IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISC. LAND APPLICATION NO. 153 OF 2016

(From Land Case No. 33 of 2008)

BENEDICTA VICENT.....APPLICANT

VERSUS

KAMBI YA SIMBA VILLAGE COUNCIL.....RESPONDENT

RULING

DR. OPIYO, J.

The Applicant Bededicta Vicent filed a Chamber Summons made under Section 11 (1) of the Appellate Jurisdiction Act, Cap 141 R.E 2002 and any other enabling provision of the law praying for orders :-

1. That, this Honorable Court be pleased to grant extension of time for the Applicant to file application for leave to appeal to the Court of appeal of Tanzania against the Judgment and Decree of the High Court delivered on 20th May, 2016, by S.C. MOSHI, J. in Land Case No. 33 of 2008.
2. That, the costs of this application be granted.
3. That, any other relief that this Honourable Court deems just be granted.

This application is supported by affidavit of Emmanuel Safari Advocate for the Applicant duly authorized to depose. Before me the applicant was presented by Mr. Safari Learned advocate while the respondent had the services of Mr. Umbula learned advocate. On 27th November, 2017, this Court ordered hearing of the application to proceed by way of written submissions. Both counsels abided to the schedule of filing their respective submissions.

The counsel for the applicant on the basis of the grounds contained in the supporting affidavit whose contents he did pray to be adopted submitted that, the applicant timely filed notice of appeal and a letter applying for proceedings, judgment and decree intended to be appealed against. That, under paragraph 6 of the supporting affidavit it is also clear that the requested proceedings, judgment and decree were supplied to the Applicant on 5th August, 2016. He continued to submit that when the decision was delivered the Applicant thought that leave was not a necessary legal requirement in processing appeal to the Court of appeal. The Applicant arrived to the above inference because the Applicants Advocate was misled by the Written Laws (Misc. amendment) Act No. of 2010 which amended the Land Disputes Court's Act, No. 2 of 2002 by removing the word (Land Division) which suggested that leave was not necessary as it was for other matters before the High Court exercising original jurisdiction in which leave is not a legal requirement. But while waiting for the requested records for purposes of processing the intended Appeal the Applicant's Advocate came across the decision of the Court of Appeal in Civil Appeal No. 54 of 2015, which was not reported and therefore there was no way the Applicant and her Advocate could have become aware of.

It was his further submission that, it is also clear under paragraph under paragraph 15 of the supporting affidavit that the Applicant's Advocate received the documents on 10th August, 2016, and this application was processed within 12 days. In the light of the above, he submitted that, it is clear that the Applicant failed to file his application for leave first on ground of honest belief that in view of the amendment effected by Written Laws (Misc. amendment) Act No. of 2010 leave to appeal to the Court of Appeal in land matter was not a legal requirement and also partly because of the Registrar's failure to supply the requested records timely and as amply demonstrated the Applicant was never sitting idle wasting time but he was for all the time in and out of Court corridors honestly believing that after filing notice of appeal and letter requesting for copies of proceedings, judgment and decree he was only required to follow up the for the requested documents and then process appeal to the Court of Appeal, but unfortunate this belief was overturned by the above cited decision of the Court of Appeal. It was the counsel submission that, under the circumstances it is clear that, the Applicant was not guilty of lashes negligence, mistakes, inaction and lack due diligence in pursuing the matter and therefore entitled to extension of time under the law. He cited the case of**, Rutagatina, C. L. v. The Advocates Committee and Glavery Mtindo Ngalapa, Civil Application No. 2 of 2011 (Unreported)** where application for extension of time was allowed because the Applicant was as in this case not guilty of lashes negligence, mistakes, inaction and lack due diligence in pursuing the matter. The Court of Appeal at pages 5, 6 and 7 said:-

"Looking at the whole circumstances of the case, particularly considering that, the applicant has been vigorously pursuing the matter...one cannot fairly say that the applicant is guilty of lashes, negligence, mistakes, inaction and lack of due diligence in pursuing the matter as argued by the learned Senior State Attorney.

...

I think, given the whole circumstances of this case, denying the applicant the extension of time sought may appear to cause injustice. I am satisfied, in the circumstances, that good cause has been shown in terms of rule 10 of the rules and I accordingly allow the application."(Emphasis underlined). The copy of the ruling is also attached for your easy reference.

He further submitted that, apart from the reasons stated above, the Applicant's application is also based on number of grounds of illegalities. The first ground of illegality is that the Honourable High Court Judge failed to answer the framed issues. He contended that the above reason of illegality was raised because it is clear at page 2 of the typed judgment in Land Case No. 33 of 2008 that the trial Court framed a total of five issues which required to be answered by the evidence. In the same judgment it is also clear that the Honourable trial Judge answered the framed issues from page 23 to 27 of the typed judgment and it is clear that the judge only answered the 1st, 2nd and 3rd issues and there is no any finding regarding the 4th and 5th issues. He argued, the trial Judge's failure to resolve the 4th and 5th issues amounts to illegalities for being contrary to the

requirement of the rules of procedure emphasized by the Court of Appeal of Tanzania in number of its decisions such as the case of **AGRO INDUSTRIES LTD VS. ATTORNEY GENERAL (1994) TLR NO. 43,** in which the Court of Appeal held and he did quote:-

> *"when a trial court allows parties to address it on any issues, the court must conclusively determine those issues, notwithstanding that the issues were not in the pleadings"*

He contended that, in a similar situation, the Court of Appeal emphasized the same position in the case of **SHEIKH AHMED SAID VS REGISTERED TRUSTEES OF MANYEMA MASJID (2005) TLR 61** where the court emphasized the requirement for the Court making decision to make a finding on each issue. the court stated;

> *"It is necessary for a trial court to make specific finding on each and every issue framed in a case, even where some of the issues cover the same aspect"*

He submitted that, In the light of the above quoted decisions of the Court of Appeal, it is clear that the trial judge is legally bound to conclusively resolve the issues framed, But since in this case the trial judge did not comply with the above cited decisions of the Court of Appeal, trial judge committed illegality by her failure to answer the framed issues, which illegality constitutes sufficient

ground for extension of time and thus it is prayed that the Applicant's application for extension of time be granted.

Further to the above, the Applicant's counsel submitted that, the application is also based on ground of illegalities that the Honourable trial Judge based her decision on fact not in dispute, by finding that the Applicant did not remember the year she was married. He argued that as long as long as it was not in dispute that the Applicant was wife of Vincent, therefore the Applicant was not under any legal obligation to prove the year of her marriage. Thus, from the pleadings and from the framed issues the date the Applicant got married to her husband was never an issue. He thus argued that, the finding of the judge is contrary to section 60 of the Tanzania Evidence Act, (Cap. 6 R. E. 2002) which provides that:-

> *"60. No fact need to be proved in any civil proceedings which the parties thereto or their agents agree to admit at the hearing or which before the hearing they agree to admit by writing under their hands or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings."*

In the light of the above quoted provision of the law and, it was his submission that it is clear that the trial judge was legally wrong basing her decision on failure of proof of a fact which did not need to be proved and therefore it is submitted that, the Honourable trial judge committed illegality by her failure to comply with the law, which illegality also constitutes sufficient good ground for

extension of time and in the result he prayed that the Applicant's application for extension of time be granted. To substantiate his argument that when illegality is alleged court may extend time he cited the case of **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia (1992) TLR 185** where it was held:

> *"when the point at issue is one challenging illegality of the decision being challenged, the court has duty even if it means extending the time for purpose to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and the record right"*

Finally, on the basis of the grounds advanced herein above, together with the strength of the authorities cited, he implore this court to make a finding and hold that, the Applicant's application has merits and on that account, grant Applicants' application for extension of time with costs.

Opposing the application the counsel for the respondent submitted that, the Counsel for the Applicant in his lengthy affidavit in support of the Chamber Summons has raised two grounds why the High Court should exercise its discretion to extend time in terms of Section 11 (1) of the Appellate Jurisdiction Act (supra). One, that the Counsel for the Applicant honestly and truly believed that amendment to the Courts (Land Disputes Settlement) Act, (Act No. 2 of 2002) that is, Act No. 2 of 2010, Written Laws (Miscellaneous Amendments) Act did do away with the requirements of seeking leave to appeal to the Court of Appeal of Tanzania in terms of S. 47 of the Act. And second, that the judgment of the High Court of Tanzania in Land Case No. 33 of 2008 is tainted with

material irregularities, hence the need for interference by the Court of Appeal and therefore, the necessitates the Court to grant extension of time.

From the above, he argued that the ground of honest belief is baseless as it is difficult to ascertain the belief of a person, leave alone honest belief. And, under the provision of Rule 45(a) of the Court of Appeal Rules, 2009 leave must be applied to the High Court within 14 days where the appeal lies with the leave of the High Court and in this case and under Section 47 (1) of the Courts (Land Disputes Settlements) Act, Act No. 2 of 2002, the appeal to the Court of Appeal of Tanzania lies with the leave of the High Court against its decision acting in its original jurisdiction. Thus, for someone, like the applicant's counsel, who obviously did lay his hands to the Amendment Act and noted the extent of amendment cannot claim to have honest believed it amended what it did not actually make. So no honest belief can be inferred from the appellants conduct. To him the delay is the result of negligence and/or inaction on the part of the advocate of the applicant for his failure to take the necessary steps to apply for leave of the High Court within the required time which does not deserve indulgence of this Court to exercise its discretion. For that he referred to the case of **Calico Textiles Industries Ltd v Pyarali Esmail Premji (1983) T.L.R. 28** where **Nyalali, CJ**, (as he then was) held that:-

> *"Surely this cannot be sufficient reason for allowing the appellant who was represented by a learned advocate, to file his appeal so much out of time. We therefore allow the application and order the notice of appeal be struck out"*

On Ground No. 2, it was his submission that, on this ground the applicant has attacked the judgment of the High Court as being tainted with some illegalities. The illegalities he asserts to are those deponed to under paragraph 18, 19 and 20 of his affidavit namely, one, that the trial judge did not answer all the issues framed, and secondly, the judgment was based on facts not in dispute finally the judge did not analyze the evidence on record hence arrived to a wrong decision. It was his submission that, these were misconceived allegations against the judgment of the Trial Judge. It is clear that in a proper case the Court may consider extending time for doing an act where there is clear illegality on the judgment of the High Court like in **VALAMBHIA's** case cited by the Counsel for the applicant, where a party was condemned without being heard, thereby violating the principles of natural justice, but surely not for every illegality as is being claimed by the applicant in the present case. The criteria as what amounts to an illegality in the judgment was set in the case of **Lyamuya Construction Company Limited v Board of Registered Trustee of Young Women's Christian Association of Tanzania** in Civil Application No. 2 of 2010 (Unreported Arusha Sub- registry of the Court of Appeal), where **Massati J.A.**, at the bottom of pg 8 and top of pg 9 of his ruling had this to say:-

> *"Since every party intending to appeal seeks to challenge a decision either on points of law or fact, it cannot in my view, be said that in VALAMBHIA's case, the court meant to draw a general rule that every*
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> *applicant who demonstrate 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"

Thus, he submitted that, based on the standard set in the above case what is meant by a judgment tainted with illegality has to be of "sufficient importance", the quality not met by the applicant's counsel allegation. This is because, assuming the trial judge indeed failed to answer the last two issues, were those issues of "sufficient importance" so as to render the judgment of the Court tainted with material illegality? It is his contention that, after all, the Judge answered the two issues though briefly, as it was reflected at the bottom of pg 26 and the top of page 27 of her typed judgment.

On the issue of waiting for the copies of judgement and decree he submitted that the claim by the applicants counsel that he needed copies of judgment and decree of the High Court before he could act and that his office was located in Dar es Salaam, so he could not get the above documents in good time misguided in that the said Counsel was appearing in Court with another Counsel by the name of Alloyce Qamara whose offices are located in Arusha and he was present in Court when the judgment of the Court was delivered on 20th May, 2016. He also argued that for purposes of the application for leave, like this one, one does not need to attach any documents like judgment or decree. He substantiated his argument by citing the case of **Executive Secretary: Wakf and Trust Commission v Saide Salmin Ambar (2001) T.L.R. 160 At Pg. 166 B-D Where Lubuva, J.A.** (as then was) held:-

"There being no legal requirement for the attachment of the copy of ruling and order to the application there was no reason whatsoever for the

Learned Judge to hold that the applicant needed to be seized with the copy of the ruling and order. The High Court was already seized with the record embodying the decision and the applicant through his advocate was also sufficiently conversant with the matter. The application could easily be processed without any attachment of documents within the prescribed period of 14 days"

He thus prayed for dismissal of the application for lack of merits with costs.

The counsel for the applicant has also filed a rejoinder I have thoroughly read and considered the same. The rejoinder is almost reiteration of what has been stated in the submission in chief, I thus I find no reason to reproduce it here.

In granting extension of time, what the court has to consider most is sufficiency of the reason causing the delay. After considering submissions of counsels for both parties, whom both agrees to the rule above, this court is faced with only one issue to determine first, whether the applicant has managed to advance good or sufficient cause to warrant granting the application for extension of time to file leave, he prayed for. It is submitted that the notice of appeal was filed within the prescribed time, and the applicant counsel had even applied for the copies of judgement and decree as early as 9/6/2016, but the same was supplied to him on 10th August, 2016, after the 14 days within which to apply leave had elapsed. So the delay was partly contributed by such late procurement of relevant documents necessary for filing application for leave. Respondents counsel counteracts this contention by submitting that, the waited documents were after all not necessary to be attached in such application, why should someone delay waiting for the same? What is to be ascertained at this juncture

is whether the long wait for the documents was necessary in the circumstances of this application. I wish to start my analysis by reproducing the current law guiding that position, i.e. rule 49(3) of the Court of Appeal Rules, 2009 which provides that;

> *"Every application for leave to appeal shall be accompanied by a copy of the decision against which it is desired to appeal and where the application has been made to the high Court for leave to appeal by a copy of the order of the High Court."*

The above provision obviously makes it mandatory to attach the copies of the order/decree intended to be appealed against. So, submission that attaching the documents was not necessary is misconceived and does not hold water. That means one cannot file application for leave without having those documents. That is, it was necessary to have the documents in terms rule 49(3) of the Court of Appeal Rules 2009, and the delay of 12 days after getting the documents is not inordinate, in my view. As for the case referred by the applicant's counsel, **Executive Secretary: Wakf and Trust Commission v Saide Salmin Ambar** (supra), what I can say is that they are right in their own right as for the time they were decided the Court of Appeal Rules 2009 was not yet in place, so they articulated correctly the then position of the Law. He Rules that was in place is those of 1979 in which, it true there was no mandatory requirement to attack those copies. As for now the principle is obsolete. The law applicable is rule 49(3) of the 2009 Rules.

From the above premise, the applicant was availed with the copies on 10th August, 2016 and filed this application on 23/8/2016, only after 12 days upon

getting the copies. In the circumstances I am convinced that the delay in procuring the copies of decree contributed to the delay in filling the application for leave. Thus delay in getting copies of judgement forms a good cause for the delay contemplated by section 11(1) under which the application is preferred. Such reason alone is enough to warrant extension of time that I need not dwell on other reasons advanced.

In other words, this court is satisfied with the reason that resulted to the delay and therefore grants the application by extending time for the applicant to file application for leave to appeal to the Court of Appeal out of time. The application for leave be filed within (14) fourteen days from the date of this order. I make no order as to costs.

(SGD)

DR. M. OPIYO,
JUDGE
8/5/2018

I hereby certify this to be a true copy of the original.

HIGH COURT TANZANIA

S.M. KULITA

DEPUTY REGISTRAR

ARUSHA

25/6/2018