

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

MISC. LAND APPLICATION No. 703 OF 2020

(Arising from Kinondoni District Land Tribunal at Mwananyamala in
Land Application No. 413 of 2011 (Hon. R.L. Chenya Chairman)

STEPHEN MWAIBANJE (DULY APPOINTED ATTORNEY

OF ATUPELE CATHERINE ODIRA ONGARA).....**APPLICANT**

VERSUS

ERIC GEORGE ONGARA (AS ADMINISTRATOR OF

THE ESTATE OF FELIZAPHINO ODIRA ONGARA).....**1ST RESPONDENT**

JOROME SIMON ASSEY.....**2ND RESPONDENT**

ANICET ANSELIM ASSEY.....**3RD RESPONDENT**

Date of last Order: 15.09.2021
Date of Ruling: 11.10.2021

RULING

V.L. MAKANI, J

The applicant is seeking for an order of extension of time within which to file an appeal against the judgment and decree of Kinondoni District Land and Housing Tribunal at Mwananyamala (the **Tribunal**) in Land Application No. 413 of 2011. The application is under section 41(2) of the Land Disputes Courts Act, CAP 216 RE 2019 and any other enabling provisions of the law. The application is supported by

the affidavits of Atupele Catherine Odira Ongara and Ashery K. Stanley, Advocate for the applicant.

According to the affidavit of Atupele Catherine Odira Ongara, she is the wife of the 1st respondent. She said during the subsistence of their marriage they managed to acquire various items including the suit property located at Kwembe area within Kinondoni Municipality. She said without consent in 2011 the 1st respondent sold three acres of the suit property to the 2nd and 3rd respondents. She went on stating that she was aggrieved with the decision of the sale of the property, and she opted to challenge the sale by filing a case at the Tribunal under a Special Power of Attorney to Stephen Mwaibanje.

According to the affidavit, on 11/09/2017 judgment was delivered in favour of the respondents and the basis of the decision was that the donor of the Power of Attorney did not appear at the Tribunal. She said the reason for the delay in filing of the appeal is that she was not aware of the said judgment which was delivered on 07/09/2017 instead of 04/09/2017 which was the scheduled date for the delivery of the judgment and without notice to the parties. She said she spent 32 months searching for Stephen Mwaibanje and when she

went to the Tribunal, she discovered that the case was decided in favour of the respondents. She said after securing the copy of the judgment, decree and proceedings she then spent about 4 months seeking legal assistance and she finally got Advocate Ashery K. Stanley from Tanganyika Law Society for Legal Aid assistance. She said the initial application for extension of time Misc. Application No. 544 of 2020 was struck out for wrong citation of the law. She said Mr. Ashery encountered family problems which forced him to travel to Dodoma and he came late hence the delay.

The affidavit of Mr. Ashery simply stated that he was in Dodoma attending burial of his uncle and he encountered family problems which kept him in Dodoma for some time and thus was late to file the requisite application.

With leave of the court the application was argued by way of written submissions. Mr. Ashery on behalf of the applicant stated that there was illegality in the impugned judgment which need to be addressed by the appellate court. He said there was illegality because the Chairman framed and determined a new issue of legality of the Power of Attorney without allowing the parties to address him. He said the

Chairperson proceeded with the defence hearing without the applicant. He cited the case of **The Principal Secretary, Ministry of Defence and National Services vs. Devram Valambhia [1992] TLR 182**

As for the delay the learned Advocate said it was in two limbs that is one being actual delay and the other one technical delay. He said the delay of 32 months is the actual delay when the applicant was not aware of the delivery of the judgment as it was delivered on 04/09/2017 instead of 07/09/2017 and she tried to find Stephen Mwaibanje without success until 14/07/2020 when she revoked the Power of Attorney and sought legal assistance. The second limb is the technical delay that is since the initial application was struck out for citing wrong provision of the laws. He prayed that the application be granted so that the party is afforded the right to be heard.

In response Mr. Mrindoko, Advocate submitting on behalf of the respondents said the excuse that the judgement was delivered on 07/09/2017 instead of 04/09/2017 is without merit as the applicant or Mr. Makubi, their previous Advocate did not make a follow up. He said 33 months and 18 days is inordinate and there is no way the

applicant could not have been aware of the conclusion of the case for all these days.

As for the second reason that the applicant lost contact of the person who had Power of Attorney and searched for him for 32 months, Mr Mrindoko submitted that the applicant has failed to show evidence how she used 2 years and 8 months to look for her donee who instituted the matter on her behalf. He said in his evidence at the Tribunal the donee said he was raised by the applicant who is the sister of her mother. Mr. Mrindoko said he expected that the applicant would have shown the efforts she went through when trying to locate the donee such as advertisements, police reports etc. but none was produced.

On the third point that the applicant used four months to search for legal assistance, Mr. Mrindoko submitted that it is trite law that time spent looking for legal assistance is no sufficient reason for delay. Further he observed that there is no evidence in the affidavit of when the applicant collected the judgment and proceedings to account for the alleged 4 months delay. He further said that the striking out of the initial application Misc. Land Application No. 544 of 2020 for

citation of wrong provision of the law is not a reason for delay because ignorance of law does not accord sufficient reason for delay. Mr. Mrindoko further said the application was struck out on 22/10/2020. Mr. Ashery had family problems and travelled Dodoma on 28/10/2020 and returned to Dar es Salaam on 19/11/2020. However, the days from 22/10/2020 to 27/10/2020 is not accounted for and there is no further evidence of when he returned to Dar es Salaam and there is no justification why he had to stay so long until 19/11/2020. He pointed out that there are 17 days unaccounted for from when he returned on 19/11/2020 to 07/12/2020 when this application was filed. He cited the case of **Lyamuya Construction Company Limited vs. Board of Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010 (CAT-Arusha)** (unreported).

Mr. Mrindoko said the illegality raised by the applicant requires long drawn arguments. The illegality that was raised by the applicant was that the Chairman erred in holding that there was no reason given for the donar to issue Power of Attorney while she was in Tanzania. Mr. Mrindoko said this issue was raised in the course of the hearing and it was left for the court to decide and there was nothing wrong when

the court gave decision on the said issue. He further said that it is not illegality when the applicant and her former advocate failed to enter appearance. He said inaction or negligence of an advocate which causes inordinate delay is not sufficient cause for extension of time. He cited the case of **Athumani Rashidi vs. Boko Onwer [1977] TLR 146 and Salum Sururu Nabahani vs Zahor Abdulla Zahor [1988] TLR 41.**

Having gone through the submissions by the parties, the issue for determination is whether the applicant adduced sufficient reasons to warrant this court to grant extension of time to file his appeal. It is settled law that grant of extension of time is the discretion of the court upon sufficient cause as was held in the cases of **Benedict Mumelo vs. Bank of Tanzania, Civil Appeal No. 12 of 2002 (CAT-DSM)** (unreported) and **Yusuf Seme & Another vs. Hadija Yusufu, Civil Appeal No. 1 of 2002** (unreported).

The main reasons for the delay according to the applicant is that the applicant was not aware of the date of the decision as judgment was delivered on 07/09/2017 instead of 04/09/2017. In my considered view, this is a lame excuse. The applicant at the Tribunal had the

services of Mr. Makubi, Advocate and the donee Stephen Mwaibanje. They were in the Tribunal when the matter was set for judgment on 04/09/2017. So, they were supposed to appear on the said date and be given another date of the judgment. The records are silent on what transpired on 04/09/2017 but I am sure if they had made an appropriate follow-up to know what had transpired on 04/09/2017, they would have known of the next judgment date. In any case, even if the judgment was delivered in the absence of the parties, it would not have taken 33 months and 18 days for the applicant to have knowledge of the said decision.

The second reason is equally lame. When one grants a Power of Attorney it means he/she trusts the donee. The donee Stephen Mwaibanje told the Tribunal that the applicant was his mother. Since they are related it beats logic that the applicant failed to locate him and for that matter for 33 months and 18 days. This reason is without merit.

The third reason on illegality is based on the issue of the Power of Attorney. This issue was raised in the course of hearing and the parties were given opportunity to address the issue, the Tribunal

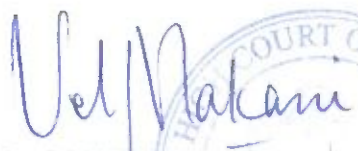
could not have avoided to consider this issue. Nevertheless, for illegality to warrant extension of time it must be apparent on the record. In the case of Moto Matiko Mabanga vs. Ophir Energy PLC & Others, Civil Application No. 463/01 of 2017 (CAT-DSM) (unreported) the Court of Appeal stated that once it is established that illegality is clearly visible on the face of record, then it can be termed as a sufficient cause to warrant extension of time. However, in this instance the issue of the Power of Attorney requires detailed investigation for it to be condition precedent for the grant of extension of time. This point too has not merit.

In view of the above, it is apparent that the applicant has failed to account for the delay of 33 months and 18 days as admitted in her affidavit. On the other hand, 4 months is a long time to search for legal assistance considering that the applicant was an Assessor in Land Tribunal in Mbeya she therefore had knowledge/awareness of where to get legal aid as compared to a lay person. Further, as pointed out by Mr. Mrindoko, and I agree with him, there are several days unaccounted for by Mr. Ashery. For instance, the days from when the application was struck out on 22/10/2020 to 28/10/2020 when he left for Dodoma; and again from when he returned to Dar

es Salaam on 19/11/2020 to 07/12/2020 when this application was filed. In terms of the case of **Lyamuya Construction Limited** (supra) since the applicant has failed to account for these days then extension of time cannot be granted. All in all, there is inordinate delay which the applicant has failed to account for.

For reasons advanced above, there are no sufficient reasons which have been advanced by the applicant to warrant the court to exercise its discretionary powers to grant extension of time to file the appeal. Subsequently, the application is hereby dismissed with costs for want of merit.

It is so ordered.


V.L. MAKANI
JUDGE
11/10/2021

