

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC LAND APPLICATION NO. 410 OF 2020

(Originating from Temeke District land and housing Tribunal Application No. 273 of 2009)

ACCESS BANK TANZANIA LIMITED.....APPLICANT

VERSUS

FATMA FARAJI MKAUGALA 1ST RESPONDENT

MWANAHAMISI HASHIMU NGOPELA 2ND RESPONDENT

SAID MHANDO HUSSEIN 3RD T RESPONDENT

Date of the last order 8/12/2021

Date of the ruling 5/03/2021

RULING

MAIGE, J

In this matter, applicant is calling upon the Court to extend time within which to pursue an appeal against the decision of the District Land and Housing Tribunal for Temeke as per Kirumbi, in Application No. 273 of 2018. In the said proceeding, the respondents herein was the applicant. The applicant was the third respondent. The other respondents were Mohamed Ally Athumani, Salha Fesal Islam and Jamila Ally Abeid. In the said decision, the trial tribunal pronounced a judgment against the applicant together with the second respondent at the trial tribunal nullifying the mortgage on residential license No. TMK 020416 and issuing a decree in favour of the first respondent for vacant possession of the same. It as well, dismissed the suit by the second and third respondents and allowed the applicant herein, to exercise her powers under mortgage as against the

properties of the 2nd and 3rd applicants herein. Though the applicants pleaded cause of action against the other three respondents at the trial tribunal, the same are not reflected in the decree of the Court. The judgment does also not suggest that either of them gave testimony in rebuttal.

At page 10 of the judgment there is a remark by the trial chairperson to the effect that the defense case of the third defendant was being closed for failure to produce a witness. There is nothing to suggest that the third respondent ever produced any witness.

This application has been preferred under section 41(2) Land Disputes Courts Act, Cap. 216, R.E., 2019 and is founded on the affidavit of Mr. Patrick Kinyerero, learned advocate for the applicant. It was opposed by the counter affidavit of Mr. Fikiri Liganga, learned advocate for the respondents.

The application was argued by way of written submissions which were presented by the respective advocates.

In accordance with the facts in the affidavit as amplified in the written submissions, the applicant places reliance on two grounds to justify his application. First, omission on the part her previous advocate to inform him

about the status of the case. As a result, it was not until on 28th May 2020 when the applicant became aware of the existence of the judgment at issue. The second ground is illegality involved in the intended appeal. The point of illegality, it is in his submissions, is the act of the trial chairperson to mark the defense case of the third respondent closed without assigning any reason therefore.

In their submissions through their counsel, Mr. Elisha Kiula, the respondents have invited the Court to hold that; sufficient cause for extension of time have not been demonstrated. On the first ground, it was their submissions that, the applicant having admitted that she was present on the date fixed for judgment through her previous advocate, she cannot be heard lamenting that she was not aware of the date of judgment for mere reason of the omission of the said advocate to notify her about the date of the judgment. In the view of their counsel, that by itself amounts to negligence which in accordance with the principle in **IHEMBE INDUSTRIES CO. LTD VS. TANESCO AND ANOTHER**, cannot be a ground for extension of time. There was no useful remark in the rejoinder submissions by the counsel for the applicant on this point. On my part, I have read the respective opinion of my brother Judge Miyambina and I

fully subscribe thereto. In the circumstance, I will agree with the respondents' counsel that, the applicant has not factually justified the delay.

This now takes me to second ground as to illegality. It would appear from the submissions that, the learned counsel for the respondents does not doubt the settled position of the law that illegality can by itself be a ground for extension of time. It is his submission however that, the facts of the case does not demonstrate any element of illegality. In his view, the reason for marking the defense case of the third respondent closed was clearly disclosed at page 10 of the judgment. In his view therefore, the illegality if any, was not apparent on the face of the record, as required in

HASSAN ABDULHAMID VS. ERASTO ELIPHASE, CIVIL APPLICATION NO. 402 OF 2019.

I have taken time to deliberate on this point in line of the contents of the judgment. As I said above, though the respondents in the case at the **trial tribunal** were four, the decrees at issue were against the third respondent alone without there being a comment on the cases against the remaining respondents. That is so despite the fact that, the case against them

proceeded *ex parte*. More to the point, while it is not suggestive in the judgment that, the applicant ever opened his defense case, at page 10 of the judgment, the trial chairperson remarked that, the case by the said respondent had been marked closed. In my view, whether a case of a party who never testified can be marked closed, raises a serious issue of illegality which would justify the Court to extend time so that it can be considered on appeal.

It is for those reasons that, the application is granted. The intended appeal should be filed within 21 days from the date hereof. No order as to costs in the circumstance.

It is so ordered.

A handwritten signature in black ink, appearing to read 'I. Maige', with a stylized flourish at the end.

**I. MAIGE.
JUDGE
05/03/2021.**

Date 5/ 3/2021

Coram: Hon. A. Chugulu - DR.

Applicant: Absent

Respondent: Mr. Elisha Kiula, advocate

RMA: Caroline Aloyce.

COURT: Ruling delivered this 5th day of March, 2021 in the presence of Mr. Elisha Kiula, learned advocate for 1st, 2nd, 3rd respondents and absence of applicant.



A. Chugulu

**A. Chugulu,
DEPUTY REGISTRAR
5/3/2021**