

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

MISC. LAND APPLICATION NO. 677 OF 2022

(Arising from the Judgment of the High Court – Land Division at Dar es Salaam in
Land Appeal No135 of 2021)

MWANAHAMISI MOHAMED SIMBA..... APPLICANT

VERSUS

SUZANA JOHN MASWATU.....RESPONDENT

R U L I N G

Date of last Order:08/12/2023

Date of Ruling: 07/03/2023

K. D. MHINA, J.

By a chamber summons taken under section 11 (1) of the Appellate Jurisdiction Act, Cap 141 R: E 2019 ("AJA"), Mwanahamisi Mohamed Simba, the applicant herein is moving this Court for an order that extension of time within which to apply for leave to appeal to the Court of Appeal be granted. The Chamber summons is supported by an affidavit affirmed by the applicant.

In opposition to this application, the counter affidavit deposited by Suzan John Maswatu, the respondent herein.

It is on record of the application that vide Application No. 418 of 2015 the applicant instituted a suit against the respondent in the District Land and Housing Tribunal ("the DLHT") for Ilala, seeking among other orders the declaration that she was a lawful owner of the house premise located at Majohe Mji Mpya. The applicant was the respondent's mother-in-law; the respondent was married to her late son. At the end of the trial the DLHT declared the applicant as the lawful owner of the disputed house.

Discontented, the respondent lodged an appeal to this Court vide Misc. Land Appeal No. 135 of 2021. This Court on 8 February 2022, allowed the appeal by declaring that the respondent was a lawful owner of the disputed house.

After that decision the applicant found herself out of the prescribed time to file leave to appeal to the Court of Appeal; therefore, she decided first to seek an extension of time. Hence this application.

In her affidavit the applicant expounded only two grounds to support her application. One, the sickness of the applicant herself and her husband and two, the illegality on the impugned decision.

The application proceeded by way of written submissions. The applicant was represented by Mr. Mohamed Tibanyendera while the respondent by Mr. Nyaronyo Mwita Kichere, both learned advocates.

In arguing the ground of sickness, Mr. Tibanyendera submitted that the applicant felt sick in July 2022 and also, she was taking care of her sick husband who has been sick for a long time. He attached the documents to bolster his argument. The annexure attached indicated that the applicant attended the Hospital on 8/7/2022, 01/8/2022, 15/8/2022 and 23/9/2022. Further the annexure indicated that the applicant's husband was sick in the year 2020.

On the second ground of illegality, Mr. Tibanyendera submitted that this Court was wrong to determine that the suit property was a matrimonial asset at the time where the late Dossa Aziz Selemani was already dead. The reason for his submission was the matrimonial assets cannot be determined after the death.

Another ground of illegality raised was that the decision by the appellate court that the suit property belonged to the late Dossa Aziz

Selemani in the absence of probate and administration proceedings was a material irregularity.

Mr. Tibanyendera further submitted that another element of irregularity is when the court failed to recognise the status of the applicant and respondent as a mother and daughter in law.

In response Mr. Kichere resisted the application by submitting that on the ground of sickness the supporting documents indicated that only four days of delay had been accounted and not every day of delay as was held in Dar es Salaam City Council vs. Group Security Co. Ltd, Civil Application No. 234 of 2015 (COA). He further stated that only four (4) out of 43 days of delay between 12 July 2022 and until 26 October 2022 when the application was filed were not accounted. Further the document indicated that the husband, Juma Dihule attended the Hospital in 2020, therefore it was irrelevant in the submission.

On illegality Mr. Kichere submitted that the alleged illegalities are in fact not illegalities because;

One, the Court was right to apply the Law of Marriage Act because the existence of marriage was pleaded and argued at the trial where the certificate of marriage was tendered and admitted.

Further to that he submitted that illegality must be apparent on the face of record as opposed to the one that can be discovered by a long-drawn argument or process. In this matter he said there no illegality on the face of record.

In a rejoinder, briefly, Mr. Tibanyendera submitted that the days of delay has been accounted properly. It was not only four days of illness as both the applicant and the husband were both ill and attended various clinics and health centres in a series of attendances on 1st, 5th and 8th of August 2022 and on 23rd September 2022.

On illegality, he submitted that the issue had been submitted at large in submission in chief and that the determination of matrimonial assets in a land case where one of the parties passed away and the administrator of the estate was not joined was a material irregularity.

Having considered the chamber summons and its supporting affidavit, the affidavit in reply, and the written submission made by the

parties, the issue is *"whether the applicant has shown a good cause for this Court to exercise its discretion in granting an extension of time to file leave to appeal."*

The Court of Appeal has already set the grounds to consider in the applications for an extension of time. In **Sebastian Ndaula vs. Grace Rwamafa (Legal Personal Representative of Joshua Rwamafa, Civil Application No. 4 of 2014 (Unreported)**, the Court put it succinctly that in an application for an extension of time, good cause to extend must be shown.

As to what may constitute a good case, again, the Court of Appeal in **Hamis Babu Ally vs. The Judicial Officers Ethics Committee and three others, Civil Application No 130/01 of 2020 (TanZlii)**, pointed out the following factors:-

- i. To account for all period of delay*
- ii. The delay should not be inordinate;*
- iii. The applicant must show diligence and not apathy, negligence, or sloppiness in the prosecution of the action that he intends to take and*
- iv. The existence of a point of law of sufficient importance, such as the illegality of the decision sought to be appealed against.*

Further, in accounting for the period of delay again, the Court of Appeal insisted that an applicant should account for each day of delay. In **Hassan Bushiri v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported), it held that;

*"Delay of even a single day has to be accounted for otherwise
There would be no point in having rules prescribing periods
Within which certain steps have to be taken."*

Apart from the above in **Principal Secretary, Ministry of Defence and National Service Vs. Devram Valambia [1999] TLR 182**, the Court of Appeal, established that illegality is sufficient ground to grant an extension of time.

I cited those cases with benchmarks to consider and test if the applicant passes the test by showing a good or sufficient cause.

Next, I will consider the issue of sickness raised by the applicant as another factor to be considered as a good cause for the extension of time.

On this, the entry point is **Emmanuel Maira V. The District Executive Director Bunda District Council**, Civil Application No. 66 Of 2010 (Tanzlii) where it was held that

"...health matters, in most cases, are not the choice of human being, cannot be shelved and nor can anyone be held to blame when they strike..."

Further, in **Juto Ally v. Lucas Komba & Another, Civil Application No. 484/17 of 2017** (Unreported), where the Court of Appeal held that:-

"Where the applicant's cause of delay is due to illness, must show that illness contributed to the delay as opposed to a general statement."

According to the applicant's affidavit she averred that she felt serious sick from July 2022 up to October 2022 where she was prescribed to attend check-up clinics at Makurumla Government Health Centre and instructed to take full bed rest with light exercise. Further she averred that she was taking care of her sick husband since 2020.

The medical report attached to the affidavit indicated that the applicant attended Makurumla Government Health Centre on 8 July 2022, 1 August 2022, 15 August 2022 and 23 September 2022. Further, the document did not indicate if the applicant was admitted to the health

center, rather than showing that the applicant was getting treatment from home as an outpatient. On 8 July 2022 she was required to attend the Hospital again after 2 weeks, on 1 August 2022 after 2 weeks, on 15 August 2022 after one month and on 23 September 2022 after one month. Further, the issues raised in the affidavit that she was instructed to take full bed rest are not indicated in the medical report.

On the argument that she was taking care of her sick husband, the medical report indicated that the husband attended at Sinza Hospital on 18 September 2020 where he was treated.

From above, in such circumstances, it is necessary for the applicant to show how illness contributed to the delay. And to account for each day of delay since the decision in Land Appeal No. 132 of 2021 was delivered on 8 February 2022 up to when this application was filed on 26 October 2022.

The applicant in this matter, only advanced a general statement that she was sick without indicating how that illness contributed to the delay taking into account that she was attending clinics after two weeks or one month. Further, she failed to account for each day of delay. The issue of

the sickness of her husband is out of context and is of no help in this matter because the medical report indicated that he attended at the Hospital way back in the year 2020.

Therefore, the issue of sickness/illness lacks merit.

As to the ground of illegality, the entry point are the alleged illegalities in the impugned decision, as raised by the applicant. The illegality raised were;

- i. That the court erred in making a finding that suit property is a matrimonial property between the respondent herein and her late husband. One Dossa Aziz Selemani (deceased) in the absence of any matrimonial proceedings before the court and without hearing the deceased thereof.*
- ii. That the court erred in making a determination that the suit property belongs to the late Dossa Aziz Selemani (deceased) without hearing evidence from the administration of estate of the said deceased and in absence of court jurisdiction to determine the estate of deceased.*
- iii. That the court erred in applying the law of Marriages Act, cap 29. R.E.2019 in a land dispute involving the Applicant herein and the Respondent who are not duly married couple.*
- iv. That the court erred in misinterpreting the evidence of PW3 before the District Land and Housing Tribunal who confirmed that she was*

compensated by the Applicant herein thus leading to an erroneous decision in Land Appeal No. 135 of 2022.

- v. *That the Court erred in the failure to recognize that the Applicant is a biological mother of the late Dossa Aziz Selemani (deceased)*

The question is whether the issues raised can constitute an illegality to qualify for this court to grant an extension of time.

First, the test of illegality was enunciated by the Court of Appeal in **Lyamuya Construction Co. Ltd Vs. Board of Registered Trustees of Young Women's Association of Tanzania**, Civil Application No. 147 of 2006 (Unreported), where it was held that;

"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 drawn argument or process."

Further, in **Hamis Mohamed Mtumwa (As the Administrator of the Estates of the late Risasi Ngawe) vs. Mtumwa Moshi(As the Administrator of the Estates of the late Moshi Abdallah)**, Civil Application No. 407/17 of 2019 (TanZlii) at page 9, where it was held that;

"...illegality must be apparent on the face of record, such as the question of jurisdiction; not one that would be discovered by long-drawn argument or process".

In the light of the above-cited decision the following can be gleaned therein.

One, is trite that to constitute illegality, the alleged point of law must be apparent on the face of the record, as such, the question of jurisdiction.

Two, the point should not be the one that would be discovered by long-drawn argument or process.

In the instant application, having gone through the records, I am not persuaded by the ground of the illegality raised by the applicant. The reasons being that

One, both the claimed illegalities are not apparent on the face of the record and does not meet the settled threshold. The illegality raised falls within the issues that attract long-drawn arguments and processes to discover whether illegality exists. Further, the issues raised are the issues of fact which need the evidence for and against to prove or disapprove the same.

Two, the basis of holding in impugned decision was not based on the Law of Marriage Act as alleged by the applicant in ground no. iii on the illegalities. The decision was based on the evidence found on the records on the acquisition of land in dispute. For avoidance of doubt, I quote what was held by this Court;

"It is the Appellant and her late husband who paid the compensation of the plot in which the dispute house is constructed. This fact was not disputed by the respondent, instead she said that she was the one who gave him (Late Dossa Aziz Seleman) the money they used to pay compensation. But she never presented any evidence to prove the same.

Before the Trial Tribunal PW 3 testified that she filed a case which ended in her favour, and the trespassers were ordered to vacate the place. After that decision PW 3 entered into the agreement with the trespassers that for them to occupy the plots legally they had to compensate her. The appellant together with her late husband paid the compensation as it is exhibited in Exhibit D6.

In legal perspective, the person who paid the compensation to the owner is the one who owns the disputed property, the title shifted from the owner PW3 to Mr. and Mrs. Dossa Aziz Seleman. The fact that they paid compensation during the subsistence of their marriage

and the suit property was their matrimonial home, therefore, the appellant has an interest in the suit property. See sections 59 (1) and 60 (b) of the Law of Marriage Act, Cap 29 R.E. 2019”.

Flowing from above as alluded earlier, the holding in the impugned decision was not based on the Law of Marriage Act rather than the evidence on balance of probabilities on how the land was acquired. Therefore, in my views, at any rate it cannot be said the issues raised by the applicant as alleged illegalities qualify within the meaning of illegality as per the decisions of **Lyamuya Construction Co. Ltd** and **Hamis Mohamed Mtumwa** (Both Supra)

Having so stated, I find and hold that, the applicant has failed to account for the delay and establish the alleged illegality as good cause for extending time for her to file the intended leave to appeal. As a result, I hereby dismiss this application with costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 07/03/2023.





K. D. MHINA
JUDGE