

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND APPLICATION NO. 502 OF 2021**

*(Arising from Land Appeal No. 123 of 2020 Hon. Mango, J dated 28<sup>th</sup> July 2021)*

**SELEMANI SAID MMAKA.....APPLICANT**

**VERSUS**

**MOHAMED NASSORO.....1<sup>ST</sup> RESPONDENT**

**HAMISI HATIBU RASHID.....2<sup>ND</sup> RESPONDENT**

**MATESO SAIDI.....3<sup>RD</sup> RESPONDENT**

**ZUBEDA HASHIM NJENJE..... 4<sup>TH</sup> RESPONDENT**

**FLAMINGO AUCTION MART..... 5<sup>TH</sup> RESPONDENT**

*Date of last order: 16/5/2022*

*Date of ruling: 30/5/2022*

**RULING**

**A. MSAFIRI, J.**

On the 20<sup>th</sup> day of September 2021, the applicant lodged an application in this Court by way of chamber summons under Section 11 (1) of the Appellate Jurisdiction Act CAP 141 RE 2019 (the Act), for the following orders; *Alls.*

- i. *That this Honourable Court may be pleased to extend time within which the applicant may make application for leave to the Court of Appeal of Tanzania out of time.*
- ii. *That costs for the application be borne by the respondents.*
- iii. *Any other relief (s) and/or order (s) that the Honourable Court may deem just and equitable to grant.*

The application is supported by affidavits by Selemani Saidi Mmaka and his advocate, Nyaronyo Mwita Kicheere.


When this application was called on for hearing on 16<sup>th</sup> May 2022, Nyaronyo Mwita Kicheere and Innocent Mwelelwa learned advocates appeared for the applicant and 2<sup>nd</sup> respondent respectively. The 1<sup>st</sup> respondent appeared in person he had no legal representation. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents did not enter appearance, despite being served through publication.

The application was disposed orally. Mr. Kicheere learned advocate for the applicant having adopted the affidavit in support of the application contended that the application for leave for appeal was supposed to be lodged on or before 28/8/2021, however the same could not be lodged in time because the applicant had to undergo medical treatment at the Police

*Alle.*

Medical Unit located at Kilwa road. When the applicant recovered, he sought for the service of the lawyer but the said lawyer fell ill as stated under paragraphs 4 and 5 of the affidavit. The said advocate was being treated at Muhimbili Hospital so he was unable to attend the case at the court.

The learned advocate submitted that sickness of both the applicant as well as the advocate constitutes sufficient cause for the extension of time. To fortify his point, the learned advocate referred to me the decision of the Court of Appeal in **FINCA (T) Limited & another v Boniface Mwalukisa** Civil Application No. 589/12 of 2018 (unreported) specifically at page 6.

On further submission, the learned advocate for the applicant contended that there are illegalities and irregularities in the judgment of the Court whereby the seller of the house in dispute was not touched instead the applicant who is not the seller has been ordered to pay compensation which is a serious point of law which needs to be addressed before the Court of Appeal. The learned advocate cited the case of **Tanzania Breweries Limited v Herman Bildad Minja** Civil Application No. 11/18 of 2019 at page 16 and 17. 

On reply, Mr. Mwelelwa having adopted the counter affidavit contended that in application for extension of time like the present one the applicant has to show sufficient cause for extension of time. The learned advocate contended further that in the affidavit in support of the application there are no sufficient reasons for the failure of the applicant to lodge the application within time.

As to the sickness, the learned advocate for the respondent contended that there is nowhere the advocate for the applicant was admitted to the hospital rather he only attended medical treatment and then proceeded with daily activities hence he had ample time to draft and lodge his application.

Regarding the applicant's sickness, the learned advocate for the respondent contended that he fell sick on 23/8/2021 while the judgment was delivered on 28/7/2021, the applicant therefore ought to account for the days between the said dates.

On further submission, the learned advocate for the respondent contended that a person can fall sick hence incapable of taking necessary action but he is supposed to explain the extent of the sickness which made him unable to attend his duties. *ALLs.*

As to the allegations of illegalities, the learned advocate for the respondent contended that there is no illegality and the judgment is fair and just. Moreover the applicant has not pointed out any illegality on the face of the said judgment to warrant the court to extend time. To this the learned advocate has referred to me the decision of **FINCA (T) Limited & another v Boniface Mwalukisa** [supra].

On his part the 1<sup>st</sup> respondent adopted his counter affidavit as part of his submission and he had nothing further to elaborate.

On rejoinder, Mr. Kicheere reiterated his submission in chief. He further contended that he attended medication and therefore could not attend the matter accordingly. Regarding the period between 23/8/2022 to 28/7/2022, the learned advocate contended that the period has been accounted because the applicant was sick.

Regarding the existence of illegality, Mr. Kicheere contended that on paragraphs 11, 12 and 15 of the affidavit in support of the application, the applicant has been able to point out the illegalities which should be addressed by the Court of Appeal. *Aulls*

Having gone through the submissions in support and rival to the application, the issue which calls for the Court's determination is whether the application has merits.

As rightly pointed out by Mr. Mwelelwa learned advocate for the 2<sup>nd</sup> respondent, it is trite law that in an application for extension of time to do a certain act, like in present one, the applicant must show good cause for failing to do what was supposed to be done within the prescribed time.

Some of the decisions of the Court of Appeal of Tanzania which require good cause to be shown before the Court can exercise its powers for extension of time, are; **Abdallah Salanga & 63 Others v. Tanzania Harbours Authority**, Civil Reference No. 08 of 2003 and **Sebastian Ndaula v. Grace Rwamafa**, Civil Application no. 4 of 2014 (both unreported).

However, what constitutes good cause has not been codified although a number of factors to be considered are; whether or not the application has been brought promptly; a valid explanation for the delay and whether there was diligence on the part of the applicant. (See for instance the cases of **Tanga Cement Company Limited v. Jumanne D. Masangwa & Another**, Civil Application no. 6 of 2001, **Tauka Theodory**

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**Ferdinand v. Eva Zakayo Mwita (*As Administratrix of the Estate of the Late Aibanus Mwita*) and Wambura NJ. Waryuba v. The Principal Secretary, Ministry of Finance and Another, Civil Application No. 225/01 of 2019 (all unreported).**

In the present application, the judgment which the applicant seeks to challenge was delivered on 28/7/2021 while the present application was lodged on 20/9/2021. The application for leave to appeal to the Court of Appeal is required to be lodged within 30 days of the delivery of the judgment or order sought to be appealed against. In the instant matter, the application for leave should have been lodged on or before 27/8/2021.

Hence counting from the date on which the application for leave should have been filed to the date on which the present application for extension of time was lodged, about **24** has days lapsed.

The reason for failure to lodge the application in time according to the learned advocate for the applicant is sickness of both the applicant and his advocate. Equally the applicant has alleged the existence of illegalities and irregularities on the impugned judgment. *Alls*

Starting with sickness, I have gone through the affidavit in support of the application, the applicant claimed that he was sick and had attended medical treatment on 23/8/2021 but his condition worsened hence he had to go back on 25/8/2021 in which after being attended he was given three days bed rest. It was not until 5/9/2021 when the applicant got better and able to consult his advocate. I have had a chance of seeing the applicant's hospital document whereby he firstly attended for medical checkup on 23/5/2021 and he returned again on 25/8/2021 in which he was given three days bed rest, which expired on 28/8/2021. The applicant's contention that it was until 5/9/2021 when he got better has not been supported by any document.

Equally regarding the applicant's advocate sickness, on his affidavit he claimed to have attended medical checkup on 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> days of September and on 10/9/2021 he got the prescriptions. The learned advocate stated further that he was very weak until 13<sup>th</sup> September. The hospital documents attached on the affidavit indicated that he only attended for medical checkup on 6/9/2021 and 7/9/2021. There is no proof as to whether the applicant's advocate attended treatment beyond 7/9/2021.

*Atls.*



Sickness is a valid ground for extension of time if proved. In **Sabena Technics Limited v Michael J Luwungu** Civil Application No. 451/18 Of 2020 (unreported), the Court of Appeal of Tanzania reiterated its stance holding that to amount to a good cause for the delay, there must be evidence that sickness had a bearing on the delay.

In the present matter even if I were to agree with the applicant on the issue of sickness still there are days which have not been accounted for. For instance from 28/8/2021 to 5/9/2021 when the applicant visited his advocate has not been strictly accounted for, equally it is indicated through the hospital documents by the advocate for the applicant that he attended for medical checkup only on 6/9/2021 and 7/9/2021, hence from that date to 20/9/2021 when the present application was lodged has not been accounted for.

It is settled law that in an application for extension of time to do an act, the applicant is supposed to account for each day of delay. Some of the decisions to that effect include the cases of **Ludger Bernard Nyoni v. National Housing Corporation**, Civil Application No. 372/01 of 2018 and **Mpoki Lutengano Mwakabuta v. Jane Jonathan** (*As Legal Representative of the Late Simon Mperasoka- Deceased*), Civil Application

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No. 566/01 of 2018 (both unreported). For instance, in the former case the Court stated thus:

*"It is settled that in an application for enlargement of time, the applicant has to account for every day of the delay involved and that failure to do so would result in the dismissal of the application"*

Hence I hold that although the sickness complained of in the present matter has been supported by documents still there are days which have not been strictly accounted for as I have indicated.

The applicant has raised the issue of irregularities/Illegality on the judgment of the High Court. The applicant, in his submission has cited the case of **FINCA (T) Limited & another v Boniface Mwalukisa** [supra] in which allegation of illegality is among the factors which may be considered as a good cause in granting extension of time.

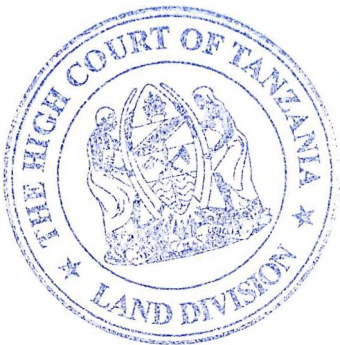
As rightly submitted by the applicant, illegality can be a ground for extension of time. But in order to constitute illegality, it must be apparent on the face of the record such as the question of jurisdiction, not one that would be discovered by long drawn argument or process. This position of law has been restated by the Court of Appeal in a number of cases

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including; **The Principal Secretary, Ministry Of Defence And National Service v Devram P. Valambhia** [1992] T.L.R387, **Lyamuya Construction v Board Of Young Women Christians Association**, Civil Application No. 2 Of 2010 (Unreported).

Coming to the present application, it would appear the purported illegalities that the applicant is not a seller but has been ordered to pay compensation, as complained by the applicant can be discovered by long drawn arguments and cannot therefore qualify to be termed as illegality.

In upshot and for the foregoing reasons, this application lacks merits and it is accordingly dismissed with costs.



  
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**A. MSAFIRI**

**JUDGE**

**30/5/2022**