IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO.416 OF 2020

(Arising from the decision of the High Court in Land Application No.38 of 2018)

YUSTINA LEMI ..... APPLICANT

VERSUS

LEAH JOHN ....1ST RESPONDENT

THECLA PETER ..... 2ND RESPONDENT

JIONSIA JOHN .....3RD RESPONDENT

RULING

Last order: 06.07.2021

Ruling date: 06.07.2021

A.Z.MGEYEKWA, J

I am called upon in this matter to decide whether this court should exercise its discretion under section 11 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 [R.E 2019] and section 14 (1) of the Law of Limitation Act, Cap, 89 [R.E 2019] to extend time within the applicant to file a Notice of intention to appeal to the Court of Appeal of Tanzania to impugn the

decision of this Court in Land Application No.38 of 2018 delivered on 24th February, 2018. The application is supported by an affidavit deponed by Yustina Lemi, the applicant. The first and second respondents is feverishly opposed to the application. In a joint counter-affidavit sworn by Mr. Armando Swenya, learned Advocate for the first and second respondents. The third respondent did not file a counter-affidavit.

When the matter was called for hearing before this court on 8th April, 2021, the applicant had the legal service of Mr. Kabura, learned counsel whereas the first and second respondent enjoyed the legal service of Mr. Kisoka, learned advocate was holding brief for Mr. Sweya, learned counsel. By the court order and consent by the parties, the application was argued by way of written submissions whereas, the applicant's Advocate filed his submission in chief on 23rd February, 2021 and the first and second respondents' Advocate filed his reply on 15th April, 2021 and the applicant's Advocate filed a rejoinder on 28th April, 2021.

Mr. Kabura, learned counsel was the first one to kick the ball rolling. Reiterating what was deposed in the supporting affidavit, the learned counsel urged this court to adopt the applicant's application and form part of his submission. Mr. Kabura draws the attention of this court that when the matter was set for mention on 15th October, 2020, the respondent

was ordered to file a counter affidavit within 14 days. He went on to state that when the matter was called for mention on 10th February, 2021 the applicant was not served with a copy of the counter affidavit and the respondent did not file the same before this court. It was his view that failure for the respondent to file a counter-affidavit means the applicant's application is not controverted and the same is unchallenged. To bolster his submission he cited the cases of **Alhaji Abdallah Talib v Eshakwe Ndoto Kiweni Mushi** (1990) TLR and **Gasper Otieno Marco & 11 others v University of Dar es Salaam and Attorney General**, Civil Application No.58 of 2000 (unreported), HC Dar es Salaam.

Submitting on the merit of the application, the learned counsel for the applicant argued that the Misc. Land Application No. 38 of 2018 for extension of time was dismissed due to inconsistency of names. He went on to state that the applicant was not represented thus he was a layperson who could not grasp easily the legal technicalities after the matter was dismissed. He stated that paragraph 7 of the applicant's affidavit, stated that the applicant has a recurrent sickness due to hypertension, hence it was difficult to apprehend the nature and effect of the ruling. He went on to state that the applicant took her time to look for a legal mind to assist her on the matter and hence lapse of time. Fortifying his position he

referred this court to the case of **Ramadhani Nyoni v M/S Haule and Company Advocate** [1996] TLR HC.

Regarding the ground of illegality. The applicant's Advocate submitted that Misc. Application No.38 of 2018 was dismissed for the reason that there was inconsistency of names of the applicant which led to a miscarriage of justice as averred by the applicant in paragraph 11 of the affidavit. He went on to state that the applicant's name Yustina; the first letter was written 'Y' and in the medical report was written 'J'. To support his position he cited the case of **Chang Qing International Investment Ltd v TOL Gas Ltd**, Civil Application No. 292 of 2016 and **Christina Mrimi v Coca Cola Kwanza Bottlers Ltd**, Civil Application No. 113 of 2011, the Court of Appeal of Tanzania held that:-

> *"...mistakes of errors in the name of a party or parties, the remedy is to correct the names from the mistaken one to the correct one."*

Insisting, Mr. Kabura stated that the dismissal order amounts to illegality which led to a miscarriage of justice, hence they urged this court to grant the applicant's application. He added that illegality is a good reason for extension of time. To bolster his submission he cited

the case of **The Principal Secretary Ministry of Defence and National Service v Devram P. Valambia** [1992] TLR.

The learned counsel for the applicant did not end there, he stated that the applicant was not afforded the right to be heard. He argued that the applicant was sick and was not represented in court during the hearing. In his view, the principle of right to be heard as enshrined under Article 13 of the Constitution of the United Republic of Tanzania of 1977 was not adhered to. To fortify his position he referred this court to the case of **Hussein Khanbhai v Kodi Raplph Siara**, Civil Revision No.25 [2014] the Court of Appeal of Tanzania at Mbeya. He went on to submit that the applicant pleaded in paragraph 8 of her affidavit that she was not aware of the notice of hearing and the date of delivery.

In conclusion, the learned counsel for the applicant beckoned upon this court to grant the applicant's application to lodge an appeal before the Court of Appeal of Tanzania with costs.

Mr. Sweya, the learned counsel for the respondents vehemently resisted the application. The learned counsel urged this court to adopt the counter affidavit and form part of his submission.

The learned counsel for the respondents began by disputing the applicant's contentiousness that the respondents have not filed a counter affidavit. He valiantly contended that the respondent has filed their joint counter affidavit on 27th October, 2020, thus he argued that the applicant's Advocate claims are with no any legal effect. He urged this court to disregard the applicant's Advocate submission and the cited cases thereto.

Submitting on the merit of the application, the learned counsel state that it is trite law that in order for the court to exercise its discretional power to grant extension of time the applicant must fulfill the following conditions; to account for all, negligence or sloppiness in the prosecution of the action that he intends to tale, the applicant must show pint of law involved of sufficient importance such as illegality.

The respondent continued to submit that the ground that the applicant is a layperson is baseless because ignorance of the law has never been a good cause for extension of time. The respondent fortified his submission by referring this court to the case of **Ngao Godwin Losero v Julius Mwarabu** (supra), the court held that:-

> "*...as has been held times out of number, ignorance of law never features as a good cause for extension of time.*"

Regarding the ground of illegality, the learned counsel for the respondent stated that the raised illegality is not on a point of law that can justify the applicant's delay. He argued that not every point of illegality can be taken to be a good cause of extension of time. He distinguished the cited case of **Valambia** (supra) and the case of **Christina Mrimi** (supra) where the illegality of the impugned decision was clearly visible on the face of the record, while in the instant application the illegality requires a long drawn process, hence, the case is irrelevant. He claimed that the names of Yustina and Justina is not a matter of substitution, it is a matter of law.

Submitting further, Mr. Sweya stated that the issue of right to be heard does not suffice to move this court to exercise its discretional power to grant extension of time. It was his view that in the instant case the matter was addressed based on the principles of the law of which every person who approaches the court must show diligence. He went on arguing that the applicant's reason for sickness is not supported by a genuine document and the name stated therein is different thus, his claims that she was not heard are unfounded. Insisting, Mr. Sweya contended that the applicant's reasons did not constitute a good cause for his delay. Fortifying his submission he cited the case of **Ludger Bernard Nyoni v**

National Housing Corporation, Civil Application No. 372/01/2018 (unreported) the Court of Appeal of Tanzania.

On the strength of the above submission, Mr. Sweya valiantly argued that the applicant has failed to account for every single day of delay and has not shown good cause to persuade this court to grant an extension of time. He urged this court to find that this application is unmerited and the same be dismissed.

In his brief rejoinder, the learned counsel for the applicant had nothing new to rejoin. He reiterated his submission in chief. Stressing that the applicant has accounted for days of delay and the issue of illegality is involved which attracts the attention of the Court of Appeal of Tanzania.

Before I proceed to determine the application on merit, I would like to address the applicant's Advocate concern that the respondents have not filed their counter affidavit as per the court order. The record reveals that the first and second respondents filed their joint affidavit on 27th October, 2020 as per the court order. No record shows the applicant was not served timely taking to account that the applicant has filed his rejoinder on 28th April, 2021 as per the court order. Therefore, I assume that both parties have complied with the court order.

Having carefully considered the submissions made by the learned counsels in their written submission and examined the affidavit and counter affidavit, the issue for my determination is ***whether the application is meritorious***.

The position of the law is settled and clear that an application for extension of time is entirely the discretion of the Court. But, that discretion is judicial and so it must be exercised according to the rules of reason and justice, as it was observed in the case of **Mbogo and Another v Shah** [1968] EALR 93, the defunct Court of Appeal for Eastern Africa, held that:-

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

Additionally, the Court will exercise its discretion in favour of an applicant only upon showing good cause for the delay. The term "good cause" having not been defined by the Rules, cannot be laid by any hard and fast rules but is dependent upon the facts obtained in each particular case. This stance has been taken by the Court of Appeal in a number of its decision, in the cases of **Regional Manager, TANROADS Kagera v Ruaha Concrete Company Ltd**, Civil Application No.96 of 2007, **Tanga**

Cement Company Ltd v Jumanne D. Massanga & another, Civil Application No. 6 of 2001, **Vodacom Foundation v Commissioner General (TRA)**, Civil Application No. 107/20 of 2017 (all unreported). To mention a few.

I have keenly followed the application and the grounds deposed in the supporting applicant's affidavit and the respondent's counter affidavit, Mr. The applicant's Advocate shown the path navigated by the applicant and the backing he has encountered in trying to reverse the decision of this court. He has raised two main limbs for his delay, ignorance of the law, and illegality. On the first limb that the applicant was a layperson the same cannot hold water.

When all is said concerning the above guiding principles, I right away reject the explanation of ignorance of the legal procedure given by the applicant to account for the delay. As has been held times out of number, ignorance of the law has never featured as a good cause for extension of time. See the case of **Ngao Godwin Losero** (supra) the Court of Appeal cited with approval the case of **Bariki Israel v The Republic**, Criminal Application No.4 of 2011 [18th October, 2016 TANZLII]. Therefore, as rightly submitted by Mr. Sweya the applicant has not accounted for each day of delay. The Court of Appeal of Tanzania in its numerous decision

insisted the need for accounting for the days of delay whereas the applicant was failed to surmount that hurdle, as a result, this Court cannot exercise its discretion by granting the applicant's application based on the first limb of his application.

Regarding the issue of illegality, the applicant alleges that the decision of this court is tainted with illegality. The illegality is alleged to reside in the powers exercised by this court in dismissing the Misc. Application No.38 of 2018 for the reason that there was inconsistency of the names of the applicant. Reading paragraph 10, the applicant alleges that the application was dismissed on legal technicalities which led to a miscarriage of justice, and that the applicant was not afforded a right to be heard. In his submission, the learned counsel for the respondent opposed the application, he argued that there is no illegality in the ruling sought to be appealed against. In his submission, Mr. Sweya stated that the alleged illegality is not apparent on the face of the record. In his view, the illegality raised by the applicant is through explanations and long drawn process.

The legal position, as it currently obtains, is that where illegality exists and is pleaded as a ground, the same may constitute the basis for extension of time. This principle was accentuated in the **Permanent Secretary Ministry of Defence & National Service v D.P.**

Valambhia [1992] TLR 185, to be followed by a celebrated decision of **Lyamuya Construction Company Limited and Citibank (Tanzania) Limited v. T.C.C.L. & Others**, Civil Application No. 97 of 2003 (unreported). In **Principal Secretary, Ministry of Defence and National Service v Devram Valambhia** [1992] TLR 185 at page 89 thus:

> *"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 straight.*** *" [Emphasis added].*

Similarly, in the cases of **Arunaben Chaggan Mistry v Naushad Mohamed Hussein & 3 Others**, CAT-Civil Application No. 6 of 2016 (unreported) and **Lyamuya Construction** (supra), the scope of illegality was taken a top-notch when the Court of Appeal of Tanzania propounded as follows:-

> "*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 Vaiambia'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." [Emphasis added].*

Applying the above authorities, it is clear that the ground of illegality that has been cited by the applicant touches on the right to be heard. I differ this Mr. Sweya observation that the illegality is not apparent on the face of the record, , the issue of names as stated in the case of Christina Mrimi (supra) was on the face of the record. Similarly, the applicant's right to be heard attract the attention of the Court of Appeal of Tanzania to find out whether the applicant was afforded right to be heard. In my view, the raised illegality bears sufficient importance, and its discovery does not require any long-drawn argument or process. This point of illegality meets the requisite threshold for consideration as the basis for enlargement of time and that this alone, weighty enough to constitute sufficient cause for extension of time.

For the sake of clarity, I have read the case of **Dominic Ishengoma** (supra). In **Ishongoma's** case, the issue for discussion was the illegality

was based on damages claimed drawn long argument by the parties. In my view, this cited case is distinguishable from the instant case. In the. However, as pointed earlier the Court of Appeal of Tanzania will have time to investigate the allegations and remedy the alleged illegalities.

In sum, based on the foregoing analysis, I am satisfied that the above ground of illegality is evident that the present application has merit. Therefore, I proceed to grant the applicant's application to lodge a Notice of Appeal out of time against the decision of this court in Misc. Land Application No.38 of 2018 within twenty-one days from today.

Order accordingly.

Dated at Dar es Salaam this date 06th July, 2021.

A.Z.MGEYEKWA

JUDGE

06.07.2021

Ruling delivered on 6th July, 2021 in the presence of Mr. Elinihaki Kabura holding brief for Mr. Daniel Anthony, learned counsel for the applicant, and Mr. Jonathan Mndeme, learned counsel for the respondent.

A.Z.MGEYEKWA

JUDGE

06.07.2021