IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA.

MISCELLANEOUS LAND APPLICATION NO 71 OF 2019

(Arising from the High Court judgment and decree in Land Case No. 13 of 2012 (Hon. Ebrahim,J) dated 08/04/2016.)

FATUMA MOHAMED.....APPLICANT

VERSUS

CHAUSIKU SELEMA.....RESPONDENT

RULING

25th February, & 15th May, 2020.

TIGANGA, J.

This is an application for extension of time within which to file a notice of appeal out of time against the judgment and decree of the High Court, Hon. Ebrahim, J in Land Case No. 13 of 2012, delivered in favour of the respondent. The said judgment was delivered on 08/04/2016. It aggrieved the applicant, who decided to appeal against it. As part of the appeal process, the applicant lodged a notice of appeal and filed Misc. Land Application No.71 of 2016 applying for leave to appeal to the Court of Appeal which leave was granted. The applicant then, instituted an appeal before the Court of Appeal, but unfortunately the same was struck out for being time barred. Following that order of the Court of Appeal, the applicant therefore

had to come back to the High Court to initiate the process. It is in that course, she filed this instant application seeking for extension of time to file a notice of appeal out of time. In this application, the court has been moved under section 11(1) of the Appellate Jurisdiction Act, [Cap 141 R.E 2002], and Rule 47 of the Tanzania Court of Appeal Rules, and the orders sought in the chamber summons are the extension of time to file the notice of appeal and the cost which was asked to be in the due cause. In the said chamber summons the applicant also put forth two main grounds for the application, first, that there are sufficient reasons for the delay as per the annexed affidavit, and second, that the complained judgment of the High Court is tainted with illegalities, irregularities and the impropriety as to per affidavit.

The chamber summons was supported by an affidavit dully affirmed by the applicant which over and above narrating the chronological facts of the event in this case it also gives the reasons for the application.

In response to the application, the respondent filed a counter affidavit opposing the application on ground that, no sufficient cause has been advanced for the court to grant the relief sought in the chamber summons which is the extension of time.

In light of the application, this court invited both parties to argue the application by way of written submissions. Through those submissions, the applicant appeared in person and unrepresented whereas the respondent had the services of the learned counsel Mr. Rutahindurwa -Advocate.

To start with, the applicant prayed to adopt the affidavit filed in support of the application and its annexure to form part of her submission and

submitted that, if all contents and documents are well examined they establish all the two grounds for this application.

The applicant also claimed that the counter affidavit of the respondent is fatally defective for it contains submissions and opinions contrary to Order XIX Rule 3(1) of the Civil Procedure Code, Cap 33 R.E. 2002. He invited this court to either strike out the said affidavit or expunge the defective paragraphs and cited the case of **Uganda versus Commissioner for Prisons Ex-Parte Matovu** (1966) E.A 514 to that effect.

The applicant stated further that, on the merits of this application, this court has powers to extend time as prayed provided that sufficient reasons are shown. She cited the case of **The Attorney General versus Twiga Paper Products Limited** (CAT) Civil Application No.108 of 2008 (unreported) which stipulated matters to take into account in deciding whether or not to grant extension of time; the same being (i) the length of the delay (ii) the reason of the delay (iii) the degree of prejudice to the respondent if the application is granted and (iv) possibly the chances of the appeal succeeding if the application is granted.

On the first two matters for consideration i.e. the length and reason for the delay, the applicant claimed that the impugned judgment was delivered on 08/04/2016 and she filed a notice of appeal in time. She successfully applied for leave and filed a civil appeal which was later struck out for being time barred on 02/04/2019. The applicant then got a copy on 08/04/2019 and consulted advocates. From 10/04/2019 to 16/04/2019 she was compiling the pleadings and finally filed the application on 18/04/2019.

The applicant divided the delay into two phases, first from the date of the impugned judgment to the date when the appeal was struck out. She claimed that this is a technical delay which deserves condonation.

The second delay which the applicant called actual delay, started on the day when the ruling of the Court of Appeal came out up to the date she filed the application. The applicant stated that it took her only 16 days to compile and file the present application and that she was not idle at all. She concluded that there are sufficient reasons for all periods of delay. She cited the case of **Philemon Mang'ehe t/a Bukine Traders versus Gesbo Hebron Bajuta**, CAT, Civil Application No.8 of 2016 (unreported) to that effect.

Regarding the third matter for consideration which is the degree of prejudice on the part of the respondent, the applicant submitted that as a matter of fact, it will be the applicant herself who stands to be prejudiced if this application will not be granted. She referred this court to her grounds of appeal attached to the affidavit she affirmed in support of this application. In support of her argument, she cited the case of **Principle Secretary, Ministry of Defence and National Service versus Devram Valambia** (1992) TLR 185, in which the court ruled that, the court has a duty to grant extension of time, if the matter at issue is the illegality of the decision being challenged.

On the last point for consideration, the applicant stated that, her affidavit contains a lot of evidence and grounds of the intended appeal and that, the same is not controverted at all and it stands the chance to succeed. She then prayed to be allowed to file her notice of intended appeal.

In his reply, the counsel for the respondent submitted that it is un-procedural to raise a preliminary objections during submissions. He stated further that, even if the affidavit is expunged, it will be the factual issues but the legal ones can still be challenged.

On the issue of delay, counsel submitted that the period of delay that is in controversy is the one starting from 09/04/2019 up to 07/05/2019. That the affidavit states that on 9th the applicant consulted two advocates who advised her to file an application for extension of time and she spent her time compiling the documents till 16/04/2019. However the court records show that the documents were filed on 07/05/2019 making the delay to be 21 days which remain un-accounted for. Although the applicant has tried to put the blame on the registry attendant, the claim remains baseless because if the applicant wanted to prove the assertions then she ought to have attached the affidavit of the said registry attendant.

Back to the issue of illegality, the counsel submitted that, the said illegality ought to be pointed out in the affidavit of the applicant and not raised during submissions. Failure to do so is as good as failure to prove illegality of the impugned decision.

He concluded by inviting this court, to hold that the applicant has miserably failed to advance sufficient reasons to warrant the grant of extension of time and so the application be dismissed with costs.

In her rejoinder, the applicant reiterated what she had stated earlier in the submission in chief that, the date of filing was tampered with to read 02/05/2019 instead of 18/04/2019 the actual date she filed the documents.

She argued further that the Rule 119(1) of the Court of Appeal Rules does not provide how or when the document is deemed to be filed but when the filing fees become payable. She claimed that the document is deemed to have been lodged on the date shown in the court's receiving stamp. For that she claimed that the actual delay is 16 days and not 21 as submitted by the respondent's counsel. She argued that there was also no need to have the affidavits of the advocates because that would not be material in the application.

On the issue of points showing irregularities, illegality and impropriety of the decision, she claimed that, the same are outlined in the annexure E to the affidavit and the same are forming part of the affidavit. She concluded that, the application has a bigger chance of succeeding, since she has shown sufficient cause, she then prayed that her application be allowed in its entirety with costs.

Before going to the merit of the application, there is a point of law raised by the applicant that, the counter affidavit contains a lot of evidence and grounds of the intended appeal. This point was raised by the applicant in the submission in chief filed by the applicant. It has been countered in the reply filed by the respondent, that raising this issue at this stage is un-procedural at it takes the respondent by surprise. In dealing with this issue, it is important to start by agreeing that, it is true that the applicant attempt to raise this point in the submissions, in the critical sense, is against the principle of disclosure, and it intended to take the respondent by surprise. However the same point being the point of law, cannot be disregarded, it must be dealt with on the ground that, the affidavit or counter affidavit are

evidence by themselves, they must really conform to what the law wants them to be, and thus those not drawn in the conformity of the law must suffer the legal consequences. Secondly, the respondent has been afforded an opportunity in the rejoinder to the reply submission, had she had anything material to save her affidavit, she would have said it. That therefore empowers me to deal with the point in the condition it has been raised. Having critically examined the contents of the whole counter affidavit, I entirely agree that, some of the paragraphs contains evidence and arguments. These paragraphs are paragraphs 5 and 7 which deserve to be expunged, as I hereby do, from the counter affidavit, as they are in contravention of the provision of Order XIX Rule 3 of the Civil Procedure Code [Cap 33 RE 2002] thereby remaining with paragraphs 1,2,3,4, and 6 of the counter affidavit.

After having dealt with the point of law, now let me go to the merit of the application as I hereby do. As earlier on pointed out, this application was filed under section 11(1) of the Appellate Jurisdiction Act (supra), which states that;

> *"Subject to subsection (2), the High Court,...may extend the time for giving notice of intention to appeal from the judgment of the High Court.....notwithstanding that the time for giving the notice or making the application has already expired."*

I find that the words of the above mentioned section are quite clear as to the grant of extension of time, that the use of the word "may" shows that it is in the discretion of the court to which an application is made whether to

grant extension or refuse it, as the case may be. It is the general principle of the law that all discretionary powers are to be exercised judiciously and with reasonable caution.

This court, after having scrutinized the arguments of both parties, in line with the provisions of the law under which this application was made, I find it important to have a look at the general principle governing the grant or refusal of extension of time. In so doing the court will be guided by the principle in the case of **Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No.2/2010(unreported) in which the principle for the grant of extension of time were stipulated, that is to say;

> *"**firstly** the applicant must account for the period of delay, **secondly** the delay should not be inordinate, **thirdly** he must show diligence and not apathy, negligence or sloppiness in prosecuting the action he intends to take, and **lastly** there must be sufficient reasons, such as the existence of a point of law of sufficient importance such as the illegality of the decision sought to be challenged."*

This means for the applicant to be entitled to the leave to do anything out of the prescribed time, he must first account for all days he delayed, he must also show that the said delay is not inordinate, in the sense that, it is not excessive. Further to that, he must also show that he has been diligently, without negligence or carelessness and or apathy in pursuing the action he

intends to take. He may also rely on the fact that the decision sought to be challenged has some apparent illegality.

The issue is whether the applicant has managed, to show the above stated criteria?

As regards the first principle that an applicant must account for all the period of the delay, I have gone through the affidavit and submission by the applicant. The applicant correctly divided the period delayed into two phases, one being from the period when the impugned judgment was delivered to the date when the appeal was struck out by the Court of Appeal. This delay was purely technical, as all that time the applicant was in court, so this period as a matter of law deserves to be condoned as submitted by the applicant and admitted by the counsel for the respondent.

The second phase she explained was that from the date she received a copy of the Court of Appeal ruling to the date she filed this application at hand. In this she has explained how she had to go and consult advocates on how she would go about the matter resulting into being advised to file an application for extension of time. However from the submissions, parties are at issue on the number of days the applicant delayed. While the applicant claims to have filed this application on 18/04/2019, making the delayed days to be 16, the respondent submits that the application was filed on 02/05/2019 making the delayed days to be 21 according to the respondent, but if arithmetically counted it is 30 days.

While the applicant has shown no base upon which she has to allege that she filed the application on 18/04/2019, the respondent has actually rely on

the application itself on the stamp showing the date on which it was received, that is on 02/05/2019. In countering that, the applicant complains that the date was tampered with, that is why the receiving date was corrected by the correction fluid.

In my considered opinion, as opposed to electronic or e-filing, where the rules provide that the document is deemed to be filed after it has been sent to the registrar or admitting officer in the proper and correct address or account, in manual filing of the document, the document is deemed to have been filed after the court fees in respect of that application or suit has been paid. The receipt shows that the same was paid for on 07/5/2019. That being the case while the applicant is complaining to have the receiving date tampered with, she has said nothing regarding the date of payment of the court fees.

That being the state of affairs, and considering the facts that even the signature of the receiving clerk was appended on 2nd day of May 2019 without being shown that it was tampered with, it makes the matter even worse if we take the date of filing to be the date the fees was paid. However it is understandable that probably the applicant failed to pay on time simply because the documents delayed in the admission process, the possibility which makes me think that, in the circumstance wisdom and justice requires that the applicant be given the benefit of doubt by being taken to have filed the application on 2nd May 2019 making the total days delayed to be 30 days.

In the case of **Hassan Bushiri v.Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 the requirement of accounting every day of delay was emphasized as follows;

> *"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".*

That being the position of the law, the applicant was supposed to account all 30 days delayed one after another. Now the issue is whether the applicant accounted for such a delay. Looking at the affidavit in support of the application and the submissions (submission in chief and the rejoinder) filed by the applicant, I find no reason given to account for the 30 days delayed.

Considering the second principle to consider, i.e whether the delay is not inordinate, it is my considered view that, by all standards the delay of 30 days unaccounted is inordinate. If not accounted, the applicant cannot be taken to be diligent, and there is no way she can escape from being seen as apathetic, negligent or sloppy in prosecuting the action she intends to take. That said, I find that, the delay is excessive and no good cause for such delay has been shown by the applicant to entitle her the relief sought in the application.

The last point to consider is the point of illegality as raised in the submissions by the applicant. It is the principle of law that, where the application for extension of time alleges illegality of the decision sought to be challenged, the court, if satisfied that there is such illegality, that constitutes sufficient reason, whether or not, the delayed days have been accounted for or not.

See the case of **TANESCO Versus Mafungo Leonard Majura and 15 Others** Civil Application No. 94 of 2016 (CAT-DSM) (Unreported) at page 10 the Court of Appeal of Tanzania elaborating on the issue of illegality as one of the grounds for an extension of time held;

> *"if the court feels that, there are other reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged then the time is to be extended."*

However the illegality so relied upon must be shown in the affidavit as one of the grounds for extension of time and the court must feel that there is such illegality. In this application the applicant deposed in page 10 and 11 of the affidavit that the points of illegality of the decision was shown in the grounds of appeal as contained in the memorandum of appeal annexture E. I have ventured to pass through the said memorandum of appeal, annexture E, but with all due respect, I have seen no any point of law constituting illegality, what I found are merely complaints based on facts which are not worthy to be called points of law to constitute illegality of the decision. That being the case, there is no any point of illegality so shown, either in the affidavit or the alleged intended memorandum of appeal. That said, and in view thereof, the application is therefore dismissed for want of sufficient cause and merits.

I give no order as to costs.

DATED at **MWANZA** this 15th day of May, 2020.

J.C.Tiganga

Judge

15/05/2020

Ruling delivered in open chambers, in the absence of the parties on line, but with the directives that they be notified of the results by the court clerk via their mobile phone numbers once they are found on line.

J.C.Tiganga

Judge

15/05/2020