

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISC. LAND APPLICATION NO. 528 OF 2021

(Originating from the decision of the District Land and Housing Tribunal of Temeke at
Temeke in Land Application No. 12 of 2015)

FATUMA SALUM HAMIS APPLICANT

VERSUS

SALUM ABDALLAH JOGAYA 1ST RESPONDENT

ATHUMAN ABDALLAH JOGAYA 2ND RESPONDENT

RAJABU ABDALLAH JOGAYA 3RD RESPONDENT

RULING

Date of Late Order: 31/05/2022

Date of Ruling: 16/6/2022

A. MSAFIRI, J

The applicant has filed in this Court the instant application seeking for the orders of the Court to extend time for her to appeal out of time against the decision delivered on 07/05/2020 by the Temeke District Land and Housing Tribunal (herein as the trial Tribunal) in Misc. Application No. 12 of 2015. The Application is made under Section 38(1) of the Land Disputes Courts Act, 2002.

Atto.

The application is supported by an affidavit of the applicant herself while the 2nd and the 3rd respondents filed the joint counter affidavit in opposition of the application. The 1st respondent did not file counter affidavit as he decided not to contest this application.

At the hearing, which was conducted orally, the applicant was represented by Mr. Baltazar Kitundu, advocate, the 2nd & 3rd respondents were represented by Mr. Lutufye Mvumbagu, advocate while the 1st respondent was unrepresented and he appeared in person.

In support of application, Mr. Kitundu submitted that, this application emanates from the decision of Hon. Mwenegoha, J, who struck out the Land Appeal No. 112 of 2020 for the reasons that the appeal was attached with judgment instead of decree. He said that, while filing before this Court an Appeal No. 112 of 2020, the applicant could not attach the decree of the impugned judgment of the trial Tribunal because it was defective. That, the dates of the judgment and decree of the impugned decision are different in such that it shows that, the decree was delivered before the judgment. The decree is dated 26/3/2020 while the judgment is dated 07/5/2020.

He stated that, because of the defectiveness of the decree, the applicant could not attach it with petition of appeal, which led for the appeal to be struck out by this Court. He submitted further that the delay for filing an intended appeal is a technical one and that, there is illegality on the face of

Ally

record which is proper to be addressed before the Court on the appeal, that is why the applicant is seeking for the extension of time to file an appeal.

Before concluding his submissions in chief, Mr. Kitundu raised a point of law to the effect that, the contents of joint counter affidavit of the 2nd and 3rd respondents seems to imply that it is a counter affidavit of one person instead of two persons. He said that, this is particularly seen at paragraph two (2) of the said joint counter affidavit. He contended that according to laws and rules governing the affidavits, this is a fault which goes to the merit of the matter and hence, the defective counter affidavit should not be adopted.

I see it necessary to point out that the counsel for the applicant did not bother to enlighten the Court on this laws and regulations which govern the affidavits.

In response, Mr. Mvumbagu submitted first on the point of law raised by Mr. Kitundu. He stated that, since the joint counter affidavit for the 2nd and 3rd respondents was served previously to the applicant, it was proper and under procedures of the Court that the counsel for the applicant would have filed a preliminary objection on that. That, raising the issue now is un-procedural as it takes the opponent party by surprise. *Adls.*

Nevertheless, Mr. Mvumbagu argued that, the whole contents of the joint counter affidavit, shows that it is filed by the two respondents. That, the omission at paragraph 2 of the same where it is written "I" instead of "We", it is only a slip of the pen. He also raised a point of law that, the application at hand is incompetent before the Court as it is filed under wrong provision of law. That, the applicant has cited section 38(1) of the Land Disputes Courts Act of 2002 while the proper provision is section 41 (2) of the Land Disputes Courts Act, Cap 216 R.E 2019 (the Act).

I should also point out that by raising a preliminary objection at this stage, the counsel for the 2nd & 3rd respondents was exactly repeating what he has accused of the counsel for the applicant.

Mr. Mvumbagu went on to argue the application on merit by submitting that, this Court is vested with powers to extend time for appeal under Section 41 (2) of the Act. This is upon the applicant showing cause for delay. He said that in this application, looking at the reasons submitted by the counsel for the applicant, they show negligence on the part of applicant and her advocate. That, the negligence of an advocate cannot be an excuse or good cause for delay. He submitted further that, the applicant has failed to account for each day of delay. That, the decision of Hon. Mwenegoha, J was delivered since 31/8/2021 while the current application was filed on 30/09/2021. He said that the affidavit of the applicant does not show reasons for delay from 31/08/2021 – 30/09/2021. *Acle*

On the issue of illegality, Mr. Mvumbagu stated that there is no illegality or irregularity on the trial Tribunal's judgment. To cement his submissions, he cited the cases of **Lyamuya Construction Co. Ltd vs. Board of Registered Trustees of Tanzania**, which was also quoted in the case of **Shelina Jahangir & 4 others Vs. Nyakutonya N.P.F. Company Limited**, CAT at Mwanza, (unreported). He prayed for the application to be dismissed with costs.

In rejoinder, Mr. Kitundu mostly reiterated his submission and added that, the appeal was lodged within time and the delay is only technical. On the point of wrong citation, he prayed for slip of the pen rule to apply as well in that omission.

The 1st respondent did not submit as he was in support of the application.

In determination of this application, I will begin with the preliminary objection/points of law raised by the counsels for the applicant and for the 2nd & 3rd respondents respectively. First, I feel obliged to remind both counsels, with due respect, that the rules of law and practices in civil litigations should be adhered in order to avoid shambles and chaos in administering of justice. I say so for the reason that, looking at the preliminary objections raised at this stage of hearing the matter on merit, they are apparent errors/omissions which should have been detected early on the stage of pleadings. *Alle.*

The applicant has raised the issue of defective joint affidavit of the 2nd & 3rd respondents. He stated that there is defectiveness at paragraph 2 of the joint affidavit, where it suggest that the same is an affidavit of one person instead of two persons. I have looked at the said paragraph 2, and it is my view that, the error does not go to the merit of the matter as it was put by the counsel for the applicant. It shows that, instead of writing "We" the contents shows "I", as follows;

*"That, **I have** read and understand the chamber summons and affidavit of one FATUMA SALUM HAMIS; hence **I have** the following in reply thereto".*

The joint counter affidavit is verified and signed by the two respondents. I agree with the submissions of the counsel for the respondents that this is a slip of the pen which does not in any way prejudice the applicant. Therefore, I will disregard this point.

The counsel for the 2nd & 3rd respondents has also raised point of law on competency of this application for wrong citation of the provisions of law. The major question here is whether the application has been preferred under wrong citation of the enabling provisions of the law and what are the consequences for such omission.

The present application has been preferred under Section 38 (1) of the Act. The counsel for the applicant has not contested this fact. I agree with the counsel for the 2nd & 3rd respondents, that the said provision is not

Adde.

applicable to present application. Section 38 provides for the appeals of decision of the District Land and Housing Tribunal in the exercise of appellate or revisional jurisdiction. The application at hand seeks for an extension of time to appeal against the decision of the District and Housing Tribunal in the exercise of its original jurisdiction. Hence the proper provision as rightly put by Mr. Mvumbagu, is Section 41 (2) of the Act.

Having found that, then what are the consequences for wrong citation of the provisions of the law?

Mr. Mvumbagu stated that this application is not proper before this Court, while Mr. Kitundu seems to suggest to Court that the slip of the pen rule can be also applied in this circumstances. In due respect to Mr. Kitundu, the wrong citation/non citation of the provisions of law can never be mitigated under what is termed as "slip of the pen". A party is not expected to "slip" in moving the Court by citing completely different provisions. A party is obliged to move the Court under proper enabling provisions of law.

Nevertheless, I am of the view that the wrong citation does not render the application incompetent. I am deriving this from the decision in the Court of Appeal case of the **Director General of LAPF Pension Fund vs. Pascal Ngalo**, Civil Application No. 76/08 of 2018 where it was held that;

*"Provided that where an application omits to cite any specific provision of the law or cites a wrong provision **but*** *Adls.*

jurisdiction to grant the order sought exists, the irregularity or omission can be ignored and the Court may order that the correct law inserted" (Emphasis added).

From that, and with the introduction of the principle of overriding objective, an application preferred under the wrong enabling provision of law is not automatically rendered incompetent provided that the Court has jurisdiction to entertain the application.

In the present matter, this Court has jurisdiction to entertain the application as the applicant is seeking for extension of time to file an appeal against the decision of the District Tribunal. This Court's power to entertain this matter is derived from both sections 38 and 41 of the Land Disputes Courts Act. Hence the raised point of law on competency of this application is hereby overruled.

Having catered on that, I will determined the application on merit. As stated before, this is an application for extension of time for the applicant to appeal out of time. It is trite law that in an application for extension of time to do a certain act, like in present matter, the applicant must show good cause for failure to do that act within the prescribed time.

There are numerous decisions of the Court of Appeal which has set a rule of requirement of good cause to be shown before the Court can exercise its powers for extension of time. Some of these decisions are the cases of *Aelle*.

Abdallah Salanga & 63 Others vs. Tanzania Harbour Authority, Civil Reference No. 08 of 2003 and **Sebastian Ndawula vs. Grace Rwamafa**, Civil application No. 4 of 2014, (all unreported), to mention a few.

What amount to a good cause has been pointed in the famous case of **Lyamuya Construction Co. Ltd vs. Board of Registered Trustees of Young Christian Woman of Tanzania (supra)**, the case has also been referred to this Court by the counsel for the 2nd and 3rd respondents. These guidelines briefly are; a valid explanation for the delay, whether there was diligence on the part of the applicant and illegality.

In her affidavit, the applicant stated that, the impugned judgment was delivered on 07/5/2020 by the trial Tribunal and she appealed on time to this Court on 07/06/2020 after having received the copy of the impugned judgment on 12/5/2020. Therefore, at that time, the applicant was within the time. However, the appeal before this Court was struck out on 31/8/2021 on technical grounds. She again filed this application on 30/9/2021.

It is my view that the first attempt to appeal by the applicant was on time. However, the appeal was struck out for not attaching the decree of the impugned judgment. The reasons given by the applicant in her affidavit is that, the decree was not attached as there was errors on dates where it was shown that the decree was delivered before the judgment. *Atle.*

According to the applicant, this defective decree did not qualify to be attached with the appeal so, together with her advocate, they have requested for the trial Tribunal to amend the errors on dates and be issued with the correct decree.

I find this explanation by the applicant in her affidavit which were substantiated by her advocate in submissions before the Court, to be sufficient cause for technical delay. It is my view that the defectiveness of the decree of the impugned judgment was not caused by the applicant or her advocate so there was no negligence on their part as it was submitted by the counsel for the 2nd and 3rd respondents.

It is for the above reason that I find the application to have merits and I hereby grant it. The intended appeal should be filed within the prescribed time by the law.

Costs shall follow the events.

Dated at Dar es Salaam this 16th day of June 2022.



A. MSAFIRI
JUDGE