

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
ARUSHA SUB- REGISTRY
AT ARUSHA

MISC. LAND APPLICATION NO. 122 OF 2022

(C/F Misc. Land application No. 84 of 2021, Originating from Land Appeal No. 49 of
2019 and Application No. 2 of 2013, Karatu District Land Tribunal)

YOSIA MANKALA 1ST APPLICANT

**JOSEPH MWANGARA [Suing as Administrator
of the estate of the late GEORGE KISSAY] 2ND APPLICANT**

VERSUS

**THE REGISTERED TRUSTEES OF
ELCT- NORTHERN DIOCESE RESPONDENT**

RULING

08th May & 17th July 2023

KAMUZORA, J.

The Applicants in this application are praying for extension of time within which to file an application to set aside dismissal order issued by this court in Misc. Land Application No. 84 of 2021 dated 13th June 2022. The application was brought by way of chamber summons under section 14(1) of the Law of Limitation Act Cap. 89 R.E 2019 and supported by joint affidavit deposed by Applicants herein. The Respondent filed counter affidavit contesting the application.

As a matter of legal representation, the Applicants enjoyed the service of Mr. Niclolaus Leon, learned advocate while the Respondent was ably represented by Mr. Qamara, learned advocate. Hearing of the application was by way of written submissions and parties complied to schedule.

In his submission in support of the application, the counsel for the Applicants adopted the affidavit in support of application but prayed that paragraph 14 of the affidavit be struck out as the same was not verified by the Applicants in their joint affidavit.

The counsel submitted that, the factor for consideration in exercising court's discretion to extend time is the existence of reasonable or sufficient cause. That, under the affidavit filed in support of application, two points were advanced by the Applicants to warrant this court to issue the order prayed for. He explained that when Misc. Land Application No. 84 of 2021 was dismissed on 13/06/2022 the Applicants were being represented by Duncan Oola, Advocate who did not enter appearance. That, it was until 28/07/2022 when the Applicants became aware of the dismissal order after inquiring on the status of the case.

That, from the time the order was issued to the time the Applicants became aware of the order, 15 days had already lapsed and until the present application was filed a total of 57 days had lapsed. He contended that the delay was not inordinate as the Applicants were diligent in bringing the current application.

The Applicants also raised issue of illegality of the decision of the District Land and Housing Tribunal which is intended to be challenged. The illegalities pointed is that, the trial tribunal had no jurisdiction as it was not properly composed as there were changes in assessors and no opinion of assessors were given hence vitiating the proceedings. To cement on his submission the Applicants' counsel cited the case of **Principal Secretary Ministry of Defence and National Service Vs. Devram Valambia** (1992) T.L.R 185.

Pointing at page 55, 57, 59, 62, 63, 64 and 72 of the typed trial court proceedings, the counsel for the Applicants added that there were different sets of assessors and the reason for the said change is unclear and that the date of reading the opinion of the assessor's was never set. For this, reference was made to the case of **Emmanuel Oshoseni Munuo Vs. Ndemaeli Rumishael Massawe**, Civil Appeal No. 272 of

2018 CAT at Arusha. It is the Applicants' prayer that the application be granted.

Contesting the application, the counsel for the Respondent submitted on the first issue of delay that the Applicants were unable to comply to a well settled principle which requires them to advance sufficient reasons for delay and account for delay for the court to grant extension of time. Reference was made to the case of **Lyamuya Construction Company Ltd Vs. Board of Registered Trustees of young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 CAT (Unreported).

Pointing at paragraph 6, 7 and 8 of the Applicants affidavit, it is the response from the Respondent's counsel that the reasons advanced by the Applicants is not sufficient for the court to grant extension of time. that they deponed that they went to Handeni to cultivate their farms leaving the case unattended. In his view that cannot be a good reason for extension of time as they did not act diligently in following up their case. On the argument based on inaction of Applicants' advocate, the counsel for the Respondent submitted that they failed to proof if there was proper instruction of the advocate and if action was taken against the defaulting advocate. He added that Applicant failed to account for

their inaction from 28/7/2022 to 26/08/2022 when the present application was made. Referring the case of **Interchick Company Limited Vs. Mwaitenda Ahobokile Michael**, Civil Application No 218 of 2016 CAT (Unreported), he insisted that the delay of even a single day has to be accounted for.

On the issue of illegality, the Respondent's counsel submitted that the same is misconceived. That, the Applicants are seeking to set aside ex-parte order in respect of Misc. Land Application No. 84 of 2021 which is an application for leave to appeal to the Court of Appeal in respect of Land Appeal No. 49 of 2021. That, in Land Appeal No. 49/2019 the issue of illegality was not among the issues for determination. That, even in Misc. Application No. 84/2021 which is application for leave together the memorandum of appeal attached, the issue of illegality was not among the issues raised. That, in this application, the Applicant has not attached an order of the court which could have been the subject of the application rather they attached proceedings of the tribunal in Application No. 2 of 2013. He insisted that illegality must be apparent on face of record and what constitutes illegality was well explained by the Court of Appeal in the case of **Abdul Issa Bano Vs. Mauro Daolio**, Civil Application No. 563/02/2017. In concluding the Respondent's

counsel urged this court to find that the Applicants have not shown any illegality in respect of Misc. Land Application No. 84/20211 thus, the application be dismissed with costs.

In a brief rejoinder, the counsel for the Applicants reiterated his submission in chief and added that since the matter was heard by different assessors and no opinion was read out to the parties, the application be granted as prayed.

In considering the above submissions and records in this case, the pertinent issue is whether the Applicants have advanced sufficient reasons for extension of time. The grant of extension of time is a matter of discretion of the court, the discretion which however must be exercised judiciously. In **Mbogo Vs. Shah [1968] EA 93**, factors were highlighted to assist the court in deciding to either grant or refuse to grant extension of time. It was held: -

*"All relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the **length of the delay, the reason for the delay/whether there is an arguable case on the appeal and the degree of prejudice to the defendant if time is extended**".* Emphasis provided

The Court of Appeal of Tanzania also formulated the guide lines to be considered in granting the extension of time in the case of **Lyamuya**

**Construction Company Limited Vs. Board of Registered Trustees
of Young women's Christian Association of Tanzania, Civil**

Application No. 2 of 2010 (Unreported). The court held that: -

"On the authorities however, the following guidelines may be formulated:

a) The Applicant must account for all the period of delay;

b) The delay should not be inordinate;

c) The Applicant must show diligence, not apathy, negligence or sloppiness in the prosecution of the action that he intends to take; and

d) If the court feels that there are other reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged."

In the case at hand the Applicants have relied on two reasons for the extension of time, one being the issue of inaction on the part of their advocate and the second reason is illegality of the decision of the trial tribunal which is intended to be challenged.

Regarding the first reason, the Applicants counsel demonstrated that when the Misc. Land Application No. 84 of 2021 was set for hearing the Applicants had instructed their advocate to proceed with the matter while they travelled to Handeni Tanga for farming. That, in their surprise they discovered that their advocate did appear on the date of hearing hence the matter was dismissed.

It is my considered view that, the attempt by the Applicants to throw the blame to their advocate cannot be accepted and it cannot on its own be a valid reason for the extension of time. In the case of **Omar Ibrahim Vs. Ndege Commercial Service Ltd**, Civil Application No. 83 of 2020 (Unreported) which was cited with approval in the case of **Mussa S. Msangi and another Vs. Anna peter Mkomea**, Civil Application No.188/17 of 2019 CAT at Dar es Salaam (Unreported), the court stressed that neither ignorance of the law nor counsel's mistake constitute good cause. The court further held that, lack of diligence on the part of the counsel is not a sufficient ground for extension of time.

Applying the principle in the above cited case, I find that whether there was negligence on the Applicants' advocates, that cannot constitute good cause to warrant this court to grant extension of time. It is also well settled position that parties are also bound to make follow up of their case and act accordingly. I do not agree with the argument by Applicants' counsel that the Applicants acted diligent in pursuing this case. The record indicates that there was non-appearance for the Applicants and their advocate for no good reason. The application was dismissed on 13/06/2022 but the present application was brought in court 26/08/2022 which is more than two months from the date of

dismissal. Although the Applicants claim that they became aware of the dismissal order on 28/07/2022, nothing was presented to justify their awareness to the existence of dismissal order. In my view, the Applicants were unable to account for delay. The Applicants have openly conceded that they delayed for a period of 57 days but have not been able to account for the delay of each day of delay. I wish to underline what was stated by the Court in **Dr. Ally Shabhay Vs. Tanga Bohara Jamaat** [1997] TLR 305 at 306 in underlining the overarching need to show necessary delays and great diligence in taking steps in applications of this nature. The court stated that,

"Those who come to court of laws must show unnecessary delay in doing so; they must show great diligence"

The argument by the counsel for the Applicant that they spent time withdrawing instructions from the previous advocate, engaging another advocate and preparing documents for filing is afterthought. I say so because that argument was raised in Applicants' rejoinder submission but it was not pleaded in the affidavit as required by the law. It is settled position that an application is proved by facts and evidence attached to the affidavit. The submission by advocate cannot form part evidence

thus, cannot prove fact which are not pleaded in the affidavit. I therefore find no merit on the first ground for delay.

Regarding the ground of illegality of the impugned decision, I agree with the counsel for the Respondent that the same cannot stand. The illegality raised by the counsel for the Applicants is that the trial tribunal was not properly composed as there were different sets of assessors and the reason for the change is unclear and no opinion of assessors. It is the Respondents argument that the issue of illegality was not raised by the Applicants in other proceeding thus, cannot be brought as ground for extension of time.

While I agree that illegality of the impugned decision can be a reason to be considered by the court in granting extension of time, I am reminded of the position that illegality must be in face of record and not that which should be discovered by long-drawn argument or process. The illegality raised in this application does not fall in the ambit of the above position. The Applicants' claim that the proceedings of the trial tribunal are tainted with illegality for there was change of assessors without reason or that no opinion was given, in my view, does not justify extension of time in this application.

I agree with the well-reasoned arguments advanced by the counsel for the Respondent. It is clear that the current application aims at enlarging time within which to file application to set aside the dismissal order of this court in Application No. 84 of 2021. That application was intended to seek for leave of this court to appeal to the Court of appeal against the decision of the High Court in Land Appeal No. 49 of 2019. The issue of illegality of the trial tribunal proceedings was not pointed out by the Applicants in both application for leave or the intended memorandum of appeal. Thus, the same cannot be raised as ground to extension of time to file application to set aside dismissal order for the application for leave to which illegality is not pleaded.

It must be noted that leave is sought to challenge the decision of the High Court and not the decision of the DLHT to which illegality is referred. The contention by the counsel for the Applicants that illegality can be raised at any stage as it touches issue of jurisdiction is baseless and does not embrace the clear set position that illegality has to be in the face of record. I therefore find this ground to have no merit.

In the final analysis, I find that the Applicants failed to demonstrate sufficient cause warranting extension of time to file application for

setting aside a dismissal order. In the upshot the application is devoid of merit and it stands dismissed with costs.

DATED at **ARUSHA** this 17th day of June 2023




D.C. KAMUZORA

JUDGE