

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

MISC. LAND APPLICATION NO. 23 OF 2019

WILLIAM FRANCIS MASANJA

*(Administrator of the estate of
the late Francis Makoye Masanga*

} **APPLICANT**

VERSUS

KAFULA MASHAURI 1ST RESPONDENT

MICHAEL JAULOLA 2ND RESPONDENT

WILLIAM KISUNA 3RD RESPONDENT

ELIAS MTALAZI 4TH RESPONDENT

MICHEMBE SOLOLO 5TH RESPONDENT

PAULINE KACHWELE 6TH RESPONDENT

AICT CHURCH ILUNGE 7TH RESPONDENT

RULING

23rd November & 7th December, 2020

ISMAIL, J.

This ruling is in respect of an application for extension of time for filing an appeal against the decision of the District Land and Housing Tribunal (DLHT) for Mwanza at Mwanza, in Application No. 316 of 2012.

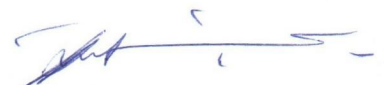


The DLHT sustained an objection raised by the respondents, contending that the matter is time barred. The application, preferred under the provisions of Section 14 (1) of the Law of Limitation Act, Cap. 89 R.E. 2002 (now R.E. 2019), is supported by the applicant's own affidavit in which grounds on which extension of time is sought are set out. The grounds advanced as the basis for this application are: **one**, failure by his counsel, to secure an extract order which would enable him to lodge an appeal to the Court; and **two**, that the application is tainted with illegalities.

The respondents have stoutly opposed the application. Through their separate counter-affidavits, they have attributed the delay to inaction by the applicant's erstwhile counsel. Refuting the applicant's contention that this application is meritorious, they urged the Court to dismiss the application.

Hearing of the application saw Mr. Denis Kahangwa, learned counsel representing the applicant, while Mr. Demetus Mtete's services were enlisted by the respondents.

Submitting in support of the application, Mr. Kahangwa argued that this matter was formerly with the late Makenene Ngelo, learned counsel who passed away in September, 2016. He contended that the said counsel



met his demise while he was processing an appeal against the decision passed by the DLHT, and he began by applying for a copy of an extract order. Mr. Kahangwa further contended that during this time, the applicant was under the impression that the appeal process was on going, only to find that the extract order had not been issued, and the appeal was yet to be lodged. The learned counsel argued that it was not until January, 2019 that the applicant enlisted the counsel's services, and it was pursuant to the counsel's advice that the applicant filed the instant application. He held the view that negligence of the applicant's erstwhile advocate should not be blamed on the applicant.

Mr. Kahangwa further submitted that the impugned ruling carries several serious irregularities which warrant the extension of time, and the law is to the effect that, where a preliminary objection contains a point of law and fact then the same must fail. He argued that the ruling went far overboard and tried to ascertain factual issues in a preliminary objection by making reference to annexures which required further proof, without giving the parties the opportunity to review the said annexures. On this, he referred to ***Ms. Safia Ahmed Okash v. Ms. Sikudhani Amir & 82 Others***, CAT-Civil Appeal No. 138 of 2016 (unreported). The learned Counsel made reference to the decision in ***Finca (T) Ltd & Another v.***



Boniface Mwalukisa, CAT-Civil Application No. 589/12 of 2018 (unreported), in which it was held that extension of time should be granted whenever illegality is raised as a ground for extension. Mr. Kahangwa prayed that the application be granted to enable the applicant file an appeal to this Court.

In his rebuttal submission, Mr. Mtete took a swipe at the applicant's submission. While praying to adopt the contents of the respondents' counter-affidavit, he held the view that no sufficient reasons had been adduced to justify the delay and that the application has no chances of success. He prayed that the same be dismissed with costs.

Mr. Mtete further submitted that, in extension of time there are cardinal principles which were developed in the case of **Daudi Haga v. Jenitha Abdon Machafu**, CAT-Civil Reference No. 01/2000 (unreported). These are; sufficient reasons and overwhelming chances of success. The learned counsel argued that, in this case, no reasons have been adduced to justify the delay, and that the applicant has not told the Court as to when Mr. Kahangwa was engaged. He stressed that the applicant has not accounted for each day of delay, consistent with the requirements enunciated in **Azzori Marwa Mang'ehe v. Samson Ondeny Masony**, HC-Misc. Civil Application No. 1 of 2014 (unreported).

Rebuking the applicant's sloppiness, Mr. Mtete contended that no effort was made since the demise of the advocate. He imputed indiligence which depicted failure on the part of the applicant, to meet the criteria for the grant of the extension of time. To bolster his contention, he cited the case of ***Samwel Mussa Ng'ohomango v. AIC (T) Ufundi***, CAT-Civil Application No. 26 of 2015 (unreported). Rejoining on the irregularity, the respondents' counsel contended that the affidavit that supports the application has not given details of the illegalities. They have just been made orally through submissions from the bar. With respect to **Finca**, Mtete's contention is that the holding in the said case is that delay of even a single day has to be accounted for.

In a short rejoinder, Mr. Kahangwa argued that whenever illegality is cited as a reason then accounting for days of delay ceases to take a prominent role. In view thereof, he contended that ***Ng'ohomango's case***, which was decided earlier than ***Finca's case*** is of little significance in this case. The counsel maintained that the applicant acted diligently after he became aware of the late advocates inability to proceed with the matter. He prayed that the application be granted.

From the parties' fabulous submissions, the pertinent issue to be resolved is whether this application has what it takes to have it granted.

It is settled law that an application for extension of time is grantable where the applicant presents a credible case to warrant grant of such extension. This means that a party asking for extension of time has a duty to justify the reason for the extension. The law also requires the applicant to act in an equitable manner (See the Supreme Court of Kenya's decision in ***Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others***, Sup. Ct. Application 16 of 2014).

This requirement got a broadened scope in the epic decision of the Court of Appeal in ***Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania***, CAT-Civil Application No. 2 of 2010 (unreported), wherein key conditions for the grant of an application for extension of time were laid down. These are:

"(a) The applicant must account for all the 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 he intends to take.

(d) If the Court feels that there are other sufficient reasons, such as the existence of a point of law of

sufficient importance; such as illegality of the decision sought to be challenged."

As courts lay emphasis on the need to assign sufficient cause, it is been underscored, as well, that in determining what constitutes sufficient cause regard has to be had to all circumstances of a particular case. See: ***Dephane Parry v. Murray Alexander Carson*** (1963) EA 546; and ***Regional Manager, Tanroads Kagera v. Ruaha Concrete Company Limited***, CAT-Civil Application No. 95 of 2007 (unreported).

Gathering from the submissions, the applicant's quest for extension of time is premised on two grounds. ***One***, the counsel's demise before he could complete the appeal process and; ***two***, irregularities in the ruling sought to be impugned. The respondents have taken a serious exception to both of the grounds. The contention is that no sufficient cause has been adduced, and the fact that the applicant has procrastinated in his action. I will choose to begin with the alleged illegality.

The legal position is, as elaborately put by the learned counsel for the parties, clear and astute. It is to the effect that where illegality exists and is pleaded as a ground, the same may constitute the basis for extension of time. This principle was first propounded in ***The Principal Secretary, Ministry of Defence and National Service v. Devram***



Valambhia [1992] TLR 185. This position has been re-stated in a plethora of subsequent decisions including **Paulo Juma v. Diesel & Autoelectric Services Ltd & 2 Others**, CAT-Civil Application No. 54 of 2007; **VIP Engineering and Marketing Limited & 2 Others v. Citibank Tanzania Limited**, CAT-Consolidated References Nos 6, 7 and 6 of 2006; **Arunaben Chaggan Mistry v. Naushad Mohamed Hussein & 3 Others**, CAT-Civil Application No. 6 of 2016; **Moto Matiko Mabanga v. Ophir Energy PLC & 2 Others**, CAT-Civil Application No. 463/01 of 2017; and **Patrobert D. Ishengoma v. Kahama Mining Corporation (Barrick Tanzania Bulyanhulu) & 2 Others**, CAT-Civil Application No. 19 of 2016 (all-unreported).

For illegality to constitute a ground, it must carry some sufficient importance. This was stated in **Lyamuya Construction** (supra), in which the Court of Appeal accentuated the following reasoning:

*"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 **Valambhia'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 record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process."

As stated earlier on, the illegality cited by the applicant touches on the DLHT's decision to sustain the objection which was allegedly a mix of a point of law and fact, and that the parties were not given an opportunity to controvert or support the points of fact. The respondent's counsel is of the view that the alleged point of illegality was not included in the supporting affidavit. Instead, it was raised at the hearing. Let me start by addressing this disquieting issue raised by the respondents' counsel. The position in our jurisprudence is quite settled on the matter. It is to the effect that, in determining whether the application has met the required conditions for its grant, conclusion is drawn from the affidavit that supports the application. The rationale for this is not hard to find. It stems from the fact that, *an affidavit is evidence*, unlike submissions which are *generally meant to reflect the general features of a party's case and are elaborations or explanations on evidence already tendered* (See: ***The Registered Trustees of Archdiocese of Dar es Salaam v. Chairman Bunju Village Government and Others***, CAT-Civil Application No. 147 of 2006 (unreported)).

Thus, while the contention raised by Mr. Mtete is in sync with the foregoing position, I am not convinced that the point of illegality has been raised through a submission from the bar. On the contrary, this is a point that has been specifically pleaded in paragraph 8 of the supporting affidavit, and what Mr. Kahangwa did, through his submission, was to elaborate what was already stated in the affidavit. It is my view that the contention by Mr. Mtete is misconceived.

Moving on to the substance of the matter, the question is whether the illegality pointed out in paragraph 8 can be profiled as an illegality of sufficient importance. I will hasten to say that the answer to this question is in the affirmative. Matters touching on failure to accord the parties the right to be heard border on a fundamental breach of principles of natural justice, and they constitute an illegality of sufficient importance, as are issues relating to the purity or otherwise of preliminary points of objection. In my unflustered view, these points of illegality meet the requisite threshold for consideration as the basis for enlargement of time. I hold that they alone, are weighty enough to constitute sufficient cause for extension of time.

Before I pen off, let me address a point which was raised by Mr. Mtete. It relates to the length of time that the applicant took in preferring



the application and the duty of accounting for each day of delay. The position is, where illegality sets in as a ground, length of time of inaction becomes of no significance. Thus, where in ***Peter Mabimbi v. The Minister for Labour and Youths Development & 2 Others***, CAT-Civil Application No. 88/08 of 2017 (unreported), action was taken after a lapse of 13 years and 8 months, the Court of Appeal took the position that that lengthy spell of action was irrelevant. I take a similar view in this respect.

In the upshot of all this, I grant the application and direct that the applicant has 14 days within which to institute his appeal. Costs to be in the cause.

It is so ordered.

DATED at **MWANZA** this 7th day of December, 2020.


M.K. ISMAIL

JUDGE



Date: 07/12/2020

Coram: Hon. M. K. Ismail, J

Applicant: Mr. William Muyumbu, Advocate

Respondent: Mr. Demetus Mtete, Advocate

B/C: B. France

Court:

Ruling delivered in chamber, in the presence of Mr. William Muyumbu, Counsel for the applicant and Mr. Demetus Mtete, Counsel for the respondents, this 07th December, 2020.


M. K. Ismail

JUDGE



At Mwanza

07th December, 2020