

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM SUB REGISTRY)
AT DAR ES SALAAM
MISC. CIVIL APPLICATION NO. 592 OF 2022**

JAYANDER GULABCHAND	1ST APPLICANT
CHANDRAKANT GULABCHAND CHOCHAN	2ND APPLICANT
DEEPAK GULABCHAND CHOCHAN	3RD APPLICANT

VS

SALIM SAID SALIM	1ST RESPONDENT
THE COMMISSIONER FOR LANDS	2ND RESPONDENT
THE REGISTRAR OF TITLES	3RD RESPONDENT
THE ATTORNEY GENERAL	4TH RESPONDENT

RULING

S. M. MAGHIMBI, J:

This application is for extension of time to lodged under the provisions of Section 11 (1) of the Appellate Jurisdiction Act [Cap. 141 of 2019]. The applicant seeks to be granted extension of time so that they may file their notice of appeal out of time. The application was lodged by a Chamber Summons supported by an affidavit of Ms. Neema Kayuni, learned advocate representing the applicants. The respondents opposed the application by filing their respective counter affidavits.

I find it apposite to briefly state the historical background of the matter. As per the records, the applicants were aggrieved by the judgment

and decree of this court in Land Case No. 82/2016, a decision dated 01st day of March, 2021. A previous notice of appeal was filed by the applicants, a notice which was deemed withdrawn by the Court of Appeal on 01st September, 2022 following the applicants' failure to lodge an appeal within sixty days from when the notice of appeal was filed. On the 27th December, 2022 this application was filed. The application was disposed by written submissions. The applicant's submissions were drawn and filed by Ms. Kayuli, the first respondent's submissions were drawn and filed by Mr. Samson Mbamba, learned advocate. On their part, the 2nd to 4th respondent's submissions were drawn and filed by Mr. Gallus Lupogo, learned State Attorney.

Substantiating the reasons for the delay, Ms. Kayuni submitted that the reasons for the delay was based on pursuing to obtain copies of the order of the Court of Appeal whereas several follow ups were made without success. She argued that it was not possible to file this application without the said copies of records and that after being supplied with the copies of the orders, it was within 10 days that the applicant's Counsel filed this application. Moreover, Ms. Kayuni added that such delay was also contributed by poor health of the 2nd applicant.

Ms. Kayuni also submitted on the illegality of the impugned decision as one of the reasons to extend time. The points of illegality to this effect were mentioned to be; one, the High Court permitting the 1st respondent to sue under his personal capacity in matters involving Administration of a deceased Estate. Two, was on the Court allowing the 1st respondent as an administrator of estate of Remtulla Kara to delegate his administrator's duties through Power of Attorney. Three, permitting/ allowing Land Case No. 82 of 2016 to be tried/prosecuted by a person who was given power of attorney one Hussein Maulid Mpulaki who was also unfit for being sick due to drug addiction. Four, allowing the matter be prosecuted by Hussein Maulid Mpulaki who had no locus standi. Five, declaration that, the suit land in Land Case No. 82/2016 an estate of the late Remtulla under the administration of the 1st respondent disregarding an admission on record that the 1st respondent herein is a drug addict and failed to prosecute the case. The last one was on the trial court declaring the suit land in Land Case No. 82/2016 an estate of the late Remtulla under administration of the 1st respondent whilst the said case was instituted by the 1st respondent under his personal capacity.

To support the above contention she cited the famous case of **Principal Secretary, Ministry of Defence, National Service Vs**

Devram Vhalambia [1992] TLR 185, where the Court of appeal made a principle that illegality is a reason for extension of time. She also cited the case of **VIP engineering and Marketing Limited and 2 Others vs Citibank Tanzania Limited in Consolidated Civil Reference No. 6, 7 & 8 of 2006**, where the same position was held. She then emphasized that where illegality has been claimed the same deserves an extension of time so as an opportunity is given to explore in depth for the purpose of ensuring the matter is appropriately addressed and put right for the party's benefit and precedent as well. She concluded by a prayer that this application be granted.

In reply, Mr. Mbamba first pointed out that the decision was handed down three years ago that is 01/03/2021 and the application was filed on 27/12/2022. On the grounds for the delay, he started with the reason that the previous notice of appeal was filed on time. He submitted that there was an omission to apply and be served with an application for records. Having so omitted, he submitted, they were mandated to file the appeal within 60 days from the date of filing the notice of appeal. He argued that the omission disqualified them from obtaining a certificate of delay.

Mr. Mbamba went on submitting that it was the inaction by the applicants to file the appeal within 60 days from the date of the notice of

appeal, that led the Court of appeal, having satisfied that the applicants were no longer interested in the appeal, to deem the appeal withdrawn. That it is the withdrawal that has brought about this application. He pointed out that the applicants have delayed for 100 days after the withdrawal order of the Court of appeal, the Court of appeal ordered the withdrawal of the notice of appeal on 31/08/2022 and the ruling was read on 05/09/2022. From that date the applicants did not take any action until 27/12/2022.

Mr. Mbamba submitted that the delay has been addressed under paragraph 9, 10 and 11 of the affidavits. The same indicate that the first attempt by the applicants to apply for ruling withdrawing the notice dated 05/09/2022 was made on 15/12/2022, he however argued that the delay has not been sufficiently explained. That in their personal affidavits, the applicants also stated that the incident of what happened but still did not explain any delay apart from being hearsay, which was what their lawyers did not do. The applicant's Counsel also reveal that even if the applicants had exhibited or annexed to the affidavit a letter dated 15/12/2022 the follow up of the copies of the orders if any was only luxurious as it had nothing to do with the timely filing of the present application which only needed to account for delay to file the present application.

With regard to illegality, Mr. Mbamba submitted that it is the law that allegations on illegalities, if properly established, amounts to a sufficient cause for extension of time. This point is however, he submitted, is subscribed by case law in the case of **Lyamuya Construction Company vs Board of Registered of Young Woman's Christian Association of Tanzania**, where it was observed that not every error of law amounts to illegality. The cases of **Khadija Kuziwa vs Tanzania Portland Cement Co. Ltd**, Civil Reference No. 4 of 2018, **Chiku Harid Chionde vs Getrude Nguge Mtinga** (as an administrator of the Yohana Claude Dugu) Civil Application No. 509/2018 were also cited to cement on his submissions.

Concluding the submission, Mr. Mbamba stated that the illegalities as produced under paragraph 14 to be points of law are not necessarily illegalities and are not worth to be used for grant of extension of time as they do not apparently appear on the face of records and they are more of grounds of appeal to be contained in a memorandum of appeal. Therefore, from the submissions, the applicants seem to have failed to account for the delay and the points of illegalities are not worthy extension of time.

On his part, Mr. Lupogo submitted that the issue appearing on the applicant's part is that the 2nd applicant travelled to India and attended medical treatment hence failed to follow up on the issues relating to the proceedings and the existence of illegalities in the proceedings at the High Court. He argued that the submission on the illegalities alleged to exist in the decision of which has aggrieved them do not exist nor exhibit any legal importance. That the judgment shows that the pleadings were clear and that the 1st respondent was suing as an administrator of the Estate. The administration of estate is not a delegation of power it is a replacement of power and that the law has not prohibited administrator of estate from seeking assistance on a drug addict. He went on submitting that the power of attorney challenged was utilised for presentation of evidence and not suing, because the pleading reflects the name of the appointed administrator.

Mr. Lupogo went on submitting that the illegalities, if at all existed, related only to the order issued by the Court in respect of allowing another person other than the administrator of estate to testify on behalf of the appointed administrator of estate; and not in the entire judgment of the Land Case No. 82 of 2016. Thus, if an illegality exists, then it does not fall within the ambit of sets of illegalities which warrant a ground for

extension of time. The case of **Wambura N. J. Waryuba Vs The Principal Secretary Ministry of Finance and Another, Civil Application No. 320/2020** cited to support the argument above and the same emphasized that not all illegalities are grounds for extension of time.

He went on submitting that the order that is challenged to be among the illegalities did not prejudice the applicant and the merits of Land Case No. 82/2016. There is no harm on the applicant nor the merits of the case because evidence was received and the applicant had an opportunity to test the validity and weight of the testimony. Moreover, he added, the illegalities in such circumstance has to be on the face of records and not one which required long drawn arguments. He supported his argument by citing the case of **Hamisi Mohamed (as administrator of the state of the late Risasi Ngawe) Vs. Mtumwa Moshi (as administratix of the estate of the late Moshi Abdallah, Civil Application No. 407 of 2019.**

Having gone through the rival submissions of both parties, it is trite law in our jurisdiction that an extension of time lies within the discretion of the Court, a discretion which has to be exercised judicially. It is therefore important that when an applicant seeks for an extension of time,

they have to establish sufficient reasons to warrant the court's exercising of its jurisdiction. In the case of **Paradise Holiday Resort Limited Vs Theodore N. Lyimo, Civil Application No.435/01 of 2018** it was stated that:

"...but the Court consistently considers factors such as the length of the delay, the reasons for the delay, the degree of prejudice the Respondent stands to suffer if time is extended, whether the Applicant was diligent, whether there is point of law sufficient importance such as the illegality of the decision sought to be challenged".

The principle above was previously cited in the case of **Lyamuya Construction Company Ltd Vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010** where the court held that, for an extension of time to be granted the applicant must account for all the period of delay, the delay should not be inordinate, the applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take and if the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance or the illegality of the decision sought to be challenged.

Having alluded the above, it is now to see whether the applicant has established sufficient grounds for the delay. The applicant seek for an extension of time to file a notice of appeal with the Court of appeal after the prior notice having been withdrawn for being tainted with discrepancies. Taking a close look at the records, the notice was withdrawn from the Court of appeal on 5th September 2022 and this application was filed on the 27th December, 2022. The letter showing that the parties had claimed to be supplied with the relevant copies of the decision was filed in Court on 16th December, that is three months from the date of when the notice was withdrawn.

The applicant states to have been making follow-up of the order for purposed of filing this application. I have perused the records seeking for evidential proof on the claimed follow ups and have arrived to the knowledge that the same do not form part of the records. If the applicants had exercised due diligence of this matter the records ought to have revealed how diligent the applicant's act were on this matter. The reasons for the delay at this point are unsatisfactory.

With regard to illegalities as alleged by the applicant, the Court has stated in numerous cases that it is not at all times that illegality is a ground for extension of time. For illegality to qualify being a ground for extension of time, the illegality should be apparent on the face of record. In the case

of **African Marble Company Limited (AMC) Vs. Tanzania Saruji Corporation (TSC), Civil Application No. 8 of 2005 [2005] TZCA 87** and **Chandrakant Joshubhai Patel v. Republic, [2004] TLR 218**

the Court maintained a position that an illegality that is apparent on the face of record is an error that can be seen by one who reads and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions.

Visiting the illegalities as listed under page 4 of the affidavit and reiterated under page 4 of the written submission, I find that the said illegalities identified from the records call for the Court of appeal's intervention to ascertain them. For instance, there is an issue of capacity of the 1st respondent to sue, Mr. Lupogo also admitted the alleged illegality relating only to the order issued by the Court in respect of allowing another person other than the administrator of estate to testify on behalf of the appointed administrator of estate. The points raised qualify the attention of the Court of Appeal. I therefore borrow leaf in the holding of the Court of Appeal that once illegalities are claimed, then an extension of time stand to be granted even if the applicant has not accounted for the days of delay. In the case of **VIP Engineering and Marketing Limited and Three Others Vs Citibank Tanzania Limited,**

Consolidated Civil Reference No. 6, 7 and 8 of 2006 CA

(Unreported) the Court of Appeal patently stated:

"It is, therefore, settled law that a claim of 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."

Having so found the existing points worth the attention of the highest court of the land, I find merits in this application and consequently, I grant the application. Time is extended for the applicant to file their intended notice of appeal which shall be filed in this court within thirty (30) days from the date of this ruling. Costs to follow cause. It is so ordered.



Dated at Dar es Salaam this 11th September, 2023.

A handwritten signature in black ink, consisting of a stylized 'S' and 'M' followed by a horizontal line.

S. M. MAGHIMBI

JUDGE