

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

MISCELLANEOUS LAND APPLICATION NO. 36 OF 2022

(Originating from DLHT of Mbeya in Misc Application No. 85 of 20 and Land
Application No. 85 of 2014)

**NEEMA MBOGELA (As administratrix of the estate of the late Alinikisa
Ngundama)1st APPLICANT**
GODFREY CHAWE 2ND APPLICANT
VERSUS
STEVE NE YOHANA MWASAMBUNGU RESPONDENT

RULING

Date of last order: 22/02/2023
Date of Ruling 10/03/2023

NGUNYALE, J.

By way of chamber summons the applicants namely NEEMA MBOGELA
(As administratrix of the estate of the late Alinikisa Ngundama) and
GODFREY CHAWE preferred the present application under section 41 (2)
of the Land Disputes Court Cap 216 R. E 2019 against the respondent
STEVE NE YOHANA MWASAMBUNGU seeking the following orders; -

- (i) *This court be pleased to extend time within which the applicants lodge an appeal out of time.*
- (ii) *Costs of this application and any other order the court may deem fit and just to grant.*

The application was supported by a joint affidavit of the applicants. In the very affidavit they deposed that they were applicants in the Misc

Application No. 85 of 2020 originating from Land Application No. 85 of 2014 at the District Land and Housing Tribunal for Mbeya at Mbeya whereby judgment was entered on 7th October 2021 in favour of the respondent. They were supplied with copy of judgment on 17th December 2021 and subsequently on 11th day of January, 2022 they filed an Appeal No. 02 of 2022 before this court challenging the decision of District Land and Housing Tribunal in Misc. Application No. 85 of 2020 in which one of the appellants was Alinikisa Ngundama now deceased. Neema Mbogela was appointed as the administrator of the deceased estate on 3rd day of February 2022. Other appellants (Effeso John Mgya and Davis Hassan Mwakisi) passed away and the other appellant Isack Mbafu lost interest with the appeal.

The applicants went on to state that following those changes, they decided to withdraw the Appeal No. 02 of 2022 before this court on 18th day of May, 2022 and they decided to file the present application. They averred that the impugned judgment is tainted with illegalities on the point of *locus stand* and the said Application No. 85 of 2014 was filed out of time. In paragraph 10 of the affidavit, they stated that they are entitled to extension of time based on delay in getting copy of judgment, procuring letters of administration of estate in respect of the deceased and death of other appellants also withdraw of the original appeal.



The application was resisted by the counter affidavit of the respondent STEPHEN YOHANA MWASAMBUNGU. In his affidavit he contested the application because it was in the applicant's knowledge that one Alinikisa Ngundama died before institution of the said appeal. The application deserves to be dismissed in its entirety with costs.

Hearing of the application attracted the form of written submission as filed by the respective learned Counsels. The applicant was represented by Ms. Pamela Kalala while the respondent enjoyed the service of Ms. Secilia Luhanga both learned advocates from P & SEN Attorneys and ML Law Firm respectively.

The court has read careful the records of the application and specifically the affidavits of the parties and noted that the applicant seeks extension of time to file an appeal out of time against the judgment of the trial Tribunal dated 7th October 2021. Grant of extension of time is a discretion of the court upon advancing sufficient cause. In the case of **Blueline Enterprise Ltd vs. East Africa development Bank** Misc. Civil Cause No. 135 of 1995, CAT it was held that; -

"...it is trite law that the extension of time must be for sufficient cause and that the extension of time cannot be claimed as of right, that the power to grant this concession is discretionary, which discretion is to be exercised judicially, upon sufficient cause being shown which has to be objectively assessed by the court..."



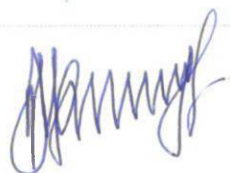
The central issue for consideration and determination is whether sufficient reasons have been advanced to warrant this court to grant an extension of time sought by the applicant. In the application at hand, I have gone through the applicant's affidavit and the parties' submissions, it is evident from the applicant affidavit that the first appeal No. 02 of 2022 was timely filed but it was withdrawn in order to comply with Probate and Administration of Estate procedure. They alleged that the learned Counsel was not aware about the death of Alinikisa Ngundama. The position that they had no knowledge of that death was strongly contested by the respondent who stated that they were fully aware of the same. With due respect to the applicants, I think the applicants aim to mislead the court unreasonably because the records are very clear that the deceased passed away on 14th September, 2021 as reflected in the affidavit and the proceedings before the trial tribunal. It will not be correct to seek extension of time relying on the argument that the delay was caused by probate procedures. The process of probate ought to start immediately after the death of Alinikisa Ngundama, it cannot be said that such death was not known to the advocate. The advocate act basing on the instructions of the client as rightly submitted by the respondent, the delay was due to the fault of the applicants. The applicants lacked due diligent



to complete probate procedures; such reason of delay cannot guarantee grant of extension of time.

The second reason advanced by the applicants in seeking extension of time was illegality of the impugned judgment. The applicants submitted that the lower tribunal's records are tainted with illegalities on point of law which can be raised at any stage. The points of law are based on *locus standi* and there were two judgments on the same application No. 85 of 2014 and the application was filed out of time. It was further submitted by the applicants that the illegalities were apparent on the face of record. The law is trite that any illegality apparent on the face of the record constitutes good cause to grant extension of time as ruled in the case of **Robert Hilima vs. The Republic** Criminal Appeal No. 42 of 2019, which was cited in page 5 -7 in the case of **Hassan Ramadhan vs. The Republic**, Criminal Appeal No. 160/2018 Court of Appeal at Tabora. The cases above are criminal cases but the principles about good cause are the same in cases be it criminal or of civil nature.

On the point of illegality, the respondent submitted that the applicants have failed to state the illegality on land Application No. 85 of 2014. They prayed the application be dismissed with costs. In rejoinder the applicant Counsel submitted that on the face of record in Application No. 85 of 2014 the respondent sued one of the applicants (Alinikisa Ngundama) for the

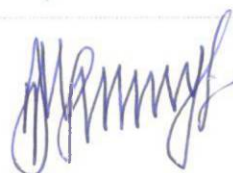


disputed property which did not belong to her but for her late son one Thobias Zakayo, but nowhere on the face of the records Alinikisa Ngundama was appointed as administratrix of the estate of the late Tobias Zakayo. It was the view of the applicants that he was sued without *locus standi* as requirement of the law that an administrator can sue and being sued on behalf of the deceased.

I will now determine the ground of illegality and the entry point is the position of the Court of Appeal in **Lyamuya Construction Co. Ltd Vs. Board of Registered Trustees of Young Women's Association of Tanzania**, Civil Application No. 147 of 2006 (Unreported), where the Court held that;

"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 drawn argument or process."

Therefore, guided by the above decision, it is trite that to constitute illegality, the alleged point of law must be apparent on the face of the record; as such, the question of double judgment and the illegality raised should not require a drawn argument or process to be discovered. This is one of the restrictions of what the illegality should be. The question is whether the issue raised by the applicant can constitute illegality to qualify for this court to grant an extension of time. The applicant in para 9 of her



affidavit pleaded illegality as a ground for extension of time. The paragraph stated;

That the tribunal's record are tainted with illegalities on the point of locus stand, there were two judgments on the same Application No. 85/2014 and an application was filed out of time.

I had time to peruse the records and noted the following; initially, on 30th June 2014 the respondent Stephen Y. Mwasambungu as an administratrix of Yohana Mwasambungu filed the original Application No. 85 of 2014 against the respondents Alinikisa Ngundama, Godfrey Chawe, Davis Hassan Mwakisi, Efeso John Mgaya and Isaack Mbafu. The application was heard and *ex parte* judgment was pronounced on 2nd June 2015 where the trial tribunal dismissed the suit with costs.

Throughout the records I have not seen an order setting aside *ex parte* judgment dated 2nd June 2015, instead I came across another *ex parte* judgment and decree dated 4th December 2020 between the same parties in land Application No. 85 of 2014. After the second judgment the applicant unsuccessful sought a right to be heard by applying to set aside the above *ex parte* order per tribunal judgment dated 17th October 2021. This judgment and decree dated 17th October 2021 is the impugned judgment in this application which is presided by two *ex parte* judgments. One important thing to note is that, in the first judgment Stephen Y. Mwasambungu is identified as the appellant and Alinikisa Ngundama and



4 others are respondents. In the second judgment Alinikisa & 3 others are cited as applicants and Stephen Yohana Mwasambungu as the respondent.

In paragraph 9 of the applicants' affidavit among the reasons of advancing the ground of illegality is about two judgments and time limitation. I think the problem of the two judgements in the records as I tried to narrate hereinabove may only be cleared through appeal against the impugned judgment. The appeal will avail the applicants a right to be heard. Therefore, an allegation of two judgments is an illegality which deserves the attention of the Court to ascertain its authenticity. It is in this regard that in **VIP Engineering and Marketing Limited and Two Others v, City Bank Tanzania Limited**, Consolidated Civil Reference Nos. 6, 7 and 8 of 2006 (unreported) it was succinctly stated that: -

"It is settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under Rule 8 of the Court of Appeal Rules regardless of whether or not a reasonable explanation has been given by the applicant under the rules to account for the delay"

Moreover, in **Kashinde Machibya v. Hafidhi Said**, Civil Application No. 48 of 2009 (unreported) it was stressed that: -

"Bearing in mind that it is now established law in this country that where a point of law involves the illegality of the decision that by itself constitutes sufficient reason to grant an extension of time... even if the appellant's appeal is out of time, there is no other option but to grant extension of time"



Applying the above quoted sound observations of the Court in the circumstances of this application, I am of the settled opinion that although the applicant has not sufficiently accounted for the period of delay, the issue of the alleged illegality of the decision to be impugned suffices to move me to grant her extension of time.

Having so stated, I find and hold that, the applicants have managed to establish the illegality as a good cause for extending time for him to file the intended appeal. As a result, the application is granted for the records to be cleared.

Dated at Mbeya this 10th day of March 2023.




D. P. Ngunyale
Judge