IN THE HIGH COURT OF TANZANIA

(AT DAR ES SALAAM)

MISC. LAND CASE APPLICATION NO. 718 OF 2020

ALLY SALUM SAID.....APPLICANT

VS

IDDI ATHUMANI NDAKI.....RESPONDENT

RULING

T.N. MWENEGOHA, J

This is an application for extension of time for leave to file to Court of Appeal made under Section 14(1) of Law of Limitation Act, (Cap 89 R.E 2019) herein after referred to Law of Limitation and Section 11(1) of the Appellate Jurisdiction Act (Cap 141 R.E 2019) herein after referred the Appellate Jurisdiction Act and Section 47(2) of the Land Disputes Courts Act (Cap 216 R.E 2019) herein after referred to the Land Disputes Courts Act.

The applicant filed chamber application supported by his sworn affidavit praying for the following orders;

i. An order for extension of time for the applicant to apply for leave to appeal to Court of Appeal of Tanzania.
ii. An order for grant of leave to appeal to Court of Appeal of Tanzania against Judgment and Decree of this Court delivered by Hon. Maige, J (as he then was) dated 28th August, 2020 in Land Appeal No. 208 of 2016.
iii. Costs of this application.

iv. Any other relief(s) as the Court deems just to grant.

The applicant was represented by Mr. Odhiambo Kobas, learned counsel while both respondents enjoyed the services of Mr. Mohamed Tibanyendera, learned counsel. Hearing was by way of written submission.

In presenting this application, Mr. Kobas submitted that the applicant herein was the respondent in Land Appeal No. 208 of 2016 which originated from District Land and Housing Tribunal at Morogoro in Land Application No. 83 of 2011 where the judgment was delivered in favour of the applicant. The applicant being aggrieved by decision of this Court in Land Appeal No. 208 of 2016 which allowed the appeal and quashed Judgment of the Tribunal is hereby filling the extension of time to file leave to appeal to Court of Appeal of Tanzania.

However, after being supplied with copies of judgment and decree on 27th October 2020 he was required to file for leave to appeal to Court of Appeal within 30 days but failed to do so and filed on 14th December 2020 having delayed for 49 days which the counsel termed to be not inordinate.

He further submitted that applicant must, as it is trite law, adduce sufficient cause for the delay and account for each day of delay. However, where illegality is put forth as a ground for extension of time, the Court has to extend time for the illegality to be addressed and not to let illegal decision to stand. For this argument he cited the case of **VIP ENGINEERING AND MARKETING LTD AND 2 OTHERS VS CITIBANK TANZANIA LTD, CIVIL REFERENCE NO. 6,7 AND 8 OF**

2006 (Unreported), where the Court Appeal addressed the illegality based on breach of fundamental right to be heard at page 22 and stated;

> *"We have already accepted it is established law in this country that where the point of law at issue is the illegality or otherwise of the decision being challenged that by itself constitutes "sufficient reason" within the meaning of Rule 8 of the rules for extending time. Equally established is the law to the effect that a decision arrived at in the breach of rules of natural justice is null, because it is tainted with illegality.....in the administration of justice, the right to be heard is the most overriding....."*

He further cited the case of **MARY RWABIZI T/A AMUFA ENTERPRISES VS NATIONAL MICROFINANCE PLC, CIVIL APPEAL NO. 378/01 OF 2019** which I summarily quote;

> *".....I am of the opinion that an allegation by the applicant that the error in the judgment of the Court has made the decision to be illegal, is a serious matter which deserves the attention of the Court on review. I think the question of the existence of real or perceived illegality in judicial proceedings of the final court, like in this case, is not one of the issues to take lightly.....Certainly, if given opportunity, the applicant will expound further the allegation contained in the above reproduced paragraphs of the affidavit in support of the application....Therefore, to demand further explanation at this stage, will in my view, be prejudicial to what the Court will have to deal with if an application for extension of time is granted. It is equally inappropriate at this stage, I think, form me to go further and determine the substance of the claim of illegality."*

He continued to give grounds for the application of extension of time to include;

i. The judgment and decree to be appealed is tainted with illegality in following manner;
   a. It emanated from a time barred appeal
   b. It upheld an appeal from Tribunal that acted without pecuniary jurisdiction and,
   c. It denied the applicant the right to be heard on capacity to contract on which it based its judgment.

ii. The judgment and decree to be appealed raises serious triable points of law in the following manner;
   a. Whether an appellate Court having found missing record of the whole testimony and exhibits of PW1 on record ought to have proceeded with determining the appeal on merit or order trial de-novo;
   b. Whether there could be proper evaluation of evidence on record by the appellate court in the absence of the whole testimony of PW1 and his exhibits

Discussing on 1st ground that the judgment emanated from a time barred appeal Mr Kobas contended that, judgment of the District Land and Housing Tribunal was delivered on 16th November 2016 whilst the memorandum of appeal was filed to the High Court Land division on 13th December 2016 and therefore out of time prescribed by the law. This was raised in appeal by the applicant's advocate as evidenced by Court's record but in the Judgment the court observed that the initial memorandum was filed on 7th December 2016 according to Court seal and that the Court observed as quoted here under;

"The receipt for filling fees would have been the evidence to establish the timing of the filing of the memorandum of appeal. I have tried to trace it on record but in vain."

From the above quoted paragraph the learned counsel submitted that despite court's failure to find the receipt for court fees, the court went on to find that the appeal was filed on time simply on account of the date of the Court seal affixed on the Memorandum of appeal, and endorsements by Deputy Registrar and Judge in Charge directing the same to be admitted. It is his view that that is an irregularity considering already there was an objection on the appeal to be filled out of time. He quoted two case that of **ADAMSON MKONDYA AND AWADHI KOMBA VS ANGELIKA KOKUTONA WANGA, MISC LAND APPLICATION NO. 521 OF 2018,** High Court decision and the case of **JOHN CHUWA VS ANTONY CIZA [1992] TLR 233** which the Court upheld the ruling of the High Court that dismissed an application whose documents were lodged within time but the receipt was issued two days out of time on **account that the date of filling the application is the date of the payment of the fees and not that of receipt of the documents in the registry.**

He submitted that in the appeal which this application emanates the Court entertained a time barred appeal which no Court fees receipt was seen or presented and since the Court misdirected itself hence the remedy is dismissal. To entertain such an appeal makes the judgment a nullity and illegal which can be reversed by an appeal to Court of Appeal if the extension of time to appeal is granted.

He articulated the triable issues from appellate judgment to be whether it was proper for the Court to proceed without satisfying Court fees were paid on time, or it was proper for admission form to be signed

by Deputy Registrar instead of Judge in Charge, or whether in absence of Court fees receipt endorsement by Judge in Charge directing Deputy Registrar was sufficient proof that Court fees were paid and lastily, whether it was proper for applicant to lodge memorandum of appeal on 7th December 20116 and serve the respondent a copy of memorandum filed on 13th December 2016.

On the 2nd ground that this Court upheld the appeal from the Tribunal without the Tribunal having pecuniary jurisdiction, he submitted that the suit property was sold at **Tanzania Shilling Fifty Five Million Only (Tshs. 55,000,000/=)**, that is to say the Tribunal did not have pecuniary jurisdiction since this Court also considered the sale which was the subject of this dispute.

Submitting on the 3rd ground that the appellate court denied the applicant right to be heard on capacity to contract on which it based its judgment, he contended that the Court was of view that the said ANTAR SAID KLEB was only 23 years old at the time of his death on 16th May 2007 and hence it was not possible for him to have acquired disputed property in 1982 since he would not have been born. Learned counsel submitted further the Court should have given parties opportunity to address the Court on that issue, which it did not hence the applicant was not given opportunity to be heard which violates **Article 13(6)(a) of the Constitution of URT of 1977**, as amended.

He revisited the case of **VIP ENGINEERING AND MARKETING LTD AND 2 OTHERS** (supra) at page 21, quoted with approval the case of **ABBAS SHERALLY AND ANOTHER VS ABDUL SULTAN HAJI**

MOHAMED FAZALBOY, CIVIL APPLICATION NO. 33 OF 2002, which held;

> *"The right of a party to be heard before adverse decision or action is taken against such a party has been emphasized by Courts in numerous decisions.* ***That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had a party been heard*** *because violation is considered to be a breach of natural justice."*

He further submitted since age issue formed the basis of the Court's judgment, the parties' right to be heard on the same was so fundamental regardless of its effect on the actual outcome of the dispute. Concretizing on this he submitted that the Court refuted the applicant's testimony on ownership of suit property while admitting and relying on testimony of PW2 who testified that ANTAR SALUM SAID and ANTAR SAID KLEB are one and the same person. And under those circumstances the Court should have ordered trial de novo and failure to do so rendered injustice on the part of the applicant.

He prayed this Court be pleased to extend time for applicant to apply for leave to appeal to Court of appeal.

In reply the learned counsel for the respondent Mr Mohammed raised points to be determined by this court that, this application is not maintainable for being brought as omnibus application without leave of the court. He submitted that an application for extension of time cannot be preferred with the application for leave to appeal, that an application for leave to appeal if made prior to the determination of the application for extension of time becomes time barred as by the time when it was

lodged in court. Section 47(2) of the Land Disputes Courts Act, Cap 216, R.E 2019 was cited and states as follows;

> *"(2)- A person who is aggrieved by the decision of the High Court in the exercise of its revisional or appellate jurisdiction may, with leave of the High Court or Court of Appeal, appeal to the Court of Appeal."*

Further more he submitted that such application has to be made within thirty days from the date of judgment which is intended to be appealed from as it is provided under Rule 45(b) of the Tanzania Court of Appeal Rules, 2019 which provides;

> *"45 – In Civil matters:-*
>
> *(a)notwithstanding the provisions of rule 46(1), where an appeal lies with leave of the High Court, an application for leave may be mad informally, when the decision against which it is desired to appeal is given, or by chamber summons according to the practice of the High Court, within thirty days of the decision, or....."*

He submitted that the applicant was duly represented by learned advocate conversant with laws applicable and therefore aware of time to apply for leave to appeal. Notice of appeal was filed and lodged in court on 2nd September, 2020 while judgment was delivered on 28th August, 2020 and applicant did not disclose why he failed to lodge leave to appeal within prescribed time or when judgment was delivered where the same could have been made informally. The applicant however filed this application on 18th December, 2020 as per signature on the Chamber summons.

He cited the case of **MOHAMED SALIMIN VS JUMANNE OMARY MAPESA, CIVIL APPLICATION NO. 103 OF 2014**, court of appeal observed that;

> *"As it is, the application is omnibus for combining two or more unrelated applications. As this Court has held for time(s) without number an* ***omnibus application renders the application incompetent and is liable to be struck out.*** *"*

He also cited the case of **RECHO JOSHUA VS MEDA JOSEPH, MISC CIVIL APPLICATION NO. 10 OF 2010 (High Court at Mwanza)**;

> *".....in the present application are different these two prayers are diametrical opposed to each other in a sense that the applicant wants this court to call for revision which is already time barred and in his second prayer, he wants this court to grant the application out of time. In determining both prayers the consideration to be taken into account are different. The application for extension of time is brought under Section 14 of the Law of Limitation Act, Cap 89 R.E 2002, it may be granted upon showing the reasons for the delay and accounting for each day of delay. The application or revision is granted after the court satisfy itself on correctness, or legality or propriety of any finding, order, or any other decision made by the lower court."*

He prays this application be struck out. Going to the merit of the case he submitted application for leave to appeal should be made within 30days from date of judgment and not when applicant was supplied with documents of judgment as alleged. There was delay of 122 days from date of delivery of judgment to date of filling this application and the applicant did not count for each day of the delay.

He submitted that the applicant relies on illegality as a sole ground for delay, which as such that ground is to be dealt with when determining the merits of application for leave as opposed to application for extension of time. He therefore submitted that the grounds raised by applicant in this application do not give sufficient reasons for this application of extension of time to be granted.

Submitting on ground that the High Court heard the appeal which emanated from a time barred appeal and without jurisdiction, he stated that if the applicant was not satisfied with the ruling of the preliminary objection in Land Appeal No. 208 of 2016, he ought to have taken proper steps to appeal to the Court of Appeal of Tanzania and that he should not use the same objections as grounds for extension of time to file leave to appeal .

He submitted that this Court was satisfied that the appeal from the Tribunal was lodged within time, to require a receipt to prove time when appeal was lodged in court is an exercise which ought to be taken by the court itself to verify whether same was properly filed or not. Judgment of the Tribunal was delivered on 16th November 2016 and Memorandum of Appeal was filed on 13th December 2016 which is only 27 days and thus within prescribed time.

On whether the applicant was given opportunity to be heard, he submitted that the court was reviewing the proceedings of the Tribunal and it was correctly established that ANTAR SAID KLEB was not able to own the suit property in the year 1982 as he was not yet born, evidence of which is in the Tribunal's records. Again, on the issue of jurisdiction of the Tribunal he contended that this was not addressed by parties to the

case when hearing the appeal from the Tribunal. He prays this application be dismissed with costs.

In his rejoinder learned counsel for the applicant submitted on the point raised by respondent's counsel that the application is omnibus. He submitted their 1st prayer is about extension of time and upon being granted then their 2nd prayer on leave to appeal to Court of Appeal. He cited the case of **MIC TANZANIA LIMITED VS MINISTER FOR LABOUR AND YOUTH DEVELOPMENT AND ATTORNEY GENERAL, Civil Appeal No. 103 of 2004** which I will not revisit it here as it is properly cited in the submissions concretizing that the application is not omnibus.

He further submitted that the applicant's major ground for extension of time is illegality of the impugned judgment as submitted in their submission in chief and therefore other considerations such as accounting for each day of delay do not hold water since illegality itself is sufficient cause for extension of time. He stated that the case of **WAMBELE MTUMWA SHAHAME VS MOHAMED HAMISI, Civil Application No. 3 of 2007 (CA)** as cited by the respondent's counsel that each day of delay should be accounted for is therefore distinguishable to this case.

I have considered arguments from both counsel and will start by addressing the point of law raised by the respondent's counsel that this application is omnibus. There is no statutory term for the definition of omnibus, however as was established in the case of **UDA RAPID TRANSIT PUBLIC LIMITED COMPANY & ANOTHER VS DAR RAPID TRANSIT AGENCY, Misc. Commercial Application Cause No. 81 of**

2018, making reference to the Black's Law Dictionary 7th edition by Garner page 1116 to mean;

> ***"a doctrine of omnibus as relating to or dealing with numerous object, or items at once, including many thing or having various purposes."***

In the upshot it is safe to say that an omnibus application is an application where two or more prayers are sought in one chamber summons. In this case at hand the applicant is seeking extension of time to appeal to apply for leave to Court of Appeal of Tanzania and the second prayer is upon grant of first player for extension of time then he prays for leave to appeal to Court of Appeal. It is trite that the prayers need to be interrelated, that upon granting one the other prayer will follow suit or refusal in the same manner.

In this application the 2nd prayer for leave to appeal can not be granted unless this court is satisfied with reasons given by the applicant that the application for extension of time has merit.

Subject to provisions of Section 11(1) of Appellate Jurisdiction Act, Cap 141 R.E 2019 and Section 47(2) of the Land Disputes Courts Act, Cap 216 R.E 2019 to wit this application lies, all prayers are made to the High Court.

Now these prayers are both to be granted by the same Court, High Court and therefore to save time and costs for it is convenient for the application to serve both prayers as long as they are related. I therefore find the objection as to this appeal being omnibus does not hold water.

I will now move to the merit of this case. The applicant's counsel has established that the basic ground for his application for extension of

time to file appeal to Court of Appeal is that of illegality. He argued that the judgment and decree in Land Appeal No. 208 of 2016 emanate from a time barred appeal. Applicant's counsel submitted that judgment of the Tribunal was delivered on 16th November, 2016 and Memorandum of Appeal was filed to this Court on 13th December 2016.

I have gone through the judgment and decree by the Tribunal. It is obvious that the judgment was delivered on 28th October, 2016. Subject to Section 41(2) of Land Disputes Court Act all appeals from the District Land and Housing Tribunal are to be lodged to the High Court within 45 days, delay of which, and upon High Court being satisfied that there are sufficient reasons may grant extension of time. The section reads;

"41 -(2) An appeal under subsection (1) may be lodged within forty five days after the date of the decision or order:

Provided that, the High Court may, for the good cause, extend the time for filing an appeal either before or after the expiration of such period of forty five days."

The respondent in this case filed his appeal from judgment of the Tribunal on 13th December, 2016 as signed. This is within the time limit prescribed of 45days and hence I find that the judgment was not time barred and was properly filed in the High Court.

The issue on pecuniary jurisdiction, this was discussed in the appellate Court in Land Appeal No. 208 of 2016. As rightly pointed out in that judgment at page 5 paragraph one of the said judgment the suit property value was Tshs. 50,000,000/= and therefore the trial Tribunal had jurisdiction to entertain the case. I have noted also that at hearing of the appeal from the Tribunal the learned counsel for the respondent (then the appellant) was the one questioning the pecuniary jurisdiction of the

trial Tribunal and it was held in favour of the Learned counsel for the applicant in this application. I will not dwell much into this since it was already established in the appellate court and hence there is no illegality in the matter of pecuniary jurisdiction.

On the issue that the applicant was not given right to be heard I do agree with the respondent's counsel that if the applicant was denied that right and since judgment was delivered in presence of counsel from both parties, if the applicant was aggrieved he should have filed his appeal on time. I can insist here that this is an afterthought and a delay tactic by the applicant since it can not be used as a ground for illegality while the right to appeal was clearly stated and the applicant failed at his own accord to act within the prescribed time.

I hereby find that this application has no merit and is therefore dismissed with costs.

Dated at Dar es salaam this 31st day of August, 2021.

T. MWENEGOHA
JUDGE