

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**LAND DIVISION**

**AT MOSHI**

**MISC.LAND APPLICATION NO. 54 OF 2021**

*(C/F Land Appeal No. 47 of 2017 of the District Land and Housing Tribunal for Same, Original Land case No. 4/2017 -Kisiwani Ward Tribunal for Same)*

**ATHUMANI KINYORI..... APPLICANT**

**VERSUS**

**JUMANNE MTAMBO.....RESPONDENT**

**RULING**

*10/2/2022 & 18/3/2022*

**SIMFUKWE, J.**

Athumani Kinyori (the applicant) filed this application seeking among other things, an order for extension of time to file an appeal against Land Appeal No. 47/2017 of Same District Land and Housing Tribunal (DLHT). The application is brought under **Section 38(1) of the Land Disputes Courts Act, Cap 216 R.E 2002** and was supported by the applicant's affidavit.

The matter was disposed orally, Ms. Esther Kibanga learned advocate represented the applicant while the respondent was unrepresented.

On the outset, the applicant's advocate adopted the applicant's affidavit together with its annexures to form part of her submissions. She also stated the brief history of the case which I will not reproduce.



Supporting the application, Ms. Kibanga submitted to the effect that **section 38(1) of the Land Disputes Courts Act (supra)** empowers the High court to extend time to appeal where sufficient cause has been shown. She averred that, the appeal which the applicant seeks to appeal against was decided on 7/9/2018 and the applicant requested to be supplied with copy of judgment on 14/9/2018. He made follow up and was informed that the tribunal clerk was sick, thus the judgment could not be typed. On 26/9/2017 the applicant wrote a reminder letter seeking a copy of judgment and decree. Again, he was informed that the tribunal clerk was still sick. The applicant proceeded to make follow up until on 03/11/2018 when the copies of judgment and decree were supplied to him. Ms. Kibanga stated further that by that time, time to appeal had already elapsed. She argued that, since the applicant was a lay person, he started seeking legal assistance until 30/12/2019 when he procured an advocate and money for preparing an application which was registered as Misc. Land Application No. 3 of 2019. On 9/7/2020 the said application was withdrawn with leave to re-file due to the fact that the same was incompetent. The applicant's counsel continued to argue that the applicant thereafter, made follow up of the court order and then instituted the instant application.

The applicant's advocate submitted two reasons for the applicant's delay to file an appeal on time. First, the applicant was making follow up of copy of judgment and decree. Secondly, seeking legal aid and refiling a proper application after withdrawing the former incompetent application. Ms. Kibanga was of the view that these reasons are enough to warrant extension of time to appeal.



The applicant's advocate referred to the case of **Michael Lesan Kweka Vs John Gliafie, [1997] TLR 152** where **Hon. Kisanga, J** (as he then was) held that:

*"(a) The court has power to grant an extension of time if sufficient cause has been shown for doing so.*

*(b) In the instant case the applicant has shown reasonable diligence in correcting the error immediately upon discovery and this conduct warranted consideration for enlarging the time in his favor."*

Basing on this authority, it was Ms. Kibanga's view that the circumstances in the cited case fits the circumstances of the instant matter.

Further to that, the applicant's advocate made reference to the case of **Keroi Madule vs Mepukor Mbelekeni, Civil Application No. 13 of 2016 (CAT)** in which **Hon. Mussa, J** stated that:

*"As a matter of general principle, it is entirely in discretion of court to decide whether to grant or to refuse an application for extension of time. That discretion is however judicial and so, it must be exercised according to the rule of reason and justice. The deciding factors being showing "good cause" by the applicants, and good cause depend on variety of factors including the length of delay, the reason for delay, the chances of appeal succeeding if application granted and degree of prejudice to respondents, if application granted."*



On that basis, the learned advocate commented that the applicant has shown sufficient cause for the delay and he acted promptly and those reasons warrant extension of time to appeal.

In addition, the applicant's advocate stated that the intended appeal raises serious triable issues which can be corrected through an appeal only. The first triable issue is that, the decision of the District Tribunal was full of errors and irregularities. Thus, the decision was improperly reached. Secondly, the application which is the subject of the appeal was hopelessly time barred. To cement her argument, Ms. Kibanga cited the case of **Principal Secretary Ministry of Defence and National Service Vs D.P Valambia [1992] TLR 185** in which it was held that:

- i. Whereas here 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.*
- ii. 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 measure to put the matter and the record right.*

She thus argued that, in the present matter, the Ward Tribunal was not properly constituted which renders its decision a nullity. She stated further that Application No. 4 of 2017 was instituted on 26/9/2017 and on the said date there was no list of Tribunal members which is contrary to the law. Then, the matter was adjourned to 3/10/2017, there is no record in respect of what proceeded on 3/10/2017. On 31/10/2017 the records show that the secretary of the Tribunal was absent. However, there is no



coram of the members or parties. It is not certain what proceeded on 7/11/2017 when the matter was called for defence since there was no list of members. Again, on 9/11/2017 when the Tribunal visited the *locus in quo*, there was no list of members which is contrary to the law. On 21/11/2017 when judgment was delivered there was also no coram, the names were written at the end of judgment after delivery. It is not certain whether the members were present from the beginning of the proceedings. Also, there is no coram nor names of the members in their respective opinions nor their signatures. She was of the opinion that, the issue of coram is legal since **section 4(1) (a) and (b) of Sheria ya Mabaraza ya Kata** provides composition of members of Ward Tribunals. Also, **Section 11 of the Land Disputes Courts Act, No.2 of 2002** provides for composition of Ward Tribunals. Thus, lack of coram in the proceedings renders the same to be a nullity.

In conclusion, the applicant's advocate prayed for the application to be granted since they have presented sufficient reasons for the delay and triable issues for the intended appeal. She also prayed for costs of this application.

In his short reply, the respondent being unrepresented submitted to the effect that the application should have been supported by a letter from the said Tribunal to prove that the delay was caused by late supply of copy of judgment. Concerning the reasons of sickness of Tribunal Clerk, the respondent argued that the same could not be a bar of typing a judgment since the same could have been typed elsewhere. Also, it was not proper for the applicant to be allowed to withdraw his application with leave to refile.



In rejoinder, the applicant's advocate answering the issue of attaching letter of the tribunal to prove the delay, she stated that the same has no basis since as a matter of practice, the court is not obliged to prove that it caused the delay. That, it is the applicant who has to prove that he applied for the copy of judgment in time.

Regarding the issues that judgment could have been typed elsewhere, Ms. Kibanga contended that they were not granted that opportunity. Thus, they had to wait for the recovery of the said court clerk.

To conclude her rejoinder, the learned advocate argued that, the respondent has not opposed the application. The reasons for the delay and triable issues of the intended appeal have not been disputed. She thus, reiterated her prayer that this application should be granted with costs.

Having gone through the records of this application and having considered the parties' submissions, the following are the court's observations. From the applicant's affidavit, the applicant's reasons for the delay to file an appeal are as deponed under paragraph 14 of his affidavit. For ease reference the said paragraph reads:

*"That, time was inadvertently lost because making follow up to obtain requisite documents to wit decree, judgement and proceeding so as to pursue the appeal, also seeking legal assistance for filing Application for extension of time o (sic) appeal as well as prosecuting the said Misc. Land Application No.03/2019.*

I will thus deal with one reason after another but before scrutinizing these reasons, I will start with the obvious. It is trite law that granting the

application of this nature is based on the discretion of the court. Such discretion has to be exercised judiciously. However, the law does not exonerate the applicant from accounting unexplainable every day of delay. See the case of **Airtel Tanzania Limited vs Misterlight Electrical Installation Co. Ltd and Another, Civil Application No. 37/01 of 2020** which at page 8 of the ruling, the Court of Appeal had this to say:

*"It may not be possible to lay down an invariable or constant definition of the phrase "good cause", but the Court consistently considers such factors like, the length of delay involved, the reasons for the delay; the degree of prejudice, if any, that each party stands to suffer depending on how the Court exercises its discretion; the conduct of the parties, and the need to balance the interests of a party who has a constitutionally underpinned right of appeal."*

Also, **section 19 (1) (2) of the Law of Limitation Act, Cap 89** provides that:

*"In computing the period of limitation for any proceeding, the day from which such period is to be computed shall be excluded. In computing the period of limitation prescribed for an appeal..., the day on which the judgment complained of was delivered, and the period of time requisite for obtaining a copy of the decree or order appealed from ..., shall be excluded"*

Having established the position of law, I now turn to the reasons established to see whether this application deserves to be granted.



The first reason for the delay as established under paragraph 14 of the applicant's affidavit is that the copies of judgment and decree were lately supplied to him. The learned advocate submitted that the impugned judgment was delivered on 7/9/2018. They requested to be supplied with the copies and the same were supplied to them on 3/11/2018. The applicant then sought legal assistance until 30/12/2019 when he procured an advocate and money and filed the application like the present one (Misc. Land Application No.3/2019) which was later on withdrawn with leave to re-file. If I pause here; time spent in seeking legal assistance from the time when the impugned decision was delivered and supplied to the applicant is more than a year, that is from 3/11/2018 to 30/12/2019. I am not convinced to use discretionary powers under these circumstances where the applicant stayed more than a year on the reason that he was looking for legal assistance. It is not disclosed how long and hard it took to look for the legal assistance. The Applicant has failed to state when he got such legal assistance. In the case of **Azizi Mohamed vs Republic, Criminal Application No.84/07 of 2019** at page 5 the CAT at Mtwara had this to say:

*"...Mr. Msham has argued, and I think rightly so that **failure to obtain legal assistance has never been considered by the Court to be a valid reason**, the applicant has not provided any particulars of the person or organisation which assisted him in preparing the documents he filed on 16<sup>th</sup> January 2019." Emphasis added*

Guided by the above authority, the applicant's contention that he was looking for legal assistance for about a year is not a valid reason for the court to exercise its discretion to grant extension of time sought.





Also, the applicant has failed to account from 9/7/2020 when the previous application was withdrawn to 19/8/2020 when he filed the present application considering that the application indicates that it is the applicant who drew/prepared and filed the documents (Chamber Summons and affidavit).

The applicant's advocate also established another reason for the delay, that is the intended appeal raises triable issues to wit: the decision of DLHT is full of errors and irregularities. Also, that the application which is the subject of appeal was hopelessly time barred. Ms. Kibanga cited the case of **Principal Secretary Ministry of Defence and National Service** (supra) to support her argument.

I am aware that illegality is among the reasons for extension of time as also discussed in the case of **Principal Secretary Ministry of Defence and National Service** (supra) which was referred by Ms. Kibanga. Much as I am aware of that, still this reason cannot move this court to grant extension of time for the reason that the same was not established in the applicant's affidavit. It is just a mere statement from the Bar. This position was also discussed in detail in the case of **Hassan Kapera Mtumba Vs. Salim Suleiman Hamdu, Civil Application No. 505/12 of 2017 (CAT-unreported)** where it was stated that:

*"Mr. Chanjarika submitted further that, it was the respondent who will suffer the most, as since 2<sup>nd</sup> September, 2013 it is the applicant who is collecting rents and benefiting from the disputed property. With respect, we find the submissions by Mr. Chanjarika on this point to be a mere counsel's statement made from the Bar. Mr. Chanjarika ought to have submitted*

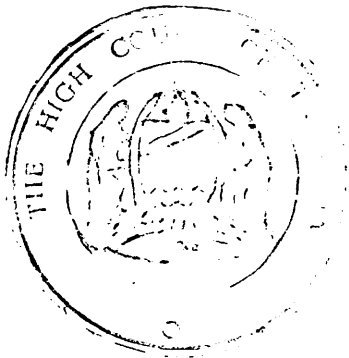


*those facts in the affidavit in reply. Unfortunately, that was not done. See our previous decisions in **Fweda Mwanajoma & Another v. Republic**, Criminal Appeal No. 174 of 2004 and **Farm Equipment Company Limited v. Festo Mkuta Mbuzu**, Civil Application No.111 of 2014 (unreported), where the Court declined to consider a statement made by the counsel from the Bar. Similarly, in the application at hand, this submission by Mr. Chanjarika cannot be considered by this Court.”*

It is on that basis that I find that, the applicant has failed to establish sufficient reasons in respect of the alleged delay for the court to exercise its discretion. Consequently, the application is hereby dismissed with costs.

It is so ordered.

Dated and delivered at Moshi this 18<sup>th</sup> day of March 2022.



A handwritten signature in black ink, appearing to read "S. H. Simfukwe".

**S. H. SIMFUKWE**

**JUDGE**

**18/3/2022**