

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

MISCELLANEOUS LAND APPLICATION NO. 29 OF 2022

(Arising from the High Court of Tanzania, Land Division in Land Case No. 94 of 2013)

PRAVINCHANDRA GIRDHARLAL CHAVDA..... APPLICANT

VERSUS

YASMIN NURDIN YUSUFALI..... RESPONDENT

RULING

12th July & 10th October, 2023

BWEGOGGE, J.

The applicant herein has lodged an application for an extension of time to file a notice of appeal to the Court of Appeal of Tanzania against the judgment and decree in land case number 94 of 2013 delivered on 04th September, 2015. The application is brought under the provision of section 11(1) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] and supported by the affidavit of the applicant.

The background of this case is eventful one. For the interest of brevity, the facts may be recounted as follows: The applicant herein is a lawful owner of the suit land on Plot No. 263 Mbezi Beach, Kinondoni District in Dar es Salaam. Allegedly, the suit land is in unlawful possession of the respondent herein. In 2013, the applicant instituted Land Case (No. 94 of 2013) against the respondent in this court for recovery of his property. This court dismissed the case on technical ground (for the reason of discrepancies of the applicant's names in respect of the disputed title deed *vis-a-vis* the court record). The applicant re-instituted the case (Land Case No. 128 of 2017) in his proper names as they appear in the disputed title deed. The respondent objected the proceedings on point of law on the ground that the matter was *res judicata*. The objection was sustained and the suit was consequently dismissed.

Undaunted, the applicant filed an appeal (Civil Appeal No. 165 of 2019) in the Apex Court. The Apex Court, likewise, had the opinion that Land Case No. 128 of 1917 re-instituted by the applicant was *res judicata*. Consequently, the appeal was dismissed. Promptly, the applicant lodged an application (Misc. Land Application No. 191 of 2022) for the extension of time to lodge notice of appeal out of time with intention to appeal against the decision of this court in Land Case No. 94 of 2013. The

application was granted. When the applicant requested the court documents for preparing the record of appeal, the deputy registrar found that the extension was granted by the High Court Land Division whereas the main suit was concluded in this court. Hence, she refrained from issuing the record of appeal and instructed the applicant to apply for a fresh extension order in this court. The applicant complied with the instruction of the deputy registrar; hence, this application.

The applicant is represented by Messrs Abdallah Gonzi and Frank Mushi, learned advocates, whereas the respondent has the services of Ms. Arwa Yusufali, learned advocate.

Mr. Gonzi, the applicant's counsel, opened his submission in chief by acknowledging the settled principle in this land that the application for extension of time may only be granted for sufficient cause shown by the applicant. That based on the principle propounded in the case of **Lyamuya Construction Company Limited vs. Board of Registered Trustees of Young Women's Christians Association of Tanzania**, (Civil Case 02 of 2010) [2011] TZCA 4, in granting the extension sought, this court would be guided by the following factors:

- 1. The applicant to account for the delay,*
- 2. The delay not to be inordinate,*

- 3. The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action he intends to take.*
- 4. If the court feels there are other sufficient reasons such as the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged.*

Further, the counsel opined that the applicant herein has been able to account for the delay and established illegalities in the impugned decision of this court in Land Case No. 94 of 2013. That the facts deposed in the affidavit supporting the application herein account for the delay occasioned. That, principally, most of the period of delay occasioned herein is what in law termed as "technical delay," specifically, the time taken from the delivery of the original case (Land Case No. 94 of 2013) on 04th September, 2015 to the conclusion of appeal (Civil Appeal No. 165 of 2019) by the Apex Court on 05th April, 2022 whereas, on 27th April, 2022 the application for extension of time to file notice of intention to appeal in respect of the original suit was lodged in court. This being the 1st phase of the period of delay. That the 2nd phase of the period of delay, commenced on 27th April, 2022 to the grant of extension of time sought for filing of notice of intention to appeal on 05th October, 2022 and ended on 17th October, 2022 when the applicant filed the intended notice within 14th days of extended time. That the 3rd phase of the period of delay

accounted commenced from 17th October, 2022 to 25th November, 2022, when the application herein was filed.

Further, the counsel submitted that before filing this application, they requested the certified court documents which were necessary to support the application herein which were provided on 17th November, 2022 whereas on 25th November, 2022 this application was instituted.

In the same vein, the counsel charged that the applicant's affidavit has deposed facts establishing the existence of a point of law of sufficient importance, specifically illegalities of the decision sought to be appealed against. That the alleged illegalities are as follows: **First**, the fact that the trial judge when composing the judgment, *suo motu* raised a new issue pertaining to variation of the applicant's names and determined the same without affording the applicant an opportunity to be heard contrary to established principle of natural justice. **Second**, the fact that the decision of the Apex Court conflicts with the decision of this court in respect of the purported variations of the applicant's name in that the Apex Court opined that the variation was non-existent. **Third**, that the trial court failed to summon the defendant to appear in court for delivery of the *ex parte* judgment entered against her contrary to the law. On the above premises, the counsel prayed this application be granted.

In reply, Ms Yusufali contended that the facts deposed in the affidavit sworn by the applicant do not demonstrate sufficient cause for grant of extension sought. That the applicant failed to discharge his obligation to furnish good/sufficient cause as required by law; hence, the application herein should be dismissed with costs. The cases; **National Microfinance Bank vs. Augustino Wesaka Gidimara t/a Builders, Paints and General Supplies** (Civil Application 154 of 2015) [2016] TZCA 209; **Benedict Mumello vs. Bank of Tanzania**, Civil Appeal No. 12 of 2002, CA (unreported) and **Tanga Cement Company Limited vs. Jumanne D. Masanga** and Another, Civil Application No. 06 of 2001, CA (unreported) were cited to buttress her point.

In rejoinder, the counsel for the applicant reiterated his previous stance that the applicant has furnished good grounds for grant of extension sought; hence, the application should be granted.

The issue for determination is whether the application herein is merited.

The provision of section 11(1) of the Appellate Jurisdiction Act enjoins this court with power to enlarge the time within which the applicant may lodge notice of intention to appeal. As rightly conceded by the counsel for the applicant, extension is only granted for good and, or sufficient cause to be furnished by the applicant. See the cases; **The Attorney General vs.**

Emmanuel Mangakisi & 3 Others (Civil Case 138 of 2019) [2023] TZCA 63; **Abdallah Salanga & 63 Others vs. Tanzania Harbours Authority** (Civil Reference 08 of 2003) [2005] TZCA 19, **Sebastian Ndaula vs. Grace Rwamafa**, Civil Application 04 of 2014, CA (unreported); **National Microfinance Bank vs Augustino Wesaka** **Gidimara t/a Builders, Paints and General supplies** (supra), **Benedict Mumello vs. Bank of Tanzania**, (supra) and **Tanga Cement Company Limited vs. Jumanne D. Masanga and Another**, (supra).

As rightly submitted by the counsel for the applicant, in gauging whether sufficient causes for grant of extension have been demonstrated, the factors to be looked into are whether the applicant accounted for the delay and the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged, among others. See the cases; **Lyamuya Construction Co. Ltd.** (supra), **Osward Masatu Mwizarubi vs. Tanzania Processors Ltd.**, Civil Application No. 13 of 2010, HC (unreported) and **Omary Shaban Nyambu vs. Dodoma Water & Sewarage Authority** (Civil Application 146 of 2016) [2016] TZCA 2024.

In accounting for the delay, the submission made by the applicant's counsel and record of this case entails that the period of delay is categorized in three-phases. **First**, is the period from the delivery of the original case (Land Case No. 94 of 2013) on 04th September, 2015 to the conclusion of the appeal (Civil Appeal No. 165 of 2019) by the Apex Court on 05th April, 2022 of which was referred to as *technical delay*. I subscribe to the assertion by the applicant's counsel in that it is settled law that the period spent in court prosecuting a case which would otherwise be struck out on technical reason, amounts to technical delay which is excusable. See the cases of **Fortunatus Masha vs. William Shija & Another** [1997] TLR 154; **Shayo vs. Consolidated Holdings Corporation (as Official Receiver of Tanzania Film Company Limited** (Civil Application 366 of 2017) [2018] TZCA 252; **Elly Peter Sanya vs. Ester Nelson** (Civil Appeal 151 of 2018) [2020] TZCA 157 and **Bank M (Tanzania) Limited vs. Enock Mwakyusa** (Civil Application 520 of 2017) [2018] TZCA 291. The applicant having filed an incompetent appeal and duly penalized by a struck-out order, the same cannot be used yet again to determine the timeousness of applying for filing the fresh appeal.

Secondly, the 2nd phase ranges from 27th April, 2022 when the application for extension of time to file the notice of intention to appeal in

respect of the original suit was lodged in court to 05th October, 2022 when the application was granted. This phase was duly accounted for. **Thirdly,** the 3rd phase of the period of delay commenced on 17th October, 2022 to 25th November, 2022, when the application herein was filed. The time extended by this court in which the applicant was supposed to file notice of intention to appeal expired on 19th October, 2022. Thereafter, while the applicant consulted the deputy registrar for the record of appeal, he was instructed to commence fresh application for extension on ground that the previous extension order was procured from a different registry. The counsel submitted in court that before filing this application, they requested the certified court documents which were necessary to support the application herein which were provided on 17th November, 2022 whereas on 25th November, 2022 this application was instituted. Taking into account the chain of events in the circumstances of this case, admittedly, the time taken by the applicant to lodge the application herein following the instruction of the deputy registrar, regardless of the validity of the instruction, is not inordinate. It suffices to point out that the applicant has accounted for the period of delay to take the appropriate legal action.

Further, I would add that the applicant herein has always been on his toes taking legal actions in pursuit of his right. It is likewise settled principle in this land that diligence in prosecuting a case, is yet a sufficient ground for the extension of time. I prefer to borrow a leaf in the case of **Mumello vs. Bank of Tanzania** [2006] 1 EA 227, the Apex Court held that:

".....applying for copies of proceedings and judgment within such a short time from the date of judgment, and later making a follow up by way of reminder and finally lodging the application immediately after being supplied with the same, depicts diligence on the part of respondent."

In tandem to the above the applicant's counsel charged that the decision of this court sought to be challenged is tainted with illegality. Among others, it was charged that the trial judge when composing the judgment, *suo motu* raised a new issue pertaining to variation of the applicant's names and determined the same without affording the applicant an opportunity to be heard contrary to establishing principle of natural justice. Unarguably, it is settled law in this land that a denial of the right to be heard in any proceeding would vitiate the proceedings. See the cases of **DPP vs. Sabina Tesha & Others** [1992] TLR 237, **Zuberi Mussa vs. Shinyanga Town Council** (Civil Appeal 03 of 2007) [2008]

TZCA 16 and **ECO – TECH (Zanzibar) Limited vs. Government of Zanzibar**, ZNZ Civil Application No. 01 of 2017, CA (unreported), among the plethora of decided cases in this respect.

Undeniably, in our jurisdiction, it is settled law that illegality of the decision sought to be challenged constitutes sufficient cause for extension of time whereas the court is obliged to extend the time for ascertaining the alleged illegality and take appropriate measure to put the record right, if the allegation is ascertained. See the cases: **Principal Secretary, Ministry of Defence & National Service vs. Devram Valambia** [1992] TLR 185; **VIP Engineering and Marketing Limited & Three Others vs. Citi Bank Tanzania Ltd.**, Consolidated Civil Reference Nos. 6,7, and 8 of 2006 CA (unreported) and **Kalunga and Company Advocates vs. National Bank of Commerce** [2006] TLR 235, among many others.

Having scrutinized the impugned decision of this court, I find that the alleged illegality is apparent on the face of the record. It patently glaring in the impugned decision that the trial judge when composing the judgment, *suo motu* raised a new issue pertaining to variation of the applicant's names and determined the same without affording the applicant an opportunity to be heard contrary to establishing the principle

of natural justice. I am satisfied that the allegation of illegality made by the applicant's counsel in this case has substance.



For the reasons I endeavoured to give herein above, I find that the applicant has demonstrated sufficient cause for grant of extension sought. The same has accounted for the whole period of delay and likewise demonstrated the point of law of sufficient importance to warrant extension of time in which to file the notice of appeal against the impugned decision of this court.

That said, I hereby grant the application herein. The applicant to lodge the intended notice of appeal within 14 days.

I make no order as for costs.

So ordered.

DATED at DAR ES SALAAM this 10th day of October, 2023.

O. F. BWEGOGGE
JUDGE