IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB REGISTRY

AT DAR ES SALAAM

MISC CIVIL APPLICATION N0. 388 OF 2023

(Arising from Land Appeal No. 10 of 2018)

THE REGISTERED TRUSTEES OF MASJID MWINYI..... APPLICANT

VERSUS

PIUS KIPENGELE..... 1ST RESPONDENT

THE REGISTRAR OF TITLES.....2ND RESPONDENT

THE COMMISIONER FOR LANDS.....3RD RESPONDNET

THE ATTORNEY GENERAL.....4TH RESPONDNET

RULING

MKWIZU, J: -

The applicant is in court seeking for enlargement of time within which to file a Notice of Appeal to the Court of Appeal of Tanzania against the decision of the High Court of Tanzania at Dar es Salaam (Luvanda. J) dated 12/11/2018 in Land Appeal No. 10 of 2028. The prayers in the chamber summons are coached thus:

1. *That the Honourable court may be pleased to extend the time within which the Applicant may file a notice of appeal to the Court of Appeal of Tanzania against the decision of the High Court of Tanzania at Dar*

es Salaam (Luvanda.J) dated 12/11/2018 in Land Appeal No. 10 of 2028.

2. *Costs of the application.*
3. *Any other order the Honourable Court may deem to grant.*

The application predicated on section 11(1) of the Appellate Jurisdiction Act (cap 141 R: E 2019), is supported by a chamber summons and the affidavit sworn on 19 July 2023 by Abeid Maulid Abeid, the Applicant's principal officer, setting out the historical background and explanation for the delay in lodging his intended appeal.

Briefly, the factual background that culminated to this application, as discerned from the affidavit in support of the application, is that the landed property No. 58, located on Plot No. 32 Block 77 Somali Street, Gerezani, Kariakoo, with title No 43083, was originally owned by Aziza Omary. On her demise on 4/7/1991, she left behind the said property to the applicant through a waqf appointing Mwishehe Mgumba, Omari Mohamed, and Abdallah Rashid as executors. Through Probate Couse No 89 of 1991, Mwishehe Mgumba, filed petitied for letters of administration which was granted on 22nd January 1992. But before that, during pendency in court of Probate Cause No. 89 of 1991, on 6/9/1991, one Daniel Zacharia successfully petitioned for letters of administration at the Kisutu Resident Magistrate court via Probate and Administration Cause No. 73 of 1991 declaring himself the only deceased relative and beneficiary and was subsequently granted such letters of administration on 31/12/1991 before the probate by Mwishehe Migunda at Kariakoo primary Court. He immediately on 8/3/1993, sold the house to Pius Kipengele followed by registration of the House in the name of the purchaser , Pius Kipengele by 1994

despite several queries by the City council on the ownership of the house in question.

It appears that there were several suits filed by then by several individuals, including Probate Cause No. 44 of 2010 by Seif Ally Kiambwe, one of the named executors of the waqf. Upon his appointment, he approached the Commissioners for lands, grouchy about the manner Pius Kipengele obtained the title over the disputed property. His complaint ended with the rectification of the land register where the name 1st respondent was replaced by that of the President of the United Republic of Tanzania prompting the filing of Civil Case No. 85 of 2012 by the 1st respondent against the applicant herein and others. This case could not, however, last long, for it was struck for being preferred in contravention of section 102 (1) of the Land Registration Act, Cap 345, R.E. 2002. At this time, the disputed property was registered in the applicant's name.

Tirelessly, the 1st respondent successfully instituted Land Appeal No. 10 of 2018 challenging the decision of the Registrar of Titles. The Registrar of Title's decision was quashed with an order to reinstate the name of the 1st respondent in the Land Register. It is averred that in this appeal, Ally Seif Kiambwe, administrator of the deceased estate, was not made a party.

The applicant was unhappy, this time, she opted to file a fresh case, Land Case No. 24 of 2019 claiming ownership of two landed properties, Plot No. 32 Block 77 Somali - Gerezani Streets and Plot No. 17 Block 56 Mchikichini Street located in the Kariakoo area, against the 1st respondent and Moez Jafferali Morbiwala. This case was again struck out on 29/4/2020 for being time-barred, followed by a duly filed notice of appeal to the Court of Appeal of Tanzania and letters requesting for necessary documents for appealing processes by the applicant. During that same period, the applicant wrote a complaint letter to the Chief

Justice, prompting a revision suomoto by the Court of Appeal No. 2 of 2020 which was dismissed on 23/11/2022.

Still on her toes, the applicant sought that, the best way was to appeal against the decision in Land Case No. 10 of 2018. She thus, on 12/7/2023, withdrew the notice of appeal that was pending before the Court of Appeal and resorted to filling the present application for extension of time to appeal pegged on two reasons: diligence and illegalities in the impugned decision as listed in paragraph 28 of the supporting affidavit.

At the hearing, Mr. Ashiru Lugwisa, the learned Advocate, was in court for the applicant, whereas Mr. Mutakyamirwa Phelimon, the Advocate for the 1st Respondent and Mr. Daniel Nyakiha, the learned State Attorney was in court on behalf of the 2nd, 3rd, and 4th Respondents .

Submitting in support of the Application, Mr. Lugiswa adopted the applicant's affidavit to form part of his submission, citing diligence and patent illegalities on the face of the impugned decision as listed in paragraph 28 of the supporting affidavit as the reasons for the delay. He contended that the applicant had been diligently and genuinely pursuing her rights in different courts without success due to some technical defects.

Acknowledging the established principle in matters pertaining to the extension of time, the applicant's counsel argued that the applicant must demonstrate good cause for the delay, illegality being one of it. He relied on the case of The **Principal Secretary Ministry of Defence and National Service Vs Devram Valamba** (1992) TLR 387 *and* **Lyamuya Construction Co. Limited Vs The Board of the Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No2 of 2010, stressing that the

points of illegalities cited in paragraph 28 are apparent on the face of the impugned decision and, therefore capable of supporting the application.

Citing to the court paragraphs 21, 24, and 26 of the supporting affidavits, he said the applicant had been actively running around the court corridors, pursuing her rights over her properties. After the pronouncement of the impugned decision on 12/11/2028, the applicant filed another case, Land case No. 24/2019, as pleaded in paragraph 21 of the supporting affidavit, which was struck out on technical grounds. He filed a notice of appeal in respect to that decision and initiated revisional proceedings in the Court of Appeal, Civil Revision No. 2 of 2020, before he sought again to challenge the decision subject of this application. He persuasively implored the court to find merit in the first ground that the applicant has been diligent in pursuing her rights. He cited the cases of **Michael Lessani Kweka Vs. John Eliafye** (1997) TLR 152 and **Irene Temu Vs. Ngasa M. Dindi and two others**, Civil Application No 278/17/2017 (unreported) support the proposition that diligence is a good ground for extending time. He concluded by inviting this court to allow the application with costs.

In reply, and having adopted the counter affidavit by the 1st Respondent to form a part of his submissions, Mr. Mutakyamirwa advocate for the 1st Respondent, opposed the application contending that no illegality is apparent in the decision of the trial court dated 12/11/2018 and that the applicant had not been diligent and genuinely in pursuing her rights. His contention was that the applicant was to file a Notice of Appeal on 11/12/2018 after the delivery of the challenged decision on 12/11/2018, she did not file the same, and this application was brought after the lapse of a four years period contrary to the law. That, it took the applicant six months period from 12/11/2018 to the date of filing Land case No. 24 of 2019 on 27th May 2019. And another three years period from when

the land Land case No. 24 of 2029 was struck out on 29th April 2020 to date, without obtaining copies of the proceedings, judgment, and decree and has waited for eight (8) months from 22nd November 2022, when the Court of Appeal dismissed revisions No. 2 of 2020, to discuss the proper way to bring this application in court. He relied on **Jaluma Suppliers Limited V. Stanbic Bank Tanzania Limited**, Civil Application No.48 of 2014, and **Ngao Godwin Losero Vs. Julius Mwarabu**, Civil Application No. 10 of 2015 (All unreported) challenging the aptness of the applicant's diligence in handling the matter.

Regarding the issue of jurisdiction of the trial court, the counsel said, there is on the records the decision by Mutungi J in Land Case No 85 of 2012 with a conclusion on the issue of jurisdiction and therefore this court cannot revert into discussing the same. He added that, the points narrated in paragraph 28 of the applicant's affidavit were not tabled before the trial judge, thus bringing them at this stage in an application for an extension of time is ignorance of procedure, which is not good cause for an extension of time. He concluded by inviting the court to dismiss the application with costs.

On his party Mr. Nyakiha, the learned state attorney for the 2nd,3rd, and 4th Respondents, supported the line of arguments adopted by the counsel for the 1st respondent, arguing that no illegality can be depicted from the face of the impugned decision. To him, the courts jurisdiction is well embodied in section 101 of the Land Registration Act cited in paragraph 28(a) of the applicant affidavit empowers the High court to exercise its powers over any decision , order or acts by the Registrar of Titles as it was done in Land Appeal No 10 of 2018 subject to this application and therefore the court had jurisdiction. He submitted in addition that in MM13, Hon. Mutungi J had made a decision on the

indicating that the High Court had jurisdiction and the 1st respondent, who was by then the applicant, had a right to challenge the said decision, order, or acts of the registrar; therefore, the arguments that the High Court lacked jurisdiction are without bases. He cited to the court the decisions in **Lyamuya Construction Co. Limited(supra)** on the principle that the illegality to constitute a sufficient ground in extending time should not take a long drawn process to ascertain their existence. He again condemned the applicant for not being diligent in pursuing her rights. He contended that the applicant took a distinct cause of action not concerned at all with Land Appeal No. 10 of 2018, and as such, she failed to account from 12/11/2018 until the date of filling this application. He finally prayed for the dismissal of the application with costs.

In his rejoinder, Mr. Lugwisa was of the view that this court should consider allowing the ground of illegality because the interpretation of the section made in Land Case No 85 of 2012 was not a product of that case but a product of the objection raised by the defendant regarding the competence of that suit before the court, the proper interpretation of those provisions would be made by the Court of Appeal. He maintained that, after all lack of jurisdiction by the court is not the only illegality relied upon by the applicant. There are about eight grounds, including denial of the right to be heard in Land Appeal No 10 of 2018, all constituting illegalities apparent on the face of the records.

He maintained that paragraphs 23- 30, is the narration of all the steps taken by the applicant accounting for the whole period of the delay. To him, the case of **Jaluma Suppliers Limited V Stanbic Bank Tanzania Limited**(supra) cited by the respondents is distinguishable because, in their case, there is no evidence showing negligence by the counsel in pursuing the applicant's rights. He invited the court to allow the application with costs.

I have passionately considered the rival submissions by the parties. I think the core issue is whether the application is meritorious. The cannon principle as agreed by the parties is, granting extension of time is in the discretion of the Court and that the discretion must be exercised judiciously according to the facts of each case. And that time can only be extended if sufficient cause is shown, normally where the complained delay is beyond the control of the applicant or due to the occurrence of facts that the party could not contemplate. See **Mumello Vs. Bank of Tanzania** [2006] E.A. 227, and the case of **Shanti vs. Handocha** [1973] EA 2007 cited in the case of **Wambele Mtumwa Shahame vs. Mohamed Hamis** (Civil Reference 08 of 2016) [2018] and **The Registered Trustees of the Archdiocese of Dar es Salaam vs. the Chairman Bunju Village Government & Others**, Civil Appeal No 147 of 2006 (unreported). In the latter case, the court held:

> *"It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice,* ***when no negligence,*** *or* ***inaction*** *or* ***want of bona fides,*** *is* ***imputed to the appellant.****"(emphasis added)*

In exercising its discretion and determining whether good cause has been shown to warrant extension of time, the Court, depending on the circumstances of each case, has to look at a number of factors such as whether the applicant was diligent, the length of the delay, the degree of the delay, an account given for the delay and whether there is a point of law or the illegality or otherwise of the impugned decision : See **Lyamuya Construction Company Limited v. Board of Trustees of Young Women Christian Association of Tanzania**, (Supra),

The applicant's explanation for the delay is based on two fore. Diligence and illegalities on the impugned decision listed in paragraph 28 of the supporting affidavit. It has been deposed that the applicant has been in court corridors throughout seeking justice for securing and retaining House No. 58 plot No, 32 Block 77. A perusal of the affidavit and the attachment thereto reveals that the impugned decision was delivered on 12/11/2018. That case was between Pius Kipengele, the appellant, the Registrar of Titles, the Land Commissioners, the Attorney General, and the Registered Trustees of Masjid Mwinyi (the applicant herein) as respondents. The applicant did not appeal. Instead, she stayed idle until 27th May 2019 and filed a fresh Land Case No. 24/2019 against Pius Kipengele and Moez Jafferali Morbiwalla, and immediately the latter was dismissed, she filed a notice of appeal followed by Civil Revision No. 2 of 2020, opened following the applicants' complaints to the Chief Justice. This revision was dismissed on 23/11/2022. The applicant remained silent for some time until July 2023 when she decided to withdraw the notice of appeal he earlier on filed against the decision in Land Case No 29 of 2019 in view of pursuing the intended appeal followed by filing this application on 27th July 2023.

It is a settled law that time spent by a party in prosecuting an abortive and, or incompetent matter creates a technical delay permissible in considering extending time. This position was discussed at length in **Fortunatus Masha v. William Shija and Another** [1997] T.L.R. 154 that:

> *"a **distinction should be made between** cases involving **real or actual delays and** those like the present one which only **involve what can be called technical delays** in the sense that **the original appeal was lodged in time but the present situation arose only because the original appeal***

> ***for one reason or another has been found to be incompetent and a fresh appeal has to be instituted.*** *In the circumstances,* ***the negligence if any really refers to the filing of an incompetent appeal not the delay in filing it.*** *The filing of an incompetent appeal having been duly penalized by striking it out, the same cannot be used yet again to determine the timeousness of applying for filing the fresh appeal. In fact, in the present case, the applicant acted immediately after the pronouncement of the ruling of this Court striking out the first appeal." (Emphasis supplied).*

The decision above illustrates a situation where the applicant has filed an appeal against the impugned decision promptly, but for some reason, the appeal is discontinued. The party's negligence is, in that a situation linked with the filing of an incompetent appeal and not the delay in filing it: See where the court said:

> ***"...the negligence if any really refers to the filing of an incompetent appeal not the delay in filing it."***

Things are, however, different in the present matter. All subsequent cases filed in court after the delivery of the impugned decision are unrelated to it and were preferred against different parties. For instance, while Land appeal No 10 of 2018 was a challenge directed to the Order of the Registrar of Titles in respect to the landed property on Plot No 32 Block 77 Somali Gerezani between the parties as they appear in this application; Land Case No 29 of 2019 filed thereafter was in respect of a claim of ownership of two landed properties, Plot No. 32 Block 77 Somali - Gerezani Streets and Plot No. 17 Block 56 Mchikichini Street located in the Kariakoo area within Dar es Salaam Region, against the 1st respondent and Moez Jafferali Morbiwala that culminated to a revision No 2 of

2020. Nothing is on record, and Mr. Lugwisa did not explain that the applicant had ever sought to challenge the complained decision for the period of nearly 56 months (four years and eight-month)between 12/11/2018 and 27/7/2023 when he filed this application.

I strongly believe that for a party to benefit from a ***technical delay*** as a ground for extension of time illustrated in **Fortunatus Masha's Case,** the subsequent proceedings must be connected to the original/ impugned decision and not anything that the applicant opts to pursue in his/her favour. As demonstrated above, this application was taken belatedly after the dismissal of the revision taken against another land matter, Land Case No 29/2019, four years plus after the delivery of the impugned decision without any plausible explanation from the applicant.

And even if I were to take the period used in prosecuting Land Case No. 29 of 2019 and the subsequent proceedings including Revision No 2 of 2020 as a technical delay, still the sequence of events narrated in the supporting affidavit leaves unaccounted seven (7) months period between the delivery of the impugned decision that is 12/11/2018 to 27/5/2019 the date when Land Case No 29 of 2019 was lodged, another seven (7) months period between the delivery of the Revision No. 2 of 2020 by the Court of Appeal on 23/11/2022 to 12th July 2023, the date of withdrawal of the notice of appeal against the decision in Land case No 29 of 2019. This application was instituted on 27th July 2023, 15 days after the withdrawal of the Applicants notice of appeal. No arguments were advanced for such a delay in taking action. It is a settled principle that in application of this nature, each day of the delay must be accounted for. See for instance, in **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported), wherein it was stated: -

"Delay, of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken."

Strict adherence to the rules of procedure was emphasized by the Court in **Dr. Ally Shabhay V. Tanga Bohorajamaat** - Civil Application No. 48 of 1997 (unreported), citing the case of **Edwards V. Edwards** (1968) 1 W.L.R. 149, the Court said:-

"So far as procedural delays are concerned, Parliament has left a discretion in the courts to dispense with the time requirements in certain respects. That does not mean however, that the rules are to be regarded as, so to speak, antique timepieces of an ornamental value but of no chronometric, so that lip service only need to be paid to them. On the contrary, in my view, the stipulations which Parliament has laid down or sanctioned as to time are to be observed unless justice clearly indicates that they should be relaxed."

The above discussions bring me to the conclusion that the applicants' first ground is a total misconception, irrelevant and unjustified.

The applicant has also relied on illegalities in the impugned decision as a ground in support of the application. The principle is, illegality or otherwise in the impugned decision can by itself constitute a sufficient ground for extension of time as amplified in **the Principal Secretary Ministry of Defence and National Service vs. Devram Valambia**, (supra) that:

"In our view when the point at issue is one alleging illegality of the decision being challenged the Court has a duty, even if it means extending the time for the

purpose to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record right."

And in Attorney **General v. Consolidated Holding Corporation and Another**, Civil Application No. 26 of 2014, it was stated thus:

"With regard to the last point, contentions as to illegality or otherwise of the challenged decision have now been accepted as a good cause for extension of time."

The affidavit supporting this ground highlights several illegalities. Paragraph 28 is relevant here, and I quote it for convenience.

"28. That the applicant has been in court corridors throughout seeking justice for securing and retaining House No. 58 plot No, 32 Block 77. There ***are illegalities and fatal irregularities in the proceedings and decision in Land Appeal No. 10 of 2018*** *including.*

1. *The High Court had no jurisdiction to entertain and determine the land Appeal No. 10 of 2018 challenging Notice of Rectification of land Register. There was no decision made pursuant to the request which ought to have been made by the 1st respondent in terms of sections 101 and 102(1) of the Land Registration Act Cap 334 RE 2019. The 3rd respondent applied for rectification on account of fraudulent acts in obtaining the Certificate of Title and the 2nd respondent accepted the application after serving the 1st respondent with Notice before the decision to make the rectification applied for. The allegation of Fraud has not been determined.*

2. *The 3rd respondent's application for rectification of Land Register and the 2nd respondent's Notice of Rectification were not decision but were interlocutory procedural steps towards the act of rectification and the said notices had not embodied facts which justified the rectification. The reasons could only be produced and procured upon request by the 1st respondent herein (appellant by then) under section 101 of the Land Registration Act. The Land Appeal No. 10 of 2018 was prematurely lodged.*
3. *The complaint was against the registration of the Pius Kipengele as the owner of House No, 58 plot No. 32 Block "77" Kariakoo Area Dar es Salaam with Title Number 43083 which was made by Seif Ally Kiambwe being administration of the estate of the late Aziza Omari but the said Seif Ally Kiambwe was not made a party to the Land Appeal No. 10 of 2018 Seif Ally Kiambwe was condemned by the 1st Respondent for not having letters of administration of Aziza Omari and that the grant of his letters of administration was inoperative the issue which was not raised before the Registrar of Titles.*
4. *The High Court heavily relied on and made decision using documents which were not evidence and were not properly before the court but were annexed to the petition of Appeal annexed to the parties' submissions, and statement made by parties' advocates in the submissions contrary to the law and practice. The appellant (1st respondent herein) heavily relied on facts which were not before the court and not flowing from the decision of the Registrar of Titles.*
5. *The High court directed the 2nd respondent to reinstate the name of Pius Kipengele in Land Registry in respect of Plot No. 32 Block "77" Kariakoo Area Dar es salaam instead of the directing the 2nd*

respondent to determine the application upon considering the documents which the thought to be relevant. The court in effect turned itself a Registrar of Titles when it determined the application at the first instance and analyzed the documents improperly received for the first time in appellate stage.

6. *The High Court without legal basic issued advisory order to the applicant to comply with the directive order of the High Court dated 20th December,2001 in Civil Appeal No. 196 of 2000 and the said order was for the application for revocation of the letters of administration granted to Daniel Zakaria to be heard by the lower court by a competent resident magistrate and that when the High Court issued advisory order on 12th November,2018 the application which had to be heard afresh (pursuant to decision in Civil Appeal No. 196 of 2000 had been marked abated on 10th March, 2010 , that is eight years back . The advisory order was impracticable and void.*
7. *The rectification of the Land Register was based on allegation of obtaining the certificate of title by fraudulent acts by the 1st respondent and the law requires the Registrar of Titles to rectify and correct the Land Registrar of Titles to reinstate the 2nd respondent before determining merits as to correctness and truth or otherwise of his commission of the alleged acts of fraud."* (bold is mine)

And it is settled that for illegality to be the basis of the grant, it must be clearly visible on the face of the record and of significant importance to deserve the appellate court's attention. This is the findings in **Lyamuya Construction Company Ltd vs. Board of the Registered Trustees of Young Women's Christian Association of Tanzania**, (supra) that:

*"**Since every party intending to appeal seeks to challenge a decision either on points of law or facts**, it cannot in my view, be said that in VALAMBIA'S case, the court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one. 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 long-drawn argument or process.**"(emphasis added)*

I have studied the pointed-out illegalities and the impugned decision. I am not at all convinced that the alleged illegalities are apparent on the face of the impugned decision to warrant the grant of the extension of time sought. The applicant's point in paragraph 28 (a) is in relation to the court's jurisdiction to entertain land appeal No. 10 of 2018 emanating from the Registrar's decision dated 23/9/2011 censuring the decision for not resolving the request ***ought to have been made*** by the 1st respondent in terms of sections 101 and 102(1) of the Land Registration Act Cap 334 RE 2019 and the fraud allegation . These to me are matters not apparent on the face of the impugned decision to qualify points of illegalities warranting the grant of extension of time. It will undoubtedly require a long process to ascertain the alleged points from the impugned decision. The same conclusion applies to the points raised in paragraphs 28 (b) to (g).

For the foregoing reasons, I find and hold that the applicant has failed to demonstrate good and sufficient cause to entitle her to an extension of time. The application is thus dismissed with costs.

Order accordingly.

Dated at **Dar es salaam**, this **19th** day of April 2024

E.Y. MKWIZU

JUDGE

19/4/2024