

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

MISC. LAND APPLICATION NO. 773 OF 2022

(Originated from the Judgment of Hon. Makuru J. in Land Appeal No. 120 of 2015 dated
26 October 2016)

EDWARD MKWELELEAPPLICANT

VERSUS

HUSSEIN BAKARI KINGUYU.....RESPONDENT

R U L I N G

Date of last Order:17/07/2023

Date of Ruling: 31/07/2023

K. D. MHINA, J.

This is an application in which the applicant moves this Court to extend the time within which to file the notice of appeal to the Court of Appeal against the decision of this Court in Land Appeal No. 120 of 2015, delivered on 26 October 2016.

The application has been brought by way of chamber summons, made under sections 14 (1) and 20 of the Law of Limitation Act, Cap 89 R: E 2019 ("the LLA").

The grounds in support of the application are contained in the affidavit duly sworn by Edward Mkwelele, the applicant. The ground for extension of time, based on illegalities as portrayed in paragraph 8 of the affidavit as follows;

- i. This Court did not consider that there was no opinion of assessors despite the fact that it was one of the grounds.*
- ii. This Court determined only the single appeal in Land No 120 of 2015.*
- iii. The file was transferred from one Chairperson to another without adducing any reason for such transfer.*
- iv. The Hon. Judge raised a new issue, which was not dealt with by the District Land and Housing Tribunal.*

The background of this case, as can be gleaned from the record, is as follows;

The controversy between the parties was over plot no. 170 Block "H" Mbezi High Density within Kinondoni Municipality. The respondent filed Land Application No 446 of 2005 at the District Land and Housing Tribunal of Kinondoni against the Applicant for the following reliefs;

- 1. A declaration order for vacant possession and eviction from the suit premises*

2. Payment of 16 million as compensation for damages caused to the foundation and bricks

3. Damages as may be assessed by this tribunal

4. Costs

At the end of the trial, the Tribunal entered the judgement in favour of the applicant.

Aggrieved, the respondent appealed to this court vide Land Appeal No. 120 of 2015. On 26 October 2016, this Court overturned the Tribunal decision and declared the respondent a lawful owner of the suit premises.

Dissatisfied, on 04/11/2016, the applicant lodged a Notice of appeal to the Court of Appeal. But on 11 August 2021, the respondent caused the notice to be struck out by the Court of Appeal vide Civil Application No. 551/17 of 2017 after the applicant failed to take necessary steps.

The application proceeded by way of written submission. While Mr Emmanuel Machibya, learned Advocate, represented the applicant, the respondent was represented by Gabilius Galikano, also a learned advocate.

In support of the application, Mr. Machibya submitted that during the hearing of Land Appeal No. 120 of 2015, one Felix Emmanuel Mtaki Mkongwa for the Respondent was not an advocate, and it was improper to proceed with the hearing with an unqualified advocate. Therefore, the judgment and

proceedings of Land Appeal No. 120 of 2015 should be quashed and set aside, and a retrial be ordered.

He further submitted that after the Land Application No. 446 of 2005 was decided in favour of the applicant by the Tribunal, the respondent tendered the Title Deed of the disputed land during the hearing of Land Appeal No. 120 of 2015, which was never tendered during the hearing of the Land Application No. 446 of 2005 at the Tribunal.

He also raised an issue that the evidence of the land officer from Kinondoni Municipal Council (PW2) could not be relied upon without supporting evidence.

In response, Mr. Galikano submitted that, immediately after the delivery of the judgment sought to be challenged, the applicant's counsel filed the Notice of appeal on 04/11/2016, which was well within time. Surprisingly, nothing was done to process the appeal until the respondent applied to strike out the Notice of Appeal vide Civil Application No. 551/17 of 2017.

Mr. Galikano further submitted that the order of the Court of Appeal indicated that upon filing the Notice of Appeal, the applicant was supposed to file an application for leave since the matter started from the District Land and Housing Tribunal- Kinondoni.

He concluded by submitting that the application is devoid of merits for no good reasons have been advanced to show where the applicant has been from 2016 to 2023.

In a brief rejoinder, Mr. Machibya submitted that the reply to the submission in chief did not touch the merits of the application but rather the summary of the Judgment of Land Appeal No. 120 of 2015 delivered by Hon. Makuru, J. on 26 October 2016. Therefore, he prayed for an application to be granted.

Having considered the chamber summons and its supporting affidavit, the affidavit in reply, and the submission made by the learned counsel for the parties, the issue that has to be resolved is whether the applicant has shown a good cause for this Court to exercise its discretion in granting an extension of time to file notice of appeal.

The entry point on this is the decision of the Court of Appeal in **Sebastian Ndaula vs. Grace Rwamafa** (Legal Personal Representative of Joshua Rwamafa) Civil Application No. 4 of 2014 (Unreported), where the Court put it succinctly that in an application for 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 **Hassan Bushiri v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported), the Court of Appeal insisted that an applicant should account for each day of delay as 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 accounting for the period of delay, if a party successfully establish illegalities against the impugned decision is also sufficient ground to grant an extension of time. See **Principal Secretary, Ministry of Defence and National Service Vs. Devram Valambia** [1999] TLR 182.

The above-cited cases contained the criteria for this Court to consider and test if the applicant passes the test by showing a good or sufficient cause.

Regarding accounting for each day of delay, it is crystal clear that from both the affidavit and submission, the applicant never accounted for the period of delay. In the affidavit, he mainly stated the facts, narration of events and the evidence of the case. Equally, in the written submission, the applicant never accounts for the period of delay.

On illegalities raised in the affidavit, I have the following observation;

First, in the applicant's submissions, he "forgot" to substantiate the illegalities he raised in paragraph 8 of the affidavit. He submitted nothing to explain or substantiate if the alleged illegality mentioned were really illegalities under the purview of the law.

Second, in his submission, the counsel for the applicant submitted new issues not contained in the affidavit, such as one Felix Emmanuel Mtaki Mkongwa, who represented the respondent during the appeal, was not an advocate.

From the discussion above, that means the counsel for the applicant, instead of submitting what was raised in the affidavit, introduced new issues during the submission, which is unprocedural. On this, I wish to remind the parties of the "Rules of the game" that parties are bound by what they pleaded in the pleadings because the Court must decide cases on the issue on the record. Therefore, I am disregarding the new facts introduced by the bar during the hearing.

Further, having gone through the alleged illegalities, though not substantiated, I have the following;

One, the first and third illegalities pointed out in the affidavit were never raised as the grounds for appeal or discussed during the appeal before this Court. Before this Court, the grounds for appeal in Land Appeal No. 120 of 2015 were;

- i. The Trial Tribunal erred in law and fact in failure to declare the applicant, now appellant, **(respondent)** the lawful owner of the parcel of land known as Plot no. 170 Block "H" Mbezi Area Kinondoni Municipality Dar es Salaam.*
- ii. The Trial Tribunal reached a wrong decision in failure to declare the respondent **(applicant)** a trespasser on the parcel of land in question hence occasioning injustice to the appellant **(respondent)**.*
- iii. That on the strength of the abundant evidence availed and on record, the trial Tribunal should have ordered for immediate vacant possession and eviction of the respondent **(applicant)** from the parcel of land under dispute.*
- iv. That the Judgment and the decree thereof delivered by the trial Tribunal is a nullity for a failure to give reasons for differing with the assessors' opinion as required by the law.*

From above, it is quite clear that the first and third illegalities pointed out in the affidavit were new issues which were never raised at the first appellate level before this Court.

Two, for the second alleged illegality pointed out in the affidavit, with respect to the counsel, I failed to understand what he meant or what he intended to challenge. This is because there was only one appeal in Land Appeal No. 120 of 2015. On this, I must end here.

Three, for the fourth alleged illegality, since the counsel did not substantiate the same, I failed to understand that new fact he referred, which the Appellate Judge raised but was not dealt with by the Tribunal. In such circumstances, it is not proper for this Court to speculate.

In **Lyamuya Construction Co. Ltd Vs. Board of Registered Trustees of Young Women's Association of Tanzania**, Civil Application No. 147 of 2006 (Unreported), the Court of Appeal 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."

Therefore, the applicant not only failed to substantiate the illegalities pointed out in the affidavit but also failed to show if the illegalities are apparent on the face of the record or even if those illegalities existed against the impugned judgment.

Flowing from the above discussion, the applicant has failed to show good and sufficient cause so that this court can extend the time to file a notice of appeal.

For the reasons above, I find no merit in this application, and consequently, I dismiss it with costs.

It is so ordered.




K. D. MHINA

JUDGE

31/07/2023