

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

MISC. LAND APPEAL NO.73 OF 2021

(Arising from the District Land and Housing Tribunal for Temeke at Temeke
in Misc. Land Application No.128 of 2019 Originating from Kigamboni Ward
Tribunal in Land Case No.56 of 2018)

NYANGE HAMISI NYANGE APPELLANT

VERSUS

JOSEPHINA LUMULI KASSIMU RESPONDENT

JUDGMENT

Date of Last order: 06.10.2021

Date of Judgment: 11.10.2021

A.Z.MGEYEKWA, J

This is a second appeal, it stems from the decision of the Ward Tribunal of Kigamboni in Land Case No.56 of 2018 and arising from the District Land and Housing Tribunal for Temeke in Misc. Land Application No. 128 of 2019. The material background facts to the dispute are briefly as follows; Nyange Hamis Nyange filed a case at the Ward Tribunal of

Kigamboni in Land Case No.56 of 2018 claiming for ownership. The appellant lamented that the respondent trespassed his piece of land and build a house while he wanted to build a wall around his piece of land. He claimed that he owned the suit land for more than 30 years and he tendered a certificate of occupancy to prove his ownership. Josephina Lumuli, on his side, claimed that he bought the unsurveyed suit land from an old woman for Tshs. 900,000/=. However, he was not in possession of the sale agreement. The trial tribunal found that the respondent invaded the appellant's land therefore, it decided in favour of the appellant.

Aggrieved, Josephina Lumuli, the respondent decided to lodge an appeal, however, he found himself out of time. Therefore he filed a Misc. Land Application No.128 of 2019 at the District Land and Housing Tribunal for Temeke, at Temeke vide Misc. Land Application No.128 of 2019 for extension of time to file an appeal out of time. The appellate tribunal determined the application and proceeded to grant the respondents' application for an extension of time.

Dissatisfied, the appellant filed the instant appeal in respect to Land Appeal No.73 of 2021 *and raised three grounds of grievances as follows:-*

- 1. That, the trial court erred in law and facts by granting Respondent's Application of extension of time to file an appeal, based on the ground of illegality of judgment of the Ward Tribunal which was not stated in Affidavit supporting that Application.*
- 2. That, the decision in the Ruling of the trial court was improperly entered, since the grounds advanced in the Respondent's Affidavit were insufficient to allow the Application for extension of time to file an appeal.*
- 3. That, the trial court erred in law and fact by disregarding grounds adduced by Applicant here is to oppose the Application.*

When the matter was called for hearing before this court on 06th October, 2021, Mr. Mohamed Nyenge, learned counsel was holding brief for Mr. Hamidu, learned counsel for the appellant, and the respondent appeared in person. Hearing of the appeal took the form of written submissions, preferred consistent with the schedule drawn by the Court whereas, the appellant filed her submission in chief on 14th September, 2021. The respondent filed his reply on 24th September, The appellant filed his rejoinder on 30th September, 2021.

In support of the appeal, on the first ground, Mr. Hamidu was straight to the point. He submitted that the law governing applications for extension of time to appeal requires the aggrieved party to show sufficient reasons for his/her delay to file an appeal within time. To support his position he cited section 20 (2) of the Land Disputes Act, Cap. 2020 which requires the District Land and Housing Tribunal to grant an extension of time after finding that there is sufficient cause to extend the time for filing the intended appeal.

The learned counsel for the appellant faulted the District Land and Housing Tribunal for granting the respondent's application for an extension of time. He claimed that the respondent's affidavit which would have persuaded the tribunal to extend the time to appeal did not provide reasons for his sickness. Therefore, the Chairman disregarded the respondent's ground. Mr. Ubadi submitted that the only raised ground by the respondent which remained was on illegality. He lamented that the ground of illegality in his affidavit was not pleaded in the respondent's affidavit instead he rose the same during the hearing of the application. Fortifying his submission he cited the cases of **Nicholas Hamis & 1013 others v Tanzania Shoe of Tanzania**, Civil Application No.54 of 2009, and **Makori Wassaga v Joshua Mwaikambo & Others**, (1987) TLR 88.

The learned counsel for the appellant continued to argue that the ground which was not pleaded or not raised cannot be granted. To buttress his position he cited the cases of **Impala Warehouse of Logistic (T) v Samwel Kayombo & 3 Others**, Revision No. 926 of 2013, **Nico Insurance (T) Ltd v Philip Paul Owoya, Tabu Sinjene, and Abillah Mohamed**, Civil Appeal No. 151 of 2017 and **Zuberi Augustino v Anceth Mugambe** (1992) TLR 137.

On the strength of the above submission, the learned counsel for the appellant beckoned upon this court to allow the appeal, quash and set aside the decision of the District Land and Housing Tribunal for Temeke.

Opposing the appeal, on the first ground, being straightforward, Mr. Balankiliza, learned counsel for the respondent submitted that the District Land and Housing Tribunal was correct to extend the time to file an appeal based on the ground of illegality. Mr. Balankiliza went on to submit that the respondent in her affidavit which was annexed to the Judgment of the Ward Tribunal as part of the affidavit. He added that in her submission the respondent referred to the said copy of the judgment of the Ward Tribunal as a ground of illegality. It was his understanding that for that reason the

issue of illegality was not new since it was referred from the annexed judgment of the Ward Tribunal.

Mr. Balankiliza distinguished the cited cases of **Nicholas Hamis** (supra) **Makori Wassaga** (supra), **Impala Warehouse of Logistic (T)** (supra), and **Nico Insurance**. He went on to submit that the issue of illegality is a sufficient and justifiable reason for the extension of time and the court may grant an extension to allow the applicant to challenge the illegality appearing on the face of the record. To bolster his position he referred this court to the case of **Danford Elisante Ngowo (as legal personal representative of the Estate of the late Robert Elisante Ngowo) v Jenerali Ulimwengu and three Others**, Misc. Land Application No. 120 of 2019. Insisting, he submitted that the appellate tribunal was correct to extend time since the issue of illegality was referred from the Judgment of the trial Ward Tribunal.

As to the second ground of appeal, Mr. Balankiliza simply argued that the District Land and Housing Tribunal extended time after it has discovered that the judgment of the Ward Tribunal revealed the error on the face of the record which amounted to illegality. He added that the issue of illegality is sensitive in the administration of justice. The learned counsel

for the respondent added that the illegality was featured in the Ward Tribunal decision since the secretary was involved in determining the matter contrary to the law.

On the strength of the above submission, the appeal before this court is demerit the same be dismissed with costs.

In her short rejoinder, the appellant's Advocate disputed the submission made by Mr. Balankiliza. He reiterated her submission in chief and added that the secretary to the tribunal was not among the tribunal members who participated in decision making. He urged this court to allow the appeal with costs.

Having summarized the submissions and arguments of both learned counsels for and against the appeal, I should now be in a position to determine the appeal on which the parties bandying words. The issue for determination is *whether the appeal is meritorious*.

In my determination, I will consolidate all grounds because they are intertwined. The same is related to the grounds for extension of time specifically the issue of illegality, the appellant contended that illegality was not pleaded in the respondent's affidavit.

I am in accord with both learned counsels that, it is settled law that an application for extension of time is grantable where the applicant presents a credible case to warrant the grant of such extension. There is no dispute that the Chairman granted the respondent's application for extension of time based on the ground of illegality.

Addressing the issue of illegality, the Court of Appeal in its numerous authorities stated that a point of law must be that of sufficient importance and must also be apparent on the face of the record. This requirement got a broadened scope in the epic decision of the Court of Appeal of Tanzania in the case of **Ngao Godwin Losero v Julius Mwarabu**, Civil Application No. 10 of 2015 when the Court of Appeal of Tanzania referred to the **Lyamuya's** case, it made the following observations:-

*"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 an 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].

In the case of **Lyamuya Construction Company Limited v Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No.2 of 2010 (unreported), the Court of Appeal of Tanzania held that:-

*“ 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 Valambhia’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 an 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, (but), not one that would be discovered by a long drawn argument or process.”* [Emphasis added].

I have keenly followed the appeal, written submissions of both learned counsels, the affidavit, and ruling of the District Land and Housing Tribunal in Misc. Land Application No.128 of 2019 and noted that the issue of illegality was mentioned by the respondent in his submission in chief. The illegality raised by the learned counsel for the applicant touches on the District Land and Housing Tribunal decision.

The respondent's Advocate strongly opposed Mr. Hamidu's submission for the reason that the issue of illegality is well featured in his submission and the impugned decision of the Ward Tribunal is annexed to the affidavit. I had to go through the applicant's affidavit to find out whether the applicant included the issue of illegality in his affidavit. The affidavit is silent in other words the applicant did not raise an issue of illegality in her affidavit.

The position in our jurisprudence is settled on the matter. It is to the effect that, in determining whether the application has met the required conditions for its grant, a conclusion is drawn from the affidavit that supports the application. The rationale for this is not hard to find. It stems from the fact that evidence was given by affidavit, therefore a point of illegality was supposed to be mentioned in the affidavit, not on attached documents or annexures which support the affidavit. Unlike submissions

which are generally meant to reflect the general features of a party's case and are elaborations or explanations on evidence already tendered. This was observed by the Court of Appeal of Tanzania in the case of **The Registered Trustees of Archdiocese of Dar es Salaam v Chairman Bunju Village Government and Others**, Civil Application No. 147 of 2006 (unreported).

Thus, while the contention raised by Mr. Ubadi is in sync with the foregoing position, I am convinced that the point of illegality has been raised through a submission from the bar. The alleged illegality is not specifically pleaded in the applicant's supporting affidavit, and what the learned counsel for the appellant did, through his submission, was to introduce a new ground of illegality and he did not bother to submit on the reasons for the delay. Instead, he completely banked on the ground which was not stated by the applicant in his affidavit. Therefore, I fully subscribe to Mr. Ubadi submission that the issue of illegality was not pleaded thus it is an afterthought. Coming before this court and insisting or stressing that there was a matter of illegality is baseless since the same cannot change the position of the law. Therefore, it is my considered opinion that as a matter of law, the Chairman faulted himself to rely on a ground that was not pleaded in the applicant/respondent affidavit since the same cannot

be termed as sufficient ground for applying for an extension of time. I recapitulate that I accede to Mr. Ubadi's views that the respondent's application at the District Land and Housing Tribunal in Misc. Land Application No.128 of 2019 was devoid of merit.

The upshot of the above is that I am inclined to disallow the appeal therefore I proceed to quash and set aside the decision of the District Land and Housing Tribunal for Temeke at Temeke without costs.

Order accordingly.

Dated at Dar es Salaam this 11th October, 2021.




A.Z.MGEYEKWA

JUDGE

11.10.2021

Judgment delivered on 11th October, 2021 in the presence of the appellant and the respondent.




A.Z.MGEYEKWA

JUDGE

11.10.2021

Right to appeal fully explained.