

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 81 OF 2021

(Originating from the decision of the District Land and Housing Tribunal for Ilala, Hon. M Mgulambwa Chairperson, in Land Application No. 325 of 2017 dated 18th May 2020)

FIKIRI SAID.....1ST APPLICANT

ERASTO CHOGO.....2ND APPLICANT

VERSUS

ANASTAZIA SAMBO.....RESPONDENT

Last Order: 14/02/2022
Ruling date: 20/04/2022

RULING

MANGO, J

The Applicants seeks extension of time to appeal against the decision of the District Land and Housing Tribunal for Ilala in Land Application No. 325 of 2017. The Application is by way of a Chamber Summons made under Order XX1 Rule 21(1), 22, 24(1) and sections 68(e) and 95 of the Civil Procedure Code, [Cap. 33 R.E of 2019] and section 14(1) of the Law of Limitations Act, [Cap. 89 R.E 2019]. The application is supported by a joint affidavit sworn by the Applicants. The Respondent objects the application and she filed a counter affidavit to that effect.

On 23rd September 2021, the Court ordered the Application be argued by way of written submissions the order which was complied with by parties.

The Applicants prosecuted the application in persona while the Respondent enjoyed legal assistance from Legal and Human Right Center.

According to the Applicants' submission and the contents of the affidavit filed in support of this Application, the Applicants have advanced illegality and pauperism as grounds for extension of time.

On illegality, the Applicants highlighted two issues. First the capacity of the Respondent to institute the matter before the District Land and Housing Tribunal. They argued that the Respondent had no locus standi to institute the suit because, she is neither the owner of the suit land nor is she the administrator of the estate of her late husband one John Silvin Sambo. The Applicants admitted that, it was the testimony of the Respondent and other witnesses before the Tribunal that, the Respondent and her late husband purchased the suit land jointly. They however argued that, joint ownership alone, cannot confer in her, the capacity to institute Land Application No. 325 of 2017.

Secondly, they pointed out failure of the Tribunal to visit the locus in quo. They argued that it was necessary for the Tribunal to visit locus in quo to ascertain the size of the land in dispute. According to them, it was necessary for the Trial Tribunal to visit locus in quo because Application No. 325 of 2017 does not contain sufficient description of the suitland. They added that, the Respondent described only the size of a piece of land purchased by her and her late husband. She did not describe the size of the alleged road. They cited the case of **NIZAR MH Versus Gulamali**

Fazal [1980] TLR 29 to support their argument that, it is necessary to visit locus in quo.

The Applicants submitted further that, illegality is a good ground for extension of time and prayed this Court to grant extension of time on the ground of illegality. They argued that if extension of time will not be granted, the Court will be blessing illegality committed by the Trial Tribunal. To buttress their argument, they cited the case of **Principal Secretary Ministry of Defence and National Services Versus Devram Valambia** [1992] TLR 387.

On pauperism, they submitted that, they lodged their appeal within time but they failed to pay filing fees. They have attached a copy of memorandum of appeal which indicates that it was received by the High Court of Tanzania, Land Division on 26th October 2020 which was within time limit for appeal.

The Respondent's reply submission was drawn in gratis by Advocate Felister Deogratus Rugazia who works with Legal and Human Rights Center. The learned advocate submitted that, the Applicants have failed to account for their delay to lodge their appeal with any good reason. She highlighted that, the Applicants have delayed to file this Application for about 276 days, that is, from 18th May 2020 when the Trial Tribunal delivered its judgement to 17th February 2021 when the application was filed. She added that, it is a well-established principle that in accounting for the delay, the Applicants need to account for each day of delay with sufficient reason. She cited the case of **Lyamuya Construction**

Company Limited Versus The board of the Registered Trustees of Young Women Christian Association as among the cases that has enlightened factors that need to be considered by the Court in determining applications for extension of time. She argued that, according to the cited decision, the Court should consider the following factors: -

- i. The Applicant must account for all the period of delay
- ii. The delay should not be inordinate
- iii. The Applicant must show diligence and not apathy, negligence or sloppiness in prosecution of the action that he intends to take
- iv. Existence of other sufficient reasons such as existence of point of law of sufficient importance such as illegality of the decision to be challenged

Applying the factors in the Application at hand, the learned counsel argued that the Applicants have shown negligence or sloppiness in filing their appeal on time. She referred this Court to paragraph 3 of the affidavit in which the Applicants stated that they have failed to pay filing fees. She is of the view that, the excuse is a mere allegation as there is no proof of such failure. She submitted further that, the Applicants managed to file two applications after the Trial Tribunal delivered its judgement. They first filed Misc. Application No. 579 of 2020 to stay execution in Application No. 325 of 2017. They also filed Misc. Application No. 434 of 2021 which was withdrawn on 3rd August 2021. She wonders how the Applicants managed to pay filing fees for the two applications but failed to pay filling fees for their appeal. She concluded that, the Applicants allegations are baseless.

On the alleged illegality, the learned counsel conceded that, illegality can be considered to be a good ground for extension of time. She however argued that, the alleged illegality must be established and explained sufficiently. Applying the principle in the Application at hand, she argued that, the Applicants merely listed the illegality. She submitted further that, the alleged illegality is not apparent on face of record.

Responding to the alleged illegalities the Respondent's Counsel submitted that, the Applicants misconceived the concept of joint ownership. She argued that in joint ownership, when one of the joint owners passes away, the right of ownership vests in the surviving owner. The Respondent owned the disputed piece of land with her husband jointly. As the husband passed away, the right of ownership over the suit land remains on the Respondent. Thus, the allegations that the Respondent lacks locus stand is absurd and frivolous.

On the issue of visit to locus in quo, the Respondent's Counsel, citing the case of **Nizar**(supra) argued that such visit is not mandatory. According to the cited case, visit to locus in quo is necessary in exceptional cases and not mandatory. She is of the view that circumstances in Application No. 325/2017 did not compel the Tribunal to visit locus in quo because, the Respondent mentioned the size of her land which has been trespassed. Thus, there was no need for the Tribunal to visit the said land. She concluded her submission by praying to have the Application dismissed with costs.

In their joint rejoinder, the Applicants reiterated their submission in chief.

According to the contents of the affidavits filed in this Application and submissions made by both sides, it is not disputed that the Applicants failed to pursue their appeal within the prescribed time limit. I agree with the Respondent's Counsel that Applicants are required to account for the delay of each day with a sufficient ground. I have considered the two grounds advanced by the Applicants and found them to be not sufficient to move this Court to exercise its discretion to extend time for the Applicants to appeal against the decision of the District Land and Housing Tribunal for Ilala in Application No. 325 of 2017. I will explain the reasons of my findings for each ground advanced by the Applicants.

The first ground advanced by the Applicants is failure to pay filing fees for the Appeal which was actually presented for filing within the prescribed time limit. The copy of memorandum of Appeal establishes that the Applicants drafted their memorandum of appeal and presented the same for filing on 26th October 2020. The document was stamped to have been received by the High Court Land Division on 26th October 2020. Despite presenting the memorandum of appeal within time, the appeal was not processed. It is not clear what made the Registry officer not to endorse the Memorandum of Appeal and proceed with other necessary steps of registration of the case.

The contents of paragraph 3 of the affidavit suggest two reasons as to why the said appeal was not processed, first, the memorandum of appeal was misplaced at the Court Registry and second, failure to pay filing fees.

The alleged misplacement of the memorandum of appeal is not supported by any evidence thus, it remains to be a mere allegation. Such allegations ought to be proved by an affidavit sworn by a Court Registry officer acknowledging such misplacement. Without proof of the alleged misplacement, the Court cannot rely on the same as a ground for extension of time. The requirement to have delays or any failures of a party to comply with the law that was contributed by Court Registry Officers to be proved by affidavit of the registry officer was echoed in a number of cases including the case of **Airtel Tanzania Limited versus Misterlight Electrical Installation Co. Limited and Another**, Civil Application No. 37 of 2020, Court of Appeal of Tanzania at Dar es salaam. In the cited case, the Court of Appeal referred to its decision in the case of **Isaack Sebegele versus Tanzania Portland Cement**, Civil Application No. 25 of 2002 which held that;

"Evidence in support of the Applicant's claim against Court Clerk was necessary. The name of the said Court clerk should have been indicated in one of the paragraphs of the affidavit of the learned counsel and that, the application should have been accompanied with the affidavit of the Court Registry Officer"

In the Application at hand, the Applicant did not mention the name of the Registry Officer who misplaced the memorandum of appeal. In addition, the Application is not supported by an affidavit of the Registry Officer of the High Court, Land Division, acknowledging the alleged misplacement of the memorandum of appeal.

The issue of pauperism that was raised by the Applicant is negated by the fact that the Applicants filed other two applications and managed to pay requisite filing fees. I hold so because, the Applicant did not dispute to have filed the two Applications, Application No. 579 of 2020 and Application No. 434 of 2021. This suggests that the Applicants did not encounter any challenge in paying filing fees but they decided not to pay filing fees for the appeal for reasons best known to themselves.

Regarding illegality, I agree with the Applicants that illegality can be considered to be sufficient ground for extension of time. However, the alleged illegality must be clearly visible on face of record and should be explained by the party raising it. The gist of the need to give details of alleged illegality is to enable the Court satisfy itself on the existence of the alleged illegalities on face of record. Illegalities alleged by the Applicants are of two categories; Capacity of the Respondent to institute the Application before the tribunal and failure of the Trial Tribunal to visit locus in quo.

The issue of locus in quo is not visible on face of record as determination of which will involve assessment of evidence. Moreover, the Applicants in their submission conceded that the Respondent owned the disputed land jointly with her late husband. As correctly submitted by the Respondents Counsel, in case of death of one of the joint owners, right of ownership automatically vests into the surviving owner. Unless additional evidence is availed to the Court, record of the court does not reveal any illegality regarding the Respondents capacity to sue over the disputed land.

The second point of illegality mentioned by the Applicants, is failure of the Trial Tribunal to visit locus in quo. I find this ground to be unfounded because there is no provision of the law that mandates Courts to visit locus in quo in all cases. It is a well-established principle that such visits are not mandatory. Even in the case cited by the Applicants, the requirement to visit locus in quo was encouraged to be conducted where necessary. The Court of Appeal held that;

"When a visit to a locus in quo is necessary or appropriate, and as we have said, this should only be necessary in exceptional cases..."

Thus, failure to visit locus in quo cannot be considered to be an illegality in Court proceedings.

For those reasons, I find the Applicants to have failed to account for their delay to appeal against the decision of the Trial Tribunal and I hereby dismiss the application for being unmeritorious. Given the fact that the Respondent defended the Application in forma pauperis, I award no costs.




Z.D. MANGO

JUDGE

20/04/2022