

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC. LAND APPLICATION NO.227 OF 2022**

(Arising from the decision of the District Land and Housing Tribunal of Ilala in
Land Application No.290 of 2020 delivered on 29th June, 2021)

MARTIN L. SWAI APPLICANT

VERSUS

HAMIS S. MIKOLA RESPONDENT

RULING

Date of last Order: 05.07.2022

Date of Ruling: 08.07.2022

A.Z.MGEYEKWA, J

This ruling is in respect of an application for an extension of time to lodge an appeal out of time against the decision of the District Land and Housing Tribunal in Land Application No. 290 of 2020. The application, preferred under the provisions of section 41 (2) of the Land Disputes Courts Act, Cap. 216

[R.E 2019]]. The affidavit is supported by an affidavit deposed by Martin L. Swai, the applicant. The applicant has set out the grounds on which an extension of time is sought. The respondent has stoutly opposed the application by filing a counter-affidavit deposed by Hamis Mikola, the respondent.

When the matter was called for hearing on 5th July, 2022, the applicant enlisted the legal service of Mr. Benedict Bagiliye, learned counsel and the respondent enjoyed the legal service of Mr. Hamis MIkola, learned counsel.

In his submission, in support of the reference, Benedict urged this court to adopt the affidavit and form part of his submission. Mr. Benedict submitted that the applicant has raised two grounds; technical delay and illegality. The learned counsel for the applicant argued that the tribunal decided the matter in favour of the respondent and execution, the respondent created his own decree and evicted the applicant from his plot. He claimed that the tribunal proceeded to determine the preliminary objection *ex parte* against the applicant and dismissed the application. In his view that was a gross illegality since the law does not permit a hearing to proceed in the absence of the person who lodged the application. It was his

submission that since the applicant was not present then the tribunal was required to dismiss the application for nonappearance instead of determining the same. He claimed that the tribunal proceeded to determine the preliminary objection *ex parte* against the applicant and dismissed the application. To buttress his contention he cited the case of **Hamisi Babu Bally v The Judicial Officers Committee & 3 Others**, Civil Application No. 130 of 2020, and **Robert Hilima v R**, Criminal Appeal No. 42 of 2018. Stressing on the point of illegality, the learned counsel for the applicant claimed that illegality is a good ground for extension of time and the same attracts the higher court to put the records clear.

On the strength of the above submission, Mr. Benedict urged this court to grant the applicant's application for an extension of time to file an appeal to this court against with costs.

In reply, the learned counsel for the respondent urged this court to adopt his counter-affidavit and form part of his submission. The learned counsel for the respondent submitted that the matter before the tribunal was not related to boundaries, the judgment shows that the dispute is related to trespass and the Land Case No. 117 of 2018 was related to ownership. He claimed that the proper remedy for the applicant was to lodge a revision. He

claimed that the applicant's counsel did not attach a copy of the impugned ruling and they conceded that the matter was *res judicata*. He lamented that the applicant was responsible to ask his Advocate about the outcome of his case. He added that the applicant cannot come before this court and claim that his counsel was incompetent while the applicant signed the affidavit. Mr. Kenneth valiantly argued that the applicant has failed to establish the technical delay considering the fact that the applicant was busy prosecuting other cases. He submitted that the matter was *res judicata* involving the same parties and same subject matter.

Regarding the ground of illegality, Mr. Kenneth forcefully contended that the records show that before hearing the matter *ex parte* the applicant and his counsel were notified that on 29th June, the tribunal will proceed with hearing the objection but they did not appear, hence, the tribunal proceeded to determine the matter *ex parte* against the applicant. He insisted that illegality was not established by the applicant's counsel. To buttress his submission he cited the cases of **Khalid Huseein Muccadam v Ngulo Mtiga (As a legal personal representative of the estate of Abubakar Omar Said Mtiga)**, Civil Application No. 234/17 of 2019, and **Lim Han**

Yung & Another v Lucy Treseas Kristensen, Civil Appeal No. 219 of 2019.

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

In his rejoinder, Mr. Benedict reiterated his submission in chief. Stressing that the matter was not *res judicata* since the subject matter was different. He claimed that the issue of boundaries did not involve the whole land because the parties are neighbours, thus, the respondent in executing the decree of the tribunal trespassed on the applicant's land. He claimed that the applicant could not concede since he was not present at the tribunal.

In conclusion, the learned counsel for the applicant urged this court to grant the applicant application with costs.

Having carefully considered the submissions made by the learned counsels in their oral submission and examined the affidavit and counter-affidavit, the issue for our determination is ***whether the application is meritorious.***

The position of the law is settled and clear that an application for an extension of time is entirely the discretion of the Court. But, that discretion is judicial and so it must be exercised according to the rules of reason and justice as was observed in the case of **Mbogo and Another v Shah** [1968] EALR 93.

Additionally, the Court will exercise its discretion in favour of an applicant only upon showing good cause for the delay. The term "good cause" having not been defined by the Rules, cannot be laid by any hard and fast rules but is dependent upon the facts obtained in each particular case. This stance has been taken by the Court of Appeal in a number of its decision, in the cases of **Regional Manager, TANROADS Kagera v Ruaha Concrete Company Ltd**, Civil Application No.96 of 2007, **Tanga Cement Company Ltd v Jumanne D. Massanga and another**, Civil Application No. 6 of 2001, **Vodacom Foundation v Commissioner General (TRA)**, Civil Application No. 107/20 of 2017 (all unreported). To mention a few.

I have keenly followed the application and the grounds deposed in the supporting applicant's affidavit and the respondent's counter-affidavit, I have shown the path navigated by the applicant and the backing he has

encountered in trying to reverse the decision of this court. In his submission, the applicant's Advocate relied on the grounds of technical delay and illegality. The applicant's counsel alleges that the ruling of the District Land and Housing Tribunal is tainted with illegality. He claimed that the tribunal proceeded with hearing the matter *ex parte* against the applicant instead of dismissing the matter for non-appearance. On his side, the learned counsel for the respondent opposed the application. Mr. Kenneth valiantly argued that illegality did not exist.

I have opted to address the second limb. The applicant alleges that the decision of this court is tainted with illegality. It has been held in times without number that where illegality exists and is pleaded as a ground the same as well constitute a good cause for an extension of time. This principle was accentuated in the **Permanent Secretary Ministry of Defence & National Service v D.P. Valambhia** [1992] TLR 185, to be followed by a celebrated decision of **Lyamuya Construction Company Limited and Citibank (Tanzania) Limited v. T.C.C.L. & Others**, Civil Application No. 97 of 2003 (unreported) and **Ngao Godwin Losero v Julius Mwarabu**, Civil Application No. 10 of 2015 (unreported). In **Principal Secretary,**

Ministry of Defence and National Service v Devram Valambhia

(supra) the Court of Appeal of Tanzania on page 89 held that:-

*"In our view, when the point at issue is one alleging illegality of the decision being challenged, **the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and, if the alleged illegality is established, to take appropriate measures to put the matter and the record straight.**" [Emphasis added].*

Therefore, I fully subscribe to the submission of the learned counsel for the applicant that the ground of illegality is a sufficient cause for an extension of time to rectify the raised anomaly. See also the case of **Badru Issa Badru v Omary Kilendu** (supra) the Court of Appeal of Tanzania held that:-

" ...I am of the considered view that even though there is a considerable delay in the application, pertinent issues have been raised. First,.. there is an allegation of illegality, irregularities, and impropriety... which cannot be brushed aside."

The illegality is alleged to reside in the powers exercised by the District Land and Housing Tribunal in hearing the application *ex parte* against the applicant. The applicant in his affidavit especially in paragraphs 5, 6, 7, and 10 the applicant narrated how the whole saga of *ex parte* hearing, and in paragraph 16 of his affidavit he claimed that the impugned decision is tainted with illegality that the tribunal contrary to the law determined the matter *ex parte* against the person who lodged the application instead of dismissing the same for non-appearances and he added that the tribunal erred in law to proceed with the delivering of the *ex parte* ruling without notifying the applicant.

The legal position, as it currently obtains, is that where illegality exists and is pleaded as a ground, the same may constitute the basis for extension of time. This principle was accentuated in the **Permanent Secretary Ministry of Defence & National Service v D.P. Valambhia** [1992] TLR 185, to be followed by a celebrated decision of **Lyamuya Construction Company Limited and Citibank (Tanzania) Limited v. T.C.C.L. & Others**, Civil Application No. 97 of 2003 (unreported). In **Principal**

Secretary, Ministry of Defence and National Service v Devram Valambhia [1992] TLR 185 on page 89 thus:

*"In our view, when the point at issue is one alleging illegality of the decision being challenged, **the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and the record straight.**" [Emphasis added].*

Similarly, in the cases of **Arunaben Chaggan Mistry v Naushad Mohamed Hussein & 3 Others**, CAT-Civil Application No. 6 of 2016 (unreported), and **Lyamuya Construction** (supra), the scope of illegality was taken a top-notch when the Court of Appeal of Tanzania propounded as follows:-

*"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 Vaiambia'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; not one that would be discovered by a long drawn argument or process." [Emphasis added].

Applying the above authorities, it is clear that the ground of illegality that has been cited by the applicant touches on point of law. In my considered view, this point of illegality meets the requisite threshold for consideration as the basis for enlargement of time and that this alone, is weighty enough to constitute sufficient cause for an extension of time.

In sum, based on the foregoing analysis I am satisfied that the above grounds of illegality are evident that the present application has merit. Therefore, I proceed to grant the applicant's application to lodge an appeal forty - five days from today.

Order accordingly.

Dated at Dar es Salaam this date 08th July, 2022.




A.Z.MGEYEKWA

JUDGE

08.07.2022

Ruling delivered on 08th July, 2022 via audio teleconference, whereas both learned counsels were remotely present.




A.Z.MGEYEKWA

JUDGE

08.07.2022