

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 822 OF 2022

(Arising from Misc. Land Application No. 165 of 2020)

AFRICAN BANKING CORPORATION (T) LTD APPLICANT

VERSUS

**MRS. MARY PETER OTARU (Administratrix of the
Estate of the late PETER CASMIR OTARU) 1ST RESPONDENT**

OTARU MANUFACTURING & TRADING CO. LTD 2ND RESPONDENT

RULING

Date of last Order 14.03.2023

Date of Ruling 15.03.2023

A.Z.MGEYEKWA

In this application, the Court is called upon to grant extension of time to lodge a Notice of Appeal to the Court of Appeal of Tanzania against the Ruling and Drawn Order of this Court in Misc. Land Application No. 165 of 2020. The application is brought under section 11 (1) of the Appellate Jurisdiction Act, Cap 141 [R.E.2019]. The application is supported by an

affidavit deponed by Mr. Herman Majani Lupogo, the counsel for the applicant. The applicant has set out the grounds on which an extension of time is sought. The respondents have stoutly opposed the application by filing a joint counter-affidavit deponed by Mr. Edward Peter Chuwa, counsel for the respondents.

When the matter was called for hearing on 14th March, 2022 the applicant enlisted the legal service of Mr. Herman and the respondent enlisted the legal service of Mr. Edward Chuwa and Miss Anna Lugendo learned counsels.

The learned counsel for the applicant started to kick the ball rolling. He urged this Court to adopt the affidavit together with a reply to the counter affidavit in support of his submission. He claimed that the impugned order of this Court in Misc. Land Application No 165 of 2020 is tainted with illegality which is on the face of the record. Mr. Herman submitted that the alleged illegality is pleaded under paragraphs 24 to 29 of the applicant's affidavit. The learned counsel for the applicant continued to state that it is trite law that illegality is sufficient reason to constitute a ground for extension of time. He referred this Court to the famous case of **Principal Secretary Ministry of Defence National Service v Devram Valambhia** (1992) TLR 82 and the position was reiterated in the case of **VIP Engineering and Marketing Ltd & 2 Others v City Bank Tanzania**

Ltd Consolidated Reference No. 7 and 8 of 2006 the Court of Appeal of Tanzania referred to the case of **TANESCO v Mufungo Leonard Mjaura & 15 others** Civil Application No. 94 of 2016 CAT. To support his grounds of illegality as sufficient reasons for extension of time, he referred this Court to the cases of **Proper Baltazar Kileo & another v Republic**, Criminal Application No.1 of 2000 (unreported) and **Jamal S. Mkumba & Andallah Issa Namangu & 35 others**, Civil Application No. 240 / 01 of 2019. The learned counsel insisted that the allegation of illegality is a good cause for extension of time even if the applicant has failed to show good cause or account for each day of delay. He stated that in the case of **Jamal S. Mkumba** (supra), the delay was over 9 years.

In conclusion, the learned counsel urged this Court to extend time and allow the application.

In reply, Mr. Chuwa contended that the present application is unnecessary and an abuse of the Court process. He valiantly contended that this application is filed as an afterthought for the reason that it is lodged before this Court after the Ruling in Misc. Land Application No.150 of 2021 which was delivered by Hon. Khalifani, J dated 6th October, 2022 and her decision based on the content of the decision of Hon. Mango, J in Misc. Land Application No. 822 of 2020. He added that the applicant did not comply with the orders issued by Hon. Mango, J.

Mr. Chuwa forcefully contended that the applicant has filed this application trying to avoid the contempt order which was issued by Hon. Khalifani whereas the applicant was ordered to pay a fine.

Regarding the issue of accounting days of delay, the learned counsel for the respondents submitted that it is trite law for an applicant to account for the days of delay. He argued that the impugned decision was delivered on 18th August, 2022 a lapse of approximately 841 days but the applicant has failed to account for each day of delay. He went on to argue that the applicant was required to lodge a Notice of Appeal within 30 days the same was to be filed on 17th September, 2020. To bolster his submission he cited the cases of **Hemed Ramadhani v Tanzania Harbours Authority**, Civil Application No. 63 of 2001, and **DSM City Council v S. Group Co, Ltd**, Civil Application No, 234 of 2015. He stressed that the pendency of the previous application was not a hindrance to filing an application.

Regarding the issue of illegality, the learned counsel for the respondent spiritedly contended that cited case of **TANESCO (supra) Attorney General v Marandakisi (supra)** and **Jamal Mkumba (supra)** are distinguishable from the application at hand. He submitted that there is a difference between an erroneous decision and an illegal decision, a decision might be wrong but not illegal. He added that illegality is when

one party is denied his right to be heard or a matter of jurisdiction. He forcefully argued that paragraph 25 of the affidavit does not refer to any illegality it is not referred to the impugned decision which this Court can rely on it as an illegality. He claimed that the new facts must be pleaded and be on the face of the record. He argued that the applicant in paragraph 27 of the affidavit is referring to a decision that does not exist. The learned counsel for the applicant insisted that there are no illegalities in the case of Hon. Mango, J.

On the strength of the above submission, Mr. Chuwa urged this Court to dismiss the Application with costs.

In his rejoinder, Mr. Herman reiterated his submission in chief. He stated they noted the raised error and the same is rectified in their reply to the counter affidavit. Stressing on the points of illegalities, he argued that the points of illegalities are listed in paragraphs 25 to 27 of the affidavit. Mr. Herman insisted that the decision of Hon. Mango, J contained illegality from the date when it was derived and it led to the consecutive pleadings. He added that if it is not dealt with it will cause injustice to the applicant. He contended that the instant application is not an afterthought application but it goes to the root of the main application which contains illegality. Ending, he urged this Court to grant their application.

Having carefully considered the submissions made by the learned counsels, the issue for our determination is *whether this Court can determine the instant application.*

I have keenly followed the grounds contained in the applicant's affidavit and the respondents' counter-affidavit as rightly submitted by Mr. Chuwa, the instant application before this Court is an abuse of the Court process. I say this because the records clearly show that

From the foregoing, it is dear that this Court cannot determine the grounds for the extension of time raised by the applicant's counsel. I am saying so because the impugned Ruling was already determined before this Court when the respondent in Misc. Land Application No. 150 of 2021 applied for orders to summons the applicant and show cause why they should not be held liable for contempt of the Court. I have read the ruling concerning Misc. Land Application No. 150 of 2021 and noted that Hon. Khalfan, J hold that were no good reasons as to why the applicant (in this application) should not be held liable for contempt of the Court's order as per Ho, Z. D. Mango, J in Misc. Land Application No. 165 of 2020. My learned sister Hon. Khalfan went on to order the applicant to pay the respondents jointly and severally a fine to the tune of Tshs. 5,000,000/=.

For ease of reference, I find it apposite to reproduce the holding of this Court here under:-


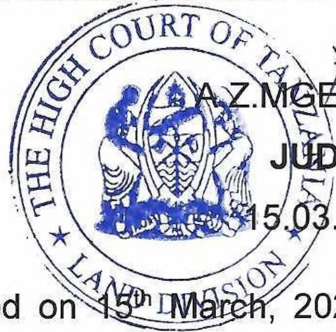
"In the upshot, I find the application meritorious as the applicant has succeeded to establish beyond reasonable doubt that the respondents have willfully disrespected the order of this Court dated 11th September, 2020."

Based on the above excerpt it is clear that I am *functus officio* to determine the instant application.

In the upshot, I proceed to strike out the application with costs.

It is so ordered.

Dated at Dar es Salaam this date 15th March, 2023.


A. Z. MGEYEKWA
JUDGE
15.03.2023


Ruling delivered on 15th March, 2023 in the presence of Mr. Herman Lupongo, counsel for the applicant also holding brief for Mr. Chuwa, counsel for the respondents.


A. Z. MGEYEKWA
JUDGE
15.03.2023
