

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

MISC. LAND APPLICATION No. 22 OF 2022

*(Arising from the Land Appeal No. 01 of 2019 of the High Court of Tanzania
Originating from Land Appeal No. 02 of 2018 of the District Land and Housing Tribunal of
Chato at Chato)*

SALOME PASCHARY----- APPLICANT

VERSUS

ATHUMAN MABUNDUGU MKWABI-----RESPONDENT

RULING

Last Order date: 28.04.2023

Ruling Date: 05.05.2023

M. MNYUKWA, J.

The applicant Salome Paschary prays that I invoke my discretionary power to grant her extension of time to file a notice of appeal to the Court of Appeal against the decision of this Court in Land Appeal No 01 of 2019 whose decision was delivered on 14/09/2020. She brought her application under Rule 10 of the Court of Appeal Rules, R.E 2019, section 11(1) of the Appellate Jurisdiction Act, Cap 141 R.E 2019 and section 14 of the Law of Limitation Act, Cap 89 R.E 2019. Her chamber application is supported by the affidavit deposed by herself.



The matter is briefly that, the application emanates from the disputes over a piece of land originated from the ward tribunal between the parties. The respondent in this application was dissatisfied with the decision of the ward tribunal and lodged his appeal to the District Land and Housing Tribunal who upon hearing the Appeal, upheld the decision of the ward tribunal. Aggrieved further, the respondent appealed to this Court against the decision of the 1st appellate tribunal decision among others on the ground that the evidence was improperly analyzed. Upon hearing the appeal, this Court allow the appeal, quashed and set aside the decision of the 1st appellate tribunal.

Following the decision of this court in Land Appeal No. 01 of 2019, the applicant found justice was not done on her part and filed a Miscellaneous Land Application No. 40 of 2021 which is an application for extension of time to file a review out of time. Unfortunately, the above application was dismissed with cost for being devoid of merits. In her processes to continue with a legal battle, the applicant filed the present application asking this Court as I have earlier on indicated, to extend time within which she could lodge the notice of appeal out of the prescribed time provided by the law.



The main reasons advanced by the applicant for extension of time has been averred under paragraph 4, 5 and 6 of her affidavit that, she was not aware and she was not informed when the Land Appeal No. 01 of 2019 was prosecuted for she did not engage or instruct the advocate namely, Demetris Mtete who appeared on the record to represent her to prosecute the above Land Appeal. She also complained that, she engaged advocate Yusuph M to appeal to the Court of Appeal, instead, the counsel lodged an application to file a review out of time and the same was dismissed for lack of merit. Finally, she raised a concern in her affidavit that she experienced financial difficulty that's why she failed to lodge the notice to appeal within time.

In a reply, the affidavit sworn by the respondent, Athuman Mabundugu Mkwabi challenged the application by averred that, the applicant did not show sufficient cause which prevented her to file a notice of appeal within time. Opposing the reasons for delay he averred that, the applicant was well informed and aware of the presence of Land Appeal No 01 of 2019 as she engaged the advocate to prosecute her case who was present when the decision was delivered on 14/09/2020 and that he was surprised that the applicant did not take any steps for about one year and a half.



On the issue of being misled by advocate Yusuph M who filed the wrong application to this Court, the respondent challenged it as he avers that, there is no proof to that effect. He also challenged the applicant's affidavit to be silent as the same did not state when she became aware of the existence and the decision of Land Appeal No. 01 of 2019. He added that, this Court dismissed the Miscellaneous Land Application No 40 of 2021 after satisfying that, the applicant was dully represented by Advocate Demetrius Mtete.

He finally opposed the applicant's ground of financial incapacity which prevented her to file a notice of appeal within time by encountered that allegation as the applicant was capable to engage the advocate, Yusuph M to prosecute Miscellaneous Land Application No. 40 of 2021 and that the present application was prepared by the applicant herself without any legal assistance. In his affidavit, the respondent stressed that, the applicant failed to account for each day of delay.

At the hearing, parties appeared in person, unrepresented and the application was argued orally. In her brief submissions, the applicant mainly reiterates what she deposed in her affidavit that, she was not aware of the existence of Land Appeal No 01 of 2019 and that she did not engage advocate Demetrius Mutete to prosecute her appeal and that it



is the financial constraints which prevented her to file a notice of appeal within time.

On his part, the respondent avers that, the applicant was aware of the case and she refused to receive summons and it is not true that she was not aware of the existence of Land Appeal No 01 of 2019.

Rejoining, the applicant prays for the application to be granted so as to get the right to be heard.

Having gone through the affidavit deposed by the parties herein and their respective brief submissions, the central issue for determination and consideration is whether sufficient reasons have been advanced to warrant the extension of time sought by the applicant.

I will determine the present application only on two grounds that stands in the applicant's affidavit which is illegality, as alleged that the applicant was not given a right to be heard and he was financially constrained which prevented her to lodge a notice to appeal within time.

The settled position of the law is that when it comes to granting an order for extension of time to do any act, the court has the discretion to grant based on the circumstance of each case when it is established that the delay was with a sufficient cause or else there was a point of illegality that impedes justice. See the case of **Benedict Mumelo vs. Bank of**



Tanzania [2006] 1 EA 227, **Tanzania Coffee Board v Rombo Millers Ltd**, Civil Application No 13 of 2015 and **Yazid Kassim Mbakileki v CRDB (1996) Ltd Bukoba Branch & Another**, Civil Application No 12/04 of 2018 to mention a few.

It is also a settled position of the law that for an application for extension of time to do a certain act to be granted, the applicant has to account for each day of delay. This has been said in the case of **Juma Shomari v Kabwere Mambo**, Civil Application No 330/17 of 2020 CAT at Dar es Salaam where it was held that:

"It is settled law that in an application for extension of time to do a certain act, the applicant should account for each day of delay and failure to do so would result in the dismissal of the application."

In fact, it is a trite law that even a delay of a single day it should be accounted for as it was held by the Court of Appeal in the case of **Dar es Salaam City Council v Group Security Co. Ltd**, Civil Application No 234 of 2015 CAT at Dar es Salaam where it was stated that:-

"... The stance which this Court has consistently taken is that an application for extension of time, the applicant has to account for each day of delay."



To begin with, I will determine the point of illegality as the applicant claimed that she was not given a right to be heard. It is a settled law that for the claim of illegality to stand as a ground of extension of time, the same has to be seen apparent on the face of the record. This has been stated in the plethora of authorities including the case of **Hassan Abdulhamid vs Erasto Eliphase** Civil Application No.402 of 2019.

Insisting, in the case of **Ngao Godwin Losero vs Julius Mwarabu**, Civil Application No. 10 of 2015, the Court of Appeal of Tanzania observed as follows when the issue of illegality was raised:-

"In our view, 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 measures to put the matter and the record straight"

The Court has further reaffirmed the stated stance in **VIP Engineering and Marketing Limited and Three Others v. Citibank Tanzania Limited**, Consolidated Civil Reference No. 6, 7 and 8 of 2006 (unreported) wherein it was clearly stated: -

"It is, therefore, settled law that a claim of the illegality of the challenged decision constitutes sufficient reason for extension of time under rule 8 regardless of whether or not a reasonable



explanation has been given by the applicant under the rule to account for the delay"

Additionally, in **Lyamuya Construction Company Limited v Board of Trustee of Young Womens Christian Association of Tanzania**, Civil Application No 2 of 2010, it was held that:

"Since every party intending to appeal seeks to challenge a decision either on points of law or facts it cannot in my view be said that in valambia's case, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right be granted extension of time he applies for one. The Court there emphasized that such a point of law must be 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 will be discovered by a long drawn argument or process."

Going to the records, the applicant alleged that, there was a point of illegality of the impugned decision to be challenged as she was not afforded the right to be heard as she did neither engaged nor instructed the advocate named Mr. Demetris Mtete to prosecute Land Appeal No. 01 of 2019.

At the outset, I should state that the applicant's affidavit falls short of truth for this Court to believe that she did not engage Mr. Demetris



Mtete to represent her in Land Appeal No 01 of 2019 as the available record which is the impugned decision sought to be challenged shows that, in prosecuting the appeal, the applicant was represented by Demetris Mtete who argued the appeal and he was present when the decision was delivered as it is reflected on page 1 and 2 of the impugned decision. As the court records bear that testimony, the same must be trusted.

As it is settled, it is a trite law that court records are deemed authentic and cannot be easily impeached. In the case of **Hellena Adam Elisha @ Hellen Silas Masui vs Yahaya Shabani & Another**, Civil Application No. 118/01 Of 2019 referred to the case of **Halfani Sudi v. Abieza Chichili** [1998] TLR 527 it was held that:-

- "(i) A court record is a serious document. It should not be lightly impeached.*
- (ii) There is always a presumption that a court record accurately represents what happened.*

It is also wondering if really the applicant did not engage advocate Demetris Mtete to prosecute Land Appeal No. 01 of 2019 on her behalf, how does he became aware of the existence of that Appeal and for whose interest Mr. Demetris Mtete prosecute the case if he was not engaged. The law is settled that if the affidavit mentions another person, then the



person mentioned should swear an affidavit as it was stated in the case of **Benedict Kiwanga v Principal Secretary Ministry of Health**, Civil Application No 31 of 2000 and **NBC Limited v Superdoll Trailer Manufacturing Company Ltd**, Civil Application No 13 of 2002. In the same line, this Court expects to see the supplementary affidavit of Mr. Demetris Mtete to support the applicant's assertion.

Again, if at all Mr. Demetris Mtete was not engaged by the applicant, why the applicant did not report that misconduct to the disciplinary machinery to which Mr. Demetris Mtete belonged for them to take appropriate action. Since the applicant's affidavit is silent to that effect, it is very difficult for this Court to believe that the applicant did not engage Mr. Demetris Mtete to represent her to prosecute the appeal.

For that reason, this Court is of the view that, the applicant failed to prove that there is a point of illegality on the impugned decision sought to be challenged and therefore this reason lacks merit and it is hereby dismissed.

On the issue of the financial incapacity of the applicant which prevented her to take an appropriate step in law to lodge a notice of appeal within time, the same also needs to be proved by the applicant. Apart from the Land Appeal No. 01 of 2019 to be prosecuted by the



advocate as the records bear testimony, the applicant also engaged an advocate to prosecute Miscellaneous Application No. 40 of 2021 as it is shown on paragraph 6 of the applicant's affidavit. Again as it was rightly averred by the respondent in his affidavit, the applicant failed to prove financial incapacity since the present application was prepared and filed by herself as shown in page 3 of the Application. For that reason, I find that the applicant did not demonstrate on how financial incapacity prevented her to lodge the notice to file appeal within time, and therefore, this reason is not merited too.

Finally, as it was observed by the respondent, the applicant failed to state in her affidavit when she became aware of the decision in Land Appeal No 01 of 2019 and therefore, she has failed to account for each day of delay as it is required under the law.

All said and considered, It is my firm view that the applicant has failed to give sufficient reason for this Court to exercise its unfettered discretion to grant an extension of time as prayed. I thus proceed to dismiss the application with costs.

Order accordingly.





M.MNYUKWA
JUDGE
05/05/2023

Ruling delivered in the presence of the applicant in person and the respondent's representative.



M.MNYUKWA
JUDGE
05/05/2023