

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

MISC. LAND APPLICATION NO. 18 OF 2020

(C/O Application No. 35 of 2015 of District Land and Housing Tribunal for Rukwa)

(F. Chinuku, Chairperson)

ASAYILE PAULO MSAKU APPLICANT

VERSUS

REVIVAL CHURCH SACCOS RESPONDENT

Date: 19/01 & 14/02/2022

RULING

Nkwabi, J.:

On 09/09/2020 the applicant, through the services of Mr. B. S. Chambi, learned advocate, filed in this court an application for extension of time within which to file an appeal to this court out of time. The intended appeal is in respect of judgment and decree in Application No. 35 of 2015 dated 24th day of December, 2019. There is also an application for stay of execution of the decree of the District Land and Housing Tribunal in Application No. 35 of 2015.

The application is brought under section 41(2) proviso of the Land Dispute Courts Act Cap 216 as amended and Order XXXIX Rule 5(1) of the Civil

Procedure Code Cap. 33 R.E. 2019. This application, I have to observe, endured the turbulent of a preliminary objection, which however, was dismissed by this court on 16/08/2021 hence the hearing and determination of this application on merits.

The amended affidavit duly sworn by Asayile Paulo Masaku on 27/08/2021 contains the grounds/basis upon which the applicant relies to bring this application. It is upon such grounds this court is invited to enlarge time for the applicant to file his purported eagerly awaited Land Appeal.

The applicant had filed Land Appeal No. 7/2020 which, however, she withdrew on 28/07/2020, hence the intended appeal became out of the statutory time. For extension of time, she blames the subsistence of the withdrawn Land Appeal No. 7/2020 and Miscellaneous Land Application No. 12 of 2020 for the delay of filing the intended appeal, and avers that this application was filed immediately.

Another reason for the application of extension of time is illegality of the judgment and proceedings of the trial tribunal: (a) as it acted on hearsay

evidence of PW1 and PW2, (b) it refused to receive the security document (the right of occupancy form).

To support the application for stay of execution, the applicant avers: (a) the applicant will suffer irreparable loss of his house since (i) the respondent's business is weakening and almost insolvent (ii) the respondent has no permanent properties to be sold in recovering his (applicant's) property. (b) his appeal stands a good chance of success and (c) She will be inconvenienced for his family lives there if execution proceeds.

The respondent, had earlier filed a counter affidavit resisting the application(s). She averred that after withdrawing Land appeal No. 7 of 2020, she subsequently withdrew Miscellaneous Land Application No. 12 of 2020. The respondent attributed the withdrawal of both he intended appeal and the application to total negligence.

The respondent too disputed the alleged illegality in that every complained illegality is misconceived as the trial tribunal acted in accordance with the law. It also suffices to state here that the grounds advanced by the applicant

for order for stay of execution pending the hearing and determination of this application were totally disputed.

On 02/12/2021 I ordered this application be disposed of by way of written submissions. The submission in chief as well as the reply submission were duly filed. The rejoinder submission for the applicant was filed as well.

Now, arguing ground 3 and 4 in course of proceedings (Land appeal No. 7/2020) the counsel for the applicant discovered some technical errors which needed some corrections, ... applied for withdrawal ..., and was granted On ground 5 proceeds to blame on the withdrawn appeal to be the causes of the delay, which he argues it is a technical delay which amounts to a reasonable cause for this court to extend time. He referred me to **Napaya Kilevori v. Ngida Loisule Misc. Civil Application No. 81 of 2019** HC at Arusha (unreported).

On his side, the respondent, through the services of Mr. Deogratius Sanga, learned counsel, attributed the withdrawals of Land Appeal No. 7/2020 and Misc. Land Application No. 12 of 2020 to total negligence on the part of the

applicant and his counsel. He added, the application is baseless and wanting in merits and the same be dismissed. He said negligence and lack of diligence is not excusable and cannot be sufficient cause for extension of time citing **Umoja Garage v National Bank of Commerce [1997] TLR 109.**

The claim that the delay is technical one did not receive a pleasant eye from the counsel of the respondent who argued that a technical delay whether real or actual is not excusable when negligence is established on the part of the applicant or his counsel, the basis of the argument being **William Shija v. Fortunatus Masha [1997] TLR 213.** He added, the case of **Napaya Kilevori** (supra) cited by the counsel for the applicant is distinguishable as it is inapplicable in this case. As such the counsel for the respondent advanced that the applicant has failed to account for each day of the delay.

In rejoinder, the counsel for the applicant maintained that the withdrawal of the former Land Appeal was immediately followed by Misc. Land application No. 12/2020 which too was withdrawn on 03/09/2020 after discovery of technical defects. Six days thereafter when another application was filed. Therefore, he argued all days have been accounted for the delay. He also

disputed that the repeated withdrawal and refiling is negligence or lack of diligence. He claimed technical delay is excusable in terms of **Napaya's** case (supra). He referred this court, as well, to **Kambona Charles v Elizabeth Charles, Civil Application No. 529/17 of 2019** CAT (unreported), **Yusufu Same & Another v Hadija Yusufu [2002]** 1CA Dar-es-Salaam and **University of Dar-es-Salaam v Dorothy Mhumbwe H/C Misc. Labour Application No. 348/2020** Dar-es-Salaam (2021) THCLD 459.

He also sought to distinguish the cases of **Umoja Garage** (supra), **William Shija** (supra) to be qualified by the decision in **Tanzania Breweries Ltd** (supra) and **Arunaben Chaggan Mistry v Naushad Mohamed Hussein & 3 Others Civil Application No. 6/2016** CAT (unreported) to the effect that:

"The legal position is settled. When there is an allegation of illegality, it is important to give an opportunity to the party making such allegation to have the issue considered."

It is, now, typical law that neither ignorance of the law, negligence and lack of diligence nor sloppiness is sufficient ground for extension of time. What

the counsel of the applicant has demonstrated by the withdrawing and refiling of applications as well as the appeal is lack of diligence. The case of **Napaya** is distinguishable with this case, since the blame was not on the applicant, rather on the tribunal unlike in this case in which the counsel for the applicant blames technical faults which he is to blame. This is what the High Court had to say in **Napaya's** application:

"Squarely, the Applicant in this application cannot be held responsible for the delay considering the efforts he showed to ensure that the appeal documents are availed to him within time. He was in fact delayed by the appellate Tribunal."

See also **Criminal Application No. 1/2016 Ally Kinanda & 2 Others vs The Republic CAT At Dodoma (July 2018) Mwarija JA:**

*"As has been held times out of number, ignorance of law has never featured as good cause for extension of time (See for instance, the unreported ARS Criminal Application No. 4 of 2011 **Bariki Israel Vs The Republic**; and MZA Criminal Application No. 3 of 2011 – **Charles Salungi Vs The Republic**). To say the least, a diligent and prudent party who is not properly seized of the applicable procedure will always*

ask to be appraised of it for otherwise he/she will have nothing to offer as an excuse for sloppiness."

Further, the counsel for the applicant failed to place material before this court for this court to be able to enlarge the time he is earnestly seeking contravening the authority in **Regional Manager TANROAD Kagera v Ruaha Concrete Co. Ltd, CAT Civil application No. 96 of 2007, at DSM (Unreported):**

"What constitutes "sufficient reason" cannot be laid down by any hard and fast rules. This must be determined by reference to all the circumstances of each particular case. This means that the applicant must place before the Court material which will move the Court to exercise its judicial discretion in order to extend the time limited by the rules."

The materials which the counsel for the applicant failed to place before this court are the proceedings in the withdrawn Land Appeal as well as the application that was withdrawn. Too the proceedings in the trial tribunal was not placed before this court in this application. As such it is clear that applicant has failed to account for each day of the delay. I would also add

that I was intrigued by the failure of the counsel for the applicant to attach to this application the proceedings of the withdrawn Land Appeal. Out of curiosity, I demanded for the proceedings and when the proceedings were brought to me only to find there in that the Land Appeal was withdrawn after Mr. Chambi failed to file written submissions on time as per the schedule of the court. That is total negligence which is not excusable. Therefore, the applicant has failed to account for each day of the delay when the days of the pendency of the Land Appeal are considered and such time is taken to have been not accounted for the delay.

On ground 6 Mr. Chambi elucidated the illegalities on the proceedings and judgment of the trial tribunal. He insisted that illegality in any impugned judgment gives the court good cause for allowing application for extension of time for filing an appeal citing **Tanzania Breweries Ltd v Herman Bildad Minja Civil Application No. 11/18 of 2019** CAT (unreported).

On the ground of illegality, Mr. Sanga was quick to respond that the alleged illegalities are a misconception as the same are not reflected anywhere in the judgment of the trial tribunal. Evidence was taken in accordance with

the law and said the assertions are unsubstantiated. The alleged illegalities ought to be apparent on the face of the record, backing his argument with **Omari R. Ibrahim v Ndege Commercial Services Ltd, Civil Application No. 83/01 of 2020** CAT (unreported):

"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said 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 points of law must be of sufficient importance and, I would add that must also be apparent on the face of records, such as the question of jurisdiction; not one that would be discovered by a long-drawn argument or process."

The counsel for the respondent sought to distinguish the case of **Tanzania Breweries Ltd** (supra) by arguing that there is no illegality in this case.

Rejoining his views in respect of the alleged illegalities, Mr. Chambi contended that the two points are crucial as both PW1 and PW2 were not

present at the time of the formation of the contract. The person who knew what took place one Philipo Mwampagatwa was not called to give evidence. The denial of receiving the document which formed the mortgage contravened the law. The illegalities pointed out is sufficient cause to extend time, he added. He urged that the authorities cited by the counsel for the respondent are unreasonable and the case of **Lyamuya Construction Co. Ltd** is distinguishable. He then insisted that the applicant has demonstrated sufficient cause for extension of time. He prayed the application be granted with costs.

I have carefully considered the alleged illegalities. In my view, and with the greatest respect to Mr. Chambi, the alleged illegalities are mere concoction. As such, they cannot assist the applicant in view of the settled law as per **Mekefason Mandali & 8 Others v The Registered Trustees of the Archdiocese of Dar-es-Salaam Civil Application No. 387/17 f 2019** (CAT DSM) (Unreported) at p 15-16:

*I am fortified by what the Court observed in the case of the **Principal Secretary of Defence and National Service v Devram Valambia** [1991] TLR 387. It was held in that case that:-*

"Where the point of law at issue is the illegality or otherwise of the decision being challenged, that is a point of law of sufficient importance to constitute a sufficient reason within rule 8 of the Court of Appeal Rules to overlook non-compliance with the requirements of the Rules and to enlarge the time for such compliance."

*It is crucial to point out however, that for this ground to stand, the illegality of the assailed decision must clearly be visible on the face of the record, and as we said in **Lyamuya Construction Company Limited** (supra), such point of law must be that of sufficient importance. In **Lyamuya Construction Company Limited** the Court said:-*

"Since every party intending to appeal seeks to challenge a decision either on point of law or fact, it cannot in my view, be said that in Valambhia'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, (but) not one that would be discovered by a long drawn argument or process.”

The alleged illegalities not only need a long-drawn argument or process but also are merely concocted in an effort to delay execution process. I add that it is willful negligence, coupled with abuse of the court process at the detriment of the respondent in that the applicant is employing delay tactics to delay execution of the decree of the trial tribunal.

The case was not based only on oral evidence, but it was also based on documentary evidence. The complaint on hearsay evidence, at this stage is marred as it is not apparent on the face of the record. Further the complaint as to the refusal to receive the alleged document in respect of the mortgage, the same is lame as there was no dispute that the applicant entered into the contract and mortgaged his landed property. What was in dispute was whether or not he had not paid the loan.

Finally, I would observe, that the application for stay of execution has as of now been overtaken by events. This court finds no need of discussion and making a determination of it, because the stay of execution order was

intended for during the pendency of this application. I rule that the application for stay of execution is overtaken by events. It is as such dismissed. The entire application, then, is dismissed with costs.

It is so ordered.

DATED at **SUMBAWANGA** this 14th day of February, 2022



A handwritten signature in blue ink, appearing to read 'J. F. Nkwabi'.

J. F. Nkwabi

JUDGE