

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 119 OF 2022

*(Arising from Land Case No. 398 of 2017 Hon. Masara, J
dated 11th December 2020)*

EFC TANZANIA MICROFINANCE LTDAPPLICANT

VERSUS

MARRY GEORGE MIHAMBO 1ST RESPONDENT

SHARDRACK WILLIAM LUHWA 2ND RESPONDENT

COMRADE AUCTION MART COMPANY LTD 3RD RESPONDENT

RONOTHE CONSULT LIMITED 4TH RESPONDENT

RULING

*Date of last Order: 20/09/2022
Date of Ruling: 05/10/2022*

KHALFAN, J.

The applicant has applied for extension of time upon which she may lodge the notice of appeal to the Court of Appeal to challenge the decision of the High Court in respect of Land Case No. 398 of 2017 dated 11th December 2020. The application is made under **Section 11(1) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019**, and is supported by the affidavit of Cleoplace James.



The brief facts leading to this application are such that the first respondent (by then plaintiff) successfully sued the applicant (by then second defendant), second respondent (by then first defendant), third respondent (by then third defendant) and fourth respondent (by then fourth defendant). The applicant having been aggrieved by the judgment and decree of this Court in Land Case No. 398 of 2017 has preferred this application.

The first and second respondents filed their respective counter affidavits to oppose the application. As for the third and fourth respondents, they were summoned by way of substituted service vide the Mwananchi Newspaper dated on 29th August 2022.

When the application came for hearing, Mr. Cleoplace James, the learned Advocate represented the applicant. On the other side, Ms. Happiness Mbiduka, learned Advocate, appeared for the first and second respondents. By Order of the Court, upon consented prayers by the parties' advocates, the application was disposed of by way of written submissions between the applicant, and first and second respondents. The hearing proceeded in the absence of the third and fourth respondents who neither appeared before the Court nor filed their counter affidavits. However, I have noted that Ms. Mbiduka filed the reply to written submission only for the first respondent.



Mr. James submitted by amplifying the contents of paragraph 5 of the affidavit (Exhibit D6) in support of the application. He advanced four points of illegalities on the face of record. On the first ground, the Court declared the suit as matrimonial properties while the second respondent sworn the affidavit dated 24th February 2014, confirming that there was no requirement of spousal consent in respect to the matrimonial property. He further submitted that, the second respondent neither disputed the same nor objected the admission of Exhibit D6. He also failed to cross examine the contents of Exhibit D6.

He argued on the second ground on the impugned judgment, that the Court failed to interpret the case of **Hadija Issa Arerary vs. Tanzania Postal Bank**, Civil Appeal No. 135 of 2017 (CAT) and **Charles Issack Ndosu vs. Mary Adrian Zalalila**, Land Case No. 279 of 2013 whereby, the Court held that, the spouse is required to register the caveat in order to protect her interest.

On the third ground, he submitted that, the Court failed to interpret the provisions of **Section 58 of the Law of Marriage Act, Cap. 29 R.E. 2019**, as the first respondent failed to tender any agreement. Coming to the fourth ground, the Court observed that the second respondent might have been misled in entering into loan



agreement. He seemingly stated that the Court ignored the fact that the second respondent signed the loan agreement and affidavit to confirm that the suit property does not constitute a matrimonial property. He also argued that, the second respondent failed to cross examine the contents thereof. He concluded that the illegality is on the face of record.

On the other hand, Ms. Mbiduka submitted in response to the applicant's submission that; the applicant has not assigned any reason as to why he delayed to file the notice of appeal within 30 days after the judgment. She contended that, fifteen months had elapsed, that is from 11/12/2020 up to 21/03/2022 when the present application was filed. She maintained that such failure marks the inordinate delay on the part of the applicant. She submitted further that, the applicant has failed to account for each and every day of the delay. She cited the case of **Mega Builders Limited vs. D.P.I. Simba Limited**, Civil Application No. 319/16 of 2020, (CAT) at Dar es Salaam [at page 8] to cement her submission.

As regards the Exhibit D6, Ms. Mbiduka submitted that the same does not contain any illegality on the face of record. She argued that **Section 114(2) and (3) of the Land Act, Cap. 113 R.E. 2019**, puts responsibility on the mortgagor to disclose whether he has



spouse or not and the mortgagee is deemed to have discharged the responsibility for ascertaining the marital status if the mortgagee declares that he has no spouse by affidavit.

She also contended that the applicant did not discharge her responsibility to inquire whether or not the second respondent is married in terms of **Section 114 (3) (supra) and Regulation 4 (1) (a) paragraph (a) (b) and (c) of Mortgage Financing Regulation GN No. 355 of 2009.**

Ms. Mbiduka distinguished the **Hadija's case (supra)** to the effect that, in the cited case, the mortgagor had sworn an affidavit to the effect that he is not married. On the contrary, in the instant case, in Exhibit D6, the mortgagor does state his marital status. She concluded her submission to emphasize her argument that illegality must be apparent on the face of record by citing the case of **Ngao Godwin Losero vs. Julius Mwarabu**, Civil Application No. 10 of 2015 (CAT).

In his rejoinder, Mr. James insisted that there is illegality regarding exhibit D6. That, the second respondent, during trial, did not deny the existence of the said affidavit but the trial Judge disregarded it. He submitted that there is a serious error on the face of record.



He, further reiterated his submission on the position of law in the case of **Charles Issack Ndosu vs Mary Adriano Zalalila (supra)**, where it was held at page 8 that: *'The mortgagee is mandated only to obtain spousal consent **where the borrower declares** that there is another person be a spouse or third party holding interest in the property.'* Therefore, according to him, this ground of appeal suffices for the court to extend time.

He concluded his rejoinder by reference to the case of **Habiba Ahmad Nangulukata & 2 Others vs Hassan, Ausi Mchopa & Another**, Civil Appeal No. 10 of 2022, (CAT), where it was held that: caveat must be registered in order to protect the interest of the spouse.

I have gone through the rival written submissions, authorities in support thereof and the available record. The issue is whether the application has merit. After due consideration, I am of a considered view that the applicant has advanced the ground of illegality amounting to sufficient reasons. The affidavit of Cleoplace James at paragraph 5 (i), (ii), (iii) and (iv) has established the ground of illegality as per Exhibit D6.



It is settled position of law as reaffirmed in the case of **VIP Engineering and Marketing Limited and Three Others vs. Citibank Tanzania Limited**, Consolidated Civil Reference No. 6, 7 and 8 of 2006 (unreported) as quoted in the case of **Metro Petroleum Tanzania Limited and Three Others vs. United Bank of Africa, Civil Appeal No. 147 of 2019**, at page 12 and 13, where it was stated that:

*'It is, therefore, settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under rule 8 **regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay.** '[Emphasis added]'*

In the current application, the applicant has demonstrated points of illegality, which I am satisfied to constitute sufficient reasons for the grant of extension of time.


In fine, I find this application with merit. I proceed to grant extension of time to the applicant to file the intended notice of appeal within 30 days from the date of obtaining the copy of this Ruling and Drawn



Order. Under the circumstances of this application, I grant no order as to costs.

DATED at DAR ES SALAAM this 5th day of October, 2022.




F. R. KHALFAN
JUDGE
05. 10. 2022

Court

Ruling delivered this 5th day of October, 2022 in the presence of Mr. Cleoplace James, learned Counsel for the applicant and Ms. Happiness Mbiduka, learned Counsel for the first and second respondents.




F. R. KHALFAN
JUDGE
05.10.2022