

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB- REGISTRY

AT MBEYA

MISC. LAND APPLICATION NO. 2717 OF 2024

(Originating from the District Land and Housing Tribunal of Mbeya at Mbeya in Misc. Application No. 98B of 2023 and Land Application No.98 of 2022)

EVANCE MWANUKE.....APPLICANT

VERSUS

EDWIN KAPINGA.....1ST RESPONDENT

VERONICA GASPER.....2ND RESPONDENT

AGNES AMBROSI KAPINGA (The administrator of the estate of the late Ambros Kapinga).....3RD RESPONDENT

RULING

Date of last Order: 18th April, 2024

Date of Ruling: 5th June, 2024

KAWISHE, J.:

The applicant Mr. **Evance Mwanuke** filed an application under section 41(2) of the Land Disputes Courts Act, [Cap 216 R.E 2019]. The applicant moved this court with a chamber summons supported by an affidavit sworn by the applicant praying for the following orders:

- 1. This, honourable court be please to extend time within which the applicant lodge an appeal out of time.*
- 2. Costs of this application be provided for.*
- 3. Any other order(s) the honourable court may deem fit and just to grant.*

The gist of the matter unfolds as follows: that the applicant filed an application before the District Land and Housing Tribunal of Mbeya (the DLHT), Land Application No. 98 of 2022, claiming to be the lawful owner of the land in dispute, located at Kagera, in Ilomba Ward, in Mbeya District. The application was dismissed on 13th December, 2023 for the reason that the applicant's counsel was absent. The applicant filed an application (Misc. Land Application No. 98B) for the restoration of the suit. But the applicant withdrew the application for being improperly filed. Hence, this application before this court seeking an extension of time within which to file an appeal out of time.

The application was argued by way of oral submission. The applicant was represented by Ms. Pamela Kalala, learned counsel while, respondents were represented by Mr. Emil Mwamboneke, learned counsel.

When the application was called for hearing, Ms. Pamela adopted the applicant's affidavit to form part of her submission. In her submission she argued that on 13th December, 2023 the DLHT for Mbeya at Mbeya

dismissed the applicant's application on the reason that the applicant's counsel was absent, while the applicant was present. She added that the matter was scheduled to be heard on three consecutive days, on 11th, 12th and 13th December, 2023.

Ms. Pamela continued to submit that on 11th December, 2023 she met with her client, but unfortunately, he had misplaced his bag with exhibits which were to be used in evidence. That the matter was adjourned to 12th December, 2023 and it was agreed to use copies if the original documents could not be found. She added that she filed a notice to use copies on 12th December, 2023. The learned counsel continued state that respondent's counsel told the DLHT that on 12th December, 2023 he would be in Iringa before the High Court and primary court, so the matter was scheduled to proceed on 13th December, 2023. Ms. Pamela, further unfolded that the issue that the respondents' counsel excused himself on the reason that he was going to be in Iringa was not stated in the trial tribunal's records. She told this court that unfortunately, on 13th December, 2023 she lost her in law in Kyela, and she informed her client (applicant) to inform the tribunal. That the applicant informed the tribunal accordingly but the tribunal told the applicant to proceed with the matter himself. That the applicant prayed

before the DLHT that he cannot proceed with the matter because he is not a lawyer. He prayed the matter to be adjourned for few days so that his counsel may come back from the funeral and proceed with the matter. That the DLHT refused and the matter was dismissed under Regulation 13(2) of G.N No. 74 of 2023. Thus, the applicant was punished for the absence of his counsel, hence he was prejudiced.

In support of her case, the learned counsel cited the case of **Arcardo Ntagazwa vs. Bunyogera Bunyambo** [1992] TLR 242, **Almas Kalumbeta vs. Republic** [1982] TLR 329 on the right to be represented. That the rule under Regulation 13(2) of G.N No. 74 of 2023, states that if the counsel, is absence for three consecutive dates, but the tribunal acted wrongly as the matter was scheduled for 11th, 12th and 13th December, 2023. That on 11th December, 2023 they were in court and the matter was adjourned, on 12th December, 2023 she filed notice to use copy of exhibit where the respondent's counsel was absent, and on 13th December, 2023 in absence of the applicant's counsel the matter was dismissed. The applicant's counsel further argued that there are irregularities and illegalities, in the order of the tribunal of 13th December, 2023, because it does not meet the three consecutive days requirement as per the cited regulation.

Ms. Pamela, stated that she filed an Application No. 98B for restoration of the matter, but later she realised that the application was not proper, the only remedy is under regulation 13(4) of GN. No. 174 of 2023. That on 30th January, 2024 she withdrew the matter. After the withdrawal, more than 45 days had lapsed, and this is the gist of this application, the only remedy is to appeal. The learned counsel further submitted that the prayer for extension of time is due to the illegalities occasioned by the DLHT. She referred the case of **Hassan Ramadhan vs. Republic**, Criminal Appeal No. 160 of 2018 CAT, Tabora; **Principal Secretary Ministry of Defence and National Service vs. Derram Valambia** (1992) TLR 185 and the case of **Robert Hilima vs. R**, Criminal Application No. 42 of 2019, to bolster her position that illegalities on the face of record is a reasonable ground to grant extension of time.

In concluding the learned counsel stated that the respondents are not disputing the application in their counter affidavit. That they did not serve the respondents with Application No. 98B in order to avoid multiplication of cases.

Mr. Mwamboneke, respondents' learned counsel in reply adopted the joint counter affidavit sworn by the respondents. The learned

counsel countering on the grounds raised for extension of time, argued that the matter was adjourned on 11th December, 2023 because the applicant had misplaced his bag, there was no proof of the same. Therefore, this makes affidavit to be circumstantial. He prayed to the court to dismiss the application for lack of merit.

Mr. Mwamboneke while responding to the issue that the applicant's counsel did not miss for three consecutive days, asserted that it has not been proved by the learned counsel. He averred that the matter was scheduled for 11th, 12th and 13th December, 2023. That the applicant's counsel did not state if she was in court on 12th December, 2023 and the court record did not show that. That on the same date the counsel stated that the respondents' counsel appeared in the High Court in Iringa, but it is not on record. He added that the applicant's counsel stated that she filed a notice to use a copy, but the copy was not served to the respondents.

Mr. Mwamboneke responded that on 12th and 13th December, 2023 the applicant's learned counsel was not in the tribunal, thus it was proper to dismiss the matter. That the applicant's learned counsel missed on 11th and 12th December, 2023 consecutively. He further argued that there are no illegalities occasioned for the trial tribunal to

dismiss the matter. Mr. Mwamboneke submitted that the applicant was ordered to proceed with the matter, but the applicant refused hence, the tribunal resorted to the last relief to dismiss the matter as per regulation 13(2) of GN. 174 of 2023. Reverting on the issue of legal representation, the learned counsel submitted that, the party to the case is the applicant and not the counsel. Therefore, the applicant's refusal to proceed because his counsel was not present was not a reasonable ground. He added that, there was no proof that the counsel was in the funeral ceremony. He claimed that the applicant's learned counsel acted negligently, and negligence is not a reasonable ground to be granted with extension of time. The representation right is not open, rather is under the law and the courts are there for that purpose.

Responding on the ground that 45 days lapsed when she filed Application No. 98B and the same application was not served to the respondent and she withdrew it, hence the respondents were not prejudiced. The Mr. Mwamboneke referred the case of **Minister of Defence** (supra), which sets out the grounds for extension of time, that the applicant has to give account for each day of delay. That the applicant's counsel failed to state before 30th January 2024 what she was doing in between. That she realised later that the application was

improper, that is negligence; that the delay should not be inordinate, since when the matter was dismissed in December, 2023, it is a long time passed, that it is more than three to four months, there is no explanation as to what she was doing.

The respondents' counsel stated that there are no reasonable grounds to grant extension of time, rather it is the negligence of the applicant's learned counsel and her client. He prayed that the application be struck out with costs.

In rejoinder the applicant's learned counsel Ms. Pamela reiterated what she submitted in her submission in chief. On the issue of negligence of an advocate and her client she stated that the Constitution of the United Republic of Tanzania, 1977 provides for the right to be represented under article 13(6) (a). That the applicant was prejudiced because his case was dismissed unlawfully. The counsel insisted her prayer for extension of time within which to file an appeal be granted. She added that there was no negligence as submitted by the respondents' learned counsel that, the applicant did not pursue his right. She referred the case of **Ramadhan** (supra) on the issue of illegality. That the decision was made on 30th January 2024 was proper to withdraw the application No. 98B. She cited the case of **Halfani Sudi**

vs. Abieza Chichili (Civil Reference 11 of 1996) [1998] TZCA 7 (9 April 1998).

Having heard the submission made by both parties, there are two issues to be determined: **first**, whether the applicant has provided sufficient reasons to be granted with extension of time within which to file an appeal, and **second**, whether there was illegality in the trial tribunal's proceedings.

It is trite law that, granting or refusing an application for an extension of time it is in the discretion of the court. But that discretion is judicial, and so it must be exercised according to the rules of reason and justice, and not according to the private opinion or act arbitrarily.

In the case of **Mbogo vs. Shah** [1968] EA, the Court of Appeal for Eastern Africa held:

"All relevant factors must be taken into account in deciding how to exercise discretion to extend time. These factors include the length of the delay, the reason for the delay, whether there is an arguable case on the appeal, and the degree of prejudice to the defendant if time is extended".

Therefore, the decision of the then Court of Appeal of East Africa shows that in exercising its discretion the court has to consider the factors set forth in dispensing justice.

The applicant's application is preferred under section 41(2) of the Land Disputes Courts Act, Cap 216 R.E 2019, which provides that:

"41(2) An appeal under subsection (1) may be lodged within forty-five days after the date of the decision or order.

Provided that, the High Court may, for the good cause, extend the time for filing an appeal either before or after the expiration of such period of forty five days."

The law requires a good cause be adduced so that the High Court may extend the time for filing an appeal. There is no fast and hard rule for determining what amounts to good cause. It is determined on a case-to-case basis, depending on the circumstances surrounding each case. In the landmark case of **Lyamuya Construction Company Ltd vs. Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 CAT at Arusha, the Court stated that, when determining whether there are sufficient reasons or not the following guidelines are relevant:

- 1. The applicant must account for all the period of delay.*
- 2. The delay should not be inordinate.*
- 3. The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.*
- 4. If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged.*

With regard to the guidelines set by the Court, in this case at hand the applicant's counsel stated under paragraph 5, 6 and 7 of the applicant's affidavit that under her service for the applicant they were supplied with the copy of the order on 13th day December, 2023 by the District Land and Housing Tribunal, the order was annexed as annexure EM1, they filed a Miscellaneous Land Application No. 98B on 15th December, 2023 in order to restore the main case which was dismissed in the said order. The application was scheduled for mention on 30th January 2024, and on the same date they decided to withdraw the filed application after it came to their knowledge that they filed an application in the wrong court. That the remedy was to file an appeal before the High Court. They came to notice that after the forty-five days for filing an appeal had expired. Hence, this application for extension of time after expiry of the time for filing an appeal.

From the submission made by the applicant's counsel, the question to be answered is whether the above reasons are sufficient for this court to grant the application for extension of time. In my opinion, it is a settled law that negligence or an error made by an advocate through negligence or lack of diligence is not sufficient cause for extension of time. See the case of **Yusuph Same & Another vs.**

Hadija Yusuph, Civil Appeal No. 01 of 2002, **Bahati M.Ngowi vs. Paul Aidan Ulungi**, Misc. Civil Application No. 490/13 of 2020 and the case of **Winjuka Godsnon Mangare vs. John J. Ottaru**, Civil Application No. 657/01 of 2022. But there is an exception to the general rule that the applicant should not be punished by the negligence of his or her counsel. The applicant in this case has been attending in court and through his advocate they made an application for restoration of the application within time. But the negligence of an advocate, caused his application to file an appeal to be out of time. In my view, the negligence done by an advocate should not be blessed. Therefore, there is no sufficient reason warranted by the applicant's counsel, and I concede with the respondents' learned counsel's submission, that negligence is not a reasonable ground to be granted with extension of time see the case of **Lyamuya Construction Company Ltd** (supra). Consequently, the first issue is answered in the negative.

Contemplating on the second ground that, there was an illegality occasioned by the DLHT. It is a settled law that where the point of law is at issue, a party alleging 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 matters and the record straight that by itself constitutes 'sufficient reason.' In the case of **the Principal Secretary Ministry of Defence and National Service** (supra), the case cited by the applicant's counsel. In that case a single justice of the Court made the following pertinent remark:

*"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 question of jurisdiction, not one that would be discovered by a long-drawn argument or process".

Therefore, when it is alleged that there is illegality in the decisions or proceedings, the court has to look if there are errors apparent on the face of the record which require intervention and consideration of the court that there is a miscarriage of justice to the applicant.

In this application at hand, Application No. 98 was dismissed only on the ground that the applicant's counsel was absent without any notice. The applicant denied to proceed with the matter in absence of his advocate. But the trial tribunal decided to dismiss his application under regulation 13(2) of GN No. 174 of 2023, which provides:

"13(2) Where a party's advocate is absent for two consecutive dates without good cause and there is no proof that such advocate is in the High Court or Court of Appeal, the tribunal may require the party to proceed himself and if he refuses without good cause to lead the evidence to establish his case, the tribunal may make an order that the application be dismissed or make such other orders as may be appropriate."

In this application at hand in the trial tribunal's record on the absence of an advocate was not specific. In the oral submission the applicant's counsel stated that she was not present on 13th December, 2023, only when the matter was scheduled for hearing. In the trial tribunal's records also reflected the same that on 13th December, 2023 the applicant's counsel was not present, and it is when the matter was dismissed. Also, in the typed proceedings of the trial tribunal it is reflected that on 12th December, 2023 is when the applicant left his bag with exhibit and the case was adjourned, while in her oral submission the applicant's counsel stated that the applicant exchanged his bag on 11th December, 2023. In this differing information, who has the correct information. The answer is in the case law, that the trial tribunal's proceedings are presumed always to reflect what happened. See the case of **Halfani Sudi vs. Abieza Chichili** (Civil Reference 11 of 1996) [1998] TZCA 7 (9 April 1998) where the CAT stated that:

"There is always the presumption that a court record accurately represents what happened"

From the proceedings of the trial tribunal on 12th December, 2023 Ms. Pamela, the applicant's counsel was present, see page 28 of the tribunal's typed proceedings. Also, it shows that the respondents' counsel Mr. Mwamboneke and Ms. Msuya were present. The matter was ordered to proceed with hearing on 13th December, 2023. On 13th December, 2023 Ms. Kalala was not present as stated. It is a simple calculation, she missed only one day, why did the tribunal invoke the provisions of the regulation 13(2) of GN No. 174 of 2023.

Ms. Kalala submitted that she filed a notice to use copies as exhibit on 12th December, 2023 while, the respondents' counsel was not present before the tribunal as he was attending Iringa High Court and primary court as stated by the applicant's counsel in her oral submission. The same also, was not reflected in the trial tribunal's proceedings. On the typed trial tribunal's proceedings it is shown that on 13th December, 2023 there were two coram, the first coram showing that there were exchange of bags and the applicant's counsel was present before the tribunal and stated what happened, and in the next coram is when the application was dismissed for non appearance of an advocate, while the applicant was present. With the presumption of accuracy of the tribunal's records, the applicant's counsel missed only one day.

In my opinion the applicant was denied his right to be heard, without any unique reason as per cited regulation by the trial tribunal. It is a trite law that a party ought to be heard before an order adverse to it is made by a court of law. There are authorities outside our jurisdiction which are persuasive provide on this aspect. In England, the case of **EARL vs. Slatter & Wheel (AERLYNE) Ltd** [1973] 1 WLR 51, it was held that where natural justice is violated it is no justification that the decision was in fact correct. Also, in the case of **A. G. vs RYAN** [1980] A. C. 718, the Privy Council said:

"It has long been settled law that a decision which offends against the principles of natural justice is outside the jurisdiction of the decision-making authority".

Also, in the case of **Abbas Sherally & Another vs. Abdul Sultan Haji Mohamed Fazalboy**, Civil Application No. 33 of 2002, the Court said:

"The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. The right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice".

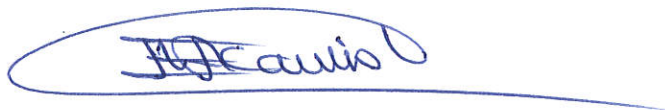
Therefore, it is established law that the decision arrived at in breach of the rules of natural justice is tainted with illegality. The issue of legal

representation has been guaranteed under article 13 (6) (a) of the Constitution of the United Republic of Tanzania of 1977 as amended from time to time. In the case of **Almas Kalumbeta** (supra), the case referred by the applicant's counsel, it was emphasized that a right to legal representations universally fundamental including in Tanzania. The same should not be deprived unless for cogent and exceptional reasons.

Therefore, basing on the above discussion, the illegality occasioned is on the face of record. Hence, the second issue is answered in the affirmative. I find the same to be sufficient ground to extend time within which to file an appeal.

Given the fact that, the illegality occasioned by the tribunal, I am convinced that the applicant has given a good cause to grant the application for extension of time. Thus, application is hereby granted, appeal to be filed within 14 days from the date of this ruling. Since, the error was occasioned by the tribunal, I make no orders as to costs.

It is so ordered.



E. L. KAWISHE

JUDGE

5/6/2024

Dated and Delivered at **MBEYA** this 5th day of June, 2024 in the presence of Ms. Pamela Kalala, learned counsel for the applicant and in the presence of Ms. Epiphania Msuya, learned advocate for the respondents, and in the presence of the applicant and in the presence of the 1st and 3rd respondents



A handwritten signature in blue ink, appearing to read 'E.L. Kawishe', is enclosed within a blue oval.

E.L. KAWISHE

JUDGE