

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

MISC LAND APPLICATION NO. 201 OF 2023

NMB BANK PLC.....APPLICANT

VERSUS

NERLY JEREMIAH MWAIKATALE.....1ST RESPONDENT

MWAFRICA GROUP LTD.....2ND RESPONDENT

RULING

10-12 July, 2023

E.B. LUVANDA, J

This is an application for extension of time to appeal against the decision of the trial tribunal dated 13/12/2022. The main grounds for extension are found at paragraphs 8, 13 and 15 of the Applicant's affidavit, being that the Applicants former Advocate Ms. Law Associates Advocate failed to timely communicate the impugned decision, until on 03/03/2023 when the Applicant was served with a notice for satisfaction of the impugned decree. The Applicant grounded also that the impugned decree is tainted with illegalities and irregularities.

In a counter Affidavit, the first Respondent stated that negligence of the Advocate has not been a ground to rescue the Applicants from the

Advocate's act or misconduct. That the Applicant failed to take necessary action on time counting from the date of delivery of the decision, the date she allege to be aware of the decision to wit on 03/03/2023 up to the date this application was instituted.

The application proceeded ex parte against the second Respondent.

Mr. Mpwaga Bernard learned Counsel for the Applicant submitted that the Applicant's delay in filing the intended appeal should be condoned by delayed communication of the impugned decision from 13/12/2022 03/03/2023 when she was served with a demand letter from the Respondent. He submitted that, Ms. Law Associates Advocates never communicated to the Applicant on the impugned decision. He submitted that the Applicant should not be punished by mistake of his advocates. He cited the case of **Judith Emmanuel Lushoka vs. Pastory Binyura Mlekula**, Misc. Land Application No. 74 of 2018 HC, **Zamana Ally (Mama Bushiri) vs. Omary Chipanta & 3 Others**, Misc. land Appl No. 449/2019, HC, **Yusufu Same & Another vs. Hadija Yusufu**, Civil Appeal No. 1/2002. On illegalities, the learned Counsel submitted that the 25% interest is so high and was not proved. That the interest from the date the house was bought to the date of judgment was not pleaded because under relief (4) pleaded interest from

the date of filing suit to the date of judgment. The learned Counsel also pegged illegality to the so called mis apprehension of evidence and failure to analyze the evidence on record. He cited the case of **Ami Tanzania Limited vs. Prosper Joseph Msele**, Civil Appeal No. 159/2020, **Juma Jafffer Juma vs. Manager PBZ Ltd & 2 Others**, Civil Appeal No. 7/2020, **Ally Salum Said (Administrator of the Estate of the Late Antar Said Kleb) vs Iddi Athumani Ndaki**, Civil Appl No. 450/17 of 2021 CAT.

In reply Mr. Boaz Moses learned Advocate for First Respondent, submitted that the Applicant failed to show a length of delay from 26/01/2023 when 45 days from appealing elapsed, where she is out for 69 days and from early March, 2023 when she allege to have instructed the lawyer (Nex Law Advocates) but took almost a month until 06/04/2023 when this application was lodged, which is lack of seriousness and commitment to both Applicant and her lawyer. He cited **Mohamed Akida & 7 Others vs. Low Shek Kon & 2 Others**, Civil Appl No. 481/17 of 2017 C.A.T at Dar es Salaam. He submitted that a mistake by a party or his advocate cannot be a sufficient ground for extension of time. He distinguished **Judith Rushoka and Zamana Ally** (supra), that therein were layperson unlike NMB who is reputable institution with in house and hired lawyers. He distinguished **Kambona Charles** (supra), because therein it was minor lapse committed

in good faith, but herein there is negligency on the part of the Applicant and her Advocate. He cited a case of **Mustapha Omari Kapiteni vs. Kulwa Hamis**, Misc. Land Application No. 821/2022, for a proposition that the Applicant was duty bound to make followup other case and that mis communication between client and advocate is not a sufficient reason for extension of time, cited **Jackson Mwendī vs. Yusiime Holdings (T) Ltd**, Misc. Labour Appl No. 195/2020, **Lim Han Yung & Another vs. Lucy Trustees Kristensen**, Civil Appeal No. 219/2019, CAT Dar es salaam, **John Chuwa vs. Anthony Giza**, (1992) TLR 233, **Mzee Mohamed Akida** (supra). The learned Counsel submitted that there is no any material irregularity need to be cross checked by the court, because the trial tribunal judgment was just, sound and fair to both sides, that is why the Applicant never challenged the same after it was pronounced. He distinguished **Ami Tanzania** (supra) on that the Applicant failed to demonstrate illegality, because the alleged issue of jurisdiction was raised and dealt with. He cited the case of **Dianarose Spare Parts Ltd Vs. Commissioner General Tanzania Revenue Authority**, Civil Appl No. 245 of 20 of 2021 C.A.T at Dar es salaam, **James Samwel Mburu vs. Attorney General** High Court of Kenya in Judicial Review No. 489 of 2016, **Stephen Wasira vs. Joseph Sinde Warioba and Another** (1999) TLR 332 C.A.T.

On rejoinder, the learned Counsel for Applicant submitted that in the affidavit and reply to counter affidavit, the Applicant addressed length and reasons for delay including point of law warranting extension in line with the case of **Mzee Mohamed** (supra). He submitted that the new Attorney was engaged for opinion thereafter drawing which took 30 days. The learned Counsel cited the case of the **Attorney General vs. Emmanuel Marangaki (as Attorney of Anastansious Anagnostou) & 3 others**, Civil Application No. 138 of 2019 CAT, for a proposition that illegality is a good cause for extension of time even if one fail to account for each day of delay.

Principally, the Applicant have failed to demonstrate both cause and reason for delay. In the impugned decree attached in a bundle of annexure NMB -5 to the Applicant's affidavit, the Applicant did not disclose as to how she procured it (as she alleged to be served with a copy of judgment alone), only blamed the trial tribunal for condemning her to refund the purchase price with colossal amount as interest and general damages, notwithstanding her readiness to make the said refund.

Be as it may, the said judgment depict that on the date of delivery to wit on 13/12/2022, the first Respondent therein (Applicant herein) was represented by Ms. Mary Machila learned Advocate. At paragraph 8 of her affidavit, the

Applicant stated that she was not made aware of the decision until the 03/03/2023 when she was served with a notice for satisfaction of a decree, while at paragraph 15, the Applicant alleged that Ms. Law Associates Advocates failed to timely communicate the impugned decision, but in submission the learned counsel for Applicant said the impugned decision was never communicated to the Applicant by its Attorneys. To my view the three phrases that is to say being not aware of the decision, failure to timely communicate and a fact that the Attorney never communicated, are not the same, nor cannot similar meaning. Because the wording in paragraph 15 cannot there was failure of timely communication meaning it was on an aspect of time, as opposed to total none communication.

Assuming that the Applicant became aware of the impugned decision on 03/03/2023 as alleged, still a delay of more than 30 days is exorbitant and inordinate delay which suggest negligency and in action on her part. It is illogical for the Applicant to allege that after receiving the alleged notice on 03/03/2023 it took two weeks to obtain legal opinion from Messr. Nexlaw Advocates over a judgment where the substantial claim of Tshs 30,000,000/= they bragged to be willing and admitted to refund it. Also to say Ms. Nexlaw Advocates from 16/03/2023 to 06/04/2023 a period of twenty two (22) days used to craft a chamber summons and affidavit and

file it is unjustifiable. To my view, this cannot be said it amounted to a successful account of her delay in filing the intended appeal as suggested by the learned Counsel for Applicant.

The learned Counsel for Applicant pleaded illegalities citing a fact that the 25% interest is too high and was not proved, also submitted that a 25% interest from the date the house was purchased to the date of judgment was not pleaded, rather the Respondent herein pleaded, interest from the date of filing the suit to the date of judgment. To my view, not every error committed in the judgment amount to illegality. To my opinion, illegality is a concept suggesting that something was done contrary to the law or forbidden by the law. Therefore, it is wrong to plead illegalities on pure matter of facts. My undertaking is grounded on a fact that, the learned counsel for Applicant was suggesting that even mis apprehension of evidence or failure to analyze evidence, can also be termed to fall under illegality, which to my opinion is a wrong and misplaced idea.

In the case of **Dianarose** (supra), the apex Court had this to say, I quote,

"I think the contention that TRA is fraught with some material irregularities, being the applicant's last remaining holdouts, was added to the application, as an afterthought. This is because, as I

see it and as correctly submitted by Mr. Sabore, there is nothing suggesting, albeit prima facie that the decision made by the TRA is suffering from any material irregularity or that the intended appeal raises any important question of law worth of determination by this court"

Herein, the Applicant in her affidavit failed even to mention the alleged illegality, it is in the submission that the counsel for Applicant picked up the purported illegality.

The application is therefore unmerited. It is dismissed with costs.

E.B. LUVANDA
JUDGE
12/07/2023

