

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND APPLICATION NO. 357 OF 2022**

*(Originated from the decision of District Land and Housing Tribunal in a Land Appeal No. 38/2018 before Honorable Rugalabamu Chairperson)*

**JACOB NEHEMIA MUSHI..... APPLICANT**

**VERSUS**

**THUWEBA OMARY KILEMBA.....RESPONDENT**

**RULING**

*27/09/2022 & 20/10/2022*

**A. MSAFIRI, J.**

The applicant has filed this application seeking for the extension of time to file appeal out of time against the decision of the District Land and Housing Tribunal (here in as the District Tribunal) in Land Appeal No. 38 of 2018.

The application is filed under section 38 (1) of the Land Disputes Courts Act, Cap 216, sections 93 and 95 of the Civil Procedure Code, Cap 33 and section 14 (1) of the Law of Limitation Act Cap 89, all of R.E 2019.

The application is supported by the affidavit of Francis Munuo, advocate. The application is vehemently opposed by the respondent who also filed the counter affidavit which was affirmed by Salim Salim, advocate of the respondent.

The brief background of this matter as per the contents of the affidavit is that the respondent instituted a land dispute against the appellant at the

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Ward Tribunal in Land Dispute No. 123 of 2017. The Ward Tribunal decided in favor of the respondent.

The applicant challenged the decision of Ward Tribunal and lodged an appeal before the District Tribunal. Having heard the parties, the District Tribunal deliberated on one ground of appeal only among the three grounds of appeal and gave judgment in favour of the applicant. The respondent was aggrieved and lodged an appeal to this court. This court deliberated on appeal and the same was delivered in favour of the respondent and order for the case file to be remitted to the District Tribunal, for the deliberation of the rest of grounds of appeal. The new Chairman decided on that issue and made findings in favour of the respondent. Aggrieved, the applicant has instituted the present application seeking for extension of time to appeal to this court.

The hearing of application was by way of written submissions and each party has complied with the court's schedule.

Mr. Munuo, for the applicant started his submissions by praying to adopt the contents of the affidavit. He submitted that the applicant has exhibited two grounds as good cause for delay. The first ground is that of sickness and the second ground is one of existence of illegalities.

On the ground of sickness, Mr. Munuo submitted that, the applicant is an old man of 82 years old and is suffering from diabetes and Hypertension. That the illness started from December 2020. He stated that, the disease made the applicant to be hospitalized. That, the medical report attached with the affidavit shows that the applicant exhibited progressive mental deterioration. He pointed that sickness is a ground for extension of time and to cement his

*Atle*

point, cited the case of **Basoa Mfaume vs Ulimwengu Sungura Hamim**, Misc. Application No 27 of 2021.

The second ground which was advanced was the existence of illegalities in the proceedings of the trial Tribunal. Submitting on the issue of illegalities, Mr. Munuo stated that, first, the respondent had instituted the proceedings before the Ward Tribunal with no locus standi to sue.

Second, Mr. Munuo submitted that the applicant was denied the right to be heard after the case file was remitted to the District Tribunal. He argued that, the decision of this Court to remit the case file was delivered on 22/3/2021 and summons to appear before the District Tribunal were issued on 24/9/2021. He argued that, at that time the applicant was admitted at the hospital since December 2020, and that the appeal against trial Tribunal was heard ex-parte despite the fact that the applicant was under treatment and medication at the hospital.

Third, Mr. Munuo submitted that another illegality is failure of the trial Tribunal to join the necessary parties. That the respondent claimed that the suit property was bought by her deceased sister Severino Petro from Boko Village Council. That, Severino Petro and Boko Village Council should have been made parties to the suit.

The fourth illegality pointed by Mr. Munuo was that the trial Tribunal was not properly constituted at all time of conducting hearing of the case in accordance with section 11 of the Land Disputes Courts Act, Cap 216. R.E 2019 and section 4 of the Ward Tribunal Act, Cap 206 R.E 2019.

*Adls.*

The fifth illegality pointed to the court was the failure of the trial Tribunal to comply with the procedure governing the visit to locus in quo.

Mr. Munuo stated that the grounds of illegalities were not raised in the first appellate Tribunal, however as they constitute points of law, they can be raised at the second appeal. He prayed for the court to grant the application with costs.

On reply, Mr. Salim, advocate for the respondent submitted that, for the court to exercise its discretionary powers to extend the time prayed, it should first take into consideration the good cause for delay, and that the applicant must account for each day of delay.

The counsel for the respondent referred the Court to the case of **Lyamuya Construction Company Limited vs Board of Trustees of Young Christians Women Association of Tanzania**, Civil Case No. 2 of 2010, CAT (Unreported), where the Court of Appeal expounded the principles to be taken into consideration by the court when considering extending time:

- (i) That, the applicant must account for all period of delay,
- (ii) The delay should not be inordinate,
- (iii) The applicant must show diligence not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.
- (iv) If the court feels that there are another reasons/such as existence of a point of law of sufficient importance such as illegality of the decision sought to be challenged.

*Alle*

Submitting on the two reasons advanced by the applicant to support his prayer for extension of time, Mr. Salim, submitted that, on the first ground of sickness, the attached hospital report shows only that the applicant attended the hospital several times for evaluation, management and monthly check ups, and that sometimes in December 2020, the applicant was hospitalized. That the applicant has failed to account for the delay as he did not show as to when his sickness begun, dates on which he attended the hospital, dates on which he was admitted, and dates he was discharged.

On the second ground of illegalities, the respondent counsel submitted that, the first illegality on the locus standi was already determined by this court in Land Appeal No 57 of 2020, so this court is functus officio.

On the ground of the right to be heard, the respondent counsel stated that the applicant has always been represented by advocate Mluge Karoli in all the proceedings and that when case file on Land Appeal No 38 of 2018 was remitted to the District Tribunal, a summons was issued and service was effected through the said advocate for the applicant, who accepted the service.

The respondent stated further that, there was no hearing when the case file was remitted to the District Tribunal as the orders of the High Court was only for the District Court to determine the two remaining grounds of appeal.

Generally, on the illegalities, the counsel for the respondents stated that the decision which the applicant intends to appeal against i.e. an Appeal No 38 of 2018 by the District Tribunal is not tainted with illegalities but rather the alleged illegalities are addressed from the proceedings of the trial Tribunal

*Alle.*

(Bunju Ward Tribunal), so the alleged illegalities have no room to be addressed in the intended appeal.

The counsel for respondent prayed for the application to be dismissed for want of merit.

I have read the contents of the affidavit and counter affidavit along with further submissions in the written submissions in support and against the application. I have also considered the issues raised in the submissions and various authorities cited by the learned counsels on both parties to support their points.

It is an established principle of law that in considering application for extension of time, the courts are vested with discretionary power on whether to grant or not to grant, however such power should be exercised judiciously where the applicant have shown good cause for failing to do what he was supposed to do within the prescribed time.

The above said principle has been set and recited in numerous decisions both of this Court and the Court of Appeal. The case **Lyamuya Construction Company Limited (supra)**, which has been referred to me by the counsel for the respondent is among the landmark authorities which has enumerated on the said principle that; in extension of time the court must take into consideration on whether the applicant has accounted for each day of delay, the delay should not be inordinate, and applicant must show diligence and not apathy, and lastly, whether there is illegality on the decision sought to be challenged.

*Atto.*



The issue for my determination is whether the applicant has advanced sufficient reasons for this court to exercise its discretion and grant the application. The applicant has raised two reasons for delay, first, the reason that he was sick, and second, the reason that the trial Tribunal decision was tainted with illegalities.

The applicant seeks to challenge the decision of the District Tribunal in Land Appeal No 38 of 2018 which was delivered on 17/1/2022, the copy was certified on 08/3/2022 and the exchequer receipt shows that the copies were paid for and collected by one Francis Munuo on 14/6/2022. The current application was filed on 04/7/2022.

On the reason of sickness, the applicant has claimed that before the file was remitted to the District Tribunal, he sustained a critical condition suffering from diabetes and Hypertension.

I have seen the document titled "Medical Report from Jacob N. Mushi" it does not enlighten on when the patient was admitted, for how long he was admitted, and when he was discharged from the hospital. The said medical report just stated that the patient condition was on assessment since December 2020, and that he was hospitalized at the hospital. The report is dated 16/6/2022.

There is also attached the National Health Insurance Fund (NHIF) outpatient claim forms. Similarly, the forms does not give any detail to show whether the applicant was admitted and when he was admitted at the hospital.

In his rejoinder, the counsel for the applicant has maintained that, the applicant was admitted at Kitengule Hospital, Tegeta. That, the medical

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report attached shows that the applicant exhibited progressive mental deterioration which has rendered him incapable of performing self-care, impaired his judgment and caused inability to make informed decisions.

Unfortunately, the medical report does not show specifically the time by which the patient (applicant) was in that condition. It just says since December 2020, and the applicant has maintained that he has encountered health challenges from December 2020. It is not clear whether he has been ill throughout December 2020 until to date.

The judgment on which this court ordered the case file to be remitted to the District Tribunal was delivered on 22/03/2021. The medical report and the applicant's submissions shows that the applicant was sick from/since December 2020. There is no account of the day from 22/3/2021 when the remittance order was issued to 17/1/2022 when the impugned Judgment was delivered by the District Tribunal. It is not clear if the applicant was sick from December 2020, to 22/3/2021 and until 17/1/2022.

It is not disputed that sickness is a ground for extension of time. However, the applicant have failed to relate his sickness with his delay to file an appeal within the prescribed time hence this ground cannot stand and is hereby dismissed.

The second ground is of existence of illegalities. The applicant through his counsel has stated that there are illegalities in the proceedings of the trial Tribunal. It should be noted that previously the applicant filed an appeal to the District Tribunal against the decision of the trial Tribunal. None of the illegalities which have been raised now was raised then except for the issue

*Alls.*



of locus standi which was dealt with by the District Appellate Tribunal, and it was also dealt with by this Court as the second appellate court hence it cannot be raised now.

The applicant through his advocate has defended his stance on the ground that the illegalities raised are points of law and can be raised at any time.

It is the position of the law that the illegalities alleged should be the one from the decision being challenged. This position is clear from a string of authorities, the one of them being the case of the **Principal Secretary, Ministry of Defence and National Service vs Devram Valambhia** (1992) TLR 182, where it was held that;

*"In our view, **when the point at issue is the one alleging illegality of the decision being challenged**, the court has a duty even if it means extending the time for the purpose to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and record straight"(emphasis added).*

In the application at hand, the applicant intends to challenge the decision of the District Tribunal in Land Appeal No 38/2018 on which, no any illegalities have been raised or alleged to exist. The alleged illegalities are directed to the decision of the Ward Tribunal which was a trial Tribunal. As pointed earlier, the applicant had appealed against the decision of the Ward Tribunal which he had a right and opportunity to raise the alleged illegalities but he did not do so. Hence it is my view that the illegalities raised now are just an afterthought after the respondent has lodged an appeal to this court and the court remitted the case file to the District Tribunal. *Atls.*

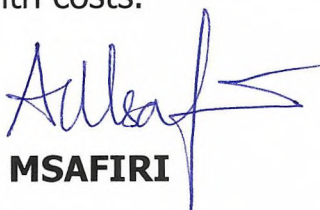
I don't agree with the applicant's submissions that the illegalities can be raised at any time if a person feels so. I am of the view that the circumstance in the cited case of **Halid Maulid vs Republic**, Criminal Appeal No. 94 of 2012 are different from the present application.

In this matter the applicant had a right of appeal and he did appeal but he forgot to raise the alleged illegalities. For now, as I said earlier, it can be termed as an afterthought.

It is for the reasons analyzed herein above I find that the applicant has not adduce good and sufficient causes upon which this court can exercise its discretion and grant an extension of time.

I hereby dismiss the application with costs.



  
**A. MSAFIRI**  
**JUDGE**  
**20/10/2022.**