IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION No. 456 OF 2022

(Arising from the decision of District Land and Housing Tribunal for Temeke in Land Appeal No. 52/2020, delivered on the 27th May, 2020 and Originating from Land Application No. 60 of 2020 from Kisarawe II Ward Tribunal dated 15th October, 2020)

AMINI MAPUNDA.....APPLICANT

VERSUS

FILOTEUS ALOYCE MSIGWA.....RESPONDENT

RULING

16/5/2022 & 20/7/2022

Masoud, J.

Before me is an application for extension of time within which the Applicant can file an appeal out of time against the decision of the District Land and Housing Tribunal for Temeke (**DLHT**) in Land Appeal No.52 of 2020, delivered on the 27th May, 2021. The Application is made under the provision of Section 14 (1) of the Law of Limitation Act, Cap 89 R.E 2019, and is supported by the Applicant's affidavit, dated 30th August, 2021. Opposing the Application, the Respondent filed his counter affidavit dated 12th October, 2021, accompanied with the preliminary objection to the

effect that the affidavit is incurably defective for containing opinion and conclusion.

Upon being served with the counter affidavit, the Applicant also on the 25th October, 2021 filed his reply to the counter affidavit accompanied with what he styled as preliminary points of objection that the respondent's Counter Affidavit has been filed out of time, and that the respondent's Counter Affidavit is defective as it has been wrongly dated and verified. As I am mindful of rules of practice pertaining to raising preliminary objection, I will treat the applicant's objections as part of her submissions in support of the application and against the respondent.

On the 22nd March, 2022 the court ordered the hearing of the Application and the preliminary objections to proceed concurrently by way of filing written submissions. Both parties adhered to the submission schedule. During the hearing of this application both parties were represented. While the Applicant was represented by Mr. Andrew Miraa, Advocate, the Respondent was represented by Mr Benitho Mandele, and Ms. Joha K. Mapondela, Advocates.

Submitting on the prelinary objections raised by the respondent, Mr. Mandele told this court that the Applicant's application contravened the rules governing affidavit. He was of the view that the affidavit contains legal conclusion, opinion and prayers. It was therefore, argued that the defective paragraphs render the entire affidavit incurably bad in law. He referred this court to the contents of paragraphs 8 and 9 of the of the impugned affidavit. The paragraphs read as follows:

> Paragraph 8; "*...the decision the subject of this application contain serious issues of law and illegality to warrant investigation by the appellate court...".*
>
> Paragraph 9; "*... the applicant stands to suffer injustice and irreparable loss the respondent in event the orders sought are not granted..."*

To support his arguments, he cited the provision of Order XIX Rule 3(1) of the Civil Procedure Code, Cape 33 R.E 2019 (**The C.P.C**). He also, referred me to **Uganda vs Commissioner of Prisons Ex-pa]rte Matovu** (1966) E.A 520, and **The Dar es Salaam Water Sewerage Corporation vs Rombo Green view Limited,** Civil Application No.183 of 2006 (unreported).

Mr. Miraa for the Applicant impliedly conceded to the respondent's preliminary objection and added that according to the provision of O. XIX R.3 (1) of the C.P.C (supra) his application falls within the exception provided under the cited provision, as it is an *interlocutory application.* To support his argument, he cited the case of **Israel Solomon Kivuyo vs Wayani Langoi and Naishooki Wayani [1989] T.L.R 140.**

In his rejoinder, Counsel for the respondent reiterated what he submitted in his submission in chief, and added that, the applicant's application is not an interlocutory application which falls within the ambits of the proviso of O.XIX R.3 (1).

After examining the impugned paragraphs, namely, paragraph 8 and 9 of the affidavit in light of the rival submissions on whether or not the counter affidavit is incurably defective for containing opinion and conclusion, I found them to be defective for being argumentative and containing legal conclusion. It is trite law that an affidavit which is to be used as evidence before the court should not contain extraneous matters but facts only. I am in this respect guided by the case of **Uganda v. Commissioner of Prison Exparte Matovu** (supra) where it was held that:

"As a general rule of practice and procedure on affidavit for use in Court being a substitute for oral evidence, it should only contain statement to which the witness disposes either of his own knowledge or such an affidavit should, not contain extraneous matters by way of objection or prayer or legal argument or conclusion."

Paragraph 9 attracts arguments as to whether or not the Applicant stands to suffer injustices and irreparable loss in the event the order sought is not granted. Further to that the content of paragraph 8 that, "*...the decision the subject of this application contain serious issues of law and illegality to warrant investigation by the appellate court..."* is indeed a conclusion.

However, it is now settled law that an offensive paragraph can be expunged and the court continue to determine the application based on the remaining paragraphs if the expunged paragraph is inconsequential. The case of **Jamal S. Mkumba and Another Vs Attorney General in Civil Application No. 240/01 of 2019** is instructive in this regard.

Consequently, paragraphs 8 and 9 of the applicant's affidavit are expunged from record of this application. With this outcome, the court will proceed to consider and determine the main Application whilst having regard to the preliminary arguments raised by the applicant against the respondent's counter affidavit as already pointed out.

Mr. Miraa submitted that the counter affidavit was filed out of time. The application was filed on 3/09/2021 and it was immediately served to the respondent. The respondent was supposed to file his reply within 14 days from the date of service, but he filed his counter affidavit together with his notice of preliminary objection on 12/10/2021, after the lapse of 14 days. Consequently, the applicant invited the court to strike out the counter affidavit and allow the application.

Mr. Miraa also submitted that, the counter affidavit of the respondent is improperly verified. In this respect, the learned counsel had it that the verification clause does not bear the name of the deponent. Therefore, the counter affidavit should for such reason be struck out with costs. Reliance was thus made to the case of **DPP vs. Dodoli Kapufi and Another,** Criminal Application No. 11 of 2008 (C.A)

In his reply, the counsel for the respondent submitted that he was served with the application on the 30th September, 2021 and managed to file his counter affidavit within time on the 12th October, 2021. On the other point, the respondent submitted that the counter affidavit has been sworn by the respondent and it met all requirement provided by the law under the provision of O. XIX R. 3(1) and O. VI R.15(2) and (3) of the C.P.C. In his rejoinder, Mr. Miraa reiterated what he submitted in his submission in chief and added that on the 28/9/2021 the applicant managed to serve the respondent with the application.

My perusal of the record revealed that the application was filed on the 3/9/2021, and the counter affidavit was filed on 12/10/2021. Ms. Mapondela, thus, insisted that the respondent filed his counter affidavit on time, 13 days after being served with the application on the 30/9/2021. My further perusal of the record revealed that apart from mere words by Mr. Miraa in his rejoinder, there is nothing on the record to prove that the application was served to the Respondent on 28/9/2021.

One would have expected Mr. Miraa to produce evidence of service signed by the respondent to show that he undeniably received the said application on the 28/9/2021. In the absence of such proof, I am therefore

persuaded that, the applicant did not serve his application to the respondent on the 28/9/2021. Thus, the argument that the counter affidavit was filed out of time is bound to fall as it is inconsistent with the record.

As to the other argument, I am satisfied that it lacks substance as the counter affidavit is properly verified and signed by the respondent. The case of **DPP vs. Dodoli Kapufi and Another (supra)** cited by Mr. Miraa is distinguishable. In the cited case, the applicant did not sign the verification clause of his affidavit, and the defects rendered the applicant's affidavit incurably defective. In the case at hand, the verification clause of the respondent's counter affidavit is signed. This argument is equally bound to fall for reasons already stated.

In so far as the reasons supporting the application are concerned, Mr. Miraa submitted that the Applicant's delay to file the intended appeal within time was due to the delay by the District Land and Housing Tribunal to avail copies of the impugned judgment and decree to the applicant. In his reply, Ms. Mpondela had it in a nutshell that the applicant failed to account for each day of delay.

My duty here is mainly to see whether the applicant has established sufficient or good cause warranting this court to exercise its discretion to grant extension of time within which to file an appeal out of time.

It was Mr. Miraa's contention that an appeal to the High Court against the decision of the District Land and Housing Tribunal (DLHT) is supposed to be filed within 45 days from the date of the decision. The judgment intended to be appealed against was delivered on the 27/05/2021, and the Applicant on 15/06/2021 applied to be supplied with relevant copies.

When the applicant was supplied with the said copies of the judgment and decree on 15/07/2021, the time to appeal had already lapsed. To be precise 49 days had already expired. Mr. Miraa's line of argument was strongly resisted by Ms. Mapondela and I am in agreement with Ms. Mapondela that, appeals to the High Court, from the DLHT exercising its appellate jurisdiction is covered under the provision of Section 38(1), (2) and (3) of the Land Disputes Courts Act Cap 216 R.E 2019, (herein after the Act)

According to the above cited provision, the aggrieved party is supposed to file his appeal within 60 days from the date of the decision and the said

appeal is to be filed in the DLHT. When filing an appeal under the above cited provision, there is no requirement to wait for the certified copies of the impugned judgment and decree.

In the Application at hand, Mr. Miraa's main reason was the alleged delay by the DLHT to supply the certified copies of the judgment and decree. Even if the applicant was to wait for the said copies, by the time he was supplied with the certified copies on the 15/07/2021, only 46 days had already passed.

Thus, the applicant was still within time to file his appeal. But he did not. Rather he waited until 03/09/2021 when he file this Application. Counting from the date when the impugned judgment was delivered on the 27/05/2021 to the date when this application was filed on 3/09/2021, more than 99 days had lapsed. It is undisputed fact the when the certified copies were supplied to the applicant, he still had an extra of 14 days which he did not account for.

It is trite law that in order to extend time, the applicant must explain the reasons for the delay for each day of delay. In the case of **Bushiri**

Hassan vs. LatifaLukioMashayo, Civil Application No. 3/2007, (unreported), the court of appeal held that:

> *"Delay of **even a single day, has to be accounted** for. Otherwise, there would be no point of having rules prescribing periods within which certain steps have to be taken."*

On those observations and findings, it is obvious that the applicant has failed to adduce sufficient grounds for the delay to warrant the discretion of this court to extend time.

In the end, the application is without merit and is hereby dismissed with costs.

Dated at Dar es salaam this 20th day of July 2022.

It is so ordered.

B. S. Masoud.
Judge