IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 90 OF 2022

(Arising from Land Application No. 132 of 2019, originating from the judgment of the Kibaha District Land and Housing Tribunal in Land Application No. 98 of 2012)

ESTER BARUTI ..... APPLICANT

VERSUS

SETHI SENYAEL AYO ..... 1ST RESPONDENT

MRISHO RAMADHANI ..... 2ND RESPONDENT

RULING

Date of last Order: 18.05.2022

Date of Ruling: 20.05.2022

A.Z.MGEYEKWA, J

This Court is called upon to grant an extension of time within which to file an application for leave to appeal to the Court of Appeal of Tanzania. At the centre of the impending appeal is the decision of the Court by Hon.

Maghimbi, J in Land Application No. 132 of 2019, in which the District Land and Housing Tribunal allowed the respondent's appeal. Dissatisfied, the applicant lodged the instant application and complains that the impugned decision of this court is tainted with illegality. The application is supported by the affidavit of Ms. Esther Barutis, setting out the ground for extension of time. The application is strongly opposed by the respondents. Through counter-affidavit; the 1st respondent counter affidavit is deponed by Seth Senyael Ayo,d the 1st respondent and the 2nd respondent counter affidavit is deponed by Mrisho Ramadhani, the 2nd respondent.

The application was disposed of through written submissions, preferred in conformity with the schedule drawn by the Court, and fully adhered to by counsel for the parties. I thank the applicant and 1st respondent's counsel for their concise and focused written submissions. However, nothing has been filed by the 2nd respondent, to-date, and no word has been heard from him on the reason for the inability to conform to the court schedule. This being the position, the question that follows is: what is the next course of action? The settled position is that failure to file written submissions, when ordered to do so, constitutes a waiver of the party's right to be heard and prosecute his matter.

This position is consistent with the Court of Appeal of Tanzania holding in the case of **National Insurance Corporation of (T) Ltd & Another v Shengena Ltd**, Civil Application No. 20 of 2007 at DSM (unreported), it was held that:

> *"The applicant did not file submission on the due date as ordered. Naturally, the Court could not be made impotent by the party's inaction. It had to act ... it is trite law that failure to file submission n(s) is tantamount to failure to prosecute one's case."*

In consequence of the foregoing, it is ordered that the matters be determined *ex-parte* against the 2nd respondent by considering the application based on the submission filed by the applicant and 1st respondent.

In this matter, the applicant had the legal service of Mr. Mgaya, learned counsel and the respondent enlisted the legal service of Mr. Mwakinga, learned counsel.

In his written submission, Mr. Mgaya began by praying for this court to adopt the applicant's affidavit to form part of his submission. Mr. Marco submitted that the applicant failed to file an application for leave within time due to longtime sickness. The learned counsel in his submission referred this court to the applicant's affidavit especially paragraphs 5, 6, 7, 8, and 9. He

submitted that the applicant's sickness started on 1st June, 2020 and later was sent to the traditional Doctor at Kigoma. He added that he was unstable for a long period and attended treatments from June, 2020 to February, 2022 when she became normal. The learned counsel went on to submit that thereafter the applicant traveled to her home village at Kagera where they conducted traditional rituals.

He went on to state that on 25th February, 2022, the applicant arrived in Dar es Salaam safely and started searching for her Advocate who prepared and managed to file the instant application on 8th March, 2022. The learned counsel for the applicant submitted that sickness is beyond the human plan and choice, it is an act of God which makes a good reason to warrant the grant of the application. To support his submission, he seeks refuge in the case of **Samwel Amos Gekura v Sofia Saidi & another**, Misc. Land Application No. 441 of 2020 (unreported).

The learned counsel for the applicant went on to submit on the issue of illegality. He submitted that it is the applicant's contention that in Misc. Application No. 132 of 2019. He stated that the issue of illegality was raised to the effect that the trial tribunal heard the matter while improperly constituted. He added that the matter was decided without giving weight to

the issue of jurisdiction which was very clear on the face of the record, that the Chairman delivered the judgment with one assessor contrary to section 23 (1) (2) of Cap. 216.

He continued to submit that the principle was put to test in the case of **Yakob Magoigo Gichere v Peninah Yusuph**, Civil Appeal No. 55 of 2015 (unreported). To fortify his submission he cited the case of **Emmanuelina Yustinian v Philipo Petro,** Misc. Land Application No. 69 of 2019 HC (unreported). He urged this court to consider this ground of illegality in the impugned decision which amounts to consenting to the illegality to remain in the records of the court.

In conclusion, the learned counsel for the applicant prays for this court for the interest of justice to grant the applicant's affidavit.

The respondent's Advocate valiantly opposed the applicant's contention. The learned counsel for the respondent submitted that the reason advanced by the applicant for the delay are two to wit; sickness, that she was suffering from the clan spirits which confused her and made her mentally unstable, and the ground of illegality.

Submitting on the reason for sickness, Mr. Mwakinga contended that this reason is not genuine and contains a lot of cooked stories, he submitted that the alleged sickness is not proven by a medical expert before opting for traditional healers. He claimed that the applicant did not attach any medical report and neither mentioned the failure to treat the applicant in normal hospitals. He lamented that the information contained in annexure EB-3 is not sufficient because first, the status of Dr. Juma Said Kiiagiye as a registered traditional doctor is not disclosed in the applicant's affidavit.

He went on to submit the second reason of insufficient cause, there is no letter from the ten cell leaders or Village Executive Officer since the applicant was a stranger in Kigoma introducing her and revealing that the applicant was treated and attended by Dr. Juma Kiagiye. He added that thirdly there was no proof of a bus ticket that she traveled to and from Kigoma to Dar es Salaam via Kagera. The learned counsel distinguished the cited case of Samwel Amos (supra) by stating that the cited case is irrelevant to the application at hand.

Regarding the ground of illegality, Mr. Mwakinga forcefully contended that by reading carefully between the lines one can find that there is no any illegality in the impugned decision in Misc. Land Application No. 98 of 2012

was caused by the improper constitution of the trial tribunal. He strenuously argued that the cited provision of section 23 (1) (2) of Cap. 216 does not provide that the Chairman will deliver judgment in the presence of assessors and the Chairman before proceedings to hear the case with a single assessor referred to the law and stated the same on his judgment. He valiantly argued that the applicant is misleading the court since the said illegality is not clearly shown where it was cropped from. He forcefully argued that the applicant to fault the Chairman without justification is uncalled. He claimed that the openness by counsel for the applicant as an officer of the court was not exercised. Fortifying his submission he cited the case of **Mohamed Itqbal v Esrom M. Maryon**, Civil Application No. 141/01 of 2017.

The learned counsel threw his last jab by contending that the issue of illegality was already been determined by this court in Misc. Land Application No. 132 of 2019 in which Hon. Maghimbi, J overruled the said ground by stating that there were no obvious records to support the claims of illegality. In his view, this court cannot decide the issue of illegality twice. Since this court is barred by the doctrine of *functus officio*. He distinguished the cited case of **Emmanuel Yustinian** (supra) by stating that in the instant application the ground of illegality does not exist.

On the strength of the above submission, the learned counsel for the respondent urged this court to dismiss the application with costs.

The Applicant's rejoinder was a reiteration of the submission in chief.

So much for the submissions of the learned counsel for both parties. The ball is now in my Court. The parties' rival submissions raise one key question. This is as to *whether or not the application has passed the threshold for its grant.* I wish to start by underscoring, first, that it is settled law that applications of this nature will only succeed upon the applicant showing reasonable or sufficient cause for the delay. This is a requirement of section 14 of the Law of Limitation Act, Cap. 89 under which the present application has been made. To grant or not to grant extensions is within the unfettered discretion of the Court.

This unfettered discretion is only subject to the obvious fetter of all discretions; that is, it must be exercised judicially the same was held in the cases of **Lalji Gangji v Nathoo Vassanjee** [1960] 1 EA 315 and **Noormohamed Abdulla v Ranchhodbhai J. Patel & another** [1962] 1 EA 447.

Moreover, in order to establish that the delay was with sufficient cause, the applicant must not only demonstrate reasons for the delay but also

satisfactorily declare and explain the whole period of delay to the Court. In other words, the applicant must account for each day of delay. The substance of the matter and, in this respect, the legal position is that an extension of time, being an equitable discretion, its exercise must be judicious. As stated in numerous decisions, such discretion must be on a proper analysis of the facts, and application of law to facts, the grant of which is done upon satisfaction by the applicant through the presentation of a credible case upon which such discretion may be exercised.

I have keenly followed the application and the grounds deposed in the supporting applicant's affidavit and the respondent's counter-affidavit, Mr. Luhogi has shown the path navigated by the applicant and the backing he has encountered in trying to reverse the decision of this court. The applicant's Advocate has raised two main limbs for his delay, technical delay, and illegality. I have opted to address the second limb. The applicant alleges that the decision of this court is tainted with illegality.

The illegality is alleged to reside in the powers exercised by the trial tribunal. The learned counsel for the applicant lamented that the trial Tribunal heard the matter while improperly been constituted and the matter was decided without giving weight to the issue of jurisdiction. Mr.

Mwakinga, in opposition to this contention, is based on the ground of illegality. He forcefully contended that illegality does not exist. It is worth noting although the issue of illegality is regarded as a sufficient ground in applications for extension of time, however, the same does not mean that any illegality raised by a party intending to appeal constitutes a point of law.

In the case of **Lyamuya Construction Company Limited v Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No.2 of 2010 (unreported), the Court of Appeal of Tanzania held that:-

> "*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 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 an 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." [Emphasis added].*

Equally, in the case of **The Commissioner of Transport v The Attorney General of Uganda and Another** [1959] E. A 329, the Court of Appeal held that:-

> *" In other words, the Court refused to extend time because the point of law at issue was not of sufficient importance to justify the extension.* ***The corollary of that is that in some cases a point of law may be of sufficient importance to warrant an extension of time while in others it may not.*** *"[Emphasis added].*

After taking in consideration what has been stated in the affidavit and the applicant's Advocate submission, I would like to make an observation that in the applicant's affidavit particular paragraphs 10, 11, and 12 the applicant complained that the trial tribunal had no jurisdiction to determine the matter. In his written submission the learned counsel submitted much on the issue of the tribunal was improperly constituted. He claimed that the Chairman delivered the judgment with one assessor contrary to section 23 (1) (2) of Cap. 216. The learned counsel for the applicant insisted that the trial tribunal Chairman omitted to receive the assessors' opinion in the presence of the parties and sat with one assessor.

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 file an application for leave to appeal to the Court of Appeal of Tanzania within thirty days from today.

Order accordingly.

Dated at Dar es Salaam this date 1th May, 2022.

A.Z.MGEYEKWA

JUDGE

19.05.2022

Ruling delivered on 19th May, 2022 in the presence of the 1st respondent.

A.Z.MGEYEKWA

JUDGE

19.05.2022