

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

MISC LAND APPLICATION No.5 OF 2022

(Emanating from Land Application No. 16 of 2018 at Maswa District Land
and Housing Tribunal)

TATU ANTHONY1ST APPLICANT
ELIZABETH LUBONGIJA2ND APPLICANT
ESTER NZALA.....3RD APPLICANT
VERSUS
PATRIC MPENDA.....RESPONDENT

RULING

16th February, & 23th March, 2023

MASSAM, J:

In this application one Tatu Anthony, Elizabeth Lubongija and Ester Nzala have filed an application before this court under the provisions of **section 41(2) of the Land Dispute Court Act, Cap 216 R.E 2019)** and section 14 (1) of the Law of Limitation Act Cap 89 R:E 2019. And

section 95 of the Civil Procedure Code, Cap 33 RE 2019 applying for the following orders;

"(1) That, this Honourable court be pleased to extend time to an appeal to of the Judgement and decree of the District Land and Housing Tribunal for Maswa by Hon J. F. Kanyerinyeri, dated 16/11/2022.

(2) Cost of this application to be provided for"

The application is supported by applicants' affidavit sworn on 16th February ,2022 by both applicants **Tatu Anthony, Elizabeth Lubongija** and **Asteria Nzala** and their grounds in affidavit were advanced during the hearing of this application by Mr. Frank Samwel counsel for the applicants

When the application came for hearing on 16th February 2023 the Applicants were represented by Mr. Frank Samwel learned Advocate while the respondent appeared in personal unrepresented.

In support of the application, Mr. Frank for the applicants submitted that the prayer is for extension of time to file an appeal out of time in land case Application No. 16 of 2011 before the Maswa DLHT which the decision

delivered on 16/11/2022. He prayed that the copy of affidavit be adopted to form part of his submission.

In his submission he notified the court that he also filed supplementary affidavit which sworn by him on 8/12/2022, he therefore, pray the said supplementary to form part of his submission.

He averred that applicants failed to file their appeal on time because they were sick, they received treatment in different places and they have no document to prove the same, as they were treated by herbalist, when they came back, they found themselves out of time.

In other hand, Mr. Frank added that the trial Chairman did not determine the objection raised by the applicants, he proceeded with the hearing of the main case without first determining the preliminary objection which was raised in written statement of defence.

He noted that the trial tribunal did not join the seller as per evidence as the respondent said he bought the said land to one Fausta Masanja. It was his submission that the said Felista was required to be joined in the case.

Another illegality was that the applicants did not given chance to call witnesses as a constitutional right of the parties.

Again, Mr Frank submitted that respondent had no *lucus standi* to file the matter before the tribunal as the disputed property belonged to Church whilst the Churches property the owner are body of trustee so the Pastor had no power to file a case of ownership against his worshipers, section 3 of Trustee and Corporation Act. Direct the same and elaborate that Institution are not supposed to file the case themselves and which need trustee to do so.

Also he submitted that the matter was *res judicata* as it was already determined by the court, respondent was already file the same case at Mwandoya (kishapu) in Criminal case No. 2/2022, respondents claimed against applicants that they stole iron bar/sheets in the said charge, and the said court did acquit the appellants. In his view he said that illegality was among the reason for extension of time. He cited the case **The State Attorney vs Tanzania Ports Authority and another**, Civil Application No. 387 of 2016 at page 11 para 3. With thus he prayed the court to extend time to file appeal out of time.

In counter response, respondent submitted that he support the decision of the Maswa DLHT, he said in that decision he tendered the exhibit which show that he bought the said properties as him and not a body of trustees or Pastor. He argued that the evidence testified by the applicants were not in that sale agreement. He also contended that applicants took his properties by claiming to be theirs that is the reasons he filed the case. He faulted that the reason that applicants were sick, he said they were not sick at all.

In rejoinder, Mr. Frank reiterated that the one which respondent replied was the one which was required to be settled in the preliminary objection but he did not say if that house was used as a Church, so he pray that illegality to be a good ground for extension of time to appeal out of time.

Having considered the submissions of Mr. Frank for the applicant and the respondent together with affidavits and counter affidavit it is this court to evaluate the grounds in affidavit if they establish the sufficient cause to grant the extension of time. The Applicants moved this court under the

provisions of section **41 (2) of the Land Disputes Courts Act** Cap 216

which provides that;

"An appeal under subsection (1) may be lodged within fortyfive 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"

In proving his grounds for delay, applicants substantively averred their reasons on affidavits from paragraphs 5,6,7 and 8, that on 16/11/2021 the Maswa District Land Housing delivered its judgment, applicants were intending to appeal but with reasons advanced in their affidavits that they were prevented by sickness and the other applicants were taking care their family who were sick. Mr. Frank in his support of the application advanced that applicants delayed to appeal due to sickness and treating the family members who were sick as they were treated in different places of herbalists. In this reason, the counsel for the told this court that applicant had no anything to prove. Respondent disputed the reason that applicants were sick.

Indeed, sickness is a good ground and sufficient reason for the court to grant extension of time to appeal out of time, but it is upon the applicant to demonstrate the proof that he/she was sick and how the said sickness prevented him from taking the necessary measures within time. In **Pastory J. Bunonga vs Pius Tofiri**, Miscellaneous Land Application No. 12 of 2019 (unreported), held:

*"Where it was on the balance of probabilities proved, sickness has been good and sufficient ground for extension of time yes. But with all fairness the fact cannot be founded on mere allegations. **There always must be proof by the applicant that he fell sick** and for the reason of sickness he was reasonably prevented from taking the necessary step within the prescribed time."*

In the instant application as I have stated above that applicants in the affidavits and at the hearing of this application, counsel for the applicants averred that applicants were prevented by the sickness but they had no proof to substantiate their reason. For instance, paragraph 4 of the affidavit of Tatu Antony stated that

That unfortunately, from mid November 2021, I fell sick from hiccough and general body malaise, therefore I was constrained to submit myself to different traditional healers until February 2022 when I got some strength

For the 2nd applicant's affidavit on paragraph 4 stated that

That unfortunately, from November 2021, my husband fell sick, thus I took him to different places for treatment until February 2022 when he recovered.

3rd applicant Ester Nzala stated on paragraph 4 that

That unfortunately, from December 2021, my son fell sick, I therefore I took him to different places for treatment until February 2022 when he recovered.

The quoted reasons of the applicants that they were prevented by sickness which is good reason for the court to grant extension of time to appeal out of time, but very unfortunately their reasons were not supported by evidence to prove that the sickness, principally as stated in the above cited case that ***There always must be proof by the***

applicant that he fell sick. Failure of that, the court find the reason is not sufficient.

Now I go to the reason of illegality. The issue of illegality averred in the supplementally affidavit which sworn by Mr. Frank Samwel and adopted by the court to form part of the application. Mr. Frank advanced his submissions by mentioning four illegalities. In the first illegality, he submitted that the trial tribunal did not determined the objection raised before proceeded with the case, he said the Preliminary Objection was raised on written statement of defence, being heard the concern of Mr. Frank that the trial tribunal proceeded with the matter without first determining the preliminary objection raised by the applicants during trial, it made me to be curious and led me to once again peruse the trial records so as to satisfy myself if what Mr. Frank submitted are real.

Having carefully scrutinized the entire record, it is plain therein that the applicants in their jointly written statement of defence had raised a preliminary objection, containing one point that the respondent/applicant had no locus standi to institute the application on behalf of the church. The same in proceedings at pages 3 and 4 show that the Chairperson ordered

the P.O to be heard on 21/05/2020. On the said date of 21/5/2020 the proceedings are clearly revealed that;

Tribunal:

The matter is coming for hearing P.O

ORDER

Hearing of P.O commence

1st respondent and 2nd Respondent

We pray the applicant Preliminary objection be dated in the date of the law

Sign

J.F Kanyerinyeri

Chairman

21/05/2020

Applicant reply submission

I have the locus standi

Sign

J.F Kanyerinyeri

Chairman

21/05/2020

Order

Ruling on 17/06/2020

Sign

J.F Kanyerinyeri

Chairman

21/05/2020

17/06/2020

CORUM

Hon J.F. Kanyerinyeri-Chairman

Assessors 1st Present 2nd Present

Applicant -Present

Respondents- Present

T/Clerk-S. Allen

Tribunal

The matter was coming for Ruling the same was passed.

Sign

J.F Kanyerinyeri

Chairman

21/05/2020

Order

Hearing on 30.07.2020

Upon seen the proceedings when the trial tribunal commenced the order of hearing of the preliminary objection I failed to understand if the it determined the Preliminary objection, what I see is that after the tribunal heard the preliminary objection Chairman used the sentence that "*the matter was coming for Ruling the same was passed*". The record is silent as to what, if anything, transpired on that day. Then thereafter it proceeded with the merit of the matter without making clear statement if the Preliminary Objection overruled or sustained. With thus I join hands with Mr. Frank that the case proceeded in illegality for the trial tribunal's failure to first determine the Preliminary Objection raised by the applicants at trial.

The court in several occasions dealt with similar issue as in **Thabit Ramadhani Maziku & Another vs Amina Khamis Tyela & Another**, Civil Appeal No. 98 of 2011 (Unreported) The Court of Appeal stated that;

*"The law is well established that a Court seized with a preliminary objection is first required to determine that objection before going into the merits or the substance of the case or application before it. In **Bank of Tanzania Ltd V. Devran P. Valambia**, Civil Application No 15 of 2002 (CAT) (unreported) the Court observed:*

"The aim of a preliminary objection is to save the time of the court and of the parties by not going into the merits of the application because there is a point of law that will dispose of the matter summarily."

Basing on the point above and the cited authority, I am of the view that issue of illegality is a point of law which we are incapable to bury it, and it settled law that illegality is a good and sufficient ground for extension of time. see the case of **VIP Engineering and Marketing Ltd, Tanzania Authority and the liquidator of Tri-Telecommunication (1) V Cit bank Tanzania Ltd** Consolidated References No. 6, 7 and 8 of 2006(unreported). In the case against **Devran Valambia** the Court of Appeal held that-

"Where the point of law at issue is the illegality or otherwise of the decision being challenged, that is a point of the sufficient importance to constitute sufficient reasons"

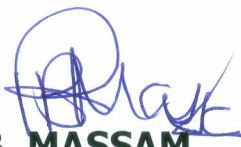
In the light of the above ground/reasons I don't see relevancy to discuss and determine the other remaining illegalities rather the discussed point is enough to find that the tribunal failed to comply with the law for

not disposing first the Preliminary objection raised by the respondent. With this view, in connection with the authorities, I find the applicant managed to establish prima facie in point on law that the tribunal proceed the matter not in compliance of law as per mentioned above authorities. Therefore, the prayer granted, no order for costs.

It is so ordered.

DATED at **SHINYANGA** this **23rd** day of March, 2023.




R.B. MASSAM
JUDGE
23/3/2023