

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

MISC. LAND APPLICATION NO. 06 OF 2021

*(Arising from decision in Land Application No. 335 of 2021 dated
15th September 2021)*

MONICA MJUNGU.....APPLICANT

VERSUS

LEONARD G. KISHALULI.....1ST RESPONDENT
ANUAR R. KISHALULI.....2ND RESPONDENT
ASHURA SINGANO.....3RD RESPONDENT
SAMWEL KARUNDE.....4TH RESPONDENT
AYSHA A. KAPELA 5TH RESPONDENT
ALFAN S. MAHADHI.....6TH RESPONDENT
GOLIATH MBEMBELA.....7TH RESPONDENT
SIMON ANDREA..... 8TH RESPONDENT
BIBI MAHIMBO.....9TH RESPONDENT
YUSTO N. MKUMBI..... 10TH RESPONDENT
JOSEPH E. MSI.....11TH RESPONDENT

Date of last order: 24/10/2022

Date of ruling: 08/12/2022

EX PARTE RULING

I. ARUFANI, J

This ruling is for the application lodged in this Court by the applicant seeking for extension of time to file in this court a notice of appeal and leave

to appeal to the Court of Appeal out of time. The application is made under section 11 (1) of the Appellate Jurisdiction Act [CAP 141 R.E 2019] and is supported by an affidavit sworn by the applicant.

Although the first to tenth respondents who were represented in the matter by Mr. Hassan Swedi, learned advocate filed in the court their joint counter affidavit but their counter affidavit was expunged from the record of the court after been found it was filed in the court out of time without leave of the court. As for the eleventh respondent, though he was dully served through publication after other means of serving him proved futile but he neither appeared in the court nor filed his counter affidavit in the court. The stated situation caused the court to order hearing of the application to proceed ex parte against all respondents.

The counsel for the applicant, Mr. Philemon Mujumba, learned advocate stated in his written submission that, the law requires application of this nature to be filed in the court promptly. He stated the reasons for the applicant's failure to comply with time prescribed for filing in the court the documents he wants to file in the court out of time are deposed at paragraphs 4, 5 and 6 of the affidavit in support of the applicant. He submitted the delay of the applicant was not intentional.

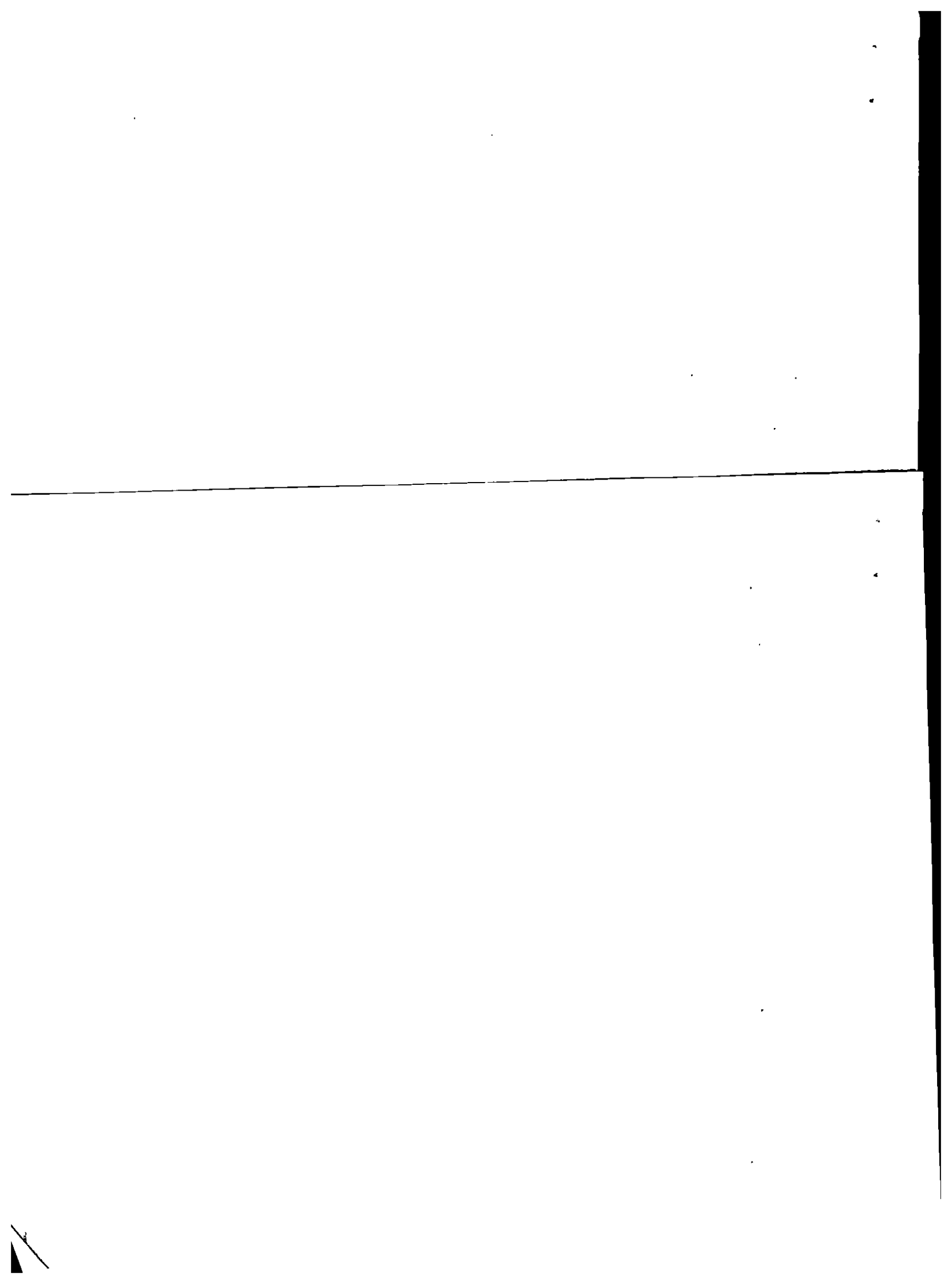
He prayed the court to grant the applicant the order is seeking from the court because the intended appeal has a great chance of success. He stated that, the court failed to consider the point of illegality pertaining to the adverse possession as the applicant has stayed in the disputed land for more than twelve years without being disturbed. He stated further that, there is a serious illegality tainting the decision of the District Land Housing Tribunal as the Chairman of the Tribunal failed to read opinion of the assessors before the parties.

He stated that is contrary to the law and it vitiated the entire previous proceedings and decision of the tribunal. He supported his argument by referring the court to the case of **Edina Adam Kibona V. Absolom Swebe (SHELL)**, Civil Appeal No. 286 of 2017, CAT at Mbeya (unreported) where the issue of requiring opinion of the assessors participated in the hearing of a matter to be read in the presence of the parties before composing and delivering judgment of the tribunal was discussed. He went on arguing that, illegality amount to sufficient cause for granting extension of time regardless of whether or not reasonable explanation for the delay has been given by the party so praying.

He submitted that, although the decision of the court did not address the issue of illegality like that of failure of the chairman of the tribunal to require the opinion of the assessors to be read to the parties but still it can

be raised in this application as it goes to the root of the matter. He stated that is like the point of jurisdiction which can be raised at any stage of the matter even at the appellate stage. To support his submission he referred the court to the case of **Tanzania – China Friendship Textiles Co. Ltd V. Our Lady of the Usambara Sisters**, Civil Appeal No. 84 of 2002 [2006] TLR 70 where it was stated the issue of jurisdiction of the court can be raised at any stage even before the Court of Appeal. He also cited in his submission the case of the **Principal Secretary, Ministry of Defence and National Service V. Devram P. Valambhia** [1992] TLR 387. In conclusion he prays the application be granted with costs.

Before going to the merits or demerit of the present application, I have keenly gone through the affidavit in support of the application and find it is on record that, parties to the present application had a land dispute which was referred before the District Land and Housing Tribunal for Kinondoni (hereinafter referred as the tribunal) as Land Application No. 42 of 2009. The said application was determined in favour of the respondents. The applicant intended to challenge the outcome of the said application by way of lodging appeal in this court but being unable to do so in time, she preferred an application No. 335 of 2021 seeking for extension of time within which to file the stated appeal out of time against the decision of the tribunal.



had lapsed. The question to determine here is whether under the stated circumstances the applicant is entitled to be granted extension of time is seeking from this court.

The court has found the provision of the law upon which the application is made which is section 11 (1) of the Appellate Jurisdiction Act do not states what the court is required to take into consideration when determine the application of this nature. For clarity purpose the afore cited provision of the law stated as follows: -

"Subject to subsection (2), the High Court or, where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned, may extend the time for giving notice of intention to appeal from a judgment of the High Court or of the subordinate court concerned, for making an application for leave to appeal or for a certificate that the case is a fit case for appeal, notwithstanding that the time for giving the notice or making the application has already expired."

The wording of the above quoted provision of the law shows clearly that there is nothing provided therein as a condition or factor required to be considered by the court in determining application of this nature. However, the court has found the use of the word "**may**" in the cited provision of the law shows the court is given discretionary power to grant or refuse an application for extension of time sought under the cited provision of the law. The stated finding of this court is being fortified by the view stated by the

Court of Appeal of Tanzania in the case of **Anthony Ngoo & Another V. Kitinda Kimaro**, [2014] TLR 34 that: -

"We are not in doubt that the permissive word "may" in section 11 (1) of AJA imply that the High Court has, on applications by intending appellants, judicial discretion to extend time for giving notice of intention to appeal."

The question as to how the court is required to exercise the stated discretionary power has been considered in number of cases including the cases of **Alliance Insurance Corporation V. Arusha Art Limited**, Civil Application No. 512/2 of 2016 and **Ngao Godwin Losero V. Julius Mwarabu**, Civil Application No. 10 of 2015, CAT at Arusha (Both unreported) where it was stated in the latter case that: -

"Is the matter of general principle that whether to grant or refuse an application ... is entirely on the discretion of the court, but that discretion is judicial and so it must be exercised according to the rule of reason and justice."

While determining an application for extension of time in the cases of **Abdallah Salanga & 63 Others v. Tanzania Harbours Authority**, Civil Reference No. 08 of 2003 **Sebastian Ndaula v. Grace Rwamafa**, Civil Application no. 4 of 2014 and **The Bishop Roman Catholic Diocese of Tanga V. Casmir Richard Shemkai**, [2019] TLR 159 the Court of Appeal

stated that the applicant is required to show good cause for the delay. The Court of Appeal went on considering the principles required to be established to move the court to grant extension of time and followed the principles formulated in the case of **Lyamuya Construction Company Limited V. Board of Trustees of Young Women Christian Association of Tanzania**, Civil Appeal No. 2 of 2010 CAT (unreported) where principles were stated to be as follows: -

- 1. That, the applicant must account for all period of delay.*
- 2. The delay should not be inordinate.*
- 3. The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.*
- 4. If the court feels that there are other reasons, such as the existence of a point of law of sufficient importance, such as illegality of the decision sought to be challenged."*

While being guided by the position of the law stated in the case cited hereinabove the court has found that, the applicant's advocate has based his submission on the argument that, there are some illegalities in the decision intended to be challenged in the court of appeal which are sufficient reason for the applicant to be granted extension of time is seeking from this court. He mentioned the stated illegalities to include the omission by the Chairman of the tribunal to read the opinion of the assessors participated in

the hearing of the matter before the parties. He stated another illegality is failure of this court to consider the evidence of the applicant relating to the adverse possession of the suit property as she has used the suit land for more than twelve years without being disturbed. He submitted those illegalities are sufficient and good cause for granting the applicant extension of time is seeking from this court.

I agreed with the counsel for the applicant's argument that allegations of illegality if established in an application for extension of time is a good cause for granting extension of time, irrespective of whether the delay has been accounted for or not. The court has come to the stated view after seeing it is a long-time standing position of the law established by or Court of Appeal in the case of **Principal Secretary, Ministry of Defence and National Service** (supra) where it was stated that;

"When the point at issue is 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 the record right."

That being the position of the law the issue to determine here is whether the applicant has managed to establish there are illegalities in the decision of this court intended to be challenged before the Court of Appeal.

The court has found the first point of illegality argued by the counsel for the applicant is in the impugned decision of this court is failure of the court to consider the issue of adverse possession of the applicant to the land in dispute for a period of more than twelve years.

The court has found it is not true that the alleged illegality was not considered by the court. The court has found it was considered by the court and found it is not a point of law but a point of fact which was supposed to be proved by evidence. Therefore, the issue of illegality of the decision of the tribunal in relation to the applicant's claim of adverse possession to the land in dispute was considered by the court, hence it is not true that it was not considered by the court.

The court has found the position of the law is well settled that, in order for the point of illegality to be accepted as a ground for extension of time, it must clearly be established in the application and in the submission fronted to the court to support the application. It should not be assumed or one which need long drawn process to discover the same. The above stated view of this court is being fortified by the decision made by the Court of Appeal in case of **Lyamuya Construction Company Limited & Another Vs. T. C. C. L. & Others**, Civil Application No. 97 of 2003 (unreported) where it was stated that:-

*"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, said that in Valambia's case, the court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one. The court there emphasized that such point of law must be that of sufficient importance and, I would add that, **it must also be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by a long-drawn argument or process.**"* [Emphasis added].

Since the issue of the applicant's claim of adverse possession to the land in dispute was considered by the court as stated hereinabove the court has found it cannot be said the argument that it was not considered by the court is a point of illegality which can move the court to exercise its discretionary power to grant the applicant extension of time is seeking from this court.

Coming to the second alleged illegality that the chairman of the tribunal did not cause opinion of the assessors participated in the hearing of the matter to be read before the parties, the court has found the alleged illegality was not raised as one of the grounds used to seek for extension of time in the application filed in this court by the applicant and it was not considered and determined in the impugned decision of this court. Since it was neither

raised nor determined by the court in the impugned decision of this court, the court has failed to see how the stated allegation can be used as a point of illegality to challenge the decision of this court. To the view of this court illegality which can move the court to grant extension of time must be in the decision intended to be challenged in an intended appeal and not illegality which is alleged is in another decision which was neither raised nor determined by the court in an impugned decision.

In the light of all what I have stated hereinabove the court has found the applicant has not managed to establish there is a good cause for granting her the extension of time is seeking from this court. Consequently, the application is hereby dismissed in its entirety for being devoid of merit and as the application was heard ex parte no order as to costs. It is so ordered.

Dated at Dar es Salaam this 8th day of December, 2022.



I. Arufani

JUDGE

08/12/2022

Court:

Ruling delivered today 08th day of December, 2022 in the presence of the applicant in person and in the presence Mr. Hussein Swedi, learned advocate for the first to tenth respondents but in the absence of the eleventh respondent. Right of appeal to the Court of Appeal is fully explained.



I. Arufani

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JUDGE

08/12/2022