

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

MISCELLANEOUS LAND CASE APPLICATION NO 21 OF 2022

*(Originating from the Judgment and Decree of the District Land and Housing Tribunal for
Kinondoni at Mwananyamala in Application 213 of 2018)*

NATIONAL MICROFINANCE BANK LTD.....APPLICANT

VERSUS

MWAJUMA HUSSEIN SAID1ST RESPONDENT

NUTMEG AUCTIONEERS &

PROPERT MANAGERS CO. LTD 2ND RESPONDENT

FADHIRI MSAKUZI MUNGAA 3RD RESPONDENT

MBEGU ALLY GEREZA 4TH RESPONDENT

SMART STARLEY MEENA 5TH RESPONDENT

Date of last Order: 23/09/2022

Date of Ruling:06/10/2022

RULING

A. A. OMARI, J.:

This Application originates from the Judgment and Decree of the District Land and Housing Tribunal for Kinondoni at Mwananyamala (the DLHT) in Application No. 213 of 2018.

The Applicant, that is; the National Microfinance Bank Limited has made this Application seeking to be heard on *inter alia* that this Honourable Court be pleased to grant them an order for extension of time within which they can file an appeal out of time.

The genesis of this matter is that, the first Respondent, Mwajuma Hussein Said instituted Application No.213 of 2018 at the DLHT against the 2nd, 3rd, 4th and 5th Respondents as well as the Applicant seeking a number of reliefs including a declaration that any action done by the 2nd Respondent and the Applicant is null and void due to lack of her consent. The judgment of the DLHT was delivered on 08 November, 2021 and was in her favour. On 24 November, the Applicant herein requested for certified copies of the judgment and got the same on 28 December, 2021.

Their main ground for seeking extension of time within which to file an appeal out of time is that the judgment contains serious irregularities and confusion that warrants determination of this honourable court. Further, the judgment, ~~resulting decree and proceedings are tainted with irregularities and illegalities~~ in that the judgment made is made in contravention of the law and that the trial magistrate erred in law and fact in that the decision is not supported by evidence on record. They also content that the intended appeal has overwhelming chances of success.

On the date set for hearing the Applicant enjoyed the services of Kulwa Shilamba learned advocate while the first Respondent enjoyed the services of as Samuel Shadrack learned advocate; as did the 3rd, and 4th Respondents.

The 5th Respondent enjoyed the services of Andrew Miraa learned advocate.

The 2nd Respondent was absent.

Before commencement of hearing the learned advocate for the 5th Respondent informed the court that they do not intend to object the Application and asked that this be put on record.

Again, before hearing could commence the learned advocate for the Applicant informed the court that he noted that the Counter Affidavit of the 1st, 3rd and 4th Respondents were defective in their verification clauses. He went on to explain that in the said verification clauses; the deponent who is the learned advocate for the Respondents has stated that the information therein is supplied by the Applicant. There is no way they would have supplied the

information to them in the circumstances. He continued to state that they are confirming to never having supplied the same information and prayed that the court puts little or no reliance at all on the Counter Affidavit filed by the said Respondents because even the overriding objective principle cannot cure such defect.

In reply, the learned advocate for the 1st, 3rd and 4th Respondents averred that the objection raised is overtaken by events they should have filed a notice of preliminary objection before the matter was scheduled for hearing and that would have allowed the parties to argue and the court to decide on the said objection. He went on to say if she insists to continue with her objection then

the matter should be adjourned and a date be set for hearing of the preliminary objection. He went on to say that the objection she was trying to raise does not go to the root of the matter and that a defective verification clause of an affidavit is no more an objection on a point of law all this is a minor typing error that is cured by section 3A and 3B of the Civil Procedure Code as revised. He concluded by passionately repeating that if the learned advocate for the Applicant insists on the objection, they then pray for an adjournment because at the end of it all the remedy in such circumstance is withdrawal and refile so the objection serves no purpose other than to delay this Application which is actually her own Application.

The learned advocate for the 5th Respondent when addressing the court on the matter of the raised objection noted that there is in fact a defect in the Counter Affidavit of the 1st, 3rd and 4th Respondents, specifically the verification clause. He went on to note that it is a principle of law that before determining an Application if there is a point of law then it has to be determined. However, he also noted that being this hearing was being conducted in a session program, the objection should be determined as the court is determining the main application for the purpose of saving time. If the court sees the objection does not have merit it will proceed to determine the Application.

In reply, the learned advocate for the Applicant averred that the learned advocate for the 1st, 3rd and 4th Respondents did not dispute that the Affidavit is defective and she reiterated that the court gives little or no real reliance to the said Counter Affidavit. After a back and forth, it was finally agreed that the preliminary objection be dealt with in the manner suggested by the learned advocate for the 5th Respondent.

The matter that is before me for determination is the Application for extension of time to file an appeal out of time against the decision of the DLHT. However, the objection raised by the learned advocate for the Applicants albeit not being done by notice as rightly argued by the learned advocate for the 1st, 3rd and 4th Respondents needs to be determined; as averred by the learned advocate for the 5th Respondent.

The question before me is whether the verification clause in the said Counter Affidavit is indeed defective. Having seen the 1st, 3rd and 4th Respondents' Counter Affidavit as filed, the verification on page 1 of the same is indeed stating that "... are true as information from the Applicant". This, in my humble opinion makes the said Counter Affidavit defective and untannable. In the case of **Salima Vuai Fom vs Registrar of Cooperative Societies & 3 Others** [1995] CAT No. 75 the Court of Appeal held that an affidavit lacking in verification is to be rejected. The 1st, 3rd and 4th Respondents' advocate did not seem to hold this view, he considered it a mere "typing error" that is curable

by section 3A and 3B of the Civil Procedure Code, Cap 33 (RE 2019) (the CPC) as revised. He went on further that the remedy would be to withdraw the Counter Affidavit and refile it. The Court of Appeal of Tanzania in the case of **Samwel Kimaro vs Hidaya Didas**, Civil Application No.20 of 2012, held

'....a defective verification clause cannot be amended. Any pleading with defective verification clause, is bad in law and the consequence of which is to strike it out.'

Applying the above authority, it is clear that a defective verification clause cannot support an Affidavit. This means the Counter Affidavit filed by the 1st, 3rd and 4th Respondents is defective and cannot be acted upon by this court. I therefore uphold the objection by the learned counsel for the Applicant and ~~struck out the Counter Affidavit, in effect I continue to determine this~~ Application without regard to the Counter Affidavit and or submission of the 1st, 3rd and 4th Respondents' Counter Affidavit.

Submitting on the Application the learned advocate for the Applicant stated that this was an application for extension of time to file an appeal against the decision of the DLHT. She prayed to adopt the affidavit of one Consolatha Resto, a Principal Officer of the Applicant so that it is part and parcel of her submission. She went on to explain that matter has been brought to court under section 41 (2) of the Land Disputes Courts Act Cap 216 (RE 2009) (the LDCA) and section 95 of the CPC. Section 41 (2) of the LDCA provides that an

appeal is to be lodged in 45 day and the court has discretion to extend the time.

In making her case she explained that the judgment of the DLHT was delivered on 8 November, 2021 to meet the 45-day deadline this the appeal should have been lodged by 23 December, 2021. She went on ahead to explain why they failed to submit before 23 of December, 2021. They wrote a letter to the DLHT requesting for the judgment and decree and made follow up and they were eventually supplied with the same on 28 December, 2021 this is 35 days after the date of judgement. So being that the time to file the appeal expired, the Applicant filed an application for extension of time in order to file the appeal. The time spent from lodging the letter to getting the judgment that is 35 days, to be excluded as the Applicant was following up on the judgment and did not in any way act negligently. She went on to state that although the time can be excluded this is not automatic as it was held in the case of **HTT Infracore Limited T/A Helios Towers Tanzania vs. Juliana Mikongomi (as the administrator of the estate of the late Charles Mikongomi and 2 Others**, Land Appeal No.25 of 2020, High Court of Tanzania at Iringa. In this case the court stated that it is trite law time spent procuring judgment and decree may be excluded in computing limitation. Nonetheless, the same cannot be assumed by parties unless one lodges an application to seek enlargement.

The learned advocate continued to submit that since the 35 days were to be excluded, they would have had to file the appeal by 31 January, 2022. Being it is not automatic they made the present Application. She went on to explain that the time from 28 December, 2021 when the copy of judgment was supplied to 19 January, 2022 when this Application was filed there is total of 22 days. The Applicant used the 22 days to study the record and prepare this Application. She averred that 22 days as a delay is reasonable time for the Applicant to prepare and file the Application and invited the court to find that 22 days is reasonable. She concluded her submission of this point by refereeing to the case of **Emmanuel Rurihafi and Janeth J. Mrema vs. Jonas Mrema**, Civil Appeal No. 314 of 2013 the Court of Appeal made reference to ~~several cases and held one month to prepare an application was diligent. It is~~ on this note that she submits that the Applicant was prompt and without negligence in for prepping as also been held by the Court of Appeal.

After consideration of the arguments made by the learned advocate for the Applicant as to why this court should grant their application for extension of time within which to file an appeal out of time. I wish to be guided by the interpretation of the Court of Appeal in the case of **Lyamuya Construction Company Ltd vs. Board Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 which lays down the guideline for exercising the discretion to extend time judiciously.

In the said case the Court of Appeal laid down four grounds for consideration as follows;

- i. The Applicant to account for the delay.
- ii. The delay not be inordinate.
- iii. The Applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action he intends to take.
- iv. If the court feels there are other sufficient reasons such as the existence of a point of law of sufficient importance; such as illegality of the decision sought to be challenged.

Using the set guidelines as a yardstick in the Application before me, I find that, the Applicant has holes in their account for the delay, while the judgement was delivered on 8 November, 2021 they requested for copies on 24 November, 2021 without a plausible explanation other than that they are a "corporate" therefore should be treated differently from individuals; though not fatal since all they had to do is request for the judgement within time, however, this could be what spiralled the delay. Additionally, it is not clear from their submission why a judgment that was ready for collection on 01 December, 2021 was obtained 28 December, 2021, thus drilling a hole in their account for the delay. The 22 days to prepare an application for extension of time is in my view excessive for an Applicant who is already delayed, since it was not the actual appeal, they were preparing for. However, in the spirit of authorities cited these

can be shrugged off. All the same, I find there is a delay and they have failed to appropriately account for it.

The Applicant has tried to meet the threshold of the third guideline by applying for extension of time but failing to account for the delay. As for the fourth guideline the Applicant is alleging illegality. Although there is no explanation of what the illegalities are, stated in their Affidavit, they have explained in their submission. Since the illegality has to be on the face of the record, I have read the impugned judgment of the DLHT. If one is to read it objectively, they will find that the fact that the assessors' opinions are on page 3 does not mean they were given at the beginning of the trial, the actual opinion quoted states

*'kutokana na Ushahidi uliootolewa na vielelezo vilivyo
letwa kwenye baraza hili na pande zote mbili'*
*(unofficial translation: from the adduced evidence and
exhibits tendered before the tribunal by both sides*

This suggests that the opinion was given as required by law (after evidence). On a whole, I do not see this as an incidence of illegality or any other illegality in the judgement of the DHLT.

It is for this reason that I find the Applicant has failed to account for and sufficiently demonstrated the reasons for the delay. The application is therefore denied and dismissed with costs.



A handwritten signature in blue ink, appearing to read "A.A. Omari", is written over a horizontal dotted line.

A.A. OMARI
JUDGE
06/10/2022

Ruling pronounced and dated 06th day of October, 2022 in the presence of Elizabeth Kifai, learned advocate holding brief for Kulwa Shilamba and Andrew Miraa learned advocates for the Applicant and 5th Respondent respectively. Also, in the presence of Paulo Mtui learned advocate, holding brief for Samuel Shadrack the learned advocate for the 2nd, 3rd and 4th Respondents.



A handwritten signature in blue ink, appearing to read "A.A. Omari", is written over a horizontal dotted line.

A.A. OMARI
JUDGE
06/10/2022