

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

LAND APPEAL NO.262 OF 2021

(Arising from the District Land and Housing Tribunal for Kinondoni at
Mwananyamala in Land Application No. 266 of 2020)

MARIAM MGOTO 1ST APPELLANT

JULIA N. BYAKWAGA (as administratrix
of the estate of the late Seleiman Byakwaga **2ND APPELLANT**

VERSUS

FRANK MANINGI RESPONDENT

JUDGMENT

Date of Last Order: 21.03.2022

Date of Judgment: 25.03.2022

A.Z.MGEYEKWA, J

The appellants have lodged this appeal against the Ruling of the District Land and Housing of Kinondoni in Misc. Land Application No.266 of 2020 dated 27th February, 2020. The material background facts to the dispute

are not difficult to comprehend. They go thus: the appellants filed an application to restore the Misc. Land Application No. 98 of 2007 which was dismissed on 15th February, 2019. The appellants on their affidavit dated 16th March, 2020 raised grounds for nonappearance, among other things, they complained that after the dismissal of the Misc. Land Application No. 98 of 2007, the applicant promptly lodged a Misc. Land Application No. 128 of 2019 seeking the Honourable tribunal to restore Misc. Land Application No. 98 of 2007. The respondent disputed the application.

The District Land and Housing Tribunal for Kinondoni determined the matter and decided in the favour of the respondent. The appellant was not happy with the decision of the appellate tribunal. He thus preferred this appeal in the Court. The appeal is predicated on six grounds of grievance; namely:

1. The Honourable Chairman gross erred in law and facts by illegally dismissing Misc. Application No. 266 of 2020 for the extension of time for appellants to file restoration of Land Application No. 98 of 2007 properly filed before the Tribunal.
2. The Honourable Chairman erred in law and facts by dismissing the application irregularly without considering that the said application did not qualify for dismissal order.

3. The Honourable Chairman erred in law and facts without considering that the appellants were within statutory period and diligent at all time before and after the struck out of Misc. Land Application No. 128 of 2019 and that at all time the appellant were pursuing their case.
4. The Honourable Chairman erred in law and facts for not analyzing properly the evidence in record before him hence defeats the right of the appellants for properly being heard.
5. The Honourable Chairman erred in law and facts for failure to consider of irregularity that Land Application No. 98 of 2007 was dismissed after two witnesses of the appellants were held and only after the appellants failed to appear on another date of hearing.
6. Honourable Chairman erred in law and fact for not considering the sufficient reason for the delay addressed by the appellants.
7. The Honourable Chairman erred in law and facts by not considering the principle of overriding justice as adherence to that could not occasion on miscarriage of justice to the Respondents.

When the matter was called for hearing before this court on 21st March, 2022, the appellant enlisted the legal service of Mr. Rashid Kyamba, learned counsel, and the respondent had the legal service of Mr. Edward Chuwo, legal service.

Getting off the ground, on the first ground of complaint, Mr. Kyamba, learned counsel for the appellant submitted that the Chairman erred in law and facts by illegally dismissing the Misc. Application No. 266 of 2020. It was his submission that before this application, other applications were struck out on the ground of technicalities. He argued that the Chairman in his Ruling stated that the previous application was dismissed while the same was struck out.

It was his view that since the application was struck out then automatically the applicant was required to file another application. To support his submission he referred this court to page 4 of the District Land and Housing Tribunal Ruling. It was his view that the Misc. Application No. 266 of 2020 was properly been filed before the tribunal and the applicant raised a ground of illegality which was a good cause for an extension of time. To buttress his contention he cited the case of **Barclays Bank Tanzania Limited v Tanzania Pharmaceutical Industries and others**, Civil Application No. 62 of 2018.

The appellant's Advocate, on the 2nd, 3rd, 5th, and 6th grounds, has repeatedly submitted on the ground of irregularity and dismissal order. Therefore, I will summarize his submissions.

Arguing for the second ground, the appellant's Advocate was brief he argued that the application was not determined on merit, therefore, the Chairman was

supposed to strike out the application instead of dismissing it. To support his submission he cited the case of **Rutanjaga Mathias and another v Elias Emmanuel**, PC Criminal Appeal No. 5 of 2016.

With respect to the third ground, the learned counsel for the appellant contended that the appellant was within the statutory period and he was diligent at all-time even after the Misc. Land Application No. 128 of 2019 was struck out. Insisting, he submitted that the appellants were in court prosecuting their case. He added that the previous application was dismissed based on the ground of irregularity. He added that section 21 (2) of the Law of Limitation Act, Cap.89 provides for exemption when the application was struck out and on 16th March, 2020 the appellant lodged a Misc. Land Application No. 266 of 2020 was within the 30 days of the limitation period as per section 3 of the Law of Limitation Act, Cap.89.

On the 5th ground, he lamented that the Chairman did not consider the ground of irregularity that Land Application No. 98 of 2007 was dismissed after the appellant failed to appear on the date of hearing.

As to the sixth ground, Mr. Kyamba simply contended that the Chairman did not consider the sufficient reasons stated in the Misc. Application No. 128 of 2020.

On the seventh ground, Mr. Kyamba complained that the Chairman did not consider the principle of overriding justice. It was his view that the Chairman was required to determine the application justly as per section 3B of the Civil Procedure Code Cap. 33, instead of basing his findings on the previous application.

On the strength of the above submission, the learned counsel for the appellant urged this court to quash the dismissal order in Misc. Land Application No. 266 of 2020 and allow the appellant to file an application for restoration of Land Case No. 98 of 2007.

On the other hand, the respondent has strenuously resisted the appeal stating that there is no error, manifest or otherwise, in the record before the Tribunal and there is no any ground which is advanced to move this court to allow the appeal.

Submitting on the first ground, Mr. Edward contended that this ground is misconceived since the appellant's Advocate stated that the application was dismissed based on the reason that there was a previous Application No. 128 of 2020. He argued that the main ground for dismissing the application is that the appellant failed to account for each day of delay. To bolster his contention, he referred this court to page 3 of the tribunal decision He stated that the

remedy was to dismiss the application and not struck out. Fortifying his submission, he cited the case of **Kibo Hotel Kilimanjaro Ltd v The Treasury Registrar & another**, Civil Application No. 502/17 of 2020.

Submitting on the 2nd ground, the learned counsel for the respondent contended that it is not correct to state that the application was not argued on merit. Mr. Edward stated that the parties argued their application by way of written submission and the application was heard on merit. To support his stand he referred this court to page 2 of the District Land and Housing Tribunal.

As to the 3rd ground, he stated that this ground is misconceived. He went on to argue that if the application was lodged within time, why the appellant lodge an application for an extension of time. He added that the application before the tribunal was related to the restoration of Misc. Application No. 98 of 2017 was dismissed for want of prosecution on 15th February, 2019 and the time started to run on the same date.

With respect to the fourth ground, Mr. Edward was brief. He argued that in the application for extension of time there is no evidence, the only evidence is the affidavit and chamber summons and the same was considered by the tribunal. He referred this court to page 1 of the tribunal's ruling.

In regard to the fifth ground, the learned counsel for the respondent strenuously argued that the issue whether Application No.98 of 2007 was heard on merit is not a reason for an extension of time. Since the said application is not the matter before this court instead the Misc. Application No. 266 of 2020 is the main application for discussion and the grounds must base on whether there was a good cause for the extension of time.

As to the 7th ground, the learned counsel for the respondent complained that the overriding principle does not apply in the matter at hand since the oxygen principle is dealing with doing away with the technicalities while the same is not an issue before this court. He argued that the Court of Appeal of Tanzania has not invoked the overriding principles in a situation where the applicant has failed to account for the days of delay.

With respect to the 6th ground, the learned counsel for the respondent threw his last jab by contending that there is no any single paragraph in the appellants' affidavit where they accounted for the days of delay.

In conclusion, the learned counsel for the respondent beckoned upon this court to dismiss the appeal with costs.

In his rejoinder, the learned counsel for the appellant reiterated his submission in chief. He claimed that in the cited cases the delay was over 6

months while in the application in question the delay was accountable since the applicant was in court premised prosecuting his case. In regard to the issue of overriding principle, he stressed that the Chairman was required to look at justice. He stated that since the appellants were prosecuting another case thus the exemption was allowed in the situation at hand.

In conclusion, he maintained his prayer, urging this court to quash the tribunal decision and allow the appeal.

Having heard the counsels' contending arguments, the Court's duty is determined as to *whether the appeal is meritorious*.

I have opted to address the first, second, and sixth grounds together since they are intertwined. The appellant complained that the trial Chairman erred in law and fact by dismissing the application instead of striking it out and the appellant's Advocate also complained that the applicant adduced good reasons for extension of time one being illegality.

Concerning the ground of accounting for days of delay, the record is clear that Hon. Rugarabamu determined the application and found that the applicant failed to account for the days of delay starting from the date when the Ruling was struck out on 15th February, 2019 to the date when he lodged the Misc. Land Application No. 266 of 2019 before the DLHT. On his side, the

learned counsel for the appellant submitted that the appellant adduced sufficient reasons for the delay, but the Chairman failed to consider the appellant's grounds for extension of time. The learned counsel for the respondent was strenuous in his opposition. Mr. Edward came out forcefully and defended the District Land and Housing Tribunal's decision as sound and reasoned. He claimed that the applicant in his affidavit did not account for days of delay.

I have gone through the appellant's affidavit and noted that the Misc. Application No. 98 of 2007 was dismissed on 15th February, 2019 for non-appearance and counting the statutory limitation period of 30 days the same was ending on 16th March, 2019 whereas the appellant filed his application to restore the Land Application No. 98 of 2007 before, Hon. Lung'wecha applying to set aside the Land Application No. 98 of 2007 dated 15th February, 2019. The same was struck out on 27th February, 2020 for being incompetent. Thereafter, the appellant lodged a Misc. Application No. 266 of 2020 for extension of time to file an application for restoration of Land Application No. 98 of 2007 on 16th March, 2020 before Hon. Rugarabamu, Chairman. In my considered view, after Application No. 128 of 2019 was struck out the appellant found himself already out of time thus he had to apply for an

extension of time to file an application to set aside the dismissal order in regard to Land Application No. 98 of 2007.

In his affidavit, the appellant's main reason was that he was in court premises fighting to file her application for restoration. In paragraph 10 of the applicant's Advocate affidavit, he stated that the delay in filing an application for restoration was due to the fact that the applicants were prosecuting Misc. Land Application No. 126 of 2019 which was dismissed on a technicality on 21st February, 2020. In paragraph 11, the applicant's Advocate stated that immediately after the dismissal of Misc. Land Application No. 128 of 2019 the applicant filed an application to set aside the said dismissal order entered on 15th February, 2020. However, the records read that the appellant filed the Misc. Land Application No. 226 of 2020 on 16th March, 2020 thus it was not immediately after the dismissal order dated 27th February, 2020. The law requires the appellant to have accounted for each day of delay instead of giving general reasons. Therefore, I am in accord with learned counsel for the respondent that the appellant failed to account for the days of delay.

In that regard to ground number five, the appellant's Advocate has raised an issue of irregularity, I had to go through the appellant's Advocate affidavit to find out whether the appellant included the issue of illegality in his affidavit and found that the appellant's Advocate did not raise an issue of illegality nor

irregularity. The position in our jurisprudence is settled on the matter. It is to the effect that, in determining whether the application has met the required conditions for its grant, a conclusion is drawn from the affidavit that supports the application. The rationale for this is not hard to find. It stems from the fact that an affidavit is evidence, unlike submissions which are generally meant to reflect the general features of a party's case and are elaborations or explanations on evidence already tendered. This was observed by the Court of Appeal of Tanzania in the case of **The Registered Trustees of Archdiocese of Dar es Salaam v Chairman Bunju Village Government and Others**, Civil Application No. 147 of 2006 (unreported).

Thus, while the contention raised by Mr. Kyamba is in sync with the foregoing position, I am convinced that the point of illegality has been raised through a submission from the bar. The alleged illegality is not specifically pleaded in the applicant's supporting affidavit, and what Mr. Kyamba did, through his submission, was to introduce a new ground of illegality. Therefore, it is my considered view that the issue of illegality is an afterthought. Thus it is correct for Mr. Kyamba to rely on the ground of irregularity while the appellant's affidavit is silent. It is noteworthy that the court confines itself to the affidavit made by the applicant or applicant's Advocate. It cannot go beyond what is not asked to do. The same was observed in the case of

Marie-Claire Lesperance v Jeffrey Larue, Civil Appeal SCA15/2015, the Court of Appeal of Seychelles. Therefore, this ground is demerit.

Concerning the fourth ground, the appellant's Advocate is complaining that the appellant was not afforded the right to be heard. I am aware that the cardinal principles of natural justice, being the cornerstone of every judicial system, must guide the discharge of judicial functions at all stages. One of these principles is undoubtedly the right to be heard, requiring the parties concerned to be afforded an opportunity to be heard before a final decision is taken. In the case of **Mbeya-Rukwa Auto Parts and Transport v Jestina Mwakyoma** [2003] T.L.R. 251. However, in the present case, the appellant was not condemned unheard. The record shows that both sides submitted their written submissions for and against the application heard. The Chairman considered the appellant's Advocate's affidavit in reaching his decision. Therefore, it is not proper for the appellant to claim that she was not given an opportunity to be heard.

Had it been that the Chairman did not consider the appellant's reasons for extension of time then this ground could have merit for the reason that the Chairman misdirected himself to state that the applicant's application was

dismissed while the same was struck out. But as long as the appellant has failed to account for days of delay then this ground cannot hold water.

As to the seventh ground of appeal, it is worth noting that the purpose of the overriding principle is not to fix every kind of defect and omission committed by the litigant. See the cases of **Juma Busiya v Zonal Manager, South Tanzania Postal Corporation**, Civil Appeal No. 273 of 2020 Court of Appeal of Tanzania at Mbeya (unreported).

Having said so, it is my respectful view that this court cannot apply the overriding principle in the circumstances where the appellant did not account for each day of delay.

In the upshot, the appellant's appeal is disallowed. No orders as to costs. Order accordingly.

Dated at Dar es Salaam this date 25th March, 2022.



A. ZIMGEYEKWA

JUDGE

25.03.2022

Judgment delivered on 25th March, 2022 in the presence through audio teleconference whereby Mr. Rashid Kyamba, learned counsel and Ms. Anna Lugendo, learned counsel for the respondent were remotely present.




A.Z.MGEYEKWA

JUDGE

25.03.2022