

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISC.LAND APPLICATION No. 281 OF 2021

HAMISI HASSANI KAMWENDA..... APPLICANT

VERSUS

NASIBU OMARI MAGWILA RESPONDENT

RULING

date of last order: 20/8/2021

date of judgment: 30/9/2021

T.N. Mwenegoha,J:

The applicant in this application have moved this Court under section 38(1) of the Land Disputes Court Act, 2019 (the land Disputes Court Act) for the following orders: -

1. That this Honourable Court be pleased to extend time within which the applicant may lodge her appeal against the judgment and order of Kilombero District Land and Housing Tribunal (the appellate Tribunal) dated 1/7/2019 in Land Appeal No. 415 of 2018.
2. That costs of the application be provided for.
3. Any other relief(s) or order that this Honourable Court may deem fit and just to be granted.

The application was supported by an affidavit of the applicant Hamisi Hassani Kamwenda dated 30/04/2020 which was countered by the counter affidavit of Nasibu Omary Magwila the administrator of estate of Omary Said Magwila.

The application ordered by my predecessor Hon. Maghimbi, Judge to be argued by way of Written submission. The Honourable Judge was transferred to another working station hence the application was re-assigned to me and upon perusal I find that the submissions are complete and therefore this Ruling. In this Court, the applicant is unrepresented while the respondent was represented by George J. Banoba.

In his submission the applicant submitted on the point of illegality that the chairman of the Appellate Tribunal nullified the proceedings and Judgment of the Lumeno Ward Tribunal (Trial Tribunal) for want of composition without determining the appeal in merit and ordered trial de novo which to him the principal of overriding objective could cure the defect found. He was therefore advised to lodge this application with the view that the Appellate Tribunal would have considered section 45 of the Land Disputes Courts Act. He therefore prayed for the application be granted.

In reply Advocate Banoba submitted that the applicant has not advanced any reason which hindered him to appeal within prescribed time rather he mixed up irrelevant reasons. He cited different authorities and stated that the applicant has failed to state sufficient grounds to be granted leave to file an appeal out of time and thus praying this Court to dismiss the application with the deserving costs.

In rejoinder the applicant reiterated his submission in chief, and added that the respondent did not attach the authorities cited and therefore they should be ignored. He also insisted that the appellate Tribunal would have cured the said error by applying the principle of overriding objective.

Having gone through both submissions, the issue for determination is whether the reasons adduced by the applicant is sufficient to convince this Court to use its discretionary power to grant this application.

Among of the cases cited by Mr. Banoba is the case of **Lyamuya Construction Company Ltd versus Board of Registered Trustees of Young Women Christians Association of Tanzania. Civil Appeal No. 2 of 2010 (unreported)** this case states among other things the reasons that can be considered for granting extension of time, which are.

- (a) The applicant must account for all 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 he intends to take.*
- (d) If the court feels that there are other sufficient reasons. Such as the existence of a point of law of sufficient importance; such as illegality of the decision sought to be challenged.*

Being guided by the above cited case, this Court notes that the applicant has not adduced any reasons as to why he delayed coming to Court. Hence, it is undisputed fact that the applicant has not accounted for each day of delay.

In the case **Bushiri Assan Vs. Latifa Lukio Mashayo Civil Appeal No. 3 of 2007** (unreported) the court had this to say:

"Delay of even a single day has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps has to be taken."

The only reason stated by the applicant is that if the Ward Tribunal was not properly constituted the Chairman should have opted for overriding objective principle to cure that defect. He used this reason to argue for illegality.

It is true that illegality is sufficient ground for the Court to extend time for appellant to appeal out of time as it was stated in case of Principal Secretary, Ministry of Defence and National Service Vs. Divran P. Valambhia [1992] T.L.R 387 where the Court of Appeal upon faced with the issue of illegality had this to say:-

"In our view when the point at issue is one 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 matter and the record right."

According the facts of this case and the records of appeal the Chairman found that three out of five members who were present during judgment did not hear part of the evidence and they were not in better position to decide the case basing on evidence the remaining two who heard the case cannot form the proper corum as per section 11 of Cap 210 R.E. 2002. Therefore, the Tribunal ordered retrial for that reason.

It is clear that the applicant wants this Court to frown upon non usage of the overriding objective principle by the District Tribunal. I shall therefore

address this matter. In order for a Court to invoke the principle of overriding objectives the circumstances of a case has to meet criteria for invoking the principle.

It is established that the overriding objective principle has not been enacted so as to bypass the established principles of law but rather technicalities which hinder dispense of justice. In the case of Richard Osia Mwandemele v. Lwitiko Osia Mwandemele, High Court Land Appeal No. 17 of 2020, Hon. Utamwa J had this to say:

*'It essentially requires courts to deal with cases justly, speedily and to have regard to substantive justice; The principle was not meant to absolve each and every blunder committed by parties in court proceedings. Had it been so, then all rules of procedure would have been rendered nugatory. **The principle does not thus, create a shelter for each and every breach of the law on procedure.**' (emphasis supplied)*

I note that the facts of the above referred case is different from the one at hand. However, the underlying principle guiding invoking of overriding principle is the same **the principle does not thus, create a shelter for each and every breach of the law on procedure.** This is even more so when the law breached goes to the route of dispensing justice as is the case in this appeal and may occasion injustice to any party. As non-compliance of Tribunal composition affects the right to be heard, which cannot be cured by the principle of overriding objectives. Applying the principle in this case will

certainly occasion injustice as right to be heard, which is fundamental right, has not been adhered to.

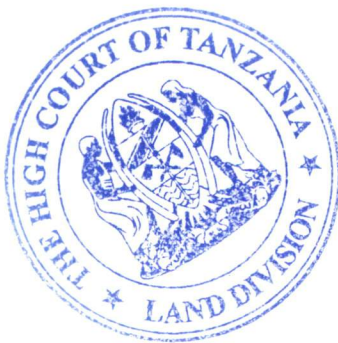
This position was also envisaged in the case of Mondorosi Village Council and 2 others v. Tanzania Breweries Limited and 4 others, Civil Appeal No. 66 of 2017, CAT at Arusha (unreported) where the Court of Appeal stated

"Regarding the overriding objective principle, we are of the considered view that, the same cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case."

Moreover, in this particular case, the record is clear that the issue of overriding objection was not something that was raised at the Tribunal, hence the applicant cannot raise a new issue on the intended appeal. The Court records further does not reveal any illegality hence this reason cannot stand. It is further noted that the applicability of overriding objective is not binding to the Tribunal or Court, it is discretionary.

In the upshot, I find the application to lack merits and it is hereby dismissed with costs.

Dated at Dar es salaam this 30th day of September, 2021



**T.N. Mwenegoha,
JUDGE.**