THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

MISC. LAND APPLICATION NO. 09 OF 2023

(Arising from the Ruling and ex parte judgment of the District Land and Housing Tribunal in Land Application No. 136 of 2009 delivered on 19/07/2010 and ex parte Judgment delivered on 16/05/2011)

SOLOMON MMARI ..... APPLICANT

VERSUS

VENANCE BENEDICT MINDE ..... RESPONDENT

RULING

Hearing date on: 7/03/2023

Ruling date on: 20/03/2023

NGWEMBE, J:

Mr. Solomon Mmari, is seeking an extension of time to appeal against a ruling which dismissed his application to set aside an *ex parte* order as well as the *ex parte* judgment so entered by the District Land and Housing Tribunal twelve (12) years ago.

The dispute was on ownership of land and harvest of sugarcane planted therein. The respondent leased 22½ acres of farm land from one Musa Lwayo in year 2000, used to grow sugarcane. In 2008 the applicant invaded the cane field and demarcated half of the farm claiming to have bought it from one Ally Lwayo. Later on, he even demanded the harvest and proceeds of the sugarcane, also together with Ally Lwayo, entered therein and harvested those sugarcane. On the first trial the tribunal decided in favour of the respondent. No appeal or setting aside an *ex parte*

judgment was preferred since then. The respondent proceeded to file an execution in year 2021. The applicant having been served with summons for execution proceedings, opted to file this application.

The application was certified by advocate Patrick Michael Massenge to be urgent on the reason that there is a pending Application No. 1055 of 2022 for execution before the District Land and Housing Tribunal for Morogoro, on which Mr. Massenge was in fear that, if the decree is executed it will cause injustice to the applicant who contemplates to appeal against it.

He moved this court under section 14 of **The Law of Limitation Act, Cap 89 RE 2019** together with section 41(2) of the **Land Dispute Court Act, Cap 216 RE 2019.** An affidavit sworn by the applicant himself accompanied the chamber summons.

From his affidavit, the applicant narrates that, he was the first respondent in Application No. 136 of 2009 which was decided *ex parte* against him for the alleged failure to file Written Statement of Defence within time, which he filed on 09/11/2009. On 10/11/2009 Hon. Mutunga chairperson ordered the matter to proceed *ex parte* against him. He challenged the *ex parte* order by an application filed on 14/12/2009 which was likewise dismissed on 16/06/2010. The matter proceeded *ex parte,* while no notice or summons was issued to him for the date of pronouncing *ex parte* judgment. He had no knowledge of the said judgment until on 17/12/2022, when he was served with the summons in Application No. 1055 of 2022 for execution.

He deposes further that upon perusal of the trial tribunal's record, he found that the whole judgment and the ruling of the tribunal had

irregularities calling for cure by this court; He pointed out the irregularities being;

i) Failure of the chairperson to take opinion of the assessors in the presence of the party,

ii) Not issuing summons to the applicant to attend the *ex parte* judgement pronouncement,

iii) The trial chairperson not referring to assessors' opinions in the judgment, and

iv) That the trial tribunal erred in not setting aside its *ex parte* order while on 08/11/2009 was Sunday so deserved to be excluded in counting the 21 days.

The Respondent who was enjoying the service of Mr. Tarimo learned advocate presented a counter affidavit substantively disputing all facts deposed by the applicant in support of the application. In such counter affidavit, the respondent stated that the applicant was represented by advocate Kashumbugu yet did not disclose when exactly did he become aware of dismissal and why he did not follow up and challenge the decision which was entered on 19/07/2010. Averred that, the applicant was aware of the *ex parte* judgment as on 19/07/2010, when the tribunal ordered *ex parte* hearing to be heard on 28/09/2010. The illegality pointed out by the applicant were as well strongly disputed by the respondent and that the applicant has not disclosed his reasons for delay.

When this application was called for hearing, advocate Massenge appeared for the Applicant, while advocate Tarimo assisted by Ms. Sofia Omary learned counsel, represented the Respondent. Mr. Massenge's submission for the application was brief. Having adopted the affidavit, he pointed out that section 14 of **The Law Limitation Act** confers to this

court the powers to extend time. He cited illegality as the ground for extension of time, referred this court to the case of **AG Vs. Emmanuel Marangaki's, Civil Application No. 13 of 2019** where it was held that illegality is a sufficient reason for extension of time. He cited section 60 (2) of the **Interpretation of Laws Act** by arguing that, the trial tribunal erred for failure to exclude the excluded day, which would otherwise make him be within time. Prayed that the application be granted.

In reply Mr. Tarimo argued that, the applicant has failed to disclose sufficient reason for such long delay. Insisted that, appeal from the Land and Housing Tribunal is 45 days, but the applicant has filed this application for extension of time after twelve (12) years that is on 20/01/2023, while the decision was made in 2010.

To him, despite the alleged illegality, the applicant was duty bound to account for each day of delay. He cited the case of **Cosmas Faustine Vs. R, Criminal Application No. 76 of 2019**, that illegality must be of sufficient public importance in the impugned decision. It was Mr. Tarimo's warning that sympathy has no place in court's exercise of discretion to extend time. Distinguished the holding in the case of **Marangaki's** with this application, because in **Marangaki's** case the applicant was not party to the case. He rested his cause with a prayer that this application be dismissed with costs in the manner of this court's ruling in **Edson Samuel Kahamba and another Vs. Registered Trustees of The Apostolic Life Community of Priests, Misc. Land Application No. 01 of 2022** where extension of time was refused for the delay of 8 months.

The parties' contention brings the main question of whether the application has merit or otherwise. In dealing with this issue, I will restate

the general principles relevant to the matter in lumpsum and in the course, specific rules will be accordingly expounded.

It is common ground that this court possesses powers under section 41 (2) of **The Land Dispute Courts Act** and section 14 of **the Law of Limitation Act**, to extend time for filing an appeal. Section 14 of **The Law of Limitation Act** gives a general provision of the powers of courts to extend time and section 41 (2) of **The Land Dispute courts Act,** gives specific powers of this court as quoted hereunder: -

> ***Section 41.***- *(1) "Subject to the provisions of any law for the time being in force, all appeals, revisions and similar proceeding from or in respect of any proceeding in a District Land and Housing Tribunal in the exercise of its original jurisdiction shall be heard by the High Court.*
>
> *(2) An appeal under subsection (1) may be lodged within forty-five days after the date of the decision or order: Provided that, the High Court may, for the good cause, extend the time for filing an appeal either before or after the expiration of such period of forty-five days."*

From the above two provisions, I have extracted two phrases "*the court may, for any reasonable or sufficient cause" or "the High Court may, for the good cause"* extend time or period of limitation. These phrases give us two attributes; *first* – the powers to extend time/period of limitation is discretionary. *Second* – in exercising that discretion, sufficient and reasonable cause must be disclosed by the applicant, also termed as good cause. The interpretation is in line with the case of **William Shija Vs. Fortunatus Masha [1997] T.L.R. 213 (CA)** where *inter alia* was held: -

"It is common knowledge that it is a matter of discretion on the part of the Court to extend time in which to file the appeal or notice of appeal. That such discretion is to be exercised judicially is also elementary. It is however, to be observed that in the exercise of such power, the requisite condition is that sufficient reason is to be given."

The applicant maintains that, sufficient cause is shown relying on the alleged illegality. In the contrary, the respondent stood firm that sufficient cause is neither established nor disclosed.

Our courts is among other jurisdictions of the world where statutes and precedents have avoided to assign an objective construction to the legal concept of *"Sufficient cause"* which is also known as *"good cause or reasonable cause"*. The rationale is to give wide circumstances upon which may be considered by the court in granting or refusing to grant extension of time. There is no confined interpretation of which constitutes sufficient cause. However, it is simple for the court to see sufficient cause which prevented the applicant from complying within time limitation to exercise his rights of appeal. I even assume that, the learned counsels for both parties, being long serving legal practitioners are able to note when it exists and when it does not exist.

There are numerous precedents on this point including in the cases of **William Shija Vs. Fortunatus Masha, Lyamuya Construction Company Vs. Board of Trustees of Young Women's Christian Association of Tanzania, Tanga Cement Company Limited Vs. Jumanne D. Massanga and Another, Civil Application No. 6 of 2001,** (CAT at Dsm) and **Vedastus Raphael Vs. Mwanza City Council and another, Civil Application No. 594/08 of 2021, (CAT at Mwz),**

are few of them. Sufficient cause may be inferred as to have been shown if, among other facts, it is shown that the delay was not caused by the applicant's indolence and considering the surrounding circumstance, it is permissible by justice and equity that extension of time be granted.

In **Lyamuya's** case the Court of Appeal set what to date are treated as factors to consider before exercising court's discretion to extend time. These are: -

(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; and

(d) If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged.

In the applicant's affidavit, claimed that, he was unaware of the *ex parte* decision which this court knows was delivered way back to 16/05/2011, equal to twelve years ago. He deposes that he became aware of the same on 17/12/2022, when he was served with the summons in application for execution. He filed this application on 20th January 2023 claiming that, after perusal he noticed illegalities in the Tribunal's proceedings and judgment. In the submissions, the applicant's counsel did not add anything on the applicant being unaware of the judgment, but concentrated on illegality of that judgement and proceedings.

Equally important to note is the respondent's counter affidavit as well as the submissions, strongly disputed the alleged illegality and stated that, the applicant was aware of the *ex parte* judgment, since when he applied

for vacation of *ex parte* order. The court pronounced its ruling *inter parte* that the case would proceed *ex parte* on the appointed date. I agree to this because if he was diligent, he would have taken action against the *ex parte* judgment within time.

To this court it is surprising to find the applicant coming to court after expiry of 12 years. The affidavit and oral submissions by the applicant's counsel have not accounted for any such long delay of twelve years. Instead, the applicant's counsel insisted on the allegations of illegalities. According to the precedents cited above, the said illegality should be of sufficient public significance, apparent on the face of the record, not to be discovered by a long-drawn argument.

I am satisfied that the applicant has failed to pass the first three tests set forth in **Lyamuya's** case. However, the allegations of illegality would be within the fourth factor, where a court finds other sufficient reasons, such as illegality of the decision sought to be challenged may grant extension of time with a view to correct such illegalities.

Admittedly, illegality has been among the considerations in extension of time even before **Lyamuya's** case. One of the earliest cases is the **Principal Secretary, Ministry of Defence and National Service Vs. Devram Valambhia [1992] T.L.R. 387.**

However, as I will expound it in the course, each case must be decided basing on its own circumstances. Alleging illegality does not *ipso facto* entitle the applicant to be granted extension of time. But the said illegality must be on the face of record as correctly argued by advocate Tarimo. Also, such illegality should bear public significance. As earlier alluded, generally if delay is caused by good cause or illegality of the

impugned judgement is observed, and upon sufficient cause, extension of time may be granted.

The bottom line is that, one must adduce best reason for delay which exhibits clearly that, the applicant was not the source of delay. That is why among others, the applicant must account on how he utilized each day of the time prescribed by the law, so that the court may see if there was any fair use and diligence in the time so given before it can award any further time on top of the statutory time limitation. It is the law in our jurisdiction that every day of delay must be accounted for.

In respect to this application, the applicant failed to account on how that single day lapsed until lapse of twelve years without taking any undertaking against the alleged **ex perte** judgement. This was held in the case of **Karibu Textile Mills Limited Vs. Commissioner General (TRA), Civil Application No. 192/20 of 2016; Bushiri Hassan Vs. Latifa Lukio Mashayo, Civil Application No. 3 of 2007;** and **Praygod Mbaga Vs. Government of Kenya, Criminal Investigation Department & Another [2019] 1 T.L.R. 629 [CA].** In the latter case the court held: -

> *"It is also a fact that what constitutes good cause has not been defined, however this Court has, in its various decisions stated number of factors to be considered. These are whether or not the application has been brought promptly, the absence of any valid explanation for the delay and whether the applicant has accounted for each day of delay and the lack of diligence on the part of the applicant"*

In this application, the learned advocate for the applicant seems to have picked illegality disjointly from other factors, while advocate Tarimo

was of the position that even when illegality is alleged, the applicant must account for each day of delay, which is more reasonable I perceive.

This application poses many unanswered questions, like whether a person may come in this court for extension of time after a very long period of delay like the applicant's application after twelve (12) years without any other explanation on how he failed to take action all along? It is settled in my mind that, illegality is not an immune ground for extension of time as the learned advocate for the applicant would want this court to treat. In the contrary, reasoning in **Lyamuya**'s case (Supra) observed: -

> *"In **VALAMBHIA's** case (supra) this Court held that a point of law of importance such as the legality of the decision sought to be challenged could constitute a sufficient reason for extension of time. But in that case, the errors of law, were clear on the face of the record. The High Court there had issued a garnishee order against the Government, without hearing the applicant, which was contrary to both the Government Proceedings Rules, and rules of natural justice. Since every party intending to appeal seeks to challenge a decision either on points of law or fact, **it cannot in my view, be said that in VALAMBHIA's case, the Court meant to draw a general rule that every applicant who demonstrate that his intended appeal raises points of law should as of right, be granted extension of time if he applies for one. The Court there emphasized that such point of law, must be that "of sufficient importance"** and I would add that it must also be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by a long-drawn argument or process."*

It is logical that, since extension of time is in the court's discretion, the applicant must present all other relevant facts on top of illegality and where the applicant sticks only on illegality, he must positively show, not only that it is apparent on the face of the record, but most important that the said illegality is of sufficient public significance or importance. I stress that the applicant must demonstrate the illegality complained of, is one of significant public importance as in **Lyamuya's** case as well as **Valambhia's** case.

Similar position from neighbouring country in the case of **Phillipus Steyn Vs. Giovanni Gnecchi - Ruscone, Civil Appllication. No. Sup. 4 of 2012 (UR3/2012)**, the Kenyan Supreme Court pointed on such burden and observed that an issue qualifies to be a question of law with significant public importance if: -

> *"Its impacts and consequences are substantial, broad-based, transcending the litigation-interests of the parties, and bearing upon the public interest. As the categories constituting the public interest are not close, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern."*

The English cases have given almost similar persuasive description of matters of law with public importance in the case of **Cromptons Vs. Wiltshire Primary Care Trust (2008) ECWA, Civ. 749, Waller L. J** laid out the following standards: -

(i) *"That the matter involves the elucidation of public law by higher courts, in addition to the interest of the parties;*

(ii) *"That the matter is of importance to a general class, such as a body of tax payers;*

(iii) *"That the matter touches on a department of state, or the state itself, in relation to policies that are of general application."*

Likewise in another English case of **Glancare Teorada Vs. A.N Board Pleanala [2006] FEHC 250** the court held that, a matter of general public importance should be one of exceptional public significance, in that:-

(i) *"The matter goes substantially beyond the facts of the case, and the appropriate case is not whether there is a point of law, but whether the point of law transcends the facts of the individual case;*

(ii) *The law in question should stand in a state of uncertainty- so that it is for the common good that such law be clarified, so that to enable the court to administer the law, not only in the instant case, but also in future cases;*

(iii) *The point of law must have arisen out of a decision of the Court, and not from a discussion of a point in the course of the hearing"*

In holistic studies of this application and specifically the said decisions sought to be challenged, I admit that the said *ex parte* judgment does not contain assessors' opinion. The phenomenon qualifies to be illegality. In our jurisdiction, illegality is a sufficient reason for extension of time, irrespective of whether the applicant has accounted for the delay or not, as it was so decided in the case of **VIP Engineering & Marketing Limited and 2 Others Vs. Citi Bank Tanzania Limited.** However, the illegality observed herein will not have the same effect for two major reasons:-

First: the 12 years delay in this case and that the applicant did not contemplate to take any action against such decision until when execution

was initiated, it shows clearly that, the application was ill motivated, to delay and defeat justice in the case before the tribunal for execution. I am not convinced under the circumstance that, this court can purport to cure the illegality after 12 years and which according to its nature, did not substantively affect the applicant in the case.

Without prejudice to the precedents cited above on the effect of illegality as a cause for extension of time, this court finds that the case at hand is exceptional calling for distinguishing. In this particular case and owing to the observed attributes, I rule that where there is an inordinate delay depending on the case, illegality even if apparent on the face of record, cannot in itself warrant extension of time under the auspices of seeking to cure them. It is fair therefore to observe under the circumstance, that those seeking extension of time based on illegality and those that do not allege any illegality, must show diligence.

Second: having referred to a good number of authorities on apparent illegality with sufficient public significance, I have settled mind that failure by the trial chairperson to discuss the assessors' opinion in the decision did not constitute sufficient public importance or significance. The applicant did not attempt to demonstrate any sufficient public significance of the said illegalities. He omitted that duty while knowing clearly that being the applicant he was bound to prove.

To the contrary I just see this application as ill motivated attempting to induce this court to condone extreme indolence which, if done will devour not only procedural laws, but the whole sense of justice in litigation. Courts will for sure invite endless litigation contrary to public policy which is the purpose of Law of Limitation stemmed to Latin maxim *interest reipublicae ut sit finis litium* meaning it is for the interest of the

Republic that there should be an end to litigation. Such endless litigations prejudice not only the adverse party but also to the Republic and this court for endless litigation.

In the circumstances of this case, it would befit the pursuit of equity and justice to follow the principle of equity by the maxim of *Vigilantibus non dormientibus aequitas subvenit* to mean equity assists the vigilant, not the sleeping. Like in the case of **Edson Samuel Kahamba and another Vs. Registered Trustees of The Apostolic Life Community of Priests**, this court borrows the Kenyan Court's diction pronounced in the case of **Kenya Local Government Workers Union Vs. Kangundo Town Council [2021] EKLR,** where the applicant applied for some reliefs after ten (10) years of the decision, the Court observed: -

> *"The Claimant has inordinately delayed in asserting its rights and because of this delay the Claimant is no longer entitled to bring an equitable claim against the Respondent in respect of the judgment of this Court. Having let the matter lie with no action for over 10 years the Court will not rouse the Respondent from their well-deserved slumber."*

In respect to this application, the appellant has come before this court after having been served with a summons for execution of a decree pronounced more than twelve (12) years ago. Even the applicant's depositions in the affidavit that he was not aware of the judgment were surely an afterthought, that is why his counsel became wary to address the same. As earlier pointed, the applicant had no interest in any cure of the alleged illegality but laches in order to deflect justice.

Apart from that, I understand that Regulation 11 (2) of ***Land Disputes Courts (The District land and Housing Tribunal)***

Regulations, 2003 provides that a party aggrieved by an *ex parte* decision made under Regulation 11 (1) should apply within 30 days to set aside the orders. The applicant despite addressing that he became aware of the judgment on 17/12/2022, which is so unlikely, he filed this application on 20/01/2023 more than 34 days after. This shows that the applicant was consistently indolent and insolent.

With the above analysis, I find the applicant has failed to disclose any sufficient cause for such long delay. Granting such extension of time, would not only be condoning laxity and avoidance of process of law, but a direct prejudice to the respondent. In order not to let this court be part of such prejudice, I proceed to dismiss this application with costs payable to the respondent.

Order accordingly.

Dated at Morogoro in chambers this 20st day of March, 2023

P. J. NGWEMBE

JUDGE

20/03/2023

Court: Ruling delivered at Morogoro in chambers this 20st day of March, 2023 in the presence of Mr. Patrick Masenge, learned advocate for Applicant, and advocate Tarimo and Sofia Omary for the Respondent.

Right to appeal to the court of appeal explained.

THE HIGH COURT OF TANZANIA

P. J. NGWEMBE

JUDGE

20/03/2023