

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

**(DAR-ES-SALAAM SUB REGISTRY)**

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 417 OF 2021**

*(Originating from Civil Case No. 361 of 2001)*

**JOACHIM ADOLF MANGILIMA NUNGU.....APPLICANT**

**VERSUS**

**CRDB BANK LIMITED..... 1<sup>st</sup> RESPONDENT**

**INTERNATIONAL LANGUAGE**

**ORIENTATION SERVICE LTD.....2<sup>nd</sup> RESPONDENT**

**RULING**

**S. M. MAGHIMBI, J:**

This is an application for enlargement of time to file a notice of appeal. The applicant intends to appeal to the Court of Appeal of Tanzania against the decision of this court (Hon. Kwariko, J (as she then was)), in Civil Case No. 361 of 2001 ("the suit"), a decision dated 27<sup>th</sup> October 2014.

The application is made under the provisions of Section 11(1) of the Appellate Jurisdiction Act, Cap 89 R.E 2019 and is supported by an

affidavit deponed by Joachim Adolf Mangilima Nungu, the Applicant herein, on the 20<sup>th</sup> day of August, 2021.

The application was disposed by way of written submissions. Before this court, the applicant was represented by Mr. Godrfey Ukong'wa, learned advocate while the first respondent was represented by Mr. Gerald G. Moshia, learned advocate.

Before going into the merits of otherwise of this application, a brief background is narrated. The applicant herein was the Plaintiff in Civil Case No. 361 of 2001 , filed against the two Respondents herein. On the 27<sup>th</sup> October 2014, the suit was struck out following an expiry of the scheduling order. Subsequent to the striking out of the suit, the applicant lodged a Land Case No. 362/2014 ("the subsequent suit") before the Land Division of the High Court. The subsequent suit was dismissed for being time barred on the 21/04/2017. Following the dismissal of the subsequent suit, the applicant herein, still eager to pursue his right, lodged a Misc. Land Case Application No. 409/2018 before the same Land Division of the High Court seeking extension of time so that he could lodge a fresh suit against the respondents herein. The Application was dismissed on the 21<sup>st</sup> May, 2021 on ground that the said extension of time should have been tabled before the Minister

then responsible for Constitutional and Legal Affairs. Following the dismissal of the application, the applicant has lodged the current application seeking to extend time so that he can refile the suit which is Civil Case No. 361 of 2001.

In his submissions to support this application, the main reason to justify extension of time was illegality allegedly seen in the document purported to be his consent to mortgage his property. He argued that the Respondent herein registered the said mortgage without his actual consent and that the modes and procedures used were illegal.

Mr. Ukong'wa further alleged that Civil Case No. 361 of 2001 got struck out by this Court during the big result now (BRN) session for a reason that the scheduling order of Civil Case No. 361 of 2001 had died a long time ago. He argued that the striking out of the suit denied the Applicant opportunity to enlarge time. Further that it was not until 21<sup>st</sup> May 2021 when he discovered that, there is an element of illegality involved in the decree of the trial judge who struck out his application vide Civil Case No. 361 of 2021 during big result now (BRN) session to the effect that an appeal is allowed in pursuit of order or decree terminating a suit during big result now (BRN) session. He supported his submissions by citing the case of; **Charles Zephania**

**Mwenesano vs Daniel Chuma, Civil Application No. 274 of 2015, CAT, (Unreported)** where the Court of Appeal had this to say:

*"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 of ascertaining the point and if the alleged illegality be established, to make appropriate measures to put the matter and the records right"*

He prayed that the application be granted.

In the reply, Mr. Mosha submitted that it is a fundamental principle of the law that the public interest demands that litigation must reach an end. He argued that the Applicant's application is incomplete for being supported by an affidavit of the different person not preferring this application as it appears the application to be instanced by G.S Ukongwa advocate while the affidavit in support of this application was sworn by the one Joachim Adolf Mangilima. That the circumstances makes a chamber application incompetent for not being supported by the proper affidavit and avers that this application deserves to be struck out as it was held in the case of; **Francis Eugen**

**Polycarp vs Ms. Panone & Co. Ltd, Misc. Civil. Application No. 2/2021, H.C Moshi at Moshi.** To support his argument, Mr. Mosha referred the court to Order XLIII Rule 2 of the Civil Procedure Code, Cap 33.

On the substance of the application, Mr. Msha submitted that it is trite law that the Court can only extend the time within which to file an appeal upon being satisfied that there are sufficient reasons for the delay advanced by the Applicant. he then argued that in this application, the Applicant's affidavit has not shown that the Applicant accounted for every day of delay. To buttress his argument, he cited the case of; **Lyamuya Construction Company Limited vs Registered Trustees of Young Women Christian Association of Tanzania, Civil Application No. 2/2010** where the Court outlined factors to be considered before granting the application of extension of time, including; (i) The Applicant has to state the cause of delay, (ii) The length of delay, (iii) Account for the delay, and (iv) The issue of law of sufficient public importance in the decision sought to be challenged.

He then submitted that through the wording of paragraph 17 of his affidavit, the Applicant claimed that illegality is seen in the

document purported to be his consent to mortgage. That the alleged paragraph means they need to employ another process to make sure that they find illegalities somewhere contrary to the need of it to be apparent on the face of the records. He hence argued that the Applicant has failed to meet any of the condition outlined for extending time. he prayed for the dismissal of the application with costs

In a short rejoinder, Mr. Ukong'wa submitted that the error on the affidavit of the applicant does not render the whole application invalid as it not fatal. That the error does not go to the root of the subject matter before the Court and can be corrected by the stroke of a pen since it does not occasion any damage to the Respondent. He cited the case of; **Dangote Cement Ltd vs ASK Oil & Gas Ltd, Misc. Commercial. Cause No. 5 of 2020** on page 16 of the ruling where the same position was held. The counsel went further to submit that being guided by the principle of overriding objective the pointed irregularity can be ignored and the Court

On the substance of the application, Mr. Ukong'wa submitted that based on what is stated in the affidavit of the applicant, good cause has been established to convince this Court to grant the relief sought.

Having gone through the respective submissions of parties, the Court has been tasked to determine one issue whether this application has merit to warrant the Court to grant the relief(s) sought. It is settled law that in exercising jurisdiction under section 11(1) of Cap 141 R.E 2019, which is discretionary, I have to be guided by agreed tale signs. These are the ' length of the delay, whether it has been explained away, diligence on the part of the applicant as opposed to negligence or sloppiness, and whether or not there is an illegality in the decision sought to be impugned. The case of **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), is very handy on this. '

Starting with the length of the delay when this court struck out the application for expiration of the scheduling order, the applicant had a clear avenue to refile the same in this court but instead. He opted to go forum shopping and lodged a subsequent at the Land Division. Following dismissal of the matter, he again went shopping to apply for extension of time through the Misc Application, an application which was dismissed and the court was clear that the extension should be tabled before the Minister.

At all this time, to this court's surprise, the applicant had not perused his own documents to have realized the alleged illegality that he is pleading now. Court of Appeal, in the case of; **Bushiri Hassan vs Latifa Lukio Mashayo, Civil Application No. 3 of 2003, CAT,** (Unreported) The Court had this to say;

*"...Delay of even single day has to be accounted for, otherwise there would be no point of having rules within which certain steps have to be taken" [Emphasis is mine]*

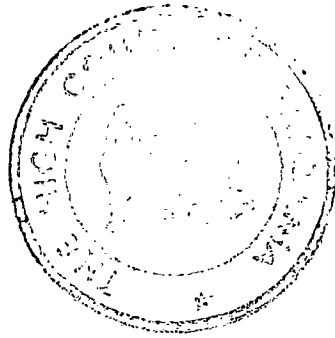
For the case at hand, it took him more almost 20 years to realize what he wanted in court and now he wishes the court to believe the sudden strike of truth which took 20 years. What I find here is that the applicant is abusing court processes by going forum shopping to delay the ends of justice by obstructing the mortgagor to proceed to realize her rights.

For the stated reasons, the applicants has failed to convince the court on his reasons for the delay to warrant time being extend to him to lodge an appeal. After all the decision of this court struck out the suit which means it did not finally determine the rights of the parties to justify an appeal. The applicant had a chance to refile his case and he opted for the land case which after its failure, he is abusing the



process by seeking this extension of time. The courts cannot entertain unserious litigants hence the application before me is devoid of merits and it is hereby dismissed with costs.

**DATED** at **DAR ES SALAAM** this 24<sup>th</sup> day of **April** 2023.



A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above a dotted line.

**S. M. MAGHIMBI**

**JUDGE**

