

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

MISC. LAND APPLICATION NO. 695 OF 2022

(Arising from the Judgment of the High Court – Land Division at Dar es Salaam in
Land Case No102 of 2020 by Hon. Matuma, J. dated 26 November 2021)

WILLA ISHENGOMA.....1ST APPLICANT

ALBERT ISHENGOMA.....2ND APPLICANT

WILMOT ISHENGOMA.....3RD APPLICANT

VERSUS

MAHENDA NYALIKA.....1ST RESPONDENT

FAUSTINE KAZINZA.....2ND RESPONDENT

R U L I N G

Date of last Order: 16/12/2022

Date of Ruling: 03/02/2023

K. D. MHINA, J.

By a chamber summons taken under section 11 (1) of the Appellate Jurisdiction Act, Cap 141 R: E 2019 (“AJA”), the applicants, Willa Ishengoma, Albert Ishengoma, and Wilmot Ishengoma instituted this application against the respondents, Mahendeka Nyalika and Faustine Kazinza.

The applicant, *inter-alia*, is seeking the following orders: -

- i. That this Court be pleased to grant an extension of time for the Applicants to lodge the notice of intention to appeal to the Court of Appeal against the decision of Land Case No. 102 of 2020 High*

Court of Tanzania Land Division at Dar es salaam by Hon. Matuma J, dated 26 Novemebr 2021;

- ii. *Any other order(s) and relief(s) the Honourable Court may deem fit and just.*

The chamber summons is supported by the joint affidavit sworn by the applicants, which expounds the grounds for the application.

According to the affidavit, the reasons for seeking an extension of time are two: **one**, the sickness of the applicants' mother, and **two**, the alleged illegality in the impugned decision.

A brief background is significant to appreciate what prompted the filing of this application. It started as a Land Case No. 102 of 2020, whereby the applicants claimed for the ownership of plots No. 413, 415, and 417 Block E, located at Kunduchi Area, Dar es Salaam, against the respondents.

At the trial, the rival allegations were that on 10 April 1994, the 2nd respondent bought a piece of land measuring two acres from the late Said Omari Salum. On 12 December 1998, he sold one acre of the same land to the 1st respondent, who developed the land and started living therein.

For the applicants, the allegations were that their late father, William Wibard Ishengoma, bought the suit land on 23 July 1998 from the same seller, Said Omari Salum. Then he surveyed and divided the land into five plots with numbers 413, 415, 417, 439, and 431. Then they were given the plots in disputes with certificates of Title as gifts

After the trial, the judge entered a judgment in favour of the respondents and declared the 1st respondent as the lawful owner of the plots.

Undaunted, the applicant approached this Court, but this time to seek an extension of time to file a notice of appeal to the Court of Appeal after they found themselves out of the statutorily prescribed time to file a notice to appeal to the Court of Appeal.

At the hearing, the applicants were represented by Mr. Charles Tumaini, learned counsel, while the respondents were by Ms. Batilda Mallyi, also a learned counsel.

Submitting on the first ground of sickness, Mr. Tumaini argued that in December 2021, the applicants' mother, who was suffering from cancer, fell very ill, that fact which took the applicants' attention to take

care of their mother. He said the applicants were taught by the doctor how to care for their mother from home.

He further argued that sickness had been a good and sufficient cause to extend time. He substantiated his submission by citing **Emmanuel R. Maira vs. The District Executive Director Bunda District Council**, Civil Application No. 66 of 2010 (CAT), unreported, on page 5, where the Court 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. Applicant's failure to file the Notice of Appeal between the handing down of the decision (27/8/2002) and March 2003 has a good cause behind: first, he was not notified of its existence, and secondly, the health incapacitation bail him out".

He concluded by submitting that out of context it might be seen that it was not the applicants who were sick but the fact that their mother who gave them the documents was ill. Further, only one applicant was residing in Dar es Salaam.

On the second ground for illegality, he submitted that illegality is a sufficient ground extension of time, and he cited **Brazafric**

Enterprises Ltd vs. Kaderes Peasants Development PLC, Civil Application No. 421/08 of 2021 (Tanzlii), whereby the Court of Appeal (at page 10) held that;

"As intimated above, once illegality is raised and established, it also constitute a good cause for extending time".

He submitted that the illegality was indicated in paragraph 9 (b) of the affidavit that the parties were not heard on the genuineness of the certificates of Title, and it was necessary for the Registrar of Title to be joined as a necessary party to testify on the same.

He concluded by submitting that the grounds raised are genuine for this court to consider and extend time.

In reply, briefly, Ms. Mallyi strongly resisted the application and started to argue on the ground of illegality. She submitted that the thought in **Principal Secretary, Ministry of Defence and National Service Vs. Devram Valambia [1999] TLR 182**, the Court held that illegality is sufficient ground to grant an extension of time, but in the matter, at hand, the applicants were unable to establish the alleged illegality.

She further submitted that in paragraph 4 of page 13 of the Judgment, the evidence of PW 1, the Land Officer and Surveyor from the Ministry of Land, whom the applicants even cross-examined, testified on the Certificates of Titles. Therefore, there was no illegality.

On the ground of illness, Ms. Mallyi first submitted that the applicant's mother was not part of the case. Further, the applicants were three; therefore, if the mother was sick, it could not be that all of them were nursing her.

On the issue that the applicants were scattered, she submitted that the applicants failed to give any evidence of that. But during the trial, all of them were attending the Court.

In a brief rejoinder, Mr. Tumaini submitted that in paragraph 9 of the affidavit, he raised an issue of illegality as there was an infringement of the right to be heard, and they established that the Registrar of Title was not joined as the part of the case.

Further, he submitted that the fact that there was a person from the office of the Registrar of Title does not make that person to be a Registrar of Title.

On the issue of sickness, he submitted that it was true that the mother was not a party to the case, but the fact that the applicants' were nursing their sick mother is a good ground to grant an extension.

Having considered the chamber summons and its supporting joint affidavit, the joint affidavit in reply, and the oral 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 leave to appeal."

The Court of Appeal of Tanzania stressed this 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.

In the application at hand, as I indicated earlier, the applicant has raised two grounds for seeking an extension: -

One, illegality on the impugned decision

Two, the sickness of the applicant's mother

In deliberation and determination, I will start to consider the issue of the sickness of the applicant's mother.

On this, the entry point is the case of **Juto Ally v. Lucas Komba & Another, Civil Application No. 484/17 of 2017** (Unreported), where the Court of Appeal 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."

In this application, the applicants indicated that it was their mother who was suffering from cancer and fell very ill; therefore, all of them were nursing her.

Having gone through the case laws and the argument advanced by the applicants, I am not persuaded by that argument as a good ground for extending time. My reasons are;

One, it was not the applicants who were sick; therefore, they failed to stipulate how illness contributed to the delay. The sickness must be on the part of the party to the suit.

Two, I agree that health matters are not the choice of the human being; they cannot be shelved, and nor can anyone be held to blame

when they strike, but the illness of a relative or parent is not a good ground in extending time, especially in the circumstances of this matter where there are three applicants who had services of an advocate since during the trial. The delay is almost eleven months and four days; therefore, the delay is inordinate.

Flowing from above, it is; therefore, the issue of sickness lacks merit.

Coming on the second ground of illegality, I agree with both counsel submissions that illegality constitutes a sufficient ground for extending time. Counsel substantiated their submissions by the cases of **Brazafric Enterprises Ltd vs. Kaderes Peasants Development PLC**, Civil Application No. 421/08 of 2021 (Tanzlii), cited by Mr. Tumaini and **Principal Secretary, Ministry of Defence and National Service Vs. Devram Valambia [1999] TLR 182**, cited by Ms. Mallyi.

Counsel differs on whether there are illegalities or not. While Mr. Tumaini submitted that the parties were not heard on the genuineness of the certificates of Title and that it was necessary for the Registrar of Title to be joined as a necessary party to prove the genuineness of the

certificates of title, Ms. Malyi submitted that applicants were unable to establish the alleged illegality. Further, in paragraph 4 of page 13 of the impugned Judgment, the evidence of PW 1, the Land Officer and Surveyor from the Ministry of Land, testified on the Certificates of Title. The applicants even cross-examined the two.

The question is whether the issue raised can constitute an illegality to qualify for this court to grant an extension of time.

In answering this, first, it should be noted that it is trite that to constitute illegality, the alleged point of law must be apparent on the face of the record, as such, the question of jurisdiction. This is the position of the Court of Appeal in **Lyamuya Construction Co. Ltd Vs. Board of Registered Trustees of Young Women's Association of Tanzania**, Civil Application No.2 of 2010 (unreported), where the Court 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."

This is one of the parameters of what the illegality should be. That the illegality raised should not require a drawn argument or process to be discovered.

On this, having gone through the records, I am not persuaded by the ground of the illegality raised by the applicant. The reason being that the claimed illegality is not apparent on the face of the record and does not meet the settled threshold. The illegality raised falls within the issues that attract long-drawn arguments and processes to discover whether illegality exists.

Further, that issue was discussed on page 13 in the impugned decision, and the same was determined.

Apart from the above, Mr. Tumaini raised an issue that the applicants were scattered, and only one lived in Dar es Salaam. Having gone through the affidavits and submissions, I have the following;

First, the issue contradicts what the counsel had submitted earlier that the applicants were nursing their sick mother.

Second, the issue was not pleaded in the affidavit; it was introduced from the bar during the submission. The facts were

introduced by the bar during the submissions. Therefore, because the matter was unlawfully and unprocedural introduced, it need not be treated and considered by this Court.

In the upshot and from the above explanations, the applicants have failed to show good cause to persuade this court to extend the time to file notice of appeal against the decision of this Court in Land Case No. 102 of 2020, which was delivered on 26 November 2021 and this application which was filed on 1 November 2022.

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

It is so ordered.

DATED at DAR ES SALAAM this 03/02/2023.





K. D. MHINA
JUDGE