IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPLICATION NO. 639 OF 2021

FARID F. MBARAK...1ST APPLICANT

FARIDAHMED MBARAK...2ND APPLICANT

VERSUS

DOMINA KAGARUKI ....1ST RESPONDENT

ELIUS A. MWAKALINGA.......................................2ND RESPONDENT

RULING

Date of Last Order: 13/04/2022
Date of Ruling: 29/04/2022

DR. T.N MWENEGOHA, J

The applicants filed an application for extension of time for the applicants to lodge an appeal to the Court of appeal against the Ruling and Order of this Court in respect of Misc. land Application No. 612 of 2017.

It was the applicants' submission that that the 1st respondent herein instituted in this Court a case, Land Case No. 51 of 2004 against the applicants, Elius A. Mwakalinga, the second respondent herein, and Tanzania Building Agency for amongst other reliefs declaration that she is a lawful owner of Plots Nos.105/106 Burundi/ Kinondoni, Dar es Salaam and damages.

That this Court dismissed the Land Case No.51 of 2004 and entered judgment in favour of the applicants and Elius A. Mwakalinga in the counter claim. The Court also declared the 2nd applicant lawful owner of plot No. 105 and the whole of semidetached house. That the Court also ordered the respondent to forthwith vacate the suit house. That the 1st respondent aggrieved by the said decision appealed to the Court of Appeal of Tanzania, Civil Appeal No. 60 of 2016.

That meanwhile the applicants in execution of the High Court judgment and decree got the respondent evicted. The house that encroached between the two plots was also demolished. However, the decision in the Court of Appeal, was that the Commissioner for Lands to resurvey Plots No. 105 and 106 Burundi/Kinondoni and subdivide the said Plots into three equal Plots for the applicants, 1st respondent and 2nd respondent.

That before the Order of the Court of Appeal has been complied the 1st respondent instituted restitutions proceedings, Misc. Land Application No. 612 of 2017 against the applicant and the 2nd respondent. She claimed a sum of TZS 108,000,000.00 as a compensation for the demolished house; TZS 7,000,000.00 as a demolition cost of the boundary wall between Plots No.105 and 106; TZS 54,720,000.00 being a mesne profit, general damages, and interest at the rate of 18% per annum and other reliefs the Court may deem fit to grant.

That despite his objection the Court granted the Application as prayed. The applicant got aggrieved and timely filed a Notice of Appeal and also wrote a letter requesting for copies of proceedings, Ruling and Order and served

them as well. However, while the applicant was waiting for requisite papers requested for intended Appeal, he was served with a Notice of Motion with intention to struct out the Notice of Appeal. After the hearing of the Notice of Motion the Appeal got struck out. That following the striking out of the Notice of Appeal the applicant is still content to appeal. However, the time for filing Notice of Appeal had long gone hence this Application for extension of time.

The applicant further proceeded to show this Court that he has sufficient cause warranting this Court to condone the delay claiming technical delay and illegality. It was his argument that he was aggrieved by the decision in Land Application No. 621 of 2017 which was delivered on 23rd May 2019 and the applicant filed within time a Notice of Appeal on 7th June, 2019. The notice was then struck out on 13th October 2021. By this date it was late to file a fresh Notice of Appeal. That, from the chronology of events it is apparent that the delay was technical. That, from 13th October, 2021 when the notice was struck out to 15th November, 2021 the days were used to prepare and file the application for extension of time and are not inordinate or any way caused by any negligence on the part of the applicant rather it has taken into account the nature of the case.

That another point for consideration in condoning the delay is that there is illegality of the decision which sought to be challenged. That the said illegalities and irregularities have been stated under paragraph 25 of the Affidavit, which are that the Application for restitution was bad in law for want of Power of Attorney as required by the law; the Application for

restitution was premature as the re-surveying and subdivision ordered by the Court of Appeal had not been carried out so as to indicate who owns which part of the land; and that the claims in the application for restitution being one of special damages no proof of the claims were presented as required by the law.

In his reply the 1st respondent started by submitting preliminary objections that first of all, the 1st applicant is named as FARID F. MBARAK. That name of FARID as 1st applicant has never featured anywhere in the previous proceedings. That there was FARIDA(Mrs) as the 1st respondent and FARID (Mr) as the 2nd respondent. That they don't have both FARID sharing one name. As such the 1st applicant is a new party to this matter and has no locus standi to apply for extension of time in this matter.

Second, under paragraph 15 of the affidavit, the applicant stated that "the copy of the ruling in Misc. Land Application No. 612 of 2017 is annexed and marked as Annexture F.2". But the said ruling is not attached to the affidavit served to them. That the respondent has perused the Court record, upon payment of court fee and discovered that only part of the said ruling was attached to the affidavit filed in Court. Pages 18 up to 23 are missing. That these omitted last pages are substantial part of the ruling as to the reasoning and findings of the Court. It was the 1st respondent's argument therefore that this application has no leg to stand on and should be dismissed with costs.

Third, that the dates in the jurat of attestation is written as 5th November, 2021 but in the signed and verification clause is written as 18th November, 2021. The date '18' is altered by adding '1' and modifying '5' to read '8'. It was the respondent's submission that this was aiming to defraud the Court to show that it was signed on 18th. In actual facts the affidavit was signed by the deponent on 5th November, 2021 and filed on 17th November, 2021. That by any standard a document filed in court cannot bear a date after being filed. A forged or altered affidavit cannot be acted upon by the Court. That a chamber summons which is not supported by affidavit cannot be acted upon.

Fourth, that the applicants' written submission is faint and difficult to read it. It was the respondent's submission that the above raised preliminary points are enough to cause the application to be dismissed with costs.

The respondents proceeded by submitting on merit of the Application where they to adopted the counter affidavit sworn by Thomas Eustace Rwebangira as part of their submission and proceeded to counter the application. It was their submission that present application is an afterthought. That the applicant is supposed to count for every day of delay as from 23rd May 2019, when the ruling was delivered, because thereafter steps taken towards appeal were taken out of time. That, failure by the advocate or a party to take essential steps is not a technical one and that it is not enough to state that the notice of appeal was struck out.

Moreover, it was the argument of the respondent that the applicant has not even counted for days of delay from13th October, 2021 when the notice of appeal was struck out by the Court of Appeal up to 17th November, 2021 when this application was filed. That the alleged consultation and draft of the document is not supported by the affidavit. That the dates in the jurat of attestation is written as 5th November, 2021 whereas in the upper side and verification clause is written as 18th November, 2021. The date '18' is altered by adding '1' and modifying '5' to read '8'.

It is allegation for the respondent that the alterations on the date were made with the purposes of escaping or overlapping a cardinal principal in application for extension of time of counting for every day of delay. After continuing with several points trying to convince this Court as to why it should not grant the application, the respondent concluded by submitting that this application be dismissed with costs.

In their rejoinder, the applicants argued that the preliminary objection raised are all mere observations with no any legal basis and that nothing has been submitted in regard to the submissions which affects the Application there are all mere technicalities intended to block the substantive justice to the applicants. They reiterated their prayers.

I have read all submissions from the parties and record before me and my task now is to decide whether this Court has merit.

Before addressing the merit of the case I wish to note hereby that parties where ordered to submit written submissions of the application in lieu of oral

hearing. It is therefore improper for the respondent to raise a preliminary objection at this point in time. The Preliminary Objection should not be raised in the submissions as this is taking the other party by surprise.

Having said that I further wish to say I find no laws purported to be violated which have been cited in the preliminary objection raised by the respondent. It is trite that a preliminary objection must be raised on point of law as cited in the case of **Mukisa Biscuits Manufacturing Co. V. West End Distributors LTD (1969) EA 699.**

Moreover, I also want to highlight that allegations of forgery are serious allegations which need to be proved in court after being investigated by the Police; hence the 1st defendant should have raised these allegations in proper court so that the court can deal and adjudication the same. However, as there is no proper allegations raised in court or investigation report from the police submitted, this court cannot act upon such allegations which indeed seem to be mere allegations as argued by the plaintiff. I have to add that upon perusal of the alleged document the court record I see nowhere where there it is dated 18th. Therefore, this allegation is puzzling.

Now in addressing on the merit of the case, I note that the applicant has pleaded that he was not sleeping on his night as there was a notice at the court of appeal, however it was struck out. It is further noted that this position is not contested by the 1st respondent, however, it was his argument that the applicant has not accounted each day of delay from when the notice was struck out on 15/10/2022 to the filing of this application on 17/11/2021.

I have to agree that the application has been filed to this court more than 30 days after the appeal was struck out. The applicant has tried to account for these days by informing this court that during this time, that is 15/10/2022 to 15/11/2022 when they filed online application, they were awaiting instruction from their clients and preparing documents. I note that this is generalization of time of delay, and each day of delay has not been accounted for as stated in the case of **Bushiri Hassan Vs. Latifa Lukio Mashayo Civil Appeal No. 3 of 2007**(unreported) where the court had this to say:

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

I further note that for a fact that the same advocate had prosecuted the same matter, the advocate should have procured new instructions in ordinate time and proceed accordingly, knowing the urgency of the matter. Thirty days of preparing document is not an ordinate delay.

The applicant has also alleged illegalities as found at paragraph 25 of the affidavit. This was vehemently countered by respondent arguing that it is long drawn process to ascertain illegalities hence it will be difficult to ascertain the illegalities.

This court has ascertained this ground and as is of the view that there are illegalities at the face of the record. This court further agrees with the 1st respondent that such illegalities need to undergo process so as to ascertain them and this is why it is prudent to let the matter to proceed to Court of

Appeal so that justice can be fairly dispensed. In the case of **Principal Secretary, Ministry of Defence and National Service Vs.Divran P. Valambhia [1992] T.L.R 387** the Court of Appeal 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 right"*
> *[Emphasis is mine].*

Hence the ground of illegality is enough to allow application at hand. I therefore grant extension of time to file the notice of appeal within 14 days from date of this Ruling, with costs.

T. N. MWENEGOHA

JUDGE

29/04/2022