IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

MISC. LAND APPLICATION NO. 93 OF 2020

(Arising from the Judgment and decree of the District Land and Housing Tribunal for Mwanza at Mwanza (Hon. Mayeye, C.) in Land Application No. 316 of 2019 dated 3rd July, 2020.)

ILEMELA MUNICIPAL COUNCIL ..... APPLICANT

VERSUS

ELIA MONGI ..... RESPONDENT

LUGANO NKISU JOSHU *(Administrator of Estate of late Ahmed Yessaya Mwakahabala)* **..... 2ND RESPONDENT**

CHARLES D. LONGO ..... 3RD RESPONDENT

JOSIAH MARWA WAMBURA ..... 4TH RESPONDENT

HAPPINESS JACKSON ITEMBE *(Administrator of Estate of late Robin Machage Maseke)* **..... 5TH RESPONDENT**

ALEXANDER FREDDY MCHAURU ..... 6TH RESPONDENT

DEOGRATIUS L. KABOGO ..... 7TH RESPONDENT

CONSOLATHA M. KOMBE *(Administrator of Estate of late Manase Ephraim Manasa)* **..... 8TH RESPONDENT**

OBEDI TIRUGUMILWA NKONGOKI ..... 9TH RESPONDENT

AMANI NASSORO LIBENANGA ..... 10TH RESPONDENT

JOHN THOMAS KATARAIHYA ..... 11TH RESPONDENT

WINTON JANUARY MWASA ..... 12TH RESPONDENT

RULING

24th February, & 15th June, 2021

ISMAIL, J.

This ruling is in respect of an application for an enlargement of time within which to institute an appeal to this Court. The impending appeal is against the judgement and decree of the District Land and Housing Tribunal for Mwanza at Mwanza (DLHT), in respect of Land Application No. 316 of 2019. At stake in the said proceedings was a prayer for a restraint order against surveying and repartitioning of the respondents' parcel of land. The contention by the respondents was that they were entitled to be allocated plots out of the said parcel of land, consistent with a Survey Plan No. 94304, issued on 16th November, 2017. The respondents prayed that, pursuant to the said allocation, they should be issued with certificates of titles in respect of the land they prayed that they be allocated.

The applicant opposed the prayers through a written statement of defence. However, at the instance of the counsel for the respondents, the DLHT held that the applicant's averments in the written statement of defence were actually an admission of wrong doing. Consequently, the DLHT entered a judgment on admission against the applicant. The judgment bred, *inter alia*, a declaration that the respondents are owners of

the disputed piece of land, and that the applicant should issue certificates of title to all of the respondents.

The application has been preferred under the provisions of 41 (2) of the Land Disputes Courts Act, Cap. 216 R.E. 2019, and it is supported by an affidavit sworn by Ludovick Joseph Ringia, the applicant's Solicitor. The affidavit sets out grounds on which the prayer for extension of time is based. The applicant's main ground for the prayer sought is that, having applied for certified copies of the ruling (sic) it was not aware that the said copies were ready for collection.

The application has been resisted by the respondents. Through a counter-affidavit sworn by Gaspar Nicodemus Mwanalyela, the respondents have denied that the applicant applied to be supplied with a copy of the judgment in that what is alleged to have been applied for was a copy of a non-existent ruling. The learned counsel stated that no follow up action was taken by the applicant's counsel after what was contended to be dumping of the letter.

At the hearing held through tele-conference the parties moved the Court to allow disposal of the application by way of written submissions.

This prayer was acceded to by the Court, consequent to which a schedule for filing the submissions was drawn and conformed to by the parties.

Getting us underway was Mr. Ludovick Ringia, learned solicitor for the applicant. In what the counsel considers as an act of diligence, the applicant submitted a letter requesting to be furnished with a copy of the judgment was submitted timely, though the same was not furnished until 5th October, 2020. He argued that upon being supplied with copies of the said decision, the applicant lodged the instant application. Mr. Ringia further argued that, since Order XXXIX Rule 1 of the Civil Procedure Code, Cap. 33 R.E. 2019 requires that appeals be accompanied by copies of judgement and decree, need for awaiting the said copies was quite inescapable. He further argued that, in terms of section 19 (2) of the Law of Limitation Act, Cap. 89 R.E. 2019, days spent on obtaining a copy of the decision ought to be excluded in computing time for appealing. It was Mr. Ringia's contention that, since the copies of the decision were requested on 3rd July, 2020, then the applicant acted diligently. The counsel buttressed his contention by citing the decision of the Court of Appeal in ***Transcontinental Forwarders Ltd v. Tanganyika Motors Ltd*** [1997] TLR 328, which was quoted with approval in ***Thobias Andrew & Another***

v. Jacob Bushiri, CAT-Civil Application No. 442/08/2017. In the former it was held:

> *"... Reminding the Registry after applying for a copy of the proceedings etc and a copy of the request to the other party may indeed be the practical and realistic thing to do, but is not a requirement of the law. Once Rule 83 [of the Court of Appeal Rules, 1979] (now Rule 90 of the Rules) is complied with the intending applicant is home and dry."*

The applicant's counsel argued that it was not the applicant's duty to make a follow-up on the copies after the same had been requested. Mr. Ringia contended, as well, that the fact that the decree - a vital document in the institution of the appeal – was certified on 28th September, 2020, implies that this application was yet to run out of time, thereby making the delay merely a technical one which would need mere certification by the Court.

The applicant's counsel introduced a new dimension which touches on illegality. This touched on the issue of jurisdiction and propriety of the judgment on admission. With respect to jurisdiction, the Counsel's contention is that the DLHT did not have pecuniary jurisdiction to handle the dispute in respect of the subject matter whose value is TZS.

2,100,000,000/-. This sum is way above the pecuniary cap of TZS. 300,000,000/- set by the law.

On the propriety of the judgment, Mr. Ringia's contention is that there was no admission by the applicant as to warrant a judgment on admission. He argued, in the alternative, that even if there was an admission in one of the averments, such admission would not extend to the rest of the written statement of defence. The counsel argued that the established position is that illegality constitutes a ground for extension of time. In fortifying this position, the learned counsel cited a number of decisions. These are ***Principal Secretary Ministry of Defence and national Service v. Devram Valambhia*** [1992] TLR 182; ***Lyamuya Construction Company Limited v. Board of Trustees of YWCA***, CAT-Civil Application No. 2 of 2010; ***Hamisi Mohamed (As Administrator of the estate of the late Risasi Ngawe) v. Mtumwa Moshi (As Administrator of the estate of the late Moshi Abdallah)***, CAT-Civil Application No. 407/17 of 2019; and ***Ilemela Municipal Council v. Ngaiza Francis Byengaro***, HC-Misc. Land Application No. 216 of 2019 (all unreported). The applicant prayed that the application be granted as prayed.

The respondents' rebuttal was swift and stout. While praying to adopt their counter affidavit, Mr. Mwanalyela, learned counsel, maintained that the affidavit constituting reasons for extension of time are illusionary and demonstrating serious lack of diligence, adding that no sufficient reasons had been demonstrated by the applicant. The counsel argued that the very act of applying copies of the decree and drawn order, instead of a judgment and a decree was a testimony of laxity and lack of diligence. He held the view that this is not a sufficient cause for extension of time. On relying on section 19 (2) of Cap. 89, the learned counsel firmly argued that the instant application is an afterthought and abuse of the process of the Court. Mr. Mwanalyela argued that if the applicant was still within time in filing the appeal, but chose to file the instant application, then this is a clear failure to exercise due diligence.

On the application of the reasoning in ***Transcontinental Forwarders Ltd*** (supra), the learned counsel argued that the same is distinguishable on two grounds. One, that this would be the case if what the applicant applied were the documents available on record. Two, that the decision touches on the Court of Appeal Rules which clearly prescribe that such is not a requirement. He maintained that since the request was for ruling and drawn order, instead of judgment on admission, then the

DLHT could not supply what was not part of the record. He argued that this is lack of diligence which should not be tolerated.

Submitting on jurisdiction, Mr. Mwanalyela contended that the question of jurisdiction was raised through a notice of preliminary objection and that after a thorough evaluation, the said objection was abandoned. The learned counsel further argued that in determining jurisdiction, it is the substantive claims that count and not general damages. He argued that this is consistent with the reasoning in ***Tanzania-China Friendship Textile Co. Ltd v. Our Lady of Usambara Sisters*** [2006] TLR 70; ***Rev. Christopher Mtikila v. Yusuf Mehboob Manji & 9 Others***, HC-Civil Case No. 80 of 2011; and ***Tanzania Breweries v. Anthony Nyingi***, CAT-Civil Appeal No. 119 of 2014 (both unreported). The respondents' counsel contended that determination of jurisdiction ought to be based on actual value and not estimated value. It was Mr. Mwanalyela's view that the applicant's counsel was flawed since the objection on pecuniary jurisdiction was based on a cumulative value of 14 plots, instead of computing value for each individual plot.

With respect to judgment on admission, the counsel's argument is that judgment on admission should not be mistaken with denial of the right to be heard which right was duly accorded to the applicant, when the

DLHT decided that judgment be entered on the basis of the applicant's admission. He described the circumstances of the case as fitting in granting the judgment on the applicant's admission, where its written statement of defence was based on general or evasive denials. The counsel cited the case ***Fikirini Issa Kocho v. Computer Logix & Others***, HC-Civil Case No. 151 of 2012 (unreported), in which it was held:

> *"It is insufficient for the defendant to simply say "puts the plaintiff to proof of several allegations in the plaint."*

In this case, the counsel contended, the applicant's denial was not specific, touching every material allegation. As such, the denial fell short of the requirements set out in Order VIII Rule 4 of the CPC.

The respondents held the view that a case had not been made out for the grant of extension of time. The counsel prayed that the application be dismissed with costs.

Having dispassionately reviewed the rival submissions, the pertinent question to be resolved is whether the same has demonstrated any sufficient cause for grant of the application.

Both counsel are unanimous that an application for extension of time can only be granted upon the Court's satisfaction that the applicant thereof

has presented a credible case that warrants grant of the extension, and that, in so doing, he has acted in an equitable manner (See: ***Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others***, Sup. Ct. Application 16 of 2014).

In the subsequent decision, the Supreme Court of Kenya laid down key principles that should guide a court when it sits to consider an application for extension of time. In the case of ***Aviation & Allied Workers Union of Kenya v. Kenya Airways Ltd, Minister for Transport, Minister for Labour & Human Resource Development, Attorney General***, Application No. 50 of 2014, it was lucidly held as follows:

> *"... We derive the following as the underlying principles that a court should consider in exercise of such discretion"*
>
> 1. *extension of time is not a right of a party; it is an equitable remedy that is only available to a deserving party at the discretion of the court;*
> 2. *a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;*
> 3. *whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;*

4. *where there is [good] reason for the delay, the delay should be explained to the satisfaction of the Court;*
5. *whether there will be any prejudice suffered by the respondents if extension is granted;*
6. *whether the application has been brought without undue delay; and*
7. *whether in certain cases, like election petitions, the public interest should be a consideration for extension."*

The holding in the just cited decision substantially mirrors the position accentuated by the Court of Appeal of Tanzania in ***Lyamuya Construction Company Ltd*** (supra), in which 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."

It is worth of a note that, what constitutes sufficient cause has to be determined by making reference to all circumstances of a particular case. This is in line with what was held in ***Regional Manager, Tanroads***

Kagera v. Ruaha Concrete Company Limited, CAT-Civil Application No. 95 of 2007 (unreported).

Leafing through the parties' depositions and submissions the issue is whether conditions set out in the cited cases prevail in this case.

Given its decisive importance, I will start with illegality. The trite position, as acknowledged by both counsel, is that, where illegality exists and pleaded as a ground, the same may constitute the basis for extension of time. This principle was first propounded in ***Permanent Secretary Ministry of Defence & National Service v. D.P. Valambhia*** (supra). Subsequent decisions, including those cited by the counsel, have picked up from there. In ***Citibank (Tanzania) Limited v. T.C.C.L. & Others***, CAT-Civil Application No. 97 of 2003 (unreported), the superior Bench held that ***"a claim of illegality or otherwise of the challenged decision or order or in the proceedings leading to the decision"*** constitutes sufficient cause for extension of time.

The most resounding position in this respect was accentuated by the Court of Appeal in ***Lyamuya Construction*** (supra), wherein the following remark was made:

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

See also: ***Moto Matiko Mabanga v. Ophir Energy PLC & 2 Others***, CAT-Civil Application No. 463/01 of 2017 (unreported).

So important is illegality, that when it is successfully pleaded as a ground, it cancels out the time of delay. In ***Peter Mabimbi v. The Minister for Labour and Youths Development & 2 Others***, CAT-Civil Application No. 88/08 of 2017 (unreported), an action taken after a lapse of 13 years and 8 months was allowed on the ground of an illegality that allegedly marred the impugned proceedings.

As stated earlier on, the illegality imputed by the applicant resides in the question of jurisdiction and the manner in which the judgment was entered against the applicant. The contention by the applicant is that the applicant's written statement of defence did not contain any admission.

While the veracity of the applicant's contention is a subject for discussion by a court sitting on appeal, the narrow issue that should be determined at this point is whether these alleged acts constitute an illegality and, if so, whether they (illegalities) bear any sufficient importance. In my unflustered view, the answer to this question is in the affirmative. Issues pertaining to pecuniary jurisdiction and the computation of the value of the subject matter; and propriety or otherwise of the judgment on admission are issues which bear sufficient importance in the mould envisioned in the ***Lyamuya Construction Ltd*** (supra). In my considered view, these are not issues which would be discovered and ascertained through a long drawn argument by the parties.

I, therefore, hold that the raised incidents of illegality meet the requisite threshold for consideration as the basis for enlargement of time.

Consequently, on this ground alone, I hold that the applicant has passed the legal threshold requisite for extension of time, and, accordingly, I grant the application. Costs to be in the cause.

It is so ordered.

DATED at **MWANZA** this 15th day of June, 2021.

M.K. ISMAIL

JUDGE

Date: 15/06/2021

Coram: Hon. M. K. Ismail, J

Applicant: Absent

Respondent: Absent

B/C: P. Alphonce

Court:

Ruling delivered in chamber, in the absence of both parties this 15th day of June, 2021.

M. K. Ismail

JUDGE

At Mwanza

15th June, 2021