

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
SHINYANGA SUB REGISTRY
AT SHINYANGA

MISC. LAND APPLICATION NO. 49 OF 2023

*(Arising from the Judgement of Land Appeal No.7 of 2021, before this Court,
Kulita J)*

LUMALA KATUNGEAPPLICANT

VERSUS

ADINA JACKSONRESPONDENT

RULING

12th February & 5th April 2024

MASSAM, J.:

The applicant herein is seeking for extension of time to file application for certification of point of law. The application is brought under section 11(1) of the Appellate Jurisdiction Act, Cap 141 RE 2019. The applicant's application is supported by an affidavit sworn by Frank Samweli the learned counsel for the applicant. The application is opposed by the respondent who filed a reply to the Affidavit sworn in by Adina Jackson the respondent in this application.

Briefly, the applicant and respondent were the appellant and the respondent respectively in land appeal No 7 of 2021 whose judgment was delivered on 30th June 2023 in favour of the respondent, the

applicant was aggrieved with the decision intend to appeal to the court of appeal. He failed to file application for certification of point of law for him to appeal to the Court of appeal within the prescribed time hence this application. The matter proceeded by way of written submission whereby both parties headed to the court schedule. The applicant had legal representation of Mr. Frank Samwel advocate and the respondent was unrepresented and thus was solemnly army.

Arguing for the application Mr. Frank submitted that the applicant failed to file his application within the prescribed time because he was sick. He averred that the parties had land matter which is land appeal No.7/2021 before this Court, the judgment entered by this court was on favour of the respondent, the same was delivered on 27/7/2023, there after the notice of appeal to the Court of appeal of Tanzania was filed through the service of MS Law Chambers.

After filing the notice of appeal, the applicant fell sick and became unconscious and was taken to the traditional healer for treatment. The applicant health became well on 28/8/2023. The applicant made follow up to his former lawyer to see if application for certification of point of law was filed, but he was informed that it was not filed as he was traced with no success and thus his former lawyer had no fund to file the

matter. Being informed so, the applicant did not relax he decided to engage the instant advocate who prepared the document for this application and thus on 31/8/2023 application for extension of time was filed. He argued this Court to allow the application as there legal erroneous in the impugned judgement worth determined by Court of Appeal of Tanzania. To substantiate the same, he cited the case of: **Lyamuya Construction Company Ltd vs Boards of Registered Trustee of Young Women's Christian Association of Tanzania, Civil Application No.2 of 2010 (CAT at Arusha)**

Mr. Frank further fortified that sickness is sufficient ground for extension of time. He referred this Court to the case of: **Lises Nhandala vs Nyanza Msomi, Misc. Land Application No.46 of 2023, (H.C Shinyanga registry unreported)**. He therefore prayed for the application to be allowed.

On the side of the respondent, submitted that the time limit for application of certification of point of law is neither provided by the Appellate Jurisdiction Act nor the Court of Appeal Rules, rather the law of limitation comes in place under item 21 part III of the Schedule of the Act, Cap 89 RE 2019 which provides for 60 days. He banked his argument with reference to the case of: **Rose Nestory Kabumbile vs**

Gibson Kabumbile, Civil Application No.127 Of 2021 (H.C – Mwanza Registry).

The respondent further added that the period to apply for certification on point of law was computed from July 1, 2023 until August 29,2023, when the period of 60 days expired. On 29 August 2023, when the deadline expired, the applicant was in good health and decided to withdraw instructions from the former advocate to the instant advocate who opted not to apply for certification of point of law instead he opted to apply for extension of time on 30/8/2023.

The respondent further argued that since the deadline for filing application for certification of point of law lasted on 29/8/2023, but the applicant filed application for extension of time on 30/8/2023. The applicant has failed to provide sufficient explanation for one day of delay. It is not mentioned as to what prevented him to file the application for certification of point of law before 29/8/2023. She also argued that, the applicant at the time was not sick why could not lodge his application. Therefore, the ground of sickness cannot hold water. She referred this Court to the case of: **Bushiri Hassan vs Latina Lukio Mashayo, Civil Application No. 3 of 2003 (CAT – unreported).**

Further the respondent fortified that, the applicant was supposed to present affidavit of his former advocate which would have detailed as to why he failed to lodge application for certification of point of law within the prescribed time. The absence of such affidavit entails that the applicant has failed to prove his case. She referred this Court to the case of **Frank Leonard Sanga vs Aneth Abdul Mhina, Misc. Civil Application No.310 of 2019 (HC Dar es salaam Registry).**

The respondent also alluded that the act by the applicant signify that he was negligence and failed to exercise his dully diligence on the count that, if his former advocate failed to proceed with the matter when the applicant was nowhere to be seen and when he came back the latter advocate informed him that he had no fund to process the application, the applicant decided to withdraw instruction to that advocate and assigned the recent advocate who prepared the instant application.

The issue for consideration is, at the time the applicant withdrawing the instruction to the former advocate, he was still in time to file application for certification of point of law, why he did not support with fund the former advocate to lodge the said application instead engaged other the recent advocate who prepared the instant

application. According to the respondent this was lack of seriousness and diligence and is against with the decision in the case of **Lyamuya Construction Company Ltd vs Boards of Registered Trustee of Young Women's Christian Association of Tanzania, Civil Application No.2 of 2010 (CAT at Arusha).**

On the issue of illegality, the respondent submitted that, it is sufficient ground for grant of extension of time without counting for day of delay. She referred to the cases of **VIP Engendering and Marketing Limited and Two Otherers vs Citibank Tanzania Limited, Consolidated Civil reference No.6,7 of 2006 (CAT)** and **the case of Tanesco vs Mufungo Leonard Majura and 15 Others, Civil Application No.94 of 2016 (CAT)**

She however argued that the illegality has to be in content and on apparent on the face of record. Also, the alleged illegality should not be discovered by the long drawn argument or process.

Looking to the case at hand there is no tainted illegality as complained by the applicant rather his own interpretation. Therefore, the alleged points of illegality cannot qualify to be sufficient reasons for this court to exercise its discretionally power to grant such extension of time. She referred to the case **of George Timothy Mwaikusa vs**

National Microfinance Bank Plc, Misc. Land Application No.41 of 2020 (HC- Dar es salaam). She therefore then pressed for the application to be dismissed with cost for lack of merit. There was no rejoinder to the effect.

I have thoroughly scanned chamber summons, affidavit, Counter affidavit and rival submission of both parties and the issue for consideration is whether this application has been brought with sufficient cause.

This being application for extension of time, the law is settled that applicant has to show sufficient cause or good cause for delay as it was held in the case of **Regional Manager, Tanroads Kagera r. Ruaha Concrete Company Ltd, Civil Application No. 96 of 2007, CAT** (unreported) and **Benedict Mumello v. Bank of Tanzania [2006] E.A 227** and that applicant is required to account for each day of delay and give sufficient reason for that delay.

There is a litany of cases to that effect. In the case of **Attorney General v. Mkongo Building and Civil Works and another, Civil application No, 266/16 of 2019**, the Court of Appeal formulated guidelines that may be considered in application for extension of time like the one at my hand. Criteria to be considered in application for

extension of time as formulated by the Court of Appeal in **Mkongo**

Building case, supra, are that:

"(a) the applicant must account for all the period of delay;

(b) the delay should not be inordinate;

(c) the applicant must show diligence, and 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 sufficient reasons, such as the existence of a point of law sufficient importance; such as the illegality of the decision sought to be challenged."

In the affidavit, applicant deposed that he failed to apply for certification on point of law as he was sick and when became aware the time for lodging application was already declined. Further the impugned decision of this Court contain illegality which need to be addressed by the Court of appeal of Tanzania.

I entirely agree with the submission of Mr. Frank that the law is well known that, sickness is a condition which is experienced by the person who is sick and that it is not a shared experience except for a sick person who is in a position to express her or his feelings. This is well elaborated in the case of **John David Kashekya Vs The Attorney General** civil application No 1 of 2012 (unreported). However, in order

for the sickness to be a sufficient cause the same must be sufficiently proved.

It is well known that sickness is a condition which is beyond human control as correctly argued by Mr. Frank and the cited case of: **Lises Nhandala vs Nyanza Msomi, Misc. Land Application No.46 of 2023, (H.C Shinyanga registry unreported).**

Nevertheless as I said before there must be satisfactory reasons and the same must be proved satisfactorily. This was fittingly explained in the case of **Emanuel R. Maira vs The District Executive Director of Bunda**, Civil Application No. 66 of 2010(unreported) that;

"Health matters in most cases are not the choice of a human being; cannot be shelved and nor can anyone beheld to blame when they strike."

Again, in the case of **Beatus Laurian Ndihayе versus Mariam Kitoela**, Miscellaneous Civil Application No.6 of 2021, the court held that;

" The applicant's only reason advanced is illness. I am well aware that as of late there are decisions which are to the effect that illness constitutes sufficient cause for extension of time. However, such illness must be

sufficiently proved. Looking at the affidavit filed in support of the application, the applicant has attached to the affidavit a letter from the traditional healer indicating that he was admitted at his place where he was receiving treatment and was later discharged after he was well. That traditional healer further proved his professionalism by attaching a copy of his Certificate of incorporation No. A.91041 issued on 29/01/2019. The reason advanced by the applicant suffices to be sufficient cause upon which this court can exercise its discretion"

In the present case, the applicant's affidavit was supported with annexure" FS-1" which is an affidavit of the Traditional Healer one Salamba Nkwaji Salamba, who firmly admitted that he received the applicant while sick on 28/7/2023 and he discharged him on 28/8/2023.

According to the applicant affidavit provides that when he was discharged, he went to his former lawyer and asked as to whether application for certification of point of law was filed. But he was informed it was not filed due to lack of funds and that he was nowhere to be seen. The applicant was angry and decided to withdraw instruction

from that advocate and assume instruction to Mr. Frank who prepared the instant application.

The instant application was filed before this Court on 31/8/2023, now the issue for consideration is, does the applicant had accounted for his delay?

It is correctly argued by the respondent that as per item 21 of part III of the Law of Limitation Act, provides for time limit for similar application to be 60 days. The impugned decision was delivered by this honourable court on 30/6/2023. Therefore, the 60 days lapsed on 30/8/2023, and the instant application was filed on 31/8/2023 and the applicant was discharged on 28/28/2023. Means there is delay of two days which not accounted for.

I associate myself with argument by the respondent that when the applicant was discharged from the traditional heller, he was still in time to file his application for certification of point of law before this Court. As to why he did not, the reason of seeking another advocate is not legal mandated. See the case of **Transport Equipment Ltd vs DP Valambia (1993) TLR 91.**

The law is settled that delay even single day, has to be accounted for. **See Bushiri Hassan vs Latina Lukio Mashayo, Civil Application No. 3 of 2003 (CAT – unreported).**

Therefore, with sickness ground the same is detailed by the applicant but there some days not accounted for especially when the applicant was discharged from his traditional heller, hence the grounds lack merit.

With illegality as ground for extension of time, in **VIP Engineering and Marketing Limited and Two Others VS. Citibank Tanzania Limited**, Consolidated Civil Reference No.6, 7 and 8 of 2006 (unreported) it was held:

"It is settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under Rule 8 (now Rule 10) of the Court of Appeal Rules regardless of whether or not a reasonable explanation has been given by the applicant under the Rules to account for the delay'.

The issue was also considered in the case of **Tanesco vs Mfungo Leornard Majura** and 15 Others, Civil Application No 94 of 2016, (Unreported), where it was stated:

"Notwithstanding the fact that, the applicant in the instant application has failed to sufficiently account for the delay in lodging the application, the fact that, there is a complaint of illegality in the decision intended to be impugned... suffices to move the Court to grant extension of time so that, the alleged illegality can be addressed by the Court'.

It is, however, significant to note that the issue of consideration of illegality when determining whether or not to extend time is well settled and it should be borne in mind that, in those cases extension of time was granted upon being satisfied that there was illegality on the impugned decision which needs attention of the court. The illegalities were explained. For instance, in **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1999] TLR 182, the illegality alleged related to the applicant being denied an opportunity to be heard contrary to the rules of natural justice. I also subscribe to the case of **Lyamuya**

Construction Company Ltd vs Board of Registered Trustees of Young Women's Christian Association of Tanzania(supra) when the Court of Appeal observed; -

*"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in **VALAMBIA'S** case, the court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one. **The Court there emphasized that such point of law must be that of sufficient importance and, I would add that it must also be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process"***

Now guided by those principles, the argument by Mr. Frank is notably not tangible, because for illegality to sound as ground for extension is only considered when the impugned decision contains that

illegality on the apparent face of it and that a person need not to draw long line to identify such illegality.

However, the argument that the learned judge violated of natural justice as the first appellate tribunal did for determining out of grounds of appeal without availing the opportunity to the parties to address on it. The complaint is about irregularity and not illegality. Similarly, the complained irregularity has not even pointed out by the applicant in the impugned decision. I find the averments by Mr. Frank is unfounded since he has failed to point out the alleged illegality.

Generally, the filing of the current application is squarely an abuse of court process as the court of law is now put into a gambling game of justice something which is dangerous in the administration of justice. To allow such an abuse, is to expose this Court to a legal ridicule. I will not allow it ever. Admittedly, illegality or otherwise in the impugned decision can by itself constitute a sufficient ground for an extension of time. This is in accordance with the principle in the **Principal Secretary Ministry of Defence and National Service vs. Devram Valambia**, (1992) TLR 185. However, for illegality to be the basis of the grant, it is now settled, it must be apparent on the face of the record and of significant importance to deserve the attention of the

appellate court and not one that would be discovered by a long drawn argument or process. [See for instance, **Lyamuya Construction Company Ltd vs. Board of the Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported)].

From the factual background of this application as has been exposed above, I am of the firm opinion that, this application is devoid of any merit and it is indeed an abuse of the Court process.

In the light of the above and in relation to the case at hand, it is clear that the applicant has failed to count for it, for him to have established sufficient cause. Also he failed to point out the alleged illegality.

For the foregoing, I find that the applicant has failed to provide sufficient cause of delay and further has failed to account for each day of delay. I therefore dismiss the application with costs for want of merit.

It is so ordered.



A handwritten signature in dark ink, appearing to read "R.B. Massam", is written over a circular stamp.

R.B. Massam

JUDGE

05/04/2024