

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(LAND DIVISION)**

**AT DARE S SALAAM**

**MISC. LAND APPLICATION NO. 311 OF 2023**

(Originating from the decision by Hon. A.A. Nchimbi, J in Land case Revision No. 16 of 2010 dated 5/9/ 2011)

**JOHN KANON NKUBA .....APPLICANT**

**VERSUS**

**UBUNGO MUNICIPAL COUNCIL..... 1<sup>ST</sup> RESPONDENT**

**MBEZI WARD EXECUTIVE SECRETARY.....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL.....3<sup>RD</sup> R ESPONDENT**

**R U L I N G**

*Date of last Order:12/10/2023*

*Date of Ruling: 10/11/2023*

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

This application for extension of time within which to lodge an application for setting aside the dismissal order of this Court dated 5 September 2011 in Land Revision No. 16 of 2010, has been preferred under section 14(1) of The Law of Limitation Act, Cap 89 (R: E 2019) and Order IX Rule 4 of The Civil Procedure Code Cap 33 R.E 2019.

The application has been brought by way of chamber summons supported by the applicant's affidavit, which expounds the grounds for the application.

In the application, the applicant, *inter-alia*, is seeking for the following orders: -

- i. The Applicant be granted an extension of time within which to lodge an application for setting aside dismissal order against the decision of the High Court Land Division, by Honourable A. A. Nchimbi dated 5<sup>th</sup> September, 2011 vide Land Revision No. 16 of 2010.*
- ii. Cost of this Application be borne by the Respondents.*
- iii. Any other relief (s) this Honourable Court may deem fit to grant*

In the affidavit the applicant raised three grounds to support the application as follows;

- i. Sickness on his part
- ii. The death of former advocate and
- iii. Illegality

The application proceeded by way of written submission. The applicant was represented by Mr. Themistocles Rwegasira, learned counsel, while the respondents was represented by Ms. Caroline Lyimo learned State Attorney.

In his lengthy submission, which I will summarize briefly, Mr. Rwegasira in support of the ground raised in the affidavit submitted as follows.

Regarding the ground of sickness, he submitted that sometimes in between the year 2011 and 2012, the applicant faced health challenges whereby he was hospitalised at Mirembe Hospital at Dodoma on 3<sup>rd</sup> September 2011 after he was diagnosed with hypertension, diabetes and mental distress. He was also advised to attend special clinic for physical exercise to restore and strength various parts of his body which were paralysed.

Further, he stated that the information regarding the dismissal of his case contributed to aggravated his sickness when he was again admitted at Tanga Regional Referral Hospital.

On the issue that death of the applicant's former advocate, Mr. Rwegasira submitted that the applicant hired the services of the late Mr. Matumla Advocate represent him. In 2012 while the applicant was at Tanga receiving treatment he received the call from a friend informing him of the death of his advocate but without being supplied with neither details of his case nor the surroundings of death of the advocate.

The applicant attempted locating his advocate office but without success, taking into consideration that, the applicant visited Dar es salaam occasionally as he was still attending medical services in Tanga region where

he domiciled. When he searched for that advocate in the Judiciary website TAMS, was indicated the advocate was the deceased.

On the last ground of illegality he submitted that there were illegalities in the decision of the District Land and Housing Tribunal for Kinondoni whereby the decision was made ex parte while the applicant was never summoned to defend his case.

In response, Ms. Lyimo argued that the subject of this Application was Land Revision Application No 16 of 2010 which was dismissed on 5 September, 2011.

He narrated that according to Item, 4 Part III of the Schedule to the Law limitations Act (Cap 89 R.E. 2019), the Application to set aside the said dismissal order was supposed to be filed within 30 days but the applicant had brought this application, 12 years after the expiry of the prescribed 30 days.

She further submitted that the applicant claimed that he was sick and that his Advocate (one Peter Matumla) passed away and he only became aware of his death in 2022. However, the applicant, under paragraph 16 of the Affidavit averred that he became aware when his Advocate died. Looking at all the exhibits attached with Application, the Applicant has not accounted

for all the 12 years that he remained without action in respect to the extension of time.

Ms. Lyimo further argued that paragraph 20 of the Applicant's Affidavit was contradictory as it stated that he was sick around the year 2012 when he received an anonymous call on the death of his advocate, while the letter he annexed from Tanga Regional Referral Hospital (Exhibit JK-8) was dated 2019 and it did not at all specify the time around which he was sick or admitted to the hospital for treatments.

From above, she argued that the same cannot be regarded as accounting for the inordinate delay, but rather than being an afterthought.

Further, she submitted that this application is sought after lapse of 12 years, a period which is quite inordinate and granting the same, there will be no end to litigation.

In addition to that she argued that, failure of the Applicant to follow up his case is not a ground for extension and since he had engaged a Law firm to act on his behalf, and laxity of lawyers, if any, is not a good cause for extension of time. To support her submission she cited **Ramadhani Rashidi Kitime vs. Anna Ally Senyangwa**, Misc. Land Application no. 3 of 2023, (**HC-** Morogoro Unreported) where it was held that: -

*"...firms are manned by lawyers who ought to know court procedures. In fact, failure of the advocate to act within the detect of law cannot constitute a good cause for enlargement of time".*

On the issue of illegality, Ms Lyimo submitted that in order for the Court to consider granting extension on ground of illegality, the illegality must be apparent on the face of record.

She argued that in this application that there were no illegalities in the Application for Revision. The issue was the applicant did not appear in Court therefore, the application was dismissed for want of prosecution.

Ms. Lyimo cited the decision of the Court of Appeal in **Wilson Sirikwa vs. Mikael Mollel**, Civil Application no. 544/02 of 2021, (Tanzlii) whereby the Court dismissed the Application for extension of time due to failure to point out illegalities in the Application to be challenged.

She also argued that even a ground for illegality in order to warrant an extension of time, ought to be raised timely as it was held in **Ramadhani Rashidi Kitime vs. Anna Ally Senyangwa**, Misc. Land Application No. 3 of 2023 (HC-Morogoro) that: -

*"Turning to the ground of illegality, it is a trite law that, illegality being one use for extension of time must be raised timely. One cannot a long period without pursuing for his right on the grant that*

*so at his own time since there is illegality on the decision. Equally, illegality must also be raised timeously, otherwise there will be no end to litigation.”*

The ground of illegality raised in the instant application had been raised after the lapse of 12 years.

Therefore, ground is rather an afterthought and that was why there were no documents to substantiate the illegality.

The applicant did not file any 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 **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.*

Flowing from above, in deliberations and determination of the application 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."*



On this after a careful scrutiny of the applicant's affidavit and the submission to support the ground of application I found no where the applicant pointed out any illegality in the impugned decision or order which he is seeking extension of time to set aside the same. For clarity the applicant is seeking to set aside the order of this court dated 5 September, 2011 in Land Revision No. 16 of 2010. That day the parties were absent and the Order was simple as follows; I quote;

**"Court**

*When this matter was fixed for hearing today, the applicant was Present in person whereas the respondent appeared by a legal Officer in the name of Mr. Hussein. I dismiss the application for want of prosecution because this Court does not know why parties have not appeared today. Particularly so the applicant who was supposed to prosecute his application.*

*Sgd".*

As I alluded to earlier, the applicant did not point any illegality in the quoted order, instead he mentioned the decision of the District Housing and Land Tribunal which was contrary even to what he was seeking in the instant application.

On this as rightly submitted by Ms. Lyimo while cited the decision of the Court of Appeal in **Wilson Sirikwa (Supra)** failure to point out illegalities in the application to be challenged is fatal.

From the above discussion, I am not persuaded by the ground of illegality raised in this application, thus it lacks merit.

On the issue of sickness, generally, it is trite that sickness is one of the good grounds for an extension of time. The Court of Appeal in **Emmanuel Maira vs. The District Executive Director Bunda District Council**, Civil Application No. 66 Of 2010 (unreported) 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..."*

But, **one**, as it was held by the Court of Appeal in **Juto Ally v. Lucas Komba & Another**, Civil Application No. 484/17 of 2017 (Unreported), a party pleading illness must show how it contributed to the delay. The Court 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."*

**Two**, there must be sufficient evidence that a party pleading with illness as a ground for extending time was sick.

The two above are very essential in invoking the discretion of this court to extend time.

In this matter, the applicant attached to his affidavit several medical reports indicating that he was sick.

For instance, attachment JK-6 dated 19 March 2019, indicated that the applicant was admitted at Mirembe Hospital Dodoma on 3 September 2011 for a period of one month after diagnosed with hypertension.

In another report dated 18 June 2021, from Mirembe Hospital it indicated that he was admitted on 3 September 2011 because of Hypertension and Diabetes. In June 2016 he was admitted after stroke. On 17 March 2021 he was diagnosed with Rheumatoid Arthritis.

Another report from Tanga Regional Referral Hospital dated 21 June 2019 indicate that the applicant was attending clinic for hypertension and Diabetes. He also attended CCBRT for eye cataract clinic on 11 March 2022.

Having analyzed as above it is quite clear that after the applicant was admitted at the Hospital on 3 September 2011 for one month, he admitted again in 2016. Therefore, under such circumstances, it cannot be said with

any degree of certitude whether the delay in instituting application set aside dismissal order was attributable to the applicant's illness and his admission in a hospital for one month in 2011 and later in 2016.

From the above discussion, the applicant's reason for sickness is not backed by any sufficient evidence. Therefore, the issue of sickness lacks merit.

The last issue of the death of the applicant's former advocate in my opinion, it should not detain me long due to the following reasons.

One, the applicant did not indicate even when exactly that advocate passed away. That is crucial in order to determine whether he died before or after the case was dismissed.

Two, at paragraph 20 of the affidavit the applicant stated that in the year 2012 he received a call when he was admitted at Tanga Regional Hospital that his advocate had passed away. The issues are; one, he did not provide any proof that in the year 2012 he was admitted at Tanga Regional Hospital and two, after receiving that information what action did, he took to make a follow up of his case at the Court. A party to the case has a duty to make a follow up of his case even if he engages an advocate, he cannot sit idle.

Therefore, in my opinion failure to prove the two issues above renders the grounds devoid of merits.

Flowing from above it is quite clear that the applicant failed to account for each day of delay and he failed to act promptly in moving this Court for extension of time after the lapse of the time of instituting an application to set aside dismissal order, thirty (30) days after the dismissal order on 22 September 2011. Instead, he filed this application after twelve (12) years which he failed to account.

In the upshot, as the applicant has not succeeded in persuading me to exercise my discretion extending the time to set aside dismissal order, I find no merit in the application and dismiss it with costs.

It is so ordered.



  
**K. D. MHINA**  
**JUDGE**  
**10/11/2023**