

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS LAND APPEAL NO. 140 OF 2008

(From the Decision of the District Land and Housing Tribunal of **KIBAHA** District at **KIBAHA** in Land Case Appeal No. 18 of 2008 and Original Ward Tribunal of Kerege Ward Tribunal in Civil Cause No. 68 of 2004)

HEMEDI MOHAMEDAPPELLANT

VERSUS

SALA TAODORIRESPONDENT

JUDGMENT

FIKIRINI, J:

Aggrieved by the decision of the Coast region District Land and Housing Tribunal, the appellant one Hemedi Mohamed appeals to this court, his grounds of appeal included the following:

1. *That the Honourable District Land and Housing Tribunal erred in law and in fact in holding to the effect that the circumstances surrounding the delay expressed in the Appellant's affidavit and submission filed to support his application for extension of time do not provide a justifiable excuse for not filing an appeal to the District Land and Housing Tribunal on time.*
2. *That the Hounourable District Land and Housing Tribunal erred in law in holding to the effect that the decision of the Kerege Ward Tribunal did not contain the illegality justifying extension of time to file an appeal to challenge it;*
3. *That the Honourable District Land and Housing Tribunal erred in law and in fact in holding to the effect that the intended appeal did not have enormous chances of success warranting an order for extension of time to file an appeal to challenge it;*
4. *That the Hounourable District Land and Housing Tribunal erred in law and in fact in holding to the effect that the case before the Tribunal did not involve issues of paramount importance warranting extension of time to file an appeal to challenge it;*
5. *That the Honourable District Land and Housing Tribunal erred in law and in fact in holding to the effect that time for filing an appeal from a Ward Tribunal to a District Land and Housing Tribunal cannot be extended for a period of over three and half years, which the Appellant here was seeking.*

The appeal was argued by way of written submissions and herein below is the summary of the said submissions by the parties through their counsels Audax K. Vedasto for the appellant and Lukwaro and Company for the respondent. It was the appellant's submission that the Chairman

erroneously decided that there was no valid reasons for the delay after the 15th of March 2007. The story behind was after the Ward Tribunal's decision the appellant appealed to the Primary Court. This was in reliance to section 20 (1) of the Ward Tribunal Act, No. 7 of 1985, Cap 206. The appellant came to learn that the Primary Court was not the proper forum sometime in April 2008, and immediately thereafter he filed for the application for extension of time. This was in three working days i.e. on the 2nd May.

In support of his argument the appellant cited the **case of Mary Marealle versus Ibrahim Kajembo, Civil Revision No. 109 of 2001** (unreported) in relation to the confusion as to which was the proper forum. Other cases along the same line were **Ramadhani Nyoni versus Haule [1966] TLR 71, and Martha Daniel versus Peter Thomas Nnko [1992] TLR 35**. This position was however, not embraced by some of the high court judges such as in the case of **Mohamed Abdulhussein versus Pita Kempapa Ltd. Civil Revision No. 66 of 2004** (unreported).

Besides the proper forum issue, the appellant also highlighted the fact that illegality of decision could be a sufficient reason for grant of the extension of time. This is because the Ward Tribunal decided on adverse possession while it had no jurisdiction to do so. Only High Court has such jurisdiction. The Ward Tribunal's decision was therefore illegal. And for that he cited the case of **Principal Secretary, Ministry of Defence versus DP Valambhia**.

Further in his submission, the appellant submitted that the Chairman did not sit with minimum of four assessors as required by the law. The cases of **John Agricola**

versus Rashid Juma (1990) TLR 1 and William Rajabu Mallya and 2 others versus R (1991) TLR 83 CAT were cited in support. According to the appellant that sitting did not constitute a proper tribunal with valid jurisdiction. The absence of jurisdiction therefore led to illegality in the decision made. The appellant cited the case of ***Abdu Hassan versus Mohamed Ahmed [1989] TLR 181 page 184*** which propounded that. In addition, the Chairman gave remedy not sought or prayed for. For this he cited the case of ***Shilabo versus Lobulu [2001] TLR 372***, Msoffe, J: in support of his submission.

Likewise, the appellant also argued that likelihood of success of the intended appeal was to be considered which the Chairman did not. The case of ***Samson Kishosha Gabba versus Charles Kigongo Gabba [1990] TLR 133*** was cited in support.

Similarly, the appellant submitted that legal issues are of paramount importance and therefore a good cause for extension of time. The appellant referred the court to the case of case of ***R. versus Hamood [1972] HCD 30***. Legal issue such as adverse possession which featured in this appeal were as well submitted on by the appellant as a good ground for grant of extension of time. The court was referred to the ***Aiyar, P.R. Concise Law Disctionary Wadwa Sales Corporation. Nagpur 1997 at pg 37, and Prime, T. The Modern Law of Limitation, Butterworth's, London, 1993 at pg 187, and the case of Salim versus Boyd [1971] EA 550.***

Reacting to the appellant's submission the respondent submitted that the District Land and Housing Tribunal correctly arrived at its decision as no sufficient cause was

shown as to why the appellant could not file his appeal for almost three years and a half. It was further the respondent's submission that the appellant has not been serious 2005 to 2006 and 2007. And the respondent was wondering what he actually did during the time as no concrete action taken were indicated besides vague statements.

It was therefore the respondent's position that grant of leave to enlarge time will be abuse of court process. Otherwise under section 20 (2) of Act No. 2 time can only be extended when there is sufficient cause. From a different angle the respondent argued that the appellant has actually not mentioned absence of officers appointed as the reasons leading to his failure to comply with the requirement or that he was looking for proper forum. These were the facts not part of the grounds of appeal. According to the respondent inclusion of facts not part of the grounds of appeal is legally and procedurally wrong.

Regarding timely filing of an appeal though in a wrong forum, it was the respondent's position that was not relevant and also that did not exonerate a party from the liability for failure to file documents timely and in the right forum.

The respondent further submitted that all high court judgments cited were not binding. As far as the extension of time is concerned, it must only be looked at each case at its own merits as stated in the case of ***Tanzania Harbours Authority versus Mohamed R. Mohamed, Civil Appeal No. 80 of 1999.***

Responding to the adverse possession issue, it was the respondent's submission that, that was not raised. Furthermore he submitted that part of the suit land has already been sold in 2007 to Seventh Day Adventist Church.

On a different note, the respondent submitted that the Ward Tribunal record were incomplete and therefore should not be relied on. And in conclusion he prayed for the appeal to be dismissed for want of merit.

In rejoinder the appellant submitted regarding adverse possession by stating that, the issue had been addressed in the Ward Tribunal judgment of 14th December 2004 at page 4. Therefore the respondent was not correct when he stated to the contrary.

Likewise responding to the sale issue raised by the respondent, it was the appellant's response that the respondent ought to have stated that in is counter affidavit and not as part of submission. By so doing the respondent's counsel action was equivalent to giving evidence from the bar which should not be considered. To hone home this point the appellant cited the case of ***Tuico versus Mbeya Cement [2005] TLR 41***, Massati, J:

In light of the above the appellant prayed for the appeal to be allowed.

I have carefully gone through the submissions and I am satisfied that this appeal has merits. Though not an automatic right and that each case should be given its own weight, in this particular appeal I am convinced there are sufficient and good causes warranting this appeal to be

allowed. There is more than one reason as to why this appeal deserves granting. First, it is clear without doubt that the appellant is a lay person, though not necessarily an excuse but cannot be ignored completely and especially bearing in mind the circumstances leading to this appeal.

Second, it is also not being disputed that at the time it was still confusing as to where parties should take their land matters. Again not a valid reason per se but I have considered the situation and concluded to be valid bearing in mind that the appellant did not just sit and wait but took steps. Only that the step taken were in a wrong direction.

Third, there are legal issues which called for attention and that can only been done if appeal in this matter is allowed. The Ward Tribunal decided on adverse possession while it has no powers to do so. That decision is thus illegal for lack of jurisdiction. The only remedy is either by way of appeal or revision by the appellate court. This is my view is a sufficient cause for grant of extension of time.

Fourth, this appeal if allowed the likelihood of success is great since there are legal issues which need to be sorted. If this is not sufficient and good cause, I do not know what else could be termed good cause. There are two main issues: one that of adverse possession which the Ward Tribunal entertained while those powers were only conferred to the High Court pursuant to section 37 of the law of Limitation Act, Cap 89. Second that the Chairman did not comply to section 11 of the Land Disputes Courts Act, Cap 216, as he sat by himself except on the judgment day. In addition there was no woman in the panel.

As well stated by the appellant's counsel in their submission that absence of jurisdiction leads to illegality and there is no way one can justify a judgment without jurisdiction. The cited cases of **Agricola** and **William** (supra) and that of **Mariri** (supra) have well clarified the position, which without hesitation I agreed to.

The respondent in their submission raised several points including the fact that High Court decisions are not binding. I totally agree with the respondent's counsel's submission but there are times such decisions have persuasive effect. In this appeal in particular those decisions had such an effect. The **Mary Marealle's** case (supra) whereby the confusion in place at the time was considered a good cause was a persuasive one. Other decisions were that of **Nyoni's** case (supra) and **Martha Daniel's** case (supra). These are some of the High Court decisions cited which had influenced my position.

Regarding delay of about three years or so before filing for the appeal, this was argued by the respondent that granting the application for extension of time would have been abuse of court process. With due respect to the respondent's counsel, though time is a major factor in determining whether appeal or any other application before the court or tribunal has observed prescribed time, but that should not be the only reason for granting or rejecting the application.

In my view where there is a burning legal issue which has occasioned miscarriage of justice, strict observance of prescribed time within which appeal or application should be filed will not make sense. And in actual fact that would not reflect well of the courts who are the custodian and

their core function is that of dispensing justice. It is important to adhere to prescribed guidelines in place but that should when need be not override the paramount importance of seeing justice done.

The respondent's counsel as well raised the issue of part of the suit land to have been sold away. In my view that does not deserve any attention. This is because the issue was brought at a wrong time and way. The issue has been brought up in course of submissions. I therefore totally share the appellant's concern that the move is akin to advocate giving evidence from the bar. There is no room for the appellant to cross examine the respondent. And that would be denying the appellant chance to exercise his right. The respondent if so wished, he ought to have included that fact in his counter affidavit and not as he did.

Similarly, the respondent raised the issue of the Ward Tribunal records being incomplete and therefore should not be relied on. In my view nothing more could have warranted grant of this appeal if not this remark from the respondent's side. The Ward Tribunal record if doubted then what about the decision there from? I believe the answer is an outright allowing of this appeal.

It is therefore my conclusion that this appeal has merits and I thus proceed allowing the appeal with costs.

It is so ordered.

Judgment Delivered this 4th September 2012 in the presence of parties.

P.S. FIKIRINI

JUDGE

4TH SEPTEMBER 2012

Right of Appeal Explained.

P.S. FIKIRINI

JUDGE

4TH SEPTEMBER 2012