

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

**MISC. LAND APPLICATION NO. 371 OF 2023**

(Arising from the Judgment of the High Court – Land Division at Dar es Salaam in Land Appeal No. 200 of 2021 dated 27 January 2023)

**ASHA ALI OMARY.....APPLICANT**

**VERSUS**

**AUDAX RWEYEMAMU KAMUHAMBWA .....1<sup>ST</sup> RESPONDENT**

**DUCRESIA KAMUZORA BAGENDA (As a  
personal legal representative of the late **DAVIS BAGENDA**) .....2<sup>ND</sup> RESPONDENT**

**ESTHER LENGWA NKUBA BAGENDA (As a  
personal legal representative of the late **GODFREY  
KALUGABA BAGENDA**) .....3<sup>RD</sup> RESPONDENT**

**R U L I N G**

*Date of last Order: 12/09 /2023*

*Date of Ruling: 18/09/2023*

**K. D. MHINA, J.**

The Applicant, Asha Ali Omary, lodged this application by way of chamber summons, made under Section 11 (1) of the Appellate Jurisdiction Act [ Cap. 141 R. E. 2019] (“the AJA”)

The applicant is in pursuit of an extension of time to file a notice of appeal and leave to appeal to the Court of Appeal against the Judgment and Decree of this Court in Land appeal No. 200 of 2021, dated 27 January 2023.

The chamber summons is supported by the affidavit affirmed by Asha Ali Omary, the applicant, which expounds the grounds for the application. As per the affidavit, the reasons for seeking an extension are;

One, the alleged illegality in the impugned decision.

Two, the sickness of the applicant. (Hospital certificate attached)

Three, financial constraints.

Fourth, the applicant's imprisonment.

But before going to the substance of the application, a brief background is significant to understand what prompted the filing of this application, as can be gleaned from the pleadings.

Before the District Land and Housing Tribunal for Kinondoni, the respondents filed against the applicant the Land Application over the ownership of plots No. 950, 951, 952, 953 and 954 located at Mbezi Kawe vide Land Application No. 442 of 2006. That matter proceeded ex-parte against and on 28 September 2007, the Tribunal pronounced its ex-parte judgment in favour of the respondents.

In 2020, vide Misc. Land Application No. 57 of 2020, the applicant applied at the Tribunal for an extension of time to set aside ex-parte

judgment. The Tribunal on 25 August 2021 granted the application and granted the applicant 30 days to lodge an application for setting aside *ex parte* judgment.

Undaunted, the respondent appealed to this Court *vide* Land Appeal No. 200 of 2021. In its decision dated 27 January 2023, this Court quashed and set aside the decision of the Tribunal in Misc. Land Application No. 57 of 2020 and re-confirm the earlier *ex parte* judgment in Land Application No. 466 of 2006. The decision which is the subject of this application.

The application proceeded by way of written submissions. The applicant was represented by Mr. Henry Mwinuka, learned counsel and the respondents by Mr. Cleophas Manyangu, also a learned counsel.

In support of the application, Mr. Mwinuka submitted that since the applicant's release from prison in 2016, she had developed several health complications, including ulcers, pressure and severe diabetes, leading to unconsciousness at times.

He stated that the applicant was severely sick from 1 January 2023 to May 2023, and therefore, even the decision of this court in Land Appeal No. 200 of 2021 was delivered on 31 January 2023 in her absence. Further,

by the nature of her sickness, informing her of the cases would cause other health complications.

Therefore, he narrated that the applicant's sickness contributed to the delay in filing this application because the nature of her illness requires timing in revealing the outcome of the case. Further, at the time the decision was passed, she was unconscious.

On illegality, Mr. Mwinuka submitted that the impugned decision intended to be challenged is tainted with illegality. He stated that this Court determined the appeal against the decision of the Tribunal to extend the time while it had no jurisdiction to do so.

Mr. Mwinuka explained that the order granting an extension of time (which was appealed for) is non-appealable since it was not covered under section 74 of the Civil Procedure Code, Cap 33 R.E. 2019, read together with Order XL Rule 1 of the same Act.

He argued that an appeal is allowed if the application for an extension of time would have been refused. To bolster his argument, he cited **Ally Saad vs. Peter Leburu Mchau and another**, Civil Appeal No. 171 of

2022 TZHC, where at page 7, the court stated that:

*"It is my view that non-listing of the order dismissing the application for extension of time to apply for review out of time was not accidentally. I subscribe to the view in his findings by my learned brother Hon. Kisanya, J in Chacha Nyikongoro Vs Ndege Kiseke Misc. Land Application No.145 of 2020 High Court at Musoma (unreported), where it was held that an appeal against an order not in the list of appealable orders under section 74 of the Civil Procedure Code, [Cap 33 R.E.2019] (the CPC) read together with Order XL Rule 1 (a)-(v) of the CPC becomes incompetent before the court liable to be strike out. "*

He insisted that since the order appealed was not appealable, this court had no jurisdiction to determine the appeal.

On the third ground, Mr. Mwinuka submitted that the applicant had no source of income and depended on the restitution of the suit property to run her life. She has been dependent on free legal aid. Therefore, because of searching for legal assistance, time could not be in her favour, considering her health condition. To bolster his argument, he cited the decision of the Court of Appeal in **Hamisi Mponda vs. Niko Insurance (T) Ltd and Another**, Civil Application No. 254/01 of 2021, where it was

held that financial constraint is a good cause in extending time.

On the last ground, Mr. Mwinuka submitted that the applicant had feared the respondent's action. He stated that by tracing the history, the applicant was already jailed because of an attempt to make any challenge to restitution of the suit property.

In response, Mr. Manyangu resisted the application by submitting that the purported medical chip (certificate) was questionable as there was no evidence that the applicant was sick in January, February, March, and April. There are no records demonstrating that the applicant is a chronically sick woman. The medical chip only indicated she was ill from 8-12 May 2023. She was admitted at Mwananyamala Regional Referral Hospital on 8 May 2023 and was discharged on 12 May 2023. This was after the expiry of the time limit prescribed for lodging a notice of appeal and an application for leave.

Therefore, the applicant failed to account for each day from 26 February 2023 when the time for lodging both the notice of appeal and application for leave expired. There is nowhere in the applicant's affidavit where she had accounted every and each day from 26 February 2023 to either 21 May 2023 or 21 July 2023. In the circumstances, the reason

advanced by the applicant falls short of accounting for the delay of 84 and 144 days.

Countering the issue of illegality, Mr. Manyangu submitted that no specific illegality pleaded in the affidavit to show that the impugned judgment has or contains illegalities. The alleged illegality in paragraphs 4 and 5 of the affidavit was not pleaded. However, in the submission, it was submitted that this court had no jurisdiction to entertain Land Appeal No. 200 of 2021.

He further submitted that the purported illegality was not raised during the Land Appeal No. 200 hearing of 2021. It was filed in reply to the written submission. Additionally, the applicant had an opportunity to raise the same by filing the notice of preliminary objection when she was served with the memorandum of appeal in Land Appeal No. 200 of 2021, but she did not utilize that opportunity. Therefore, the appellate Court in Land Appeal No. 200 of 2021 was correct in rejecting or refusing to entertain the objection raised from the backdoor.

Regarding the cited case of **Mchau** (Supra), Mr. Manyangu stated that not only is the decision persuasive but also distinguishable to the

circumstances of this case. In that case, it was an application for an extension of time to apply for review against an *ex parte* decision. In contrast, in the instant application, it was an extension of time to set aside an *ex parte* judgment whereby the respondents appealed and not file the review.

He concluded by citing **Charles Richard Kombe vs. Kinondoni Municipal Council**, Civil Reference No. 13 of 2019, where it was settled that for a decision to be attacked on the ground of illegality, one has to successfully argue that the court acted illegally for want of jurisdiction or for denial of the right to be heard or that the matter was time-barred.

He argued that what is contented by the applicant is not the question of want of the court's jurisdiction to entertain the appeal, but rather, the applicant alleged that the appeal was incompetent. In such circumstances, the question of want of jurisdiction cannot arise in the impugned judgment in Land Appeal No. 200 of 2021.

Regarding the financial constraints and search for legal aid, Mr. Manyangu submitted that the court records indicated that in Land Application No. 442 of 2006, the applicant was represented by the late Andrew Mwakajinga of Mwakajinga Company, Advocates, in Misc. Land Application



No. 20 of 2008 was represented by Advocate Francis Stola, in Misc Land Application No. 57 of 2020, and Land Appeal No. 200 of 2001 was represented by Hosea Chambo from Clax Law Chambers. In the instant application (Misc Land application No. 371 of 2023), the applicant is represented by Henry Mwinuka, advocate from AVIS LEGAL. Therefore, no record shows that the applicant had free legal services. Even the pleadings and other legal documents drawn or filed in this case did not reflect that the applicant was given free legal aid or was done gratis.

Further, there was no evidence that the said advocates were assigned such cases by the Tanganyika Law Society or given dock briefs by the Registrar of the High Court to represent the applicant. In addition, there is no letter from the Tanganyika Society or the High Court Registrar which indicates that the applicant was assigned the said advocates for free legal aid.

On the last ground, shortly, he submitted that no such reason is recognized by either statutory law or precedents.

The applicant did not file the rejoinder.

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

counsel for the applicant and the respondents, 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 a notice of appeal and to apply for leave to appeal.

As to what may constitute a good case, the Court of Appeal in the cited case of **Lyamuya Construction Co. Ltd (Supra)** and also 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: -

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

In this application at hand, where the impugned decision was delivered on 27 January 2023, and this application was filed on 21 June 2023, as I alluded to earlier, the applicant has raised four grounds for seeking an

extension.

Therefore, in deliberation and determination, I will start with the ground of illegality. And on this, I will be guided by the decisions of the Court of Appeal, which already settled the position on the subject.

**One**, is the case of **Principal Secretary, Ministry of Defence and National Service vs. Devram Valambia [1999] TLR 182**, which held that illegality is sufficient ground to grant an extension of time.

**Two**, the case of **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."*

What is complained by the applicant as illegality is pleaded under paragraphs 13 and 15 of the affidavit that in the appeal, this Court exercised the powers not provided for it because the decision of the Tribunal, which granted an extension of time, was not appealable. The applicant has raised the issue of the jurisdiction of the court when it heard the appeal.

In my opinion, this should not detain me long, because a quick glance of the ground of illegality regarding jurisdiction raised by the applicant reveals important point of law which deserve the attention of the Court.

Taking into account the settled principle as explained in numerous decisions of the Court of the Court of Appeal including **The Principal Secretary Ministry of Defence** and **National Service and Lyamuya Contraction Company Ltd** (supra); that jurisdiction is a point of law which constitute an illegality, I am persuaded by the ground of illegality raised in this application.

Apart from that I am also compelled to consider the grounds of illegality raised by the applicant. In so doing I will be guided by the widely cherished principle, that whenever illegality is raised as a ground for enlarging time. On this it should be noted that it is not the duty of this Court to determine whether the illegality raised has merits or not. That is the duty of the Court of Appeal.

Flowing from the above findings I hold that the applicant has brought a good cause for the delay to warrant the Court exercise its discretion to enlarge the time sought. This suffices to dispose of this application. I do not

see any point of considering the remaining grounds for, their determination will not change the outcome of this application.

Therefore, this application is meritorious. I allow it and order that the applicant should file the Notice of Appeal and application for leave to appeal within fourteen (14) days of pronouncement of this ruling. No order to costs.

It is so ordered.



  
**K.D. MHINA**  
**JUDGE**

**18/09/2023.**