

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND APPLICATION NO. 665 OF 2020**

*(Arising from Land Case No. 35 of 2014 and Misc. Land Application  
No. 66 of 2019)*

**EMMANUEL NASUZWA KITUNDU.....APPLICANT**

**VERSUS**

**ALEX MSAMA MWITA.....1<sup>ST</sup> RESPONDENT**

**W.W.F. TANZANIA PROGRAM OFFICE.....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

Date of last order: 20/10/2021

Date of Ruling: 29/10/2021

**A. MSAFIRI, J:**

The applicant is seeking for an order of extension of time so that he can lodge his Application for setting aside a Ruling emanating from a settlement decree out of time, delivered by Hon. Awadhi, J on 7<sup>th</sup> June, 2019 in Misc. Land Application No. 66 of 2019. The Application was brought under section 14(1) of the Law of Limitation Act, Cap. 89 R.E 6, 2019 accompanied by the affidavit of the applicant himself.

Hearing of the Application was by way of written submissions, Mr. Kanonyele, learned advocate appeared for the applicant while Mr. Augustine Kusalika, learned advocate appeared for the 1<sup>st</sup> respondent and Mr. Juvenalis Ngowi learned advocate appeared for the 2<sup>nd</sup> respondent.

Mr. Kanonyele commenced his submission by fully adopting the contents of the applicant's affidavit which he prayed for the same to form part of his submissions save for the minor typographical errors. The advocate stated that the applicant condemns the conduct and treatment he received by the trial Judge in Misc. Land Application no. 66 of 2019 whereas after ordering appearance of parties in person, the applicant appeared in person on 22<sup>nd</sup> March, 2019 but despite that he complained in court that he did not instruct Mr. Kanonyele to represent him since he was not aware of the settlement entered between the plaintiff and the 1<sup>st</sup> defendant and that he personally intended to contest the Application, the Hon. Judge ignored him and proceeded to issue orders ignoring his interest.

Mr. Kanonyele, submitted further that, the major complaint by the applicant about the Ruling and the conduct in Misc. Land Application No. 66 of 2019 is the illegality which prevailed in the same. That there was construction of the purported Deed of Settlement purported to have been entered between the plaintiff and decree holder in Land Case No. 35 of 2014 in which the applicant was the 1<sup>st</sup> defendant. That the applicant was not made a party to the said Settlement, but surprisingly, the Hon. Court illegally blessed the said Deed of Settlement without considering the illegality in its composition and the applicant's interest in the impugned decree.

Mr. Kanonyele contended that the illegality being one of the reasons advanced in the applicant's affidavit, the court, regardless of other reasons advanced, ought to grant the Application in view of determination

of illegality. He cited numerous cases to support his argument one of them being the case of **VIP Engineering Marketing Limited & 2 Others vs. Citibank Tanzania Limited, Consolidated Reference No. 6,7, and 8 of 2006, CAT** (unreported). He urged the court to see the ground of illegality as a sufficient reason to allow this Application.

Mr. Kusalika for the 1<sup>st</sup> respondent vehemently argued against the Application. He prayed to adopt the contents of the 1<sup>st</sup> respondent's counter affidavit and stated that the reasons advanced by the applicant in his affidavit are not sufficient to warrant the grant of the Application.

He argued that the Applicant has failed to account for delay of filing the Application promptly and diligently. That since the impugned Ruling was delivered on 7<sup>th</sup> June, 2019, and the current Application was filed after over 17 months, the applicant was supposed to account for each and every day of delay. He urged the court not to consider all authorities submitted by the Applicant as they are irrelevant to the Application at hand. Mr. Kusalika cited several cases among them the case of **Yusufu Same & Hawa Dada vs. Hadija Yusufu, Civil Appeal No. 1 of 2002** (unreported).

Mr. Juvenalis Ngowi for the 2<sup>nd</sup> respondent also submitted against the Application. He prayed to adopt the contents of his counter affidavit. He stated that, it is a trite law that a party seeking for extension of time to file an Application must show sufficient reasons for delay and must as well account for each day of his inordinate delay, and the reasons must be established in the affidavit supporting the Application.

Mr. Ngowi submitted further that, the applicant in his affidavit, has failed to establish the reasons for his delay. That, counting from 7<sup>th</sup> June, 2021 when the impugned Ruling was delivered, and the date which the current Application was filed, there is a delay of not less than 8 months. Mr. Ngowi argued that the only paragraph in the applicant's affidavit which give out the reason for delay is paragraph 9 which states that the applicant was bereaved by his father and he has to travel and attend funeral. The affidavit does not state the date of death, date of travelling and the date of the applicants coming back from funeral.

Mr. Ngowi urged the court to take note that the Application does not show how the applicant is intending to challenge the impugned Ruling. The prayers stated in the chamber summons states that it is an Application for extension of time to set aside the Ruling. He challenged the Application that a party cannot set aside the Ruling which was not an ex-parte Ruling.

On the reason of illegality advanced by the applicant, Mr. Ngowi stated that this was a new issue established by the applicant's advocate as the same does not feature in the applicant's affidavit. Despite that, if there was any illegality in the proceedings of the High Court, the remedy for the applicant is to file for extension of time to file an appeal to the Court of Appeal or file for Review instead of Application to set aside the same. He asserted that an Application to set aside the decision of the court due to illegality is unknown creature in the Judicial Jurisprudence.

He added that, the argument by the Applicant that he did not instruct Mr. Kanonyele to represent him ought to be proved by the affidavit of Mr. Kanonyele swearing that he did not instruct Mr. Chuwa, learned advocate

to hold his brief during the proceedings of the impugned Ruling. To cement his submissions, Mr. Ngowi cited numerous cases one of them being the case of **Jumane Hussein Bilingi vs. the Republic, Criminal Application No. 20 of 2014, CAT at DSM** (unreported). He prayed for dismissal of the Application.

There was no rejoinder from the applicant's side, therefore after consideration of submissions of parties and the records available in the court file, the issue for my determination is whether the Application has merit.

The Application is brought under section 14(1) Part III item 21 of the First Schedule of the Law of Limitation Act, Cap. 89 R.E. 2019. First, to correct the applicant, there is no "First Schedule" to the cited law, but there is a Schedule which is made under section 3 of the cited Act.

As per chamber summons, it is an Application to set aside a Ruling of this court delivered on 7<sup>th</sup> June, 2019 by Hon. Awadhi, J in Misc. Land Application No. 66 of 2019. In his submission, Mr. Ngowi for the 2<sup>nd</sup> respondent urged the court to take note that the chamber summons does not show how the applicant is intending to challenge the impugned ruling. He stated that a party cannot set aside the Ruling which was not an ex-parte Ruling. I have gone through the proceedings and Ruling of Misc. Land Application No. 66 of 2019. The applicant was a party to the Application as the 2<sup>nd</sup> respondent. He even entered physical appearance on 22/03/2019 during the ongoing proceedings. Therefore, it is not as if the applicant was not a party to the Application or was unaware of the same so he intends to set aside the decision of that Application. I have



to admit that I was faced with questions similar to the one asked by Mr. Ngowi for the 2<sup>nd</sup> respondent. What kind of an Application does the respondent intends to file if the leave was granted by the court? In which court? Can the applicant file the Application to set aside the Ruling of the High Court in the same court?

Neither the chamber summons nor the affidavit of the applicant reveals what kind of an Application he intends to file, whether it is the leave of this court to file an appeal to the Court of Appeal, review or revision by the High Court? It seems the applicant chose to keep this important information to himself and his advocate.

In such circumstances, the court will assume that the words "***extension of time to file an application to set aside a Ruling***" means that the applicant intends to appeal to the higher court or review to this court. On that line, the important question is whether the applicant has advanced sufficient reasons as set in numerous cases among them being the cases of **British Broadcasting Corporation vs. Eric Sikujua Ng'maryo, Civil Application No. 138 of 2004, CAT, DSM** (unreported) and **Lyamuya Construction Company Limited vs Board of Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010.**

In the current Application, in his affidavit, the reasons for delay advanced by the applicant appears in paragraph 9 whereby he stated that the delay was due to the fact that, the judgment (sic) was not ready for collection immediately after its delivery, and second, soon thereafter he was

bereaved by his father and had to attend the funeral in the village and when he came back to Dar es Salaam, he was already out of time.

It is trite law that an applicant seeking for extension of time has to account for each day of delay. In the present matter, the applicant's affidavit does not reveal when he collected the copy of impugned Ruling, when he was bereaved, when did he went to attend the funeral and which date he came back from the village.

The applicant's first attempt to seek for extension of time was unfruitful before Hon. Opiyo, J where the Application was struck out for being incompetent. The Ruling was delivered on 19/10/2020 and as per the Drawn Order, it was extracted on 26/10/2020. However, the applicant did not act promptly but filed this matter on 19/11/2020. In my opinion, the applicant has failed to account for each day of delay so, he did not advance sufficient reasons before this court to warrant to be granted leave for an extension of time.

In the case of **Oswald Masatu Mwizarubi vs Tanzania Fish Processors Limited**, Civil Application No. 13 of 2010, (CAT) Mwanza Registry, (unreported) Mjasiri JA (as she then was) had the following observation;

*"It is upon the party seeking extension of time to provide the relevant material in order to move the court to exercise its discretion".*

In submissions, Mr. Kanonyele for the applicant contended that illegality is one of the reasons advanced in the applicant's affidavit and urged the

court to see the ground of illegality a sufficient reason to allow the Application.

In the case of **Principal Secretary, Ministry of Defence and National Service vs Deuram Valambia [1991] TLR 387** it was held 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 alleged illegality be established, to take appropriate measures to put the matter and the record straight".*

Furthermore, in the case of **British Broadcasting Corporation (supra)**, the Court of Appeal cited with approval the case of **Harban Haji Mosi & Another vs Omari Hilal Seif & Another, Civil Reference No. 19 of 1997** where it was stated that;

*"Leave is grantable where the proposed appeal stands reasonable chances of success or where, but not necessarily, **the proceedings as a whole reveal such disturbing features as to require the guidance of the Court of Appeal.....**"* (Emphasis supplied).

The illegality claimed by the applicant is revealed in paragraphs 2,3,4,5,6,7, and 10 of the affidavit. In his submission, Mr. Kanonyele stated that the major complaint of the applicant is the conduct of the proceedings and Ruling of Misc. Land Application No. 66 of 2019. That the applicant was the defendant in the Land Case No. 35 of 2014. That the plaintiff (now 1<sup>st</sup> respondent) and the 2<sup>nd</sup> defendant (now 2<sup>nd</sup>



respondent) entered into a Deed of Settlement between them and the same was blessed by this court without considering that the applicant was left out in the said Deed of Settlement while he has interest in the impugned decree. In paragraph 5 of the affidavit, the appellant argued that, irrespective of Land Case No. 35 of 2014 been determined involving three parties to it, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed Settlement of a Decree between themselves and neglected the applicant, the act which infringed his right over the suit premises.

I have gone through the proceedings and Ruling of the impugned Misc. Land Application No. 66 of 2019, I have failed to detect the point of general importance or a novel point of law which can be said it needs the attention of the higher court. The proceedings as well, does not reveal such disturbing features as to require the guidance of the Court of Appeal. I have warned myself against going into determination of the matter on merit, but however what the applicant is arguing in his affidavit was already determined during the hearing of the impugned Application. The applicant attended the proceedings of the impugned Application so his arguments that he was not aware of the proceedings are wrong and misplaced.

It was observed in the case of **Ngao Godwin Losero vs. Julius Mwarabu** Civil Application No. 10 of 2015 CAT Arusha (unreported), that the illegality of the impugned decision has to be clearly visible on the face of the record.

In the present Application what is seen is the misplaced accusations which attracts long drawn argument or process. I am of the view that the

principle set in **VALAMBIA's** case on the point of illegality was not met in the present Application. To that end, I must conclude that the applicant has not demonstrated any good cause that would entitle him extension of time. In the result, this Application fails and is accordingly dismissed with costs.

It is so ordered.

Dated at Dar es Salaam this 29<sup>th</sup> day of October, 2021.



**A. MSAFIRI**

**JUDGE**

