

**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**MBEYA SUB- REGISTRY**

**AT MBEYA**

**MISC. CIVIL APPLICATION NO. 34 OF 2023**

*(Originating from Civil Appeal No. 6 of 2023 of the district court of Rungwe in Civil Case No. 2 of 2023 of the primary court of Rungwe district at Tukuyu)*

**GIDION MWAKASEGE .....APPLICANT**

**VERSUS**

**ZENA JOHN KILIMA .....RESPONDENT**

**RULING**

*Date of hearing: 24/4/2024*

*Date of ruling: 6/5/2024*

**NONGWA, J.**

The applicant by chamber summons made under rule 3 of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules G.N. 312 of 1964 and any other enabling provision of laws has moved this court for extension of time to lodge an appeal in Civil Appeal No. 6 of 2023 of the district court of Rungwe. The application is supported by an affidavit of the applicant and resisted by the respondent who dully sworn a counter affidavit.

The dispute between the parties has a snappy history, it started with an agreement to purchase the land measuring 3.5 acres located at Bulongwa village within Rungwe district, the applicant being the seller and the respondent purchaser. The respondent paid Tsh. 20,000,000/= as the purchase price of the land. After purchasing the respondent discovered that the land had a dispute which triggered him to claim refund of purchase money, in the course, the applicant refunded Tsh 10,000,000/= to the respondent and promised to pay the balance but in vain. This made the respondent to file Civil Case No. 2 of 2022 in the primary court of Rungwe district at Tukuyu. In that case the respondent won. Dissatisfied with the outcome of the case the applicant unsuccessfully challenged the decision in the district court of Rungwe vide Civil Appeal No 6 of 2023, the district court confirmed the judgement of the primary court. Still eager to overturn the decision of the two courts, the applicant was caught in the web of time limitation to file the appeal, hence the present application.

In the affidavit of the applicant, it is deponed that the judgment of the district court was delivered on 28<sup>th</sup> June 2023, while preparing to file the appeal he fell sick. It is further deponed that the judgment of the appellate court is tainted with illegalities **one**, the lower courts entertained the case without jurisdiction and **two**, the case was *res subjudice*.

When the matter was called for hearing, parties were represented by Mr. Ipyana Mwantoto and Luka Ngogo, both learned counsels for the applicant and respondent respectively. Hearing took the form of written submission.

In the submission Mr. Mwantoto opted to confine to the illegalities pleaded under paragraph 6 of the affidavit. On jurisdiction of the courts, it was submitted that the dispute related to ownership of land which cannot be resolved on normal civil courts. He cited the case of this court in **Masoudi Shilangonga vs Kmbangwa Rubengwa**, Civil Appeal No. 27 of 2020 to support the point.

In respect of the case being *res subjudice*, the counsel stated that there was another pending suit in the district land and housing tribunal between the parties which was substantially the same. Section 8 of the Civil Procedure Code Cap 33 R: E 2019 which deals with *res subjudice* suit and the case of **Philip Kimbwereza (Appointed Attorney of Anup Bhiku Jethwa) vs International Commercial Bank (Tanzania) Limited & Others**, Land Case No. 19 of 2020 in which the court declined to entertain a suit which was directly and substantially in issue and was pending in another court were cited.

Armed with the above, counsel for the applicant prayed the application to be granted.

Adversely, counsel for the respondent submitted that extension of time is in the discretion of the court and has to be exercised judicially in accordance with the rule of reasoning and justice. He stated that the applicant did not account each day of delay as he was late to file the appeal for more than 97 days from the date judgment was pronounced. On this point the case of **Bishiri Hassan vs Ratifa Lukio Mashayo**, Civil Application No. 192/20 of 2016 CoA was cited.

On the alleged illegalities in the impugned decisions, counsel for the respondent submitted that the claim in the trial court was for recovery of money arising from contract of sale of *shamba* and not possession or ownership of land, thus being a normal civil case as opposed to land ownership.

On the issue of *res subjudice*, it was contended that in the land tribunal the dispute is ownership of land and parties were different with those in this case. He added that in the primary court, cause of action is recovery or return of purchasing price. Counsel submitted that for the alleged illegality to sail application for extension of time, it has to be on point of law of sufficient importance, apparent on face of record and one

which cannot be discovered by a long-drawn argument or process. The cases of **Fatma Hussein Sharif vs Alikhan Abdallah**, Civil Application No. 536 of 2017 and **Lyamuya Construction Company Limited vs Board of Young Youth Christin Association**, Civil Application No. 2 of 2010 were cited to convince the court on that point.

Counsel for the respondent went on to stated that the alleged points are mere grounds of appeal in the decision, he prayed the application to be dismissed.

I have dispassionately considered the application documents and submission of the learned counsels. Before I proceed, I wish to state that it is trite law that an application for extension of time is entirely in the court's discretion to grant or refuse it. However, those discretionary powers must be judiciously exercised according to the rules of reason and justice, not personal whims. Although there is no universal definition of what constitutes good cause, in exercising such powers, the Court is required to consider the prevailing circumstances of the particular case guided by a number of 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 and whether there is a point of law of sufficient importance such as illegality of the decision sought to be challenged. See **Abdulrahman Mohamed Ally vs Tata**

**Africa Holdings T. Limited**, Civil Application No. 166 of 2021 [2023] TZCA 60 (24 February 2023[ TANZLII) and **Lyamuya Construction Co. Ltd vs Board of Registered of Young Women's Christian Association of Tanzania**, Civil Application 2 of 2010 [2011] TZCA 4 (3 October 2011; TANZLII).

In this application the applicant's reason for delay is pegged on illegality. Therefore, I will not deal with the submission of the respondent's counsel that the applicant did not account each day of delay. Regarding illegality in the decision as a ground for extension of time, it is a settled position in our jurisdiction that an alleged illegality if established, is sufficient to move the Court to extend time. The Court clearly stated this in the case of **Principal Secretary, Ministry of Defence and National Services v. Durvam Valambhia** [1992] TLR 387 held that;

*'In our view, when the point at issue is one alleging the illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and the record right'*

In this application under paragraph 6 of the affidavit applicant has alleged existence of illegality in the lower courts for lack of jurisdiction in the sense that the case was filed as normal civil suit while it is a land

dispute over ownership and that the matter was *res subjudice*. The respondent had contrary view that the case was not a land case over ownership rather based on cause of action for recovery of money.

From the contending arguments whether the court below had jurisdiction or not is a matter which cannot be decided in application for extension of time, that is the matter to be decided in the intended appeal in which parties will be given enough opportunity to argue for and against the points. In **Victoria Real Estate Development Limited vs Tanzania Investment Bank & Others**, Civil Application 225 of 2014 [2015] TZCA 78 (3 July 2015; TANZLII) the court stated;

*'... the Court cannot rule out at this stage that so long as then he was not a lawful purchaser. Certainly, deciding at this stage whether or not the illegality, if upheld, will be an exercise in futility may border closer to going into the merits of the application intended to be filed if time is extended.'*

Applying to above to the present application, the issue of jurisdiction of the court is so fundamental to which the court must satisfy first before it proceeds with the matter. In the circumstance of this application from the records of the application and argument of learned counsels, I find that the points raised are point of sufficient important which calls the

appellate court to have full hearing of the parties to decide them after placing all material necessary for the determination of the points.

For the foregoing reasons, I allow the application and the applicant is granted a period of thirty (30) days from the date of delivery of this ruling to file the appeal. Costs to follow events.



A handwritten signature in blue ink, appearing to read "V.M. Nongwa".

**V.M. NONGWA**  
**JUDGE**  
**6/5/2024**

DATED and DELIVERED at MBEYA this 6<sup>th</sup> day of May, 2024 in presence of the applicant in person and in absence of the respondent.

A handwritten signature in blue ink, appearing to read "V.M. Nongwa".

**V.M. NONGWA**  
**JUDGE**