

IN THE HIGH COURT OF TANZANIA
[LAND DIVISION]
AT SUMBAWANGA
MISC. LAND APPLICATION NO. 8 OF 2020

**(Originating from Land Case No. 26 of 2016, and
Land Appeal No. 3 of 2020)**

JOACHIMU MWANAKULYAAPPLICANT

VERSUS

1. GERVAS KAGOSHA

2. JAMES KAGOSHA



.....RESPONDENTS

RULING

16Th – 29th September, 2020

MRANGO, J.

This application has been preferred by the applicant under **section 41(2) of the Land Disputes Courts Act, Cap 216 as amended by the Written Laws (Miscellaneous Amendments, No. 2, 2016** seeking for this court to extend time for him to file an appeal. The application is supported by the affidavit of the applicant, Joachim Mwanakulya.

When the application was called on for hearing, applicant was represented by James Lubusi – learned advocate whilst respondents were represented by Mr. Peter Kamyalile – learned advocate. Mr. James Lubusi prayed to argue the application by way of written submission whereas Mr. Kamyalile had no objection. This court set a date for each party to file submission. The parties filed their respective submission as scheduled and ordered by this court.

Arguing in support of the application, learned advocate for the applicant submitted that the applicant lodged an appeal before this court as appeal No. 3 of 2020, however it was withdrawn on 09th March 2020 for failure to attach copy of judgement and decree.

After the appeal No. 3 of 2002 being withdrawn, the learned advocate found the time to file an appeal has lapsed, hence has preferred application for a leave to appeal out of statutory time under section 14 (1) of the Law of Limitation Act, Cap 89 RE 2002 which was struck out for being incompetent, hence this application.

Mr. James Lubus prayed to adopt the affidavit of which he said to contain sufficient reason for delay. He submitted that the bureaucracy of

the District Land and Housing Tribunal in Miscellaneous Land Application No. 4 of 2020 delayed to issue copy of judgement and decree. He emphasized his stand by citing the Court of Appeal case of **Barclays Bank Tanzania Ltd versus Phylician Hussein Mcheni, Civil application No. 176 of 2015** where it was observed thus; among factors to be considered in an application for extension of time under Rule 10 of the Court of Appeal Rules are (a) the length of delay (b) the reason of delay-whether delay was caused or contributed by the dilatory conduct of the applicant (c) whether case such as whether there is a point of law or illegality or otherwise of the decision sought to be challenged"

Mr. Lubusi cited also the case of **Regional Manager, Tanroads Kagera versus Ruaha Concrete Company Ltd, Civil Application No. 96 of 2007**, unreported, where it was observed thus;

"The test for determining an application for extension of time is whether the applicant has established some material amounting sufficient cause or good cause as to why the sought application is to be granted"

Mr. Lubus, in commenting the appeal No. 3 of 2020 which was withdrawn, he submitted that the same was within time, however the reason for withdrawn was non- attachment of the copy of judgement and decree which was caused by the District Land and Housing Tribunal for Rukwa at Sumbawanga in preparing the copy of judgement and decree, which to his view is sufficient reasons for delay.

Mr. Lubus further submitted that to his calculation, the re-filing the leave to appeal out of time hardly took three weeks since the appeal was withdrawn. He cited the case of **Chankulila Sichinga versus Willy John Pilla, Misc. Land Application No. 54 of 2019**, HC Mbeya Registry where he said Hon. Mambi, J refused extension of time because the applicant had stayed silence for one year.

He further submitted that he delayed for a very short period as it normal for litigation coming for mention or hearing when pleadings are complete to take a month or two.

He also submitted on the issue of involvement of assessors as he said the decision was completely without the opinion of assessors. He also argued on the issue of non-joinder of the seller, thus illegality as in the

case of **Juma B. Kadala versus Laurent Mkandee (1983) HC**, where it was observed thus, the seller must be included in the suit regardless of the law applicable in that particular suit. He argued that in land application No. 26 of 2016 the sellers alleged were not joined.

He finally prayed for the court to allow this application to file appeal out of time.

In reply, Mr. Peter Kamyalile – learned advocate for the respondents prayed for the counter affidavit be adopted as it contains his strong reason for opposing the application on the ground that the applicant has miserably failed to establish sufficient cause upon which the court can enlarge the time . The applicant has failed to show any point of illegality recognized by the law and also has failed to account for every day of the delay with sufficient reason for the delay.

With regard the ground of delay to get a copy of the judgement and decree Mr. kamyalile submitted that it is trite of the law that any person who want to benefit with the provision of **section 19 (2) of the Law of Limitation Act, Cap 89 RE 2019** must show the letter for the request of copy of judgement and decree which was made within the appealable time

which is 45 days. He further said the learned advocate for the applicant must show when he was given the said documents. The applicant has failed to show any letter in which he applied for the said copy of judgement and decree and he has failed to show the date on which he was supplied the said documents. He further submitted that the judgement was delivered on 23 /12/ 2019 and was ready for collection on 31/01/ 2020, but the applicant lodged Land Case Appeal No. 3 of 2019 on 14/01/ 2020 without attaching a copy of judgement and decree, that implies that the applicant did not request such document in order to appeal. He argued that, that was a very serious negligence on the part of the learned advocate which does not constitute sufficient reason for extension of time as it was held the case of **Martha Khotwe versus Miston Mwanjamila, Civil Application No. 5 of 2014**, unreported at page 5 & 6 that;

"At any rate negligence does not constitute good and sufficient cause to warrant extension of time. See Umoja Village versus NBC, Civil Appeal No. 26 of 1996 and Paulo versus Bethunderson, Civil Appeal No. 7 of 2005 (both unreported)." For the foregoing reasons, the applicant has

failed to advance good cause to justify an extension. The application is dismissed with costs."

Responding to the ground citation of wrong law on application for extension of time in Misc. Land Application per paragraph 8 &9 of affidavit he submitted that it is trite of the law that failure of a party's advocate to check the law is not sufficient ground for allowing an appeal out of time. Since the applicant advocate cited wrong provision on application for previous application for extension of time that he said is not sufficient reason and should be dismissed. The position was laid down in the case of **Calico Textile Industries Ltd versus Pyaraliesmail Premji [1983] TLR 28, CA**, it was held thus;

"Failure of a party's advocate to check the law is not sufficient ground for allowing an appeal out of time."

With regard the lack of opinion of assessors as illegality per paragraph 12 of affidavit, he submitted that there is no any illegality because the law allow such issue under **section 23 (3) of the Land Disputes Courts Act, Cap 216**. He further submitted that the case of **Juma Kadala** as cited by the learned advocate for the applicant is

distinguishable in the sense that in the present case the one who instituted the land application at the District Land and Housing Tribunal was the respondents who purchased the disputed land. The principle of failure to join the seller as a necessary part could be applicable if the land application at the trial tribunal was opened by the applicant Joachim Mwanakulya.

Mr. Kamyalile submitted that it is trite of the law nowadays that in application for extension of time the applicant must state the reasons for delay and account for every day of delay. Also delay of even a single day has to be accounted for otherwise there would be no point of having rules prescribing periods within which steps have to be taken. He said the applicant affidavit has failed to account the reasons for delay every day from 23rd day of December 2019 up to 11th day of June 2020, the applicant has failed also to account the reason for delay every day from 04th day of June 2020 up to 11th day of June 2020 when he filed this application. To cement his position he cited the case of **Safari Petro versus Boay Tlemu, Court of Appeal application No. 320/2017** at Arusha at page 6, it was held that;

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 have to be taken.

"Guided by the foregoing decision, the fact that there has been no explanation by the applicant regarding the delay in the 232 days, the implication is that there was none. In the circumstances, he has failed to give good cause to move the court to grant the sought extension of time. As it was in the first application, this application is found to lack merit and has to fail. It is accordingly dismissed for want of merit with costs."

Finally, he prayed for the application to be dismissed with costs.

The question is whether the application before this court has merit.

It is now a cardinal principle of law that when the time has expired, there must be explanation or material upon which the court may exercise its discretion to extend it. This stance has been taken by this court and Court of Appeal in a number of decisions. See the case of **Regional Manager, Tanroads Kagera vs. Ruaha Concrete Co. L.t.d; Civil Application No. 96 of 2007** CAT, (unreported), **Godwin Ndeweri and**

Karoli Ishengoma vs. Tanzania Indil Corporation (1995) TLR 200
and **Republic vs. Yona Kaponda and 9 others (1985) TLR 84** and
Tanga Cement Company Limited v. Jumanne D. Massanga and
another, Civil Application No. 6 of 2001.

In this application before me, through the affidavit as sworn by Joachim Mwanakulya averred that he was appellant in the Land Appeal No. 3 of 2020 before this court after being dissatisfied with the judgement of the District Land and Housing Tribunal for Rukwa In application No. 26 of 2016. The land appeal No. 3 of 2020 was filed within statutory time.

It was further averred by the applicant that the said appeal was not attached with the copy of judgement and decree, hence the appeal was withdrawn by the court for being incompetent. The applicant averred that the time to appeal lapsed, hence his learned advocate James Lubus filed application No. 4 of 2020 seeking leave to appeal out of time, however he cited wrong citation of law in the application, which could not move the court and thus this court was not moved to grant leave to appeal out of time.

The applicant argued that there is a point of law to challenge the intended appeal on illegality of the decision on lack of assessors in land application No. 26 of 2016.

On other hand, learned advocate for the respondents in his counter affidavit strongly contested that the applicant initially lodged an appeal without a copy of judgement and decree and said the applicant failed to prove by documents that the tribunal delayed to supply him copy of judgement and decree as he averred in the affidavit. He further averred that the applicant advocate has been negligently for filing the application for extension of time under wrong provision of law.

Apart from above, learned advocate for the respondents averred that the applicant failed to account the reason for the delay every day from 23rd day of December 2019 up to 11th day of June 2020, and also failed to account the reason for delay from 4th day of June 2020 up to 11th day of June 2020 when he filed this application.

As to the point of illegality, learned advocate for the respondents averred that the applicant failed to substantiate the details of the alleged illegalities as required if are apparent on the face of the record.

Having perused the entire records of this application, it transpires to this court that, the applicant through his learned advocate filed an appeal No. 3 of 2019 to this court without attaching both a copy of judgement and decree. The applicant advocate complained that the tribunal was the source of the delay, hence not supplied with such documents on time, however there is no proof to that effect. This court see that the learned advocate was negligently and as argued by the learned advocate for the respondents negligence does not constitute good and sufficient cause to warrant extension of time as per the authority cited to me.

Again, the learned advocate for the applicant filed an application for extension of time after the appeal was withdrawn, however he cited a wrong provision of the law to move the court. This court struck out the application for being incompetent.

I now move to the ground as asserted by the applicant's advocate in the affidavit that decision intended to be appealed before this court is faced with illegality on the face of it. The said illegality is based on the issue of joinder of seller and lack of assessors. The learned advocate was of the firm view that the ground of illegality per se is a sufficient cause for an extension of time.

There are several decisions of the Court of Appeal regarding issue of illegality as raised against the challenged decision. **In Vip Engineering and Marketing Limited and Two Others Vs. Citibank Tanzania Limited.** Consolidated Civil Reference No. 6, 7 and 8 of 2006 (unreported) it was held:

"It is settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under rule 8 (now Rule 10 of the court of Appeal Rules regardless of whether or not a reasonable explanation has been given by the applicant under the rules to account for the delay"

The issue was also considered in the case of **TanESCO vs. Mufungo Leonard Majura and 15 Others**, Civil Application No. 2016, (unreported), where it was held:

Notwithstanding the fact that, the applicant in the instant application has failed to sufficiently account for the delay in lodging the application, the fact that, there is a compliant of illegality in the decision intended to be

impugned... suffices to move the Court to grant extension of time so that., the alleged illegality can be addressed by the court.

In the instant case, the applicant challenges tribunal decision particularly in the paragraph 12 of affidavit alleging that the District Land and Housing Tribunal of Rukwa had entertained land application No. 26 of 2016 without assessors as result it gave illegal decision. However, learned advocate for the respondents disputed that there is no any illegality of lack of opinion of assessors as the law under section **23 (3) of the Land Disputes Courts Act, Cap 216 RE 2019** allows the Chairperson to continue and conclude the proceedings without members if they are absent of which this court concedes.

However, it was observed that when raising issue of illegality court granting extension of time must put emphasis on point of law which are that of sufficient importance. See case of **Lyamuya Construction Company Ltd vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, where it was observed:-

"Since every party intending to appeal sees 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 the question of jurisdiction; not one that would be discovered by a long drawn argument or process"

With the above principle in the statement, I have not been persuaded by the applicant on the issue of illegality in the District Land and Housing Tribunal that, it is not on the face of it, and does not suffice as a good cause for the court to grant extension of time as prayed.

As argued by the learned advocate for the respondents it is now trite of the law that in application for extension of time the applicant must state the reasons for the delay and has to account each day of delay. In this case, the applicant's advocate filed this application on 12th day of June

2020 after the application No. 4 of 2020 was lastly struck out on 4th day of June 2020 for being incompetent. The applicant's advocate delayed for almost eight (8) days before filing this application and there is no any further explanation regarding such delay of eight days to the satisfaction of this court, means that he failed to account for such days of delay to satisfaction of this court of which three days could be enough time for him to re-file.

For the reason stated above, I find the applicant has failed to advance good cause sufficient for this court to grant enlargement of time for the applicant to file an appeal. The application is dismissed with costs.

Order accordingly.




D. E. MRANGO

JUDGE

29.09.2020

Date - 29.09.2020
Coram - Hon. W.M. Mutaki – DR.
For Applicant - Mr. James Lubus
Applicant - Present
Respondent - Present
B/C - Mr. A.K. Sichilima – SRMA

COURT: Ruling delivered in the presence of the parties and Advocate
for the Applicant Mr. James Lubus.

Right of appeal explained.



W.M. MUTAKI

DEPUTY REGISTRAR

29.09.2020