

**IN THE HIGH COURT OF TANZANIA
SUB-REGISTRY OF GEITA
AT GEITA**

MISC. LAND APPLICATION NO. HC/GTA/LND/MLA/4445/2024

(Arising from the decision in Misc. Land Application No. 43 of 2018 at District Land Housing Tribunal for Geita delivered on 27 March 2020, Hon. KAPINGA, Chairman)

**MAJALIWA MAYOMBWA.....APPLICANT
VERSUS
MARRY MARTIN LUTALAMILA.....RESPONDENT**

R U L I N G

Date of last Order: 25/04/2024

Date of Ruling: 03/05/2024

K. D. MHINA, J.

This application has been preferred under section 41 (1) of the Land Dispute Courts Act, Cap 216 (R: E 2019)

The chamber summons is supported by the affidavit of Majaliwa Mayombya, the applicant, which expounds the grounds for the application.

The applicant, *inter alia*, is seeking for the following orders:

- (i) *That this Honorable Court be pleased to grant an order for an extension of time within which the Applicant be allowed to file an Appeal out of time in Land Application No.43 of 2018 from District Land and Housing Tribunal for Geita at Geita.*
- (ii) *Costs of Application.*

The applicant was represented by Mr. George Alfred, a learned advocate, while the respondent by, Mr. Yona Shekifu, also a learned advocate. The application proceeded by way of written submission.

Briefly, the background of this matter dates back to 2018, when the respondent herein filed a case against the applicant before the District Land and Housing Tribunal ("the DLHT") for Geita vide Application No 43 of 2018. At the DLHT, the respondent, inter alia, claimed the following reliefs;

1. Declaration that the applicant is a lawful owner of the suit house located at plot No 91. Block "0" Nyatukala in Sengerema Township
Attentively refund of TZS. 50,000,000 being the value of the suit house.
2. Permanent injunction restraining the respondent from trespassing on the suit premises in any manner

On 27 March 2020, the DLHT declared the respondent the lawful owner of the suit land.

Dissatisfied but out of time, on 5 March 2024, the applicant approached this Court by applying for an extension of time to file an appeal.

As per the affidavit, the reasons for seeking an extension are;

One, when the judgment of the DLHT was delivered, he was in prison and serving a sentence of ten (10) years.

Two, he spent most of his time seeking legal aid after being discharged from prison.

Also, in the submission, he added another ground of illegality based on two issues;

One, the document which was relied upon by the DLHT to justify the sale was in contravention of sections 5 and 47 (1) of the Stamp Duty Act.

Two, the applicant's key witnesses were not properly summoned to testify before the tribunal.

Supporting the application, Mr. Alfred submitted that by the time the judgment of the trial tribunal was delivered on 27 March 2020 in Land case No. 43/2018, the applicant was in prison in Geita, serving a sentence of ten years in jail. The applicant had been in prison as prisoner No. 880/2019 since 1 June 2018 until he was released on 5 January 2023 following a presidential pardon.

However, the applicant was again charged with criminal trespass for unlawfully entering the suit premises (the subject matter in land case No.

43/2018) and sentenced to six months imprisonment from 21 March 2023 to 20 July 2023.

He argued that the contention that the applicant was in prison is a good cause for this court to grant an extension of time within which the applicant to file his appeal out of time. He cited **Joseph Sweet vs. The Republic**, Criminal Appeal No. 11/2017 (Tanzlii) and stated that the Court of Appeal observation that; had the reason that the appellant was in prison would have been considered, the High Court would have granted the extension of time to the appellant.

The second reason for the delay was that the applicant spent most of the time seeking legal aid since he was released from jail. Upon release, the applicant was not financially sound enough to afford to hire an advocate for his case. In that case, he had to seek legal aid, starting with the Mwanza Regional Commissioner, who, on 13 October 2023, was directed to Tanganyika Law Society (TLS), Mwanza chapter, for legal aid consideration.

It was not until 5 February 2024 that he was addressed to his advocate, whom he came to meet on 8 February 2024.

Regarding illegalities, Mr. Alfred submitted that;

Firstly, the document which was relied upon by the trial tribunal to justify the sale of the suit premise, the sale agreement, was in contravention of the law, particularly sections 5 and 47(1) of the Stamp Duty Act No. 20/1972 [CAP 189 R.E 2019].

He supported his argument by citing **Malmo MontageKonsult AB Tanzania Branch vs. Margaret Gama**, Civil Appeal No. 86/2001, where the Court of Appeal held that:

"Now the sale Agreement -Exhibit P3- was not stamped and, therefore, ought not to have been admitted as evidence. Since the agreement was not lawful evidence in the case, it cannot be considered in deciding the right of the parties regarding the disputed property".

Second, he argued that the applicant's key witnesses were not properly summoned to appear before the tribunal to testify. Since the applicant was disputing the whole transaction regarding the suit premise, those witnesses were crucial for his case. The applicant was in prison and had no freedom to go out and bring them.

In response, Mr. Shekifu submitted that the applicant failed to adduce sufficient reasons for the court to grant leave so that the Applicant could

file his appeal out of time as prescribed by law because the decision intended to be challenged was delivered on 27 March 2020, four (4) years ago. Further, that judgment was delivered in the applicant's presence even though he was attending from prison. He was aware of that judgment in Land Application No. 93 of 2018 delivered by the DLHT for Geita.

He further stated that the Applicant was released from prison on 5 January 2023, and after his release, he did not make any follow-up. However, after 76 days, he trespassed into the suit land, which resulted in his conviction and sentence by Sengerema Primary Court in March 2023. Therefore, apart from being in prison, the applicant failed to account for more than 296 days of delays. Mr. Shekifu substantiated his submission by citing **Lyamuya Construction Co. Ltd Vs. Board of Registered Trustees of Young Women's Association of Tanzania**, Civil Application No. 147 of 2006 (unreported), where it was held that an applicant should account for each day of delay and **Wambele Mtumwa Shamte vs. Mohamed Hamis**, Civil Reference No. 8 of 2016 (Tanzlii) that each day of delay must be accounted.

Regarding the issue of financial constraints, Mr. Shekifu submitted, according to the cited case of **Wambele Mtumwa Shamte** (Supra) at

page 11, where it was held that financial constraint is not a sufficient ground to extend time.

Reverting to the grounds of illegalities, Mr. Shekifu submitted that the alleged illegality in the decision of the Tribunal was not apparent on the face of the record, as the issue of failing to call witnesses is not an illegality. The applicant was never denied his right to defend and call his witnesses.

Regarding stamp duty, he submitted that the lack of unpaid stamp duty cannot be taken in later stages and cannot be considered illegal in the proceedings. He substantiated this by citing the decision of the East Africa Court in **Sunderji Nanji vs. Ghaloo**, 1958 (E.A) 762, where it was held that;

"The question of admissibility of unstamped document cannot be raised on appeal but only at trial the trial. This is so that the other party can be given an opportunity of paying the requisite duty and thus making it admissible."

Further, the issue of illegality must be apparent on the face of record as well explained in the case of **Lyamuya Construction (Supra)**, where it was held that;

"The court there emphasized that such a point of law must be of sufficient importance, and I would add that it must 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."

In a brief rejoinder, Mr. Alfred submitted that the applicant's sworn affidavit clearly states the underlying circumstances that occasioned his delay, that he was once in prison and subsequently sought legal assistance.

Regarding the issue of illegality, he reiterated that Section 47 (1) of the Stamp Duty Act No. 20/1972[CAP 189 R.E 2019] makes it mandatory for every document chargeable with stamp duty to be stamped before being admitted as evidence in court. That position is well settled in the case of **Malmo Montage Konsult AB Tanzania Branch (Supra)**.

Having considered the chamber summons and its supporting affidavit, the affidavit in reply, and the written submission made by the learned counsel for the parties, the issue that has to be resolved is:

"whether the applicant has shown a good cause for this Court to exercise its discretion in granting an extension of time to file an appeal."

The Court of Appeal of Tanzania stressed this in **Omari R. Ibrahim vs. Ndege Commercial Services Ltd**, Civil Application No. 83/01 of 2020 (Tanzlii), where the Court put it succinctly that in an application for an extension of time, good cause to extend must be shown.

As to what may constitute a good case, again, the Court of Appeal in **Hamis Babu Ally vs. The Judicial Officers Ethics Committee and three others, Civil Application No 130/01 of 2020 (TanZlii)**, pointed out the following factors: -

- i. To account for all period of delay*
- ii. The delay should not be inordinate;*
- iii. The applicant must show diligence and not apathy, negligence, or sloppiness in the prosecution of the action that he intends to take and*
- iv. The existence of a point of law of sufficient importance, such as the illegality of the decision sought to be appealed against.*

Again, the Court of Appeal insisted that an applicant should account for each day of delay in accounting for the period of delay. In **Hassan**

Bushiri v. Latifa Lukio Mashayo, Civil Application No. 3 of 2007 (unreported), it held that;

"Delay of even a single day has to be accounted for otherwise

There would be no point in having rules prescribing periods

Within which certain steps have to be taken."

Apart from the above, the Court of Appeal also established that illegality is sufficient ground to grant an extension of time in **Principal Secretary, Ministry of Defence and National Service Vs. Devram Valambia** [1999] TLR 182.

I cited those cases as benchmarks to consider and test whether the applicant passes the test by showing good or sufficient cause, considering that the decision in which an **extension of time is sought was delivered on 27 March 2020, and this application was filed on 5 March 2024.**

Therefore, in deliberation and determination, I will start with the grounds of illegality raised by the applicant, which, in my opinion, should not detain me long because of the following reasons;

As I alluded to earlier, grounds of illegality were raised during the submission. In the affidavit, the applicant never raised such an issue.

On this, I wish to remind the parties regarding the “Rules of the game” that parties are bound by what they pleaded in the pleadings because the Court must decide cases on the issue on the record. There is a plethora of authorities on this issue, the Court of Appeal in **Yusuf Khamis Hamza vs. Juma Ali Abdallah**, Civil Appeal No. 25 of 2020 (Tanzlii),

"In this case, the issue of the time bar was not raised by the parties in their pleadings. In this sense, it was quite in order and absolutely perfect for the court below not to deal with matters which were not canvassed in pleadings".

Therefore, the applicant tried to “smuggle” new facts and issues introduced by the bar in the applicant’s written statement while they were not raised in the affidavit.

Two, even if we consider that the grounds of illegality were properly brought, a mere look at the applicant's complaints as illegality is contrary to what has been provided in *Lyamuya Construction (Supra)* that illegality must 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.

The issue of witnesses is neither illegal nor irregular. Being a civil matter, it was upon the applicant to make sure that all his intended

witnesses (if any) testified before the closure of his case. Therefore, he could not now shift the blame to any other person or plead illegality.

Regarding the issue of stamp duty, that is a mere irregularity and not an illegality. Admittedly, in the case of **Malmo** (Supra), the principle is that the Court cannot act on an instrument that is not affixed by stamp duty. But in **Elibariki Mboya vs. Amina Abeid** (TLR) 2000 At 122, the Court of Appeal of Tanzania elaborated further on the same issue. The court pointed out that if the irregularity does not go to the issue of jurisdiction or merits of the case, it is curable. Therefore, that issue cannot invalidate the decree.

Reverting to the grounds as per the affidavit and substantiated by written submissions, I will start with the first ground that;

"When the judgment of the DLHT was delivered, he was in prison and serving a sentence of ten (10) years".

On this, it is not in dispute that when the judgment was delivered on 27 March 2020, though he was a prisoner, the applicant attended the Court. He was released from prison on 5 January 2023, and after his release, he did not make any follow-up, but after 76 days, he trespassed into the suit land, which resulted in his conviction and sentence by Sengerema Primary Court in March 2023. Therefore, that alone disqualifies the applicant from pleading that he was in prison. This is because he was

released and “mute” instead of making a follow-up of his case by taking appropriate remedies.

The law is clear on the grounds of financial constraint and that he was looking for legal aid. In **Yusuf Same and another vs. Hadija Yusuph, Civil Appeal No. 01 of 2002** (Unreported), the Court of Appeal held that:-

"We are aware that financial constraint is not a sufficient ground for extension of time."

Though it is trite that financial constraint may not be a sufficient ground for an extension of time, there are exceptional circumstances when it can be a sufficient and good reason. In the cited case of **Yusuf Same** (Supra), the Court of Appeal pointed out the circumstances where it can be sufficient. It held;

"But in the circumstances of this case at hand, where the respondent was a widow, depending on legal aid, her plea of financial constraint cannot be held to be insignificant."

Again, the Court of Appeal in **Constantine Victor John vs. Muhimbili National Hospital**, Civil Application No. 214/18 of 2020 (Tanzlii) highlighted the circumstances where the exception to the general rule could be invoked by accepting the plea of financial constraint based on the grounds that: one, the applicant was on legal aid, and two, the

applicant had been unemployed since 25.09.2009, when the respondent terminated his employment.

Having gone through the above-cited case laws and the argument advanced by the applicant, I am not persuaded by that argument as good grounds for extending time. My reasons are;

Because the applicant was released from prison on 5 January 2023, but his pursuit for legal aid started in October 2023, and he got that legal Aid on 5 February 2024, there are no details on accounting for each day of delay, especially from 5 January 2023 until he was imprisoned again on March 2023.

In the upshot and from the above explanations, the applicant has failed to show good cause to persuade this court to extend the time to file an appeal.

I find no merit in this application, and consequently, I dismiss it with costs.

It is so ordered.




K. D. MHINA
JUDGE

03/05/2024