extension of time is, nothing but a statement from the bar that cannot be acted upon. Nor could it have been acted upon by the learned single Justice, had it been made in the Applicant's submission before him.*

Therefore, in the light of the case of **the Registered Trustees of the Archiodiocese of Dar es Salaam,**[30] **Farida F. Mbarak and Farida Ahmed Mbaraka**[31] **and Karibu Textile Mills Limited,**[32] even if there is no oral hearing or written submissions, the evidence is already in the Court. The later can render a decision based on such evidences without further elaboration or explanation because it is presumed the Court knows much better on the already laid down principles. For instance, in applications of interim or interlocutory injunction, the Court knows the three condition. *First*, substantial issue or serious issue to be tried. In considering an application for interim injunction the Court will look an affidavit evidence and see if there is substantial or serious issue to be tried. *Second*, balance of convenience. The Court will critically look at the facts deposed in the affidavits of the Parties and determine on whose side the balance of convenience tilts. If it is in favour of the Applicant, the Court will grant injunction. *Third*, irreparable injury. The Court will look if the Applicant in his affidavit

[30] Civil Appeal No. 147 of 2006 *loc cit.*
[31] Civil Reference No. 14 of 2019 *loc cit.*
[32] Civil Reference No. 21 of 2017 *loc cit.*

deposed facts which show that, if injunction is not granted, he will suffer serious and substantial damage which cannot be remedied by monetary compensation or damages.

Six, given the general practice and procedure that an affidavit is a substitute of oral evidence, dismissal of the application on the scheduled hearing date is equal to infringement of the right to be heard. Since the affidavit evidence is in the Court, the later should proceed to determine the application instead of dismissing the same for non-appearance or want of prosecution. In fact, filing of a sworn affidavit in support of the application, is by itself prosecution of the application. It is the Court's view that *the Civil Procedure Code* was designed to ensure a fair hearing by advancing and not curtailing the scope of the right to a fair hearing.[33] If the latter is vivid, the Court must condone a departure from the established rule of practice of dismissing applications while the affidavit evidences are complete in record.

Seven, while appreciating that an affidavit is a substitute of oral evidence, when the Respondent do not object the chamber application, Courts do not suomoto grant as it is prayed. The Court goes through the affidavit evidence in order to get satisfied whether the available evidences are sufficient to grant the prayed relief (s).

Eight, determining an application on merits on the scheduled date for hearing in the absence of the Applicant without good cause may help

[33] Cap 33 [R.E. 2019].

to reduce furtherance of litigations as there will be no room for application of setting aside applications dismissed for want of prosecution. Three points may be recalled here: *First*, there is a *dictum* that justice delayed justice denied. Dismissal of the application without consideration of affidavit evidence will attract filling another application for setting aside the dismissed application, which in turn causes delay of justice. To that end, it undermines the role of the judiciary as it degrades the judicial process of reaching substantive justice. *Second*, Courts are arena of justice and equity. A Party should not be condemned without consideration of his/her affidavit evidence already in Court. *Third*, one of the main challenges in our judicial system as it applies elsewhere in least developed common wealth countries are congestion of cases in all Courts cadres. A situation may be alarming where one main suit yields many chamber applications which must be dissolved prior main suit.

Nine, delay of cases caused by plethora of chamber applications discourages investors due to volatility and uncertainty of cases disposal. For the sake of this ruling, however, I will not go into details and examples on this point.

Ten, the Court by taking a strict or technical view of dismissing the application for non-appearance of Counsel causes prejudice to the innocent Party who has faith in Court especially when he engaged an Advocate and the later fails to appear. I do note that; there are two position on this point. The first position strictly requires dismissal of the matter when the Applicant's Counsel is negligent in prosecuting

the matter and that his/her inaction cannot be a ground of extension. In the case of **Hashimu Madongo & 2 Others v. The Registrar for Trades and Industries & Another**, this Court held that:[34]

> *It is settled principle that, negligence or inaction on the party of Counsel does not constitute efficient reason for extending time.*

I don't condone the practice of Advocates acting negligently. The point that I make, as I do distinguish the position in **Hashim Madongo's case**, is that; in application made of chamber summons, the matter should not be dismissed for want of prosecution or non-appearance of the Applicant and/ or his Advocate while there is affidavit evidence in record.

I further note that, once a Party engages an Advocate, he thinks that his Advocate will appear when the case will be taken up for hearing. But when the Advocate fails to appear, normally, a Party should not suffer on account of default or non-appearance of the Advocate. The Court should proceed to determine the application based on the available affidavit evidence. In the Indian case of **Rafiq & Another v. Munshilal & Another**[35] as cited in the case of **The Secretary, Department of Horticulture**, **Chandigarh & Another v. Raghu Raj**,[36] arising out of Special Leave Petition,[37] the High Court disposed

[34] Civil Application No. 13 of 1999, High Court of Tanzania (unreported) at p. 6
[35] [1981] AIR 1400, 1981 SCR (3) 509.
[36] Civil Appeal No. 6142 of 2008, Supreme Court of India.
[37] Civil No. 1583 of 2007 High Court of India.

of the appeal preferred by the Appellant in absence of his Counsel. When the Appellant came to know of the fact that his appeal had been disposed of in absence of the Advocate, he filed an application for recall of the order dismissing the appeal and to permit him to participate in the hearing of the appeal. The application was, however, rejected by the High Court, *inter alia,* on the ground that there was no satisfactory explanation why the Advocate remained absent. The aggrieved Appellant approached the Supreme Court of India. While allowing the appeal setting aside the order passed by the High Court and remanding the matter for fresh disposal in accordance with the law, the Supreme Court stated:

> *The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their Advocates, the obligation of the parties is to select his Advocate, brief him, pay the fees demanded by him and then trust the learned Advocate to do the rest of the things. The Party may be a villager or may belong to a rural area and may have no knowledge of the Court's procedure. After engaging a lawyer, the Party may remain supremely confident that the lawyer will look after his interest.*
>
> *At the time of the hearing of the appeal, the personal appearance of the Party is not only not required but hardly useful. Therefore, the Party having done everything in his power to effectively participate in the proceedings can rest*

assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the Advocate that the latter appears in the matter when it is listed...Even if we do not put our seal of imprimatur on the alleged practice by dismissing this matter which may discourage such a tendency, would it not bring justice delivery system into disrepute. What is the fault of the Party who having done everything in his power and expected of him would suffer because of the default of his Advocate. If we reject this appeal, as Mr. A.K. Sanghi invited us to do, the only one who would suffer would not be the lawyer who did not appear but the Party whose interest he represented. The problem that agitates us is whether it is proper that the Party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative. May be that the learned Advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a Party to an innocent Party suffering injustice merely because his chosen Advocate defaulted. Therefore, we allow this appeal, set aside the order of the High Court both dismissing the appeal and refusing to recall that order. We

direct that the appeal be restored to its original number in the High Court and be disposed of according to law. [Emphasis applied]

I understand, the India environment is different from our societal environment. Indeed, the case of **Rafiq & Another**[38] arose out of a special leave petition as distinguished to this Chamber application. However, the stirring issue remains the same. It is on punishing clients out of mistakes done by their Advocates. Worse indeed, the Applicant is punished while his affidavit evidence is in record and he is not expected to bring new evidence at the hearing date.

Back in Tanzania, the case of **Citibank Tanzania Limited v. Emma Mwenda and Edna Nduguzi**,[39] represents the second position. In that case, the Court was confronted with an application to set aside the dismissal order for non-appearance of the Applicant on 16th March 2019.[40] In reaching her decision, the Court had the following important observation for the sake of protecting rights of the litigants as against negligence of Advocate who defaulted to appear at the hearing date:

> It is evident that the Advocate for the Applicant did wrongly note the hearing date hence dismissal order for non-appearance. However, this Court cannot blame a Party for

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[38] [1981] AIR *loc cit.*

[39] Miscellaneous Labour Application No. 489 of 2020 High Court of Tanzania Labour Division at Dar es Salaam (unreported).

[40] Revision Application No. 252 of 2019, High Court of Tanzania Labour Division at Dar es Salaam (unreported).

> the negligence of his Advocate as it was stated in the case of **Kambona Charles (as administrator of the estate of the late Charles Pangani) v. Elizabeth Charles**.[41] The fact that the cause for non-appearance is a human error is inevitable. Also, it is clearly known that, a negligence caused by an Advocate cannot constitute a ground to set aside the dismissal order. However, for the sake of protecting rights of the litigants, I take a benefit of doubt that the reasons given by the Applicant and circumstances of events happened are sufficient to warrant this application. In the end result, I find merit in the application and allow it. The dismissal order dated 16th March, 2019 is set aside. The *Revision Application No. 252 of 2019* restored.[42]

In the case of **Ghania J. Kimambi v. Shedrack Ruben Ng'ambi**, the Court observed the following:[43]

> What happened to former Applicant Counsel, is pure and simple negligence of an Advocate and not otherwise, *it sounds unfair and inequitable in my considered opinion for a part in civil litigations to be punished for an error*

[41] Civil Application No. 529/17 of 2019, High Court of Tanzania at Dar es Salaam District Registry (unreported).
[42] *Ibid.*
[43] Misc. Application No. 692 of 2018, High Court of Tanzania at Dar es Salaam (unreported)

committed by the Advocates and more specifically where the error is within the domestic affairs of the Advocate. Throughout history, Courts of law have assumed the position of custodians of justice. It therefore comes as a surprise and indeed lowers down the reputation and respect of the Court when parties submitting themselves to the jurisdiction of the Court loses their cases for wrong committed by their Advocates or representative. (Emphasis supplied)

For protecting rights of litigants, United Kingdom has gone further to make a provision under *Section 122 (2) of the Magistrates Courts Act* which treats absence of a represented Party as not absence. It provides:[44]

(1) A Party to any proceedings before a Magistrate's Court may be represented by a legal representative.

(2) Subject to subsection (3) below, an absent Party so represented shall be deemed not to be absent.

(3) Appearance of a Party by a legal representative shall not satisfy any provision of any enactment or any condition of a recognizance expressly requiring his presence. (Emphasis added)

[44] Cap 43 of 1980 *loc cit.*

Eleven, litigants should not be made to suffer injustice out of the Advocate negligence or reckless or inadvertence or inaction in attending client's chamber applications which are supported with affidavit evidences. It is the humble view of the Court that disposal of the application based on the available affidavit evidence will serve parties to get their rights than being punished on Advocate's fault.

Twelve, the Court will be performing its very own objective of the judicial system i.e justice upon furnishing the Court with evidences. In other words, dismissing the chamber application on default bases at the hearing date or for non-filling of written submissions punishes the Applicant unheard while his or her affidavit evidences are with the Court. Therefore, the Court disciplines a client on mistake done by his Advocate while his affidavit evidence is in record of the Court. In so doing it renders injustice. In the case of **General Marketing Company Limited v. A. A. Sharifu,** Lord Bowen held:[45]

> *It is a well-established principle that the object of Courts is to decide the rights of the parties and not to punish them for mistakes they made in conduct of their cases by deciding otherwise than in accordance with their rights...I know of no kind of error or mistakes which if not fraudulent or intended to overreach, the Court out to correct, if it can be done without injustice to the other party. Courts do not*

[45] [1980] TLR 61 at p. 65.

exist for the sake of discipline but for the sake of deciding matters in controversy. (Emphasis applied)

It is the findings of the Court that this kind of practice (deciding chamber summons/ application basing on available affidavit evidence, in case the Applicant and/ or his Advocate do not appear at the hearing date, will lead to substantial observance of natural justice.

Needless, there are only four exception to the second school of thought. *First*, the application should not be decided on merits upon non- appearance of the Applicant if there is a raised preliminary point of legal objection. In that event, the Applicant and/or his Advocate must appear and defend the legal objection. Failure to appear, the Respondent must be given an *ex-parte* right to address the raised objection. *Second*, when the Court *suomotu* or upon being moved by the Respondent that it is in the interests of justice for the Applicant and/or his Advocate to appear in order to clarify some piece of evidences contained in the affidavit. It may be evident where an affidavit is lacking in precision, inconsistent with other paragraphs of the same deponent. In that circumstances, upon being noted by the Court or the adverse party, that there are paragraphs in the affidavit raising conflict of evidence, the Court may plausibly require merit on oral hearing to find the truth. I have used the word "may" with a purpose. Under normal circumstances, the Court has a duty to reject such piece of evidence. *Third*, if there is a formal notice to the Court with genuine reason served to the other Party on the non-appearance of the Applicant and/ or his Advocate at the hearing date. *Fourth*, the

principle established by the second school of thought in this ruling shall not apply retrospectively.

In summation, having considered the stand of the two schools of thought with extreme care, I find that the second school of thought carries much weight. I therefore lay down a principle that in case a party and /or his Advocate do not file written submissions on time as per the Court's order or do not appear when the chamber application is scheduled for hearing, the application should not be dismissed for want or prosecution or non- appearance of the Applicant and / or his Advocate. The Court should determine the application on merits based on the affidavit evidence.

Needless the afore *position*, I have noted the Applicant did comply with the Court's schedule. As such, I will proceed to determine the chamber application on merits based on the supporting affidavit of the Applicant and the counter affidavit of the Respondent forming part of the record as well as their elaborating written submissions. The reasons advanced by the Applicant through the supporting affidavit are as follows:

One, the deponent is the son of Applicant and lawful Attorney with fully powers and authority to act in this application who instituted the *Land Application No. 88 of 2016* before District Land and Housing Tribunal for Njombe and therefore conversant with facts deponed.

Two, the said *Land Application No. 88 of 2016* was decided in the Respondent's favour on the 28th day of July, 2021.

Three, soon after the said decision, the deponent made follow ups to be supplied with the copies of proceedings and decision of the Tribunal so as to file an appeal before this Court within the time to appeal after been aggrieved with the decision of the Tribunal. To the same, the deponent wrote the letter dated 28/07/2017 to be supplied with the Copy of Proceedings and Judgement.

Four, on days later her mother one Atuwonekye Mwenda was severely sick and she was admitted at St. Joseph Hospital IKELU Diocese of Njombe suffering from Transient Ischemic Attack (TIA) and Emergency hypertension from 5th September, 2017 to 2nd October, 2017. The deponent was only person to take care of her and was frequently attending clinic for her checkup. Therefore, the deponent could not process the appeal on time.

Five, inadvertent on 3rd October, 2017 after obtaining the copy of the decision of the Trial District Land and Housing Tribunal on the 1st October, 2017 with the help of Advocate Samwel Mcharo from Njurumi and Co. Advocates erroneously lodged the Memorandum of Appeal before this Court and marked received without being aware that the time to appeal to this Court elapsed.

Six, the appeal was not heard and decided on its merits but following the preliminary objection on time limitation due to the Applicant's Advocate's incompetence, to which the Applicant herein conceded the same. The appeal thereby was struck out by Hon. Chugulu, DR, (with extended Jurisdiction) on 28th January, 2020.

Seven, following the information supplied by the deponent's Counsel on the struck out order, the deponent's mother due to her age and health was shocked and on 30th January, 2020 was again admitted at St. Joseph hospital due to old age and as a result, the deponent frequently kept attending hospital for taking care of her, hence contributed also to the delay.

Eight, on 18th February, 2020 after the deponent's mother has at least recovered, the deponent instructed his Counsel to make follow up for her case, and that he advised her to lodge this Application for extension of time against the decision of the Trial Tribunal which is tainted with illegalities.

Nine, the Respondent is currently on the verge of executing the decision of the Trial Tribunal, thus rendering the intended appeal which has high chance of success nugatory and becomes effectively academic because of the likely possibility of the execution pre-empting or undermining and/or defeating altogether the said appeal in a manner likely to occasion injustice to the Applicant.

Ten, the delay in the appeal has not been caused by neglect, ill will, negligence or fraud on part of the Applicant but rather due to the reasons stated hereinabove.

The Respondents disputed the Applicant's contention on her third reason of making follow up of the copies of proceedings and decision for being unfounded and his idea being an afterthought.

Equally, the fourth, fifth and sixth Applicant's reasons were disputed by the Respondent for reason that the Applicant had an Advocate who worked on his behalf and that the Advocate's incompetence is no defense for he worked on the Applicant's information.

Moreover, the Respondents disputed the seventh, eighth, nineth, and tenth reasons deponed by the Applicants for being unfounded and that the delay was due to negligence of the Applicant himself, hence the only remedy is to be struck out with costs.

In her written submission, the Respondent reiterated the deponed affidavit evidence.

I have ardently considered the evidences and elaboration of the evidences of both parties. Eight points are indisputable valid:

First, what constitutes a sufficient reason or good cause for extension of time as shown in the Courts of law mean; all that is expected by the Applicant is to show that he was prevented by sufficient or reasonable or good cause and that the delay was not caused or contributed by dilatory conduct or lack of diligence on his part.[46] The same position was maintained in the case of **Mrs. Kamiz Abdullah M. D. Kermal**

[46] Republic v. Yohana Kaponda and 9 Others [1985] TLR 84 as cited in the case of Ihembe Industries Co. Limited v. Tanzania Electrical Mechanical and Electronics Services Agency (TEMESA) p. 2 (unreported). Also, see: Allison Xerox Silla v. Tanzania Habours Authority, Civil Reference No. 14 of 1998 Court of Appeal of Tanzania at Dar es Salaam (unreported); AG v. Masumin and Another, Misc. Civil Application No. 11/2015 High Court Dar es Salaam (unreported) at p. 9 (unreported).

v. The Registrar of Buildings and Miss Hawa Bayona.[47] In that case, the Court of Appeal observed the following:

> *Where delay is caused by good reasons, a prudent party may safeguard his interest by applying for extension of time*. The same reasoning was observed by the Court of Appeal in the case of **Civ. Appl. 181/2006 National Housing Corporation & Another v. M/S Property Bureau(T) Limited**:
>
> > *...where delay is caused by good reasons other than the time taken in preparing the record of appeal, a prudent party may safeguard its position by applying for extension of period prescribed for the doing by any Act or Rule.*

In other words, the law requires this Court to exercise its discretion powers to extend time where there are some materials. In the case of **Godwin Ndewasi Karoli Ishengoma v. Tanzania Audit Corporation**,[48] the Court held that:

> *The rules of Court must prima facie be obeyed and in order to justify extending time during which some step in the procedure requires to be taken there must be some material on which the Court can exercise its discretion...*

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[47] [1988] TLR 199 CA.

[48] [1995] TLR 200; Also see: Ratnam v. Cumarasamy and Another, [1964] 3 All ER 933.

In the daily cited case of **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, the Court issued the following guidelines for granting an application for extension of time: *(i) whether, the Applicant account for all period of delay?* (ii) *whether the delay is ordinate?* (iii) *whether the Applicant act diligently and not negligently or sloppiness in the prosecution of the case that he intends to take?* (iv) *whether, there was any illegality of the decision sought to be challenged?* [49]

The afore four guidelines have been cited with approval and applied by the Court in numerous decisions. In the case of **Mobrama Gold Corporation Ltd v. Minerals and Others,** it was ruled that:[50]

> *It is generally inappropriate to deny a party an extension of time. Where such denial will stifle his case as the Applicant's delay does not constitute a cause of procedural abuse or contemptuous default and because the Respondent will not suffer any prejudice, an extension should be granted.*

The issue therefore is; *whether the actions of the Applicant were diligent enough to warrant extension of time.* The followings facts appear to be correct. *One*, evidence proves that on the same day after Judgment of the District Tribunal, that is on 28th July, 2017 the

[49] Civil Application No. 2 of 2010, Court of Appeal of Tanzania at Dar es Salaam (unreported).
[50] [1998] TLR 425.

Applicant wrote a letter in order to be supplied with the same and start appeal process. *Two*, it was not until 11th September 2017 when the Applicant was supplied with the said copies. *Three*, before filing the Appeal the Applicant got sick and was admitted at St. Joseph's Hospital Ikelu, Diocese of Njombe. *Four*, the Applicant's Advocate filed the Appeal on the 3rd October 2017. *Five*, the Applicant spent almost 3 years in the corridors of justice pursuing the struck out *Land Appeal No. 19 of 2017*. *Six*, on 28th January, 2020 *Land Appeal No. 19 of 2017* was struck out. *Seven*, there is allegation without any proof that the Applicant was re-admitted on 30th January, 2020. There are however, no data as to when the Applicant was discharged after been readmitted at hospital. *Eight*, on 18th February, 2020, the deponent instructed his Counsel to make follow up of the case. The later advised him to lodge this application. *Nine*, this application was lodged on 19th February, 2020.

Further, the Court is of findings that, as sworn by the Applicant, the act of Advocate Samwel Mcharo from Njurumi and Co. Advocates of lodging the struck out appeal on 3rd October, 2017 was an erroneous act. Indeed, the said Counsel acted legally and in dignified manner. To say that the Advocate was incompetent in admitting the preliminary objection on time limitation is not fair and it is an affront to the noble profession.

In sum of the afore evidences, it is the verdict of this Court that the Applicant has clearly shown that his actions were neither dilatory nor lacked diligence.

Second, the Court has accepted certain reason as amounting to sufficient reasons. But no particular reason or reasons have been set out as standard sufficient reasons. It all depends on the particular circumstances of each application. Sickness is a sufficient ground warranting extension of time. My learned Sister, her Ladyship Sameji, J. (as she then was) when once confronted on the same scenario in the case of **Rashid Ramadhani Samila v. Said Ahmedi Abd and Another**,[51] held:

> *Now considering that there is ample evidence that the Applicant had since indicated his interest to Appeal and indeed applied for a copy of judgment within time, but only delayed by sickness as indicated...my considered view that the delay to appeal in this case was neither caused by nor can it be attributed to any dilatory conduct on the Applicant.*

The records in this case shows that the Applicant was sick. There is also evidence that the Applicant was been nursed by the deponent herein. There is no evidence to the contrary showing that the Applicant despite of her sickness could instruct the Advocate to file an appeal on time or sick for extension of time to appeal out of time. Though there is no proof that the the Applicant was re-admitted on 30th January,

[51] Misc Land Application No. 33 of 2013 High Court of Tanzania, Iringa District Registry, p. 9 (unreported).

2020, the whole evidence shows that the Applicant never slept of her right.

Third, late issuance of the copy of Judgement and Decree is a good ground. In the case of **Hans Paul Automats Limited v. RSA Limited,** the Court of Appeal of Tanzania while confronted with the point of delay by the Court to issue a copy of ruling, held that:[52]

> *The Applicant should not be condemned for the delay by the Court to supply him with the copy of ruling. Similarly, in this case I am satisfied that the Applicant is not to blame since he has shown that the High Court Registry contributed to the delay.*

In the present case, the records speak capaciously that the impugned decision was delivered on 28th July, 2017. The copy of Judgement and Decree was certified and issued on 11th September, 2017. The Applicant filed the struck out appeal on 3rd October, 2017 quite beyond the required 45 days of appeal. As decided in the **case of Hans Paul,**[53] the Applicant ought not to have been blamed by the Court because the later issued her with the copy of decision late.

Fourth, negligence or dilatory conduct, or inaction, or drowsy conduct of the Applicant in taking certain action do not constitute sufficient reason. The same position was taken in the *inter alia* cases of **Samwel Kobelo Muhujo v. National Housing Corporation, Ajuwa Fute**

[52] Civil Application No. 126 of 2018, at Arusha, p. 9 (unreported).
[53] Civil Application No. 126 of 2018, *loc cit.*

and 5 Others v. Usaje Simon Mwakapala.[54] In the instant application, though disputed by the Respondent, the Applicant never acted negligently in pursuing her rights. The act of the Advocate of erroneously filing the appeal out of time should not apply at the peril of the Applicant unless the Advocate was engaged late. As found in the case of **Ghania J. Kimambi**[55] it is unfair and inequitable for a part in civil litigations to be punished for an error which is within the domestic affairs of the Advocate. After all, it was the Court to be blamed for issuing the copy of decision almost 60 days after its delivery. In such scenario, the Court should be obsessed with dissolving the matter on merits than on draconian or colonial technical issues. Determining matters on merits makes the society healthier because the root of the dispute is determined. It further reduces double work to the Court and to the Parties for no good reason. Indeed, it serves the minimal resources and time we have. At large, it reflects a just society which upholds substantive rights of its citizens than punishing them on technical grounds.

Fifth, Acting reasonably and diligently. The Applicant acted reasonably and diligently in taking essential steps after obtaining the copy of judgement and decree on 11th September, 2017 by prompting filing the struck out appeal on 3rd October, 2017. She also acted diligently after recovering from her health by filing the instant application. In the case of **Michael Lesani Kweka v. John Eliafye**, the Court

[54] Consolidated Civil Ref. No. 6, 7 and 8/2006.
[55] Miscellaneous Land Application No. 692 of 2018, *loc cit.*

solidified on the condition of acting promptly before one is granted with leave for extension of time. The Court held that:[56]

> *Extension of time may be granted where party putting forward such plea has shown to have acted reasonably diligently to discover omission and upon such discovery, he acted promptly to seek remedy for it.*

Sixth, each day of delay has to be accounted for. In the *inter alia* case of **Zuberi Nassor Moh'd v. Mkurugenzi Mkuu Shirika la Bandari Zanzibar**.[57] It was the same position in *inter alia* case of **Airtel Tanzania Limited v. Masterlight Electrical Instalation Company Limited and Arnord Mulashani**.[58] In the case of **Ramadhani J. Kihwani v. TAZARA**, Mwambegele J.A maintained the same position that:[59]

> *Even a delay of a single day has to be accounted for otherwise there would be no point of having rules prescribing period within which certain steps have to be taken.*

In the present application, the Applicant has accounted for each day of delay. After Judgment of the District Tribunal, that is on 28th July,

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[56] [1997] TLR 152.
[57] Court of Appeal of Tanzania at Zanzibar, Civil Application No. 93/15 of 2018 (unreported).
[58] Civil Application No 37/01 of 2020 at p. 11 (unreported).
[59] Civil Application No 401/18 of 2018 Court of Appeal at Dar es Salaam at p. 9 (unreported).

2017 the Applicant wrote a letter in order to be supplied with the same and start appeal process. It took her two months to get the copy of decision which was certified and issued on 11th September, 2017. The Applicant lodged the appeal on 3rd October, 2017. The same was dismissed for being out of time on 28th January, 2020. It was not the fault of the Applicant. There is affidavit evidence that the same Applicant was readmitted to Hospital up to 18th February, 2020. On the following day, that is on 19th February, 2020, this application was filed. With such note, the Applicant managed to account for each day of delay.

Seventh, illegality of the impugned decision is the good ground for extension. That was stated in the cases of **Mrs. Mary Kahama (Attorney of Georgia George Kahama) and Another v. H. A. M Import & Export (T) Limited and 2 Others**;[60] **Mrs. Rafikihawa Mohamed Sadik v. Ahmed Mabrouk and 2 Others**;[61] **The Registered Trustees of Shadhily v. Muhfudh Salim Omary Bin Zagar (Administrator of the Estate of the Late SalimOmary)**;[62] **Principal Secretary, Ministry of Defence and National Service v. Duram P. Valambhia.**[63] In the later case, it was held:

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[60] Court of Appeal of Tanzania at Dar es Salaam at p. 10 (unreported).
[61] Civil Application No.179/01 of 2018 Court of Appeal of Tanzania at Dar es Salaam at p. 16 (unreported).
[62] Civil Application No. 512/01 of 2018, Court of Appeal of Tanzania at Dar es Salaam (unreported).
[63] [1992] TLR 182.

> In our view, when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record straight.

The illegality alleged in the impugned decision and proceedings of the trial Tribunal is that the opinion of assessors was not read and considered before judgment which contravenes *Section 23 (2) of Land Disputes Courts Act.*[64] The Respondent has denied it. That point, however, can be dealt on appeal itself. But it must be noted that the Court has further maintained that illegality is subject of diligence. That was the position in the case of **National Housing Corporation v. Ettiens Hotel**.[65] The Applicant herein, as demonstrated earlier, has been diligent in pursuing her rights.

Eighth, it has always been that rules of procedure are handmaid of justice and I take this that to mean they should facilitate rather than impede decisions on substantive issues. Courts have continued to recognize different prior decisions which urges the Courts not to dwell on technicalities in deciding cases but rather determining the rights of the parties as it is echoed in the Constitution of the United Republic of

[64] Cap 216 [R.E. 2019].

[65] Revision No. 10 of 2005 Court of Appeal of Tanzania (unreported).

Tanzania. That was the position of the Court in the case of **General Marketing Company Limited**.[66]

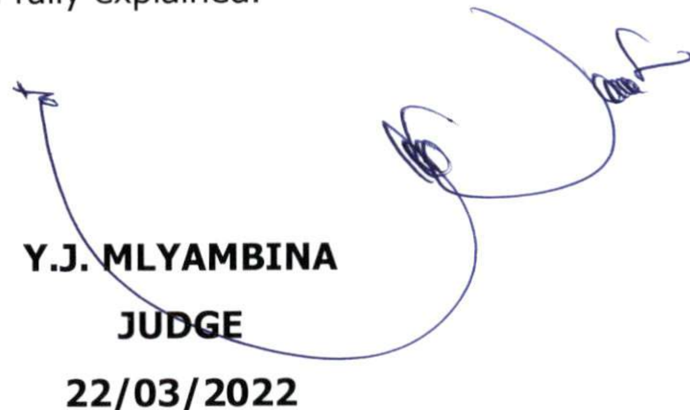
In the end result, the application is hereby granted. The Applicant is given fourteen days (14) days to file his intended appeal. Since the decision has introduced a new principle unknown to our jurisprudence, let costs be shared. Order accordingly.

Y.J. MLYAMBINA

JUDGE

22/03/2022

Ruling delivered and dated 22nd March, 2022 in the presence of learned Counsel Amandi Isuja for the Applicant and in the absence of the Respondent. Right of Appeal fully explained.



Y.J. MLYAMBINA

JUDGE

22/03/2022

[66] [1980] TLR 61 *loc cit.*