

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 164 OF 2021

(Originated from Land Appeal No. 107 of 2018 in the High Court of Tanzania Land Division at Dar es Salaam decided by Hon. I. Maige dated 8th day of May, 2020 and Application No. 149 of 2008 of the District Land and Housing Tribunal for Kinondoni at Mwananyamala decided by Hon. Mbilinyi dated 4th May, 2016)

PAULO MUSHI..... APPLICANT

VERSUS

THE REGISTERED TRUSTEES OF

CONSOLATA FATHERS.....RESPONDENT

R U L I N G

Date of last Order: 27/09/2021

Dated of Ruling: 25/10/2021

A. MSAFIRI, J:

Before me is an application brought under section 11 of the Appellate Jurisdiction Act, Cap. 141 R.E 2019. The order being sought for is: -

- a) That this Honourable Court may be pleased to grant extension of time for Applicant to file a Notice of Appeal against the Respondent in respect of Land Appeal No. 107 of 2016 in the High Court of Tanzania Land Division at Dar es Salaam.*
- b) That this Honourable Court may be pleased to grant extension of time for Applicant to file a letter requesting Rulings, Drawn Orders,*

endorsed exhibits and proceedings in respect of Land Appeal No. 107 of 2016.

c) That this Honourable Court may be pleased to grant extension of time for Applicant to file Application for leave to Appeal to the Court of Appeal of Tanzania against the decision of Land Appeal No. 107 of 2016.

d) Costs of this application be in the course.

e) Any other order(s) and relief(s) the Honourable Court may deem fit to grant.

The Application is supported by the affidavit of Paulo Mushi, the applicant while the respondent, opposing the application, filed a counter affidavit of Fr. Brown Cyprian Mvanda. The hearing of the Application was by way of written submissions. The applicant was represented by Lusajo Willy, learned Advocate while the respondent was represented by Rajab Mrindoko, learned Advocate. In their submissions, the counsel for the applicant prayed to adopt the applicant's affidavit and "affidavit in reply to the counter affidavit" and their contents to form part of his submission. Likewise, for the respondent's counsel who prayed also for the counter affidavit of Fr. Brown Cyprian Mvanda, a trustee of the respondent to form part of their submission.

Having considered the submissions of both parties together with the court's records, the major issue for determination is whether this Application is meritorious. Starting with brief background of the Application, the applicant was aggrieved by the decision of Kinondoni District Land and Housing Tribunal in Land Application No. 149 of 2008. In the said matter, the trial Tribunal had decided in favour of the

respondent, declaring them the lawful owner of Plot No. 16 Block "B" Ununio, Kinondoni, Dar es Salaam. The applicant appealed to this Court through Land Appeal No. 107 of 2016 before Hon. Maige, J (as he then was). After hearing of the appeal, the court find that the appeal has no merit and dismissed it with costs. The applicant was not satisfied hence the intended appeal to the Court of Appeal.

It is trite law that in applications for extension of time, the applicant must show good cause for the delay as required by Rule 11 of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019.

The provision states;

"11(1) subject to subsection (2), the High Court or where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned, may extend the time for giving notice of intention to appeal from a judgment of the High Court or of the subordinate court concerned, for making an application for leave to appeal or for a certificate that the case is a fit case for appeal, notwithstanding that the time for giving the notice or making the application has already expired".

Factors to be taken into account in determining whether or not to exercise the courts discretion has been outlined in various decisions of the Court of Appeal. Admittedly, such factors are not necessarily exhaustive but at the moment they include; cause of the delay, length of the delay, whether or not the applicant has accounted for the delay, and whether there is illegality or any issue of law of sufficient public importance in the decision sought to be challenged. [See the cases of **Principal Secretary,**

Ministry of Defence and National Service vs. Devram Valambhia (1992) TLR 182 and **Lyamuya Construction Co. Limited vs. Boards of Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 CAT, Arusha (Unreported)]

In the determination of the present Application the main question is whether the applicant has met the herein above set factors. In his affidavit which forms part of the applicant's submission, the applicant stated that between 9th to 19th May, 2020 when he was in the process of preparation of Notice of Appeal, the Principal Officer of the respondent one Antipas Edward Tesha approached the applicant and proposed to him to settle the matter and asked the same not to initiate any appeal to challenge the decision in Land Appeal No. 107 of 2016. He said that, the respondent's Principal Officer told him that, the respondent will provide amount of money to the applicant as a consideration of the settlement proposed.

The applicant avers that, trusting the respondent being a religious institution, he stopped all appeal plans. However, until to date, the respondent has not honored the said settlement. This reason is also reflected in the written submission by the advocate for the applicant. The respondent has denied this claim and told the court that is not sufficient reason for delay and the appellant has failed to prove his mere words.

From this, I have gathered that one of the reasons for delay, forwarded by the applicant is that he was led by the agent of the respondent to believe that they will enter settlement agreement, but the agent did no

honour his words. However, this court finds that this is not sufficient ground to warrant extension of time. The applicant's claims are mere words without any proof.

It is elementary law that, he who alleges must prove as provided for under Section 110 of the Evidence Act, Cap. 6 R.E 2019 [see the case of **Wambura N.J Waryuba vs. The Principal Secretary Ministry of Finance & Another**, Civil Application No. 320/01 of 2020, CAT DSM (unreported)].

In his submission, the counsel for the applicant averred that, because it was the respondent who approached the applicant for settlement through one Antipas Edward Tesha, it was the respondent who was to dispute the claims by producing a sworn counter affidavit by the said Antipas Edward Tesha. Since there is no that counter affidavit, it means the respondent has admitted that fact. With due respect to the counsel for the applicant, I differ with his position. As said, it is trite law that who alleges must prove. The respondent has denied the applicant's claims through his counter affidavit and in the written submissions, so hence the applicant cannot shift the burden of proof to the respondent. In this ground, I find that the applicant has failed to provide the sufficient reason for his delay and neither has he gave an account for each day of his delay.

The second ground which the applicant prays for this court to consider is the issue of illegality. The applicant in his affidavit claims that among the grounds of the intended appeal is the illegality of the letter of offer purported by the respondent to be the document of ownership of the vendor of the suit property to the respondent. He stated that the letters

from the Ministry of Land, Housing and Human Settlement Development stated among others that Plot No. 16 Block "B" Ununio has no connection with LD/126/66/1/PJC and that the alleged letter of offer by the respondent is fake. The said letters were annexed to the affidavit as PM -1 collectively.

The ground of illegality was elaborated further by the learned counsel of the applicant where he referred this court to the cases of **Principal Secretary, Ministry of Defence and National Service vs. Devram Valambia (supra)**, and **Lyamuya Construction Company Limited vs Board of Trustees of Young Women's Christian Association of Tanzania,(supra)**.

On their part, the respondent through Mr. Mrindoko, denied vehemently the existence of illegality in the decision of the High Court. Agreeing with the principles raised in the cases referred by Mr. Lusajo for the applicant, Mr. Mrindoko pointed that the illegality of the impugned decision must clearly be visible on the face of record as emphasized in **LYAMUYA'S case (supra)**. He emphasized that the illegality complained of by the appellant is the letter of offer which is claimed to have been fraudulently obtained. Mr. Mrindoko argued that the said letter was produced without any objection during the trial Tribunal. He said that the applicant has not established that the illegality complained of is apparent on the face of record.

As it was observed in the case of **VIP Engineering & Marketing Limited vs Citibank Tanzania Limited, Consolidated Civil**

References No. 6, 7 and 8 of 2006, it is established that where the point of law at issue is the illegality or otherwise of the decision being challenged, that by itself constitutes "*sufficient reasons*". So, it is true that, time could be extended if the court feels that there is a point of law of sufficient importance, such as the illegality of the impugned decision.

However, as it was clearly laid down in the case of **LYAMUYA CONSTRUCTION (supra)**, the illegality of the impugned decision has to be clearly visible on the face of the record. Incidentally, the court in the referred case 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 raised points of law should, as of right, be granted extension of time if he applies for one. The court 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 record, such as the question of jurisdiction, not one that would be discovered by a long drawn argument or process**".(emphasis mine).*

Applying the foregoing statement of principle to the case at hand, the illegality of the letter of offer by the respondent alleged to be fake is not apparent clear on the face of record and to my view, the same will take a long drawn argument. This is so, because the letters which was annexed to the affidavit collectively as annexure PM -1 which are purported to prove that the letter of offer was fake, the first letter dated 9th February,

2006 addressed to the Registered Trustees of Consolata Father is the new document which has been introduced at this stage. It has not featured in the impugned decision, hence it was not part of evidence during the trial, so it cannot be raised at this stage.

On the letter dated 20 April, 2017 from the Ministry for Lands addressed to Paul Elendwasen Mushi, it was established that it was the appellant who caused the same to be written by the said Ministry while the appeal was pending. As this issue was determined during the appeal, I will refrain from going into that. Nevertheless, I find that this also draws a long process which was discouraged in the case of LYAMUYA.

I am of the view that the applicant has failed to establish that the illegality complained of is apparent on the face of record and is easy to be seen without any long process or long drawn argument. For those reasons, I must conclude that the applicant has not demonstrated any good and sufficient cause that would entitle him extension of time. In the result, this Application fails and is accordingly dismissed with costs.

Date at Dar es Salaam this 25th day of October, 2021.


A. MSAFIRI
JUDGE

