

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
ARUSHA DISTRICT REGISTRY
AT ARUSHA

MISC. LAND APPLICATION NO. 101 OF 2022

(C/F Application no. 43 of 2018 District land and Housing Tribunal of Arusha)

JOAN JOHNSTONE MUGISHA APPLICANT

VERSUS

**JOHNSTONE JOSEPH KALUMUNA
FINCA MICROFINANE BANK LTD
NSOMBO & COMPANY LIMITED
EMMY ANYANDWILE KASESELA
MANGWEMBE 2011 CO. LTD**

.....RESPONDENTS

RULING

14th December, 2022 & 20th March 2023

TIGANGA, J.

The applicant is seeking for extension of time so that she can file an application for revision out of time in this Court. She aims to challenge proceedings, Judgment and Decree of District Land and Housing Tribunal of Arusha (the trial tribunal) in Application No. 43 of 2018 delivered on 18th September, 2020. The application is made under **section 14 (1) of the Law of Limitation Act, Cap 89 R.E 2019** (Law of Limitation Act) and is supported by applicant's sworn affidavit which all respondents except the 1st disputed and filed their counter affidavits thereof.

A brief history of the matter at hand as can be deciphered from the record is that, the dispute relates to a piece of land measuring 24 meters' length and 13 meters' width located at Ambureni, Moivaro Village within Nkoanrua Ward in Arumeru District hereinafter referred to as (suit property). According to the trial tribunal's records, some times in January 2017, the 1st respondent took a one-year loan from the 2nd respondent and registered the suit property as security for that loan. The said property was her daughter's but under his guardianship as he bought it for her in 2009 when she was about 6 years old. In January, 2018, the 1st respondent was issued with a notice by the 3rd respondent inquiring him to repay the loan lest the suit property will be sold to repay the loan.

The 1st respondent did not heed to the request and consequently on 24th February, 2018 the suit property was sold to the 4th respondent at a bid price of Tshs. 21,000,000/= in an auction conducted by the 5th respondent herein.

The 1st respondent refused to give vacant possession of the suit property to the 4th respondent and filed Application No. 43 of 2018 at the trial tribunal, claiming that the demand notice was issued without taking the dispute to court. Also, it was unjustifiable for the auction to be conducted by

the 5th respondent while the notice was issued by the 3rd respondent. More so, the suit property was sold at a price below the market value. He prayed that the trial tribunal declare the auction and sale illegal and nullify the same. The 4th respondent filed a counter claim alleging that, failure of the 1st respondent to give vacant possession of the suit land has caused her substantial loss as she had to rent another property for her accommodation. She prayed that, the trial tribunal declare her the lawful owner and order eviction of the 1st respondent from the suit property.

After hearing the parties, the trial tribunal declared the auction and sale to be legal as the 1st respondent had defaulted payment of loan issued to him by the 2nd respondent. The counter claim was merited as the 1st respondent was ordered to give vacant possession of the suit property and the 4th respondent was awarded Tshs. 3,000,000/= as general damages for all the inconvenience caused to her.

The application at hand is initiated by the 1st respondent's daughter who claims to be the rightful owner of the suit property. According to her affidavit, she was neither involved in 1st respondent's loan nor consented to let her property be pledged as security for the alleged loan. She claims that,

she only became aware of the whole ordeal after the 5th respondent went to her home telling her that, they were instructed to execute the trial tribunal's decree. She was therefore ordered to vacate the suit property within 14 days and immediately thereafter she went to the trial tribunal to inquire more and filed a Misc. Application No. 32 of 2022 claiming ownership of the suit property. She also sought guidance from this Court and was advised to file a formal application hence the current application.

During hearing of the application which was by way of written submission, the applicant was represented by Mr. Mitego Methusela Robert, the 2nd respondent was represented by Mr. Ian Harold Joseph whereas the 3rd, 4th and 5th respondents were represented by Mr. Gwakisa Kakusulo Sambo all learned Advocates. The 1st respondent did not bother to file his submission but the rest of the respondent filed their respective counter affidavits.

Supporting the application Mr. Mitego submitted that, the applicant has managed to account for each day of delay from 14th April, 2022 when she became aware of the matter to 27th July, 2022 when she filed this application. Hence, there was no negligence or sloppiness from her side as

she was always in court corridors in pursuit of justice as held in the case of **Royal Insurance Tanzania Limited vs. Kiwenga Strand Hotel Limited**, Civil Application No. 111 of 2009, CAT at Dsm (unreported).

Apart from due diligence, the learned counsel submitted that, there are a number of illegalities in the decision sought to be challenged which is also a sufficient ground for extension of time. The first illegality is the fact that, the suit property bears applicant's name in the sale agreement, thus, she ought to have been made party to the initial application. Mr. Mitego referred the court to the case of **Constantine B. Assenga vs. Elizabeth Peter & 4 Others**, Civil Appeal No. 70 of 2019 CAT at Dsm (unreported) which underscored the importance of joining all the necessary parties to the suit. Learned counsel mentioned the second illegality as the fact that, the trial tribunal received the Receipt of sale, Certificate of Sale by Public Auction, Mortgage Agreement, Collateral Agreement and Affidavit from the 5th respondent while all those documents were not stamped with the stamp duty contrary to section 47 of the **Stamp Duty Act**, Cap 189 R.E. 2019. He prayed that this Court exercise its discretion and grant the application for extension of time as prayed.

In response, Mr. Joseph for the 2nd respondent submitted that, in considering application for extension of time, the applicant must show good cause. However, in the application at hand the applicant has not shown good cause to warrant extension of time. He argued that, after she become aware of the impugned procedure and decision, she filed Application No. 32 of 2022 and Misc. Application No. 67 of 2022 at the trial court instead of filing the current application in this Court after lapse of 107 days. He further argued that, the claims on illegalities raised by the applicant are unfound and baseless as the applicant was still a minor and still under the guardianship of his father when the land was purchased and the loan was executed. The same can be gleaned from the 2nd respondent's affidavit and its annexure FMB 1. Thus, the cited case of **Constantine Assenga vs. Elizabeth Peter** (supra) is distinguishable in the application at hand.

He further submitted that, any illegality must be apparent on the face of record not the ones that will require a lengthy process to decipher. That, section 45 of the **Land Disputes Courts Act**, Cap 216, R.E. 2019 prohibits reverse or alteration of decisions or orders of the Ward or District Land and Housing Tribunal based on among other things improper admission or rejection of any evidence unless such admission or rejection has occasioned

a failure of Justice. He referred the court to the case of **Yakobo Magoiga Gichere vs. Peninah Yusuph**, Civil Appeal No. 55 of 2017, CAT at Mwanza which implored courts to do away with technicalities and have regard to substantive Justice. He prayed that non stamping is among the anomalies that can be pardoned. He prayed that the application be dismissed with cost.

Submitting jointly for the 3rd, 4th and 5th respondents, Mr. Sambo averred that, the applicant has failed to account for each day of delay as well as the illegality in the impugned proceedings and decision of the trial tribunal. He argued that, the applicant become aware of Application No. 43 of 2018 since 13th March, 2018 when she filed Application No. 50 of 2018 before the trial tribunal. Therefore from 2018 to 2022 is four years which is unaccounted for by the applicant. Apart from that, even by taking into account that she become aware on 14th April, 2022 when she was approached by the 5th respondent, the court broker, she has not accounted for all the days from that day to 27th July, 2022 when this application was filed which is 104 days. More so, the applicant is not a legal owner of the suit land as seen in her father's affidavit (exhibit E-1 in 4th respondent's counter affidavit) that, he bought land under her name while she was still a minor. That, the applicant's father, 1st respondent, and his wife consented

to mortgage the suit property for loan thus, the applicant had no ownership or interest over the same.

The fact that she was in court corridors seeking justice from when she became aware of the trial tribunal's decision is neither deponed in her affidavit nor substantiated in her submission hence the case of **Royal Insurance Tanzania Ltd** (supra) cited by her learned counsel is distinguishable to the circumstances of this case. Regarding the illegalities, Mr. Sambo argued that, they are not apparent on the face of record. Starting with her not being party to the case, Mr. Sambo argued that, the applicant was still a minor when the case was instituted and her father signed an affidavit claiming ownership hence there was no need of being joined as party. As to the 2nd illegality that the alleged documents were not stamped, he argued that, the same is a mere allegation which requires evidence and the applicant never bothered to attach even one of those documents in her affidavit to support her claims. He also cited section 45 of the **Land Disputes Courts Act** and submitted that, the trial tribunal cannot be reversed by wrong admission of evidence.

It was learned counsel's further submission that, the Application No. 43 of 2018 has already been put to rest as it was finalized to its execution and the report was filed in court. In that regard, this application has been brought as an afterthought. He referred the Court to the Case of **Muze Zongoi Kisere vs. Richard Kisika Mungendi & 2 Other**, Civil Application No. 320/17 of 2017 CAT at Dsm (unreported) where the Court of appeal insisted on accounting even a single day of delay before the person is entitled to extension of time. He also cited the case of **Ngao Godwin Losero vs. Julius Mwarabu**, Civil Application No. 10 of 2015, CAT at Arusha (unreported) where the Court of Appeal insisted that illegality must be seen on the face of records and not after a long drawn process. He prayed that this application be dismissed with cost for want of merit.

In his rejoinder, Mr. Mitego reiterated his earlier submission and insisted that the applicant has managed to account for each day of delay. More so, properties placed under guardianship do not give the guardians the legitimacy to use them in any manner. Thus, the trial tribunal erred in determining Application No. 43 of 2018 without the applicant being joined as a necessary party. He prayed that the application be granted.

After rival arguments from both parties the question for determination is whether this application for extension of time has merit. It is worth noting that, the law with regard to extension of time has been extensively litigated. Among the factors to be considered in granting extension of time if first and foremost, the applicant is hindered by a valid cause from taking a particular legal action. In the present case, the enlargement of time is sought to enable the applicant to file revision against the trial tribunal as per section 14 (1) of the Law of Limitation Act.

Second consideration is the fact that, the powers vested in Courts regarding extending time by the above provision are discretionary in nature hence, must be exercised judiciously and according to the rules of reason and justice. As per jurisprudence, it can only be exercised upon the Court being satisfied that there exists a good cause or good causes. The duty to demonstrate the good cause rests upon none other than the applicant (See; **Benedict Mumello vs. Bank of Tanzania**, Civil Appeal No 12 of 2012, C AT and **Ngao Godwin Losero v. Julius Mwarabu**, (supra) (all unreported).

Third, there is no universal definition of what constitutes a good cause for purposes of extension of time. Several factors must be considered in

establishing whether or not a good cause upon which to extend the time exists as was held in the case of **Attorney General vs. Tanzania Ports Authority & Another**, Civil Application No 87 of 2016 CAT(unreported). According to this and many other authorities, relevant factors for consideration include, the duration of delay-whether the delay is inordinate; whether the applicant has sufficiently accounted for the delay; whether the applicant has demonstrated diligence and not apathy, negligence or sloppiness in the prosecution of the action he intends to take; or whether there exists a point of law of sufficient importance such as the illegality of the decision sought to be challenged.

Last consideration is that, delay must fully be accounted for even if it is just for one day as held in the case of **Ramadhan J. Kihwani vs TAZARA**, Civil Application No. 401/18 of 2018, CAT (unreported). Based on these principles, the point for determination is whether a good cause has been demonstrated.

Starting with the duration for delay, the applicant claimed that, as soon as she become aware of the execution process on 14th April, 2022, she immediately went to the trial tribunal to inquire more. She did not account for 11 days from 14th to 25th April, 2022 when she filed Application No. 32 of

2022 and Misc. Application No. 67 of 2022. Her affidavit further showed that, on 21st July, 2022, she instructed her Advocate to write a letter to this Court seeking guidance and were instructed to file the present application which was filed on 27th July, 2022. What transpired from 25th April, 2022 when she filed her two applications at the trial tribunal to 21st July, 2022 when she wrote the Judge in charge seeking guidance is unknown. Neither her affidavit nor her written submission showed the outcome of such applications and there are no trial court's records showing that she was attending her two applications filed or rather if she decided to abandon them. Such facts are unclear which amounts to delay of almost 90 days which are unaccounted for. Without a paragraph in the affidavit showing the out come of the applications which were filed before the District Land and Housing Tribunal, the applicant before this court may be looked at as a forum shopper.

As to illegality pointed out by the applicant, the law is certain and the Court of Appeal decisions are one that, illegality or otherwise of the decision intended to be challenged suffices as a good cause for extension of time (See; **CRDB Bank Limited vs. George Kilindu and Another**, Civil Application No. 87 of 2009, CAT (unreported), **Secretary, Ministry of Defence and National Service v. Devram Valambhia** (1992) TLR 182).

It is however to be noted that, as correctly argued by the respondents' counsels and as held in **Ngao Godwin Losero v Julius Mwarabu** (supra), the illegality must be of sufficient importance and apparent on the face of the record such as the question of jurisdiction and not one that would be discovered by a long drawn legal argument or process.

Applying the above principle to the application at hand it is clear that, when the suit property was purchased by her father back in 2009, the 1st respondent, the applicant was only 6 years old. This is per her father's affidavit signed as her guardian in 2017, he stated that at the time the applicant was 14 years old. In that regard, whether it was her father or the applicant herself who purchased the suit property requires evidence which will conclude the issue of ownership. In the circumstances, whether or not she ought to have been joined as a necessary party to Application No. 43 of 2018 as the owner of the suit property can only be established after long drawn legal argument as the same is not apparent on the face of records on the decision to be challenged hence unfounded.

The same goes to the issue of non-stamping of document; it is trite principle that, in order for the Court to exercise its discretion in extending

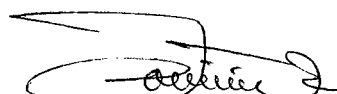
time, it is crucial that the same be furnished with necessary information which is usually are obtained from the affidavit deposed in support of the application. Since it is a substitute of oral evidence, affidavit is essentially the basis of the application and it carries all the weight. In the applicant's affidavit none of the document alleged not to be stamped with stamp duties were attached hence remains as mere allegations.

For the reasons stated above, I find this application devoid of merits and proceed to dismiss it with cost.

It is accordingly so ordered.

DATED and delivered at **ARUSHA** this 20th day of March, 2023




J.C. TIGANGA
JUDGE