

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(LAND DIVISION)**

**AT MOROGORO**

**MISC. LAND APPLICATION NO. 07 OF 2022**

*(Arising from the Decision of the District Land and Housing Tribunal for Morogoro, at Morogoro in Miscellaneous Land Application No. 67 of 2013)*

**BETWEEN**

**MSAFIRI MAFUNG'A MBACHO.....APPLICANT**

***VERSUS***

**NATIONAL MICROFINANCE BANK PLC..... 1<sup>ST</sup> RESPONDENT**

**IJ INTERNATIONAL LIMITED..... 2<sup>ND</sup> RESPONDENT**

**ISSA MZANGE ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**12<sup>th</sup> June, 2023**

**CHABA, J.**

The applicant, Msafiri Mafung'a Mbacho is seeking for an extension of time within which to lodge his petition of appeal out of time against the decision of the District Land and Housing Tribunal for Morogoro, at Morogoro (the DLHT) in Miscellaneous Application No. 67 of 2013, which was delivered on 29<sup>th</sup> November, 2021.

The applicant has lodged this application under section 41 (2) of the Land Disputes Courts Act (CAP. 216 R. E, 2019] as amended by The Written Laws (Miscellaneous Amendment) Act No. 2 of 2016 and section 19 (3) of the Laws

of Limitation Act [CAP. 89 R. E, 2019]. Above all, the application is supported by an affidavit sworn by the appellant himself. On their party, although the respondents were duly served with the Chamber Summons none of them filed a counter affidavit to oppose the application.

When the application was due for hearing, the applicant and the 3<sup>rd</sup> respondent appeared in persons, and unrepresented. The 1<sup>st</sup> and 2<sup>nd</sup> respondents did not show up, hence hearing of the application proceeded in their absence.

Arguing in support of the application, the applicant submitted and urged the Court to enlarge him time within which he can be able to file his appeal out of time. He further prayed the Court to adopt his affidavit and form part and parcel of his oral submission. He finally prayed for costs of the application and any other relief(s) this Court may deem fit and just to grant.

As hinted above, although the 3<sup>rd</sup> respondent did not file any pleading in terms of counter affidavit, yet he prayed the applicant's application be ignored or rejected on the following grounds: -

1. That, the judgment of the District Land and Housing Tribunal for Morogoro, at Morogoro was delivered on 29/11/2021 and the copy of judgment was ready for collection on 3/2/2022, and the applicant filed his application on 2/3/2022.
2. That, the applicant has refused to obey the decision of the District Land and Housing Tribunal because he is still maintaining ownership of the disputed land.



3. That, the applicant from 29/11/2021 is still possessing the disputed land. Based on the above grounds, the 3<sup>rd</sup> respondent concluded by praying the Court to condemn the applicant to pay costs of this suit.

In re-joining, the applicant accentuated that, on 12/12/2021 he wrote a letter to the DLHT for Morogoro requesting for a copy of judgment. He added that, he submitted the second letter on 3/01/2022. For these reasons, he prayed the Court to consider his application because he submitted the letters before the DLHT within reasonable time but the copy of the impugned judgment was supplied to him on 15/02/2022, hence the delay was not his fault.

Having heard the contending submissions of the parties and upon considering the application before me, the central issue for determination is, whether or not this application is meritoriously grantable.

Before going any further, it should be noted that failure to file counter affidavit as ordered by Court, means that respondent(s) does not contest the application. As a matter of procedure, the respondents were supposed to file their counter affidavits to oppose the application or otherwise. In **Asha Ramadhan Mwamba Vs Mselemu Ramadhan**, Misc. Land Application No. 219 of 2018, (unreported), HCT - Land Division, DSM; this Court was confronted with alike situation. Addressing the consequences of failure to file a counter affidavit, the Court held among other things that: -

*"The position of the law is that where a party fails to file counter affidavit, that means he has no objection to the application."*

Apart from the above holding of this Court, even if the present application is unchallenged, in my opinion, still the applicant is duty bound to prosecute and prove his application in line with the principle of law. In this regard, I find it necessary to consider at this juncture whether the applicant has been able to advance good cause to warrant this Court issue the orders sought for an extension of time.

On reviewing the applicant's application and the Court records, it is apparent that the judgement of the trial tribunal was delivered on 29<sup>th</sup> November, 2021. On 1<sup>st</sup> December, 2021, truly the applicant wrote a letter to the trial tribunal applying for the copy of judgment, so that could file the intended appeal in time before this Court. According to the record, the said letter was received by the trial tribunal on the very same date. Indeed, it has not been disputed by the 3<sup>rd</sup> respondent that the applicant was supplied with the copy of judgment on 3<sup>rd</sup> February, 2022.

However, in his oral submission the applicant asserted that he received the copy of judgment on 15<sup>th</sup> February, 2022 whereas under paragraph three of his affidavit, he averred that he received the said copy of judgment on 3<sup>rd</sup> February, 2022. I am alive to the settled law that, pleadings are the basis upon which the claim is founded and that parties are bound by their own pleadings. Therefore, if there is any evidence produced by either of the parties which is not supportive or is at variance with what is stated in the pleadings, the same must be ignored.



In the case of **Barclays Bank (T) LTD Vs. Jacob Muro**, Civil Appeal No. 357 of 2019, Court of Appeal of Tanzania sitting at Mbeya, the Court had the following to state: -

*"We feel compelled, at this point, to restate the time-honoured principle of law that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored – See: **James Funke Ngwagilo v. Attorney General** [2004] TLR 161. See also **Lawrence Surumbu Tara v The Hon. Attorney General and 2 Others**, Civil Appeal No. 56 of 2012; and **Charles Richard Kombe t/a Building v. Evarani Mtungi and 3 Others**, Civil Appeal No. 38 of 2012 (both unreported).*

From the above authority, it is therefore glaring that since parties are bound by their own pleadings, this means that neither the parties themselves nor the Court is allowed to depart from such pleadings except where the Court has granted leave to amend the requisite pleadings. Guided by the aforementioned precedents, on account of what is evident in the pleadings, in absence of any amendment in the pleadings, the assertion made by the applicant that he received copy of judgment on 15<sup>th</sup> February, 2022 this fact no doubt that it has been departed from what is contained in the pleadings and hence it deserves to be ignored as the same is at variance and incompatible

with the pleaded facts as it was elaborated in the case of **Barclays Bank (T) LTD VS. Jacob Muro** (supra).

Now coming to the present application, with reference to appeals from District Land and Housing Tribunals, under section 41 (2) of the Land Disputes Courts Act [CAP. 16 R. E, 2019], the law provides that; 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. [Bold is mine].**

Under section section 19 (3) of the Law of Limitation Act [CAP. 89 R. E, 2019], which ought to be cited as section 19 (2), the law states that; in computing the period of limitation prescribed for an appeal, **an application for leave to appeal**, or an application for review of judgment, the day on which the judgment complained of was delivered, and the period of time requisite for obtaining a copy of the decree or order appealed from or sought to be reviewed, shall be excluded. In the recent decision by the Court of Appeal of Tanzania in **Valerie Mcgivern Vs. Salim Farkrudin Balal**, Civil Appeal No. 386 of 2019, CAT sitting at Tanga, the Court had the following to state at page 11 of the typed Judgment that: -

*"...Suffice to say, section 19 (2) of LLA and the holding of the decision cited above reinforce the principle that computation of the period of limitation prescribed for an appeal, is reckoned from*



*the day on which the impugned judgment is pronounced the appellants obtains a copy of decree or order appealed by excluding the time spent in obtaining such decree or order..."*

In simple terms, the exclusion of time is automatic. It is not necessary for applicant to apply to the Court to make exclusion. The Court of Appeal of Tanzania both in the cases of **Registered Trustees of the Marian Faith Healing Centre @ Wanamaombi Vs. The Registered Trustees of the Catholic Church of Sumbawanga Diocese**, Civil Appeal No. 64 of 2006 (unreported) and **Valerie McGivern Vs. Salim Farkrudin Balal** (supra), have resorted to the effect that the exclusion of time is automatic, and I fully subscribe to this position of the law. For example, in the case of **Registered Trustees of the Marian Faith Healing Center @ Wanamaombi's** (supra), the Court observed that: -

*"...the period between 2/5/2003 and 15/12/2003 when the appellants eventually obtained a copy of the decree ought to have been excluded in computing time."*

Guided by the case laws cited above and in the light of section 19 (2) of the Law of Limitation Act (supra), it follows therefore that, the period between 29<sup>th</sup> November, 2021 when the judgment was pronounced and 3<sup>rd</sup> February, 2022 when the applicant eventually obtained a copy of decree, ought to be excluded in computing time limits. The period of limitation to institute an appeal,

according to the law is to say 45 days. Therefore, in this application computation of the period of limitation prescribed for an appeal, is reckoned from the day on which the applicant was issued with copies of judgment of the DLHT, that is 3<sup>rd</sup> February, 2022. Thus, as gleaned from the court records, this application for extension of time by the applicant was lodged on 2<sup>nd</sup> March, 2022 while the applicant still had an ample time of almost 18 days to lodge an appeal, He was still within time to lodge his appeal up to 20<sup>th</sup> March, 2022. It is now convenient to state at this juncture that this application for enlargement of time was lodged before this Court while it was totally premature, because the applicant had plentiful time to file the intended appeal as demonstrated above.

For the above reasons, it is my holding that this application is misconceived, unmerited and unmaintainable, henceforth it is hereby struck out in its entirety. Since the applicant, is now out of time to appeal, if he still wishes to pursue this matter, may apply for the extension of time to file the intended appeal according to the applicable laws. Each party bear its own costs. **It is so ordered.**

**DATED at MOROGORO** this 16<sup>th</sup> day of June, 2023.



M. J. CHABA

**JUDGE**

**16/06/2023**