

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MOROGORO

AT MOROGORO

MISC. LAND APPLICATION NO 80 OF 2023

[Arising from the order of this court in Land Appeal No 93 of 2023 originating from Land Application No 52 of 2018 of the District Land and Housing Tribunal for Morogoro District at Morogoro].

BETWEEN

AHMAD KIBWANA & 8 OTHERS.....APPLICANTS

VERSUS

ZAINABU SAIDI UMANDE (as the administrator of the estate of late Ally Chamchua)**RESPONDENT.**

RULING

MRUMA, J

This is an application for extension of time within which the Nine (9) Applicants can lodge an appeal out of time against the decision of the District Land and Housing Tribunal for Morogoro delivered on 18. 7. 2023. The application is made under sections 14 (1) and 21 (1) of the Law of

Limitation Act [Cap 89 R.E. 2019], and section 41 (2) of the Land Disputes Courts Act [Cap 216 R.E. 2019]. It is supported by an affidavit sworn by Mr Alpha Boniface, advocate for the applicants. The application is strongly resisted by the Respondent who filed a counter affidavit affirmed by herself contending that the Applicants were fully aware of the parties who participated in the trial tribunal and there was no reason to omit their names in the appeal.

At the hearing of this application both parties were represented. The Applicants appeared through Mr. Alpha Boniface learned advocate whereas the Respondent enjoyed the legal services of Mr. Hassan Nchimbi, also learned advocate. The Application was disposed of by way of written submissions.

Submitting in support of the application Mr Sikalumba revisited historical background of the matter and submitted that the first, third, fourth and fifth Applicants were Respondents in Land Application No 52 of 2018 before the District Land and Housing Tribunal which was delivered on 18/7/2023. Immediately after delivery of that judgment and within the prescribed time the Applicants filed an appeal which was registered as Land Appeal No 93 of 2023.

In her reply to the petition of appeal the Respondent successfully raised a preliminary objection, on the point of law that the appeal was incompetent and was untenable for omitting names of some of the parties who were parties to the previous proceedings before the trial tribunal. The preliminary objection was sustained and the appeal was struck out. After, the order striking out the appeal, the Applicants found themselves out of time and hence this application.

Submitting in support of the Application, Mr. Alpha submitted that counting from the date of the Judgment of the trial tribunal was delivered to the date of "preparing" this application there were Seventy Nine (79) days and that there was another five days only from the date the appeal was struck out to the date they filed this application. The learned counsel contended that the reasons for delay were not deliberate or by negligence but due to the fact the Applicants were prosecuting their appeal with due diligence. He said that the reasons for not joining some of the parties was that he believed that they were not aggrieved by the decision of the first instance tribunal. Mr Alpha submitted that this application has been brought promptly and without any delay in order to save the time of the court and justice to the parties. He submitted that Section 21 (2) of the

Law Limitation Act exclude time in which parties were prosecuting the same proceedings in a court of law.

Replying to the counsel for the Applicant's submissions Mr. Hassan Nchimbi counsel for the Respondent submitted that whereas it was true that the first appeal was struck out on 5/10/2023 and that this application was instituted on 16/10/2023, but the Applicants have failed to account for the period from 5th October 2023 to 15th October 2023 a period of ten days which requires explanation. He said that in an application like this each day must accounted for. The learned counsel contended that failure to account for ten days was not a technical issue as alleged by the learned counsel for the Applicants because the errors committed in preparing the appeal were deliberately made. He said that an advocate being an officer of the court omitting some of the parties was great negligence on his part. He said that the Rules which apply in technical delays are not applicable on circumstance of this case.

In rejoinder Mr. Alpha denied to have failed to account for ten days from the date the ruling was delivered. He said that the affidavit was prepared and sworn on 6/10/ 2023 which is one day after the ruling was delivered and it was lodged in court's system on the same day but there were internet problems, and therefore any delay was not intentional as they

acted promptly and lodged the application online on 6th October, 2023 one day after the ruling.

I have carefully considered the submission for and against the application and I am settled in my mind that the issue for determination is whether the applicants have managed to demonstrate good cause warranting extension of time.

Extension of time is judicial discretion conferred to the court, as any other discretion of the court the same should be exercised judiciously upon good/ sufficient cause being shown. The principle was emphasized by the court of appeal in the case of Ngao **Godwin Losero vs. Julius Mwarabu**, Civil Appeal no 10 of 2015, CAT at Arusha (Unreported)

In instant application there can be no dispute that Land appeal 93 of 2023 was lodged well within the prescribed time. However, in the process of hearing it was discovered that some parties who were in the original case before the trial tribunal had not been cited in the appeal. The Applicants' counsel explanation is that he did not cite them because they were not aggrieved by the decision of the trial tribunal therefore they were not interested in the appeal. I find this explanation to be satisfactory. Proper citation of the parties is a technical issue which does not go to the

substantive justice of the matter. In the case of **Salim Amour Diwani V. The Vice Chancellor Mandela African Institute of Science and Technology & Another** the Court of Appeal held inter alia that:-

"Court records are considered authentic and should not be easily altered as parties would wish to. It bears re affirming that parties in the proceedings should at any given time appear as they did in the previous proceedings unless there is a reason for not observing that and only with leave of the court"

In that case the Court of Appeal didn't dismiss the appeal instead it strike it out. It is trite law that where the court finds an appeal, application or any proceedings before it to be incompetent the remedy is to strike it out instead of dismissing it. This remedy (i.e. striking out of the matter), gives a party whose matter has been found incompetent and therefore struck out a chance to come again to the court with the same issue seeking the same remedy. Dismissal of the proceedings is a remedy where the matter has been heard and determined on merits and the remedy to an aggrieved party is an appeal to the higher court.

As stated earlier, Land Appeal No 93 of 2023 was instituted within the prescribed and the parties prosecuted it honestly believing that they were

The only problem (which I find to be technical), was that some of the parties who were in the previous proceedings were omitted in the appeal.

Section 21(2) of the Law of Limitation Act provides that:-

"In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or in a court of appeal against the same party, for the same relief, shall be excluded where such proceeding is prosecuted in good faith in a court which from defect of jurisdiction or other cause of a like nature, is unable to entertain it"

In the instant application the reason given by the applicant is that the delay was due to the fact that they were prosecuting another matter to wit Land Appeal No 93 of 2023 which was found to be incompetent for not citing all parties who were in the previous proceedings. Mr. Hassan contends that such an error was due to the counsel's negligence and thus it cannot constitute a good ground for extension of time. I do not agree. As recently observed by the Court of Appeal in the Case of **Okech Boaz Othiambo & Another Versus Salama Idd Kanyorota** we are not angels, we are human beings and can make mistakes. Believing that there

is no need when preparing an appeal to join a party who was in the original proceedings but who is not interested with the appeal or rather who is not aggrieved by the impugned decision of the lower court is not an error constituting grave negligence. It is a technical error which is curable under Section 3A and 3B of the Civil Procedure Code [Cap 30 R.E. 2019]C, and that is why this court struck out the appeal which entails putting its doors back or in Kiswahili version "***kurudishia mlango***" instead of closing or locking it, the court would have dismissed the appeal and therefore completely locking its doors to the parties.

In the case of **Salim Lakhani and two others vs. Ishfaque Shabir YusufAli (As Administrator of the Late Shabir Yusufali)**, Civil Appeal No. 237 of 2019 the Court of Appeal had this to say:-

*Interpreting the application of the quoted provision (i.e. Section 21 (2) of the Law of Limitation Act] vis a vis the matter at hand, it is clear that, before the respondent can press into service the applicability of the said provision, he has to satisfy the following conditions among others:- one; **the earlier proceeding from which the respondent is seeking to exempt the time spent prosecuting the same was rejected for want of jurisdiction or other cause of a like nature, two; that the***

earlier proceeding and the latter proceeding are founded upon the same cause of action or matters at issue, and three; he was prosecuting High Court Civil Revision No. 105 of 2002 with due diligence and in good faith.

In the case **Tanzania Cotton Marketing vs. COGECOT Cotton Company S.A.**, [2004] T.L.R. 132, while discussing the applicability of section 21 of the Law of Limitation the court said;

"In order for section 21 (1) to apply, and for time spent in prosecution of another proceeding to be excluded, it has to be shown, inter alia, that other proceeding was prosecuted in a court incompetent to entertain it "

Applying the above conditions to the case at hand, on the first condition land appeal was struck out for non-inclusion of some parties who were parties in the original proceedings, the court had jurisdiction but the matter was incompetent and therefore could not be determined by the court.

For reasons stated above the Applicants have shown good cause for the court to extend time and therefore the application is granted. The

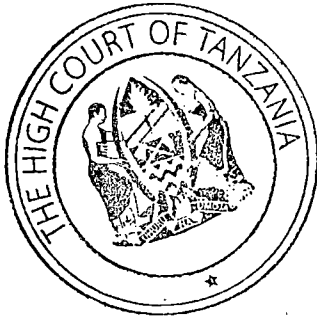
Applicants are given fourteen (14), days time within which they can file their appeal. Costs will be in the cause.


A. R. MRUMA

JUDGE

21. 5. 2024

Ruling delivered in presence of the parties this 21st Day of May
2024.




A.R. MRUMA

JUDGE

21. 5. 2024