

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC. LAND APPLICATION NO.399 OF 2021**

(Arising from Land Case No.147 of 2009 and Misc. Application No. 540 of
2019 at High Court)

GEORGE BENEDICT LUPEMBE APPLICANT

VERSUS

EXIM BANK TANZANIA LIMITED RESPONDENT

RULING

Date of last Order: 22.03.2022

Date of Ruling: 29.03.2022

A.Z.MGEYEKWA, J

This ruling is in respect of an application for an extension of time to lodge a Notice of Appeal out of time against the decision of this court in Land Case No. 147 of 2009. The application, preferred under the provisions of section 14 of the Law of Limitation Act, Cap. 89 [R.E 2019] and section 11 (1) of the

Appellate Jurisdiction Act, Cap. 141 [R.E 2019]]. The application is supported by an affidavit deposed by Ashery Fred Utamwa, the applicant's Advocate. The applicant has set out the grounds on which an extension of time is sought. The respondent has stoutly opposed the application by filing a counter-affidavit deposed by Stanslaus Ishengoma, the learned counsel for the respondent.

When the matter was called for hearing on 4th November, 2021 when the matter came for hearing, the applicant enlisted the legal service of Ms. Julita Suluhu, learned counsel and the respondent enjoyed the legal service of Mr. Stanslaus Ishengoma, learned counsel. By the court order, the application was scheduled to be disposed of by the way of written submission whereby the applicant filed his submission in chief on 16th November, 2021. The respondent was required to file a reply before or on 29th December, 2021. A rejoinder was filed on 4th January, 2022.

In his submission, in support of the reference, Dr. Utamwa urged this court to fully adopt the affidavit together with all appended documents thereon. Dr. Utamwa submitted that the procedure and ultimate decision in that suit were marred with serious illegality inter alia the fact that the trial court usurped powers by hearing and eventually giving a decision on it albeit the fact that it

had no jurisdiction to entertain and determine the suit because the cause of action was a breach of contract emanating from loan agreements whose monetary value stood at Tshs. 38,153,784.53. He added that the court had jurisdiction on the subject matter and pecuniary. He stated that the jurisdiction of the court is a creature of the statutes as was underlined by a string of court cases including the case of **Tanzania Electric Supply Company (TANESCO) v Independent Power Tanzania Limited (IPTL)** [2000] TLR 324. He added that the parties cannot confer jurisdiction to a court or tribunal that lacks that jurisdiction. Fortifying his submission he cited the cases of **William Sabuka v Safari Sipembo**, Land Appeal No.31 of 2018, **Sospeter Kahindi v Mbeshi Mashini**, Civil Appeal No.56 of 2017 CAT at Mwanza (unreported). He went on to submit that in the case of **William Sabuka** (supra) the court quoted the case of East African Court of Appeal sitting at Dar es Salaam held in the case of **Sbyam Thanki and Others v New Palace Hotel** [1971] 1EA 199.

Dr. Utamwa went on to submit that grants to applications for extension of time are court discretionary. He added that the court will grant an extension of time only if satisfied that there are sufficient causes for the delay. He added that there is no clear-cut statutory definition for the term of sufficient

cause. To buttress his contention he cited the cases of **Lyamuya Construction Company Ltd v Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No.2 of 2010 (unreported), **Badru Issa Badru v Omary Kilendu**, Civil Application No. 97/17 of 2020 (unreported) and **The Principal Secretary, Ministry of Defence and National Service v Devram Valambhia** [1992] TLR 185.

It was his further submission that one may argue that the trial court was blameless in entertaining this illegality because the matter was filed by parties, hence, it was the parties to blame. It was his stand that the Court of Appeal of Tanzania's position and authority is clear enough that a court must assess itself if it had jurisdictional power to entertain a dispute brought before it at the very beginning moment. To fortify his submission he cited the case of **Cipex Company Ltd v Tanzania Investment Bank (TIB)**, Civil Appeal No. 127 of 2018.

In conclusion, Dr. Utamwa urged this court to grant the applicant's application for an extension of time to allow the applicant to file an appeal to the Court of Appeal of Tanzania against the decision of this court in Land Case No. 147 of 2009. He also prayed for costs.

The learned counsel for the respondent argued that the Court of Appeal has set guidelines to be considered before granting an application for an extension as enumerated in the case of **Ngao Godwin Lusero v Julius Mwarabu**, Civil Application No. 10 of 2015, CAT at Dar es Salaam. The said guidelines are:-

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

Mr. Ishengoma also cited the case of **Tanzania Rent A Car v Peter Kimuhu**, Civil Application No.226/-1 of 2017 the Court of Appeal of Tanzania at Dar es Salaam (unreported). The Court of Appeal of Tanzania held that:-

"Delay of even a single day has to be accounted for otherwise there would be no point of having rules prescribing within which certain steps have to be taken."

Mr. Ishengoma went on to submit that looking at the applicant's affidavits and written submission one may find nothing stated as sufficient reasons for delay from 23rd July, 2015 date of the decree to the date of filing this Application in court on 4th August, 2021. He strongly submitted that the applicant's application is delayed beyond reasonable time and no accounting of each day of delay has been made. He added that what triggered the application was the execution proceedings where the court ordered the arrest of the applicant in the event of failure to pay the balance of the decretal sum. He valiantly argued that the application has an intention to frustrate execution proceedings for the decree-holder to enjoy the fruits of the decree and frivolous and abuse of the court process.

On the strength of the above submission, the learned counsel for the respondent stressed that no sufficient cause has been advanced and hence the applicant's Application for extension of time is without merit and the same be dismissed with costs.

In his rejoinder, Dr. Utamwa reiterated his submission in chief. Stressing that the Land Application No. 147 of 2009 was filed in the court which had no jurisdiction to entertain it. He added that it is his settled opinion that this was illegal which illegality is sufficient cause for extension of time in order to

rectify the said anomaly. He added that more weight is underlined by the Court of Appeal of Tanzania recent case of **Badru Issa Badru v Omary Kilendu** (supra).

In conclusion, the learned counsel for the applicant urged this court to grant the applicant application with costs.

Having carefully considered the submissions made by the learned counsels in their oral submission and examined the affidavit and counter-affidavit, the issue for our determination is ***whether the application is meritorious.***

The position of the law is settled and clear that an application for an extension of time is entirely the discretion of the Court. But, that discretion is judicial and so it must be exercised according to the rules of reason and justice as was observed in the case of **Mbogo and Another v Shah** [1968] EALR 93.

Additionally, the Court will exercise its discretion in favour of an applicant only upon showing good cause for the delay. The term “good cause” having not been defined by the Rules, cannot be laid by any hard and fast rules but is dependent upon the facts obtained in each particular case. This stance has been taken by the Court of Appeal in a number of its decision, in the

cases of **Regional Manager, TANROADS Kagera v Ruaha Concrete Company Ltd**, Civil Application No.96 of 2007, **Tanga Cement Company Ltd v Jumanne D. Massanga and another**, Civil Application No. 6 of 2001, **Vodacom Foundation v Commissioner General (TRA)**, Civil Application No. 107/20 of 2017 (all unreported). To mention a few.

I have keenly followed the application and the grounds deposed in the supporting applicant's affidavit and the respondent's counter-affidavit, I have shown the path navigated by the applicant and the backing he has encountered in trying to reverse the decision of this court. In his submission, the applicant's Advocate relied solely on the ground of illegality. The applicant's counsel alleges that the decision of this court is tainted with illegality. On his side, the learned counsel for the respondent opposed the application. Mr. Ishengoma valiantly argued that the applicant was required to account for each day of delay and not otherwise. Considering that the delay is more than 10 years. I agree that the applicant and his Advocate have accounted for the days of delay. However, the case law permits a party to raise a ground of illegality as a ground for extension of time in exclusion of accounting for each day of delay.

It has been held in times without number that where illegality exists and is pleaded as a ground the same as well constitute a good cause for an extension of time. This principle was accentuated in the **Permanent Secretary Ministry of Defence & National Service v D.P. Valambhia** [1992] TLR 185, to be followed by a celebrated decision of **Lyamuya Construction Company Limited and Citibank (Tanzania) Limited v. T.C.C.L. & Others**, Civil Application No. 97 of 2003 (unreported) and **Ngao Godwin Losero v Julius Mwarabu**, Civil Application No. 10 of 2015 (unreported). In **Principal Secretary, Ministry of Defence and National Service v Devram Valambhia** (supra) the Court of Appeal of Tanzania at page 89 held that:-

*"In our view, 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 straight.**" [Emphasis added].*

Therefore, I fully subscribe to the submission of the learned counsel for the applicant that the ground of illegality is a sufficient cause for an extension of time in order to rectify the raised anomaly. See also the case of **Badru**

Issa Badru v Omary Kilendu (supra) the Court of Appeal of Tanzania held that:-

"...I am of the considered view that even though there is a considerable delay in the application, pertinent issues have been raised. First,.. there is an allegation of illegality, irregularities, and impropriety... which cannot be brushed aside."

The illegality is alleged to reside in the powers exercised by this court in excess of its hearing the application of this court while it had no jurisdiction to entertain the dispute. In his submission, the learned counsel for the applicant elaborated that this court had no jurisdiction to entertain the dispute for the reasons that the subject matter was concerning breach of contract which is a civil matter, thus in his view, this court lacked pecuniary jurisdiction to entertain the matter whose pecuniary level was at Tshs. 38,153,784.53. He added that under section 40 (2) of the Magistrates' Court Act, Cap.11 all disputes on movable properties whose value was below Tshs. 100,000,000/= should be filed in District Courts. Thus, the same was not a fit case for this court to determine.

Applying the authority stated in the case of **Praygod Mbaga v The Government of Kenya, Criminal Investigation Department and The Hon.**

Attorney General of Tanzania, Civil Reference No. 04 of 2019. It is clear that where illegality exists and is pleaded as a ground, the same as well constitutes a good cause for an extension of time.

I am also guided the authority of the case of **Arunaben Chaggan Mistry** (supra), the Court emphasized the ground of illegality must be such a point of law that is of sufficient importance and apparent on the face of the record, such as the question of jurisdiction.

In sum, based on the foregoing analysis I am satisfied that the above-ground of illegality is evident that the present application has merit. Therefore, I proceed to grant the applicant's application to lodge a Notice of Appeal within twenty-one days from today.

Order accordingly.

Dated at Dar es Salaam this date 29th March, 2022.

A.Z.MGEYEKWA
JUDGE
29.03.2022

Ruling delivered on 29th March, 2022 in the presence of Dr. Ashery Utamwa, learned counsel for the applicant.




A.Z.MGEYEKWA

JUDGE

29.03.2022