

TANZANIA / JUDGMENT

elias shamte another vs patrick tairo

2022 tzhclandd 840 26 august 2022

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM MISC. LAND APPLICATION NO.388 OF 2022 (Arising from the decision of Kinondoni District Land and Housing Tribunal in Misc. Application No. 1208 of 2021) ELIAS SHAMTE..... 1st APPLICANT JOAQIM NDIALE..... 2nd APPLICANT VERSUS PATRICK TAIRO RESPONDENT

RULING

Date of last Order: 24.08.2022 Date of Ruling: 26.08.2022 A.Z.MGEYEKWA, J This ruling is in respect of an application for an extension of time to lodge a Notice of Appeal out of time against the decision of this court in Land Case No. 147 of 2009. The application, preferred under the provisions of section 14 of the Law of Limitation Act, Cap. 89 [R.E 2019], The application is supported by an affidavit deposed by Elias Shamte and Joaqim Ndiale, the applicants. The applicant has set out the grounds on which an extension of time is sought. The respondent has stoutly opposed the application by filing a counter-affidavit deposed by Patrick Tairo, the respondent. When the matter was called for hearing on 4th November, 2021 the hearing was conducted through video conferencing whereas the applicants enlisted the legal service of Mr. Joseph Mbogela, learned counsel and the respondent enjoyed the legal service of Mr. Gasper Chuwa, learned counsel. In his submission, in support of the application, Mr. Mbogela urged this court to fully adopt the applicants' affidavit and form part of his submission. Mr. Mbogela submitted that their application is pegged on the sole ground of illegality. He stated that the tribunal's decision did not consider the fact that the Ward Tribunal judgment was in form of mediation hence it was not executable. Mr. Mbogela argued that there was no any prayer made by the parties instead the discussion was based on the construction of a wall that was constructed before the respondent lodged the case at the trial tribunal, the learned counsel for the applicant went on to submit that the respondent applied for execution to demolish the wall which was not a matter in dispute, 2 however, the District Land and Housing Tribunal ordered execution without satisfying itself whether the Ward Tribunal judgment was executable. The learned counsel for the applicant contended that it was improper for the appellate tribunal to order execution and its order was fatal. He stated that the applicant had adduced sufficient cause for an extension of time. To buttress his contention he cited the cases of Permanent Secretary Ministry of Defence & National Service v D.P. Valambhia [1992] TLR 387, Mary Rwabizi t/a Amuga Enterprises v National

Microfinance PLC, Civil Application No. 378/01 of 2019, and Andrew Athumani Ntandu & Another v Dustan Peter Rima (as an administrator of the estate of the late Peter Joseph Rima), Civil Application No. 551/01/2019. The learned counsel for the applicants stated that the 2nd applicant was not a party to the previous case but he was affected by the order of execution. In conclusion, Mr. Mbogela urged this court to grant the applicant's application with costs. The learned counsel for the respondent prayed for this court to adopt the respondent's counter-affidavit and for part of his submission. Mr. Chuwa's confutation was strenuous. He came out forcefully and defended both trial tribunals' decisions as sound and reasoned. The learned counsel for the 3 respondent contended that the applicant was aware that there was an execution but he was idle for 43 days doing nothing. He valiantly contended that the applicants did not adduce good cause for an extension of time and the counsel did not account for the days of delay. He submitted that this court has discretionary power to grant the application but upon good cause advanced by the applicants. He claimed that the fence which was demolished belonged to the 1st applicant and he was a party to the application but he decided to abscond. Supporting his submission, Mr. Chuwa referred this court to paragraph 4 of the applicant's affidavit. The learned counsel for the respondent continued to argue that in the whole affidavit, the applicants have not stated how the 2nd applicant was affected thus, he cannot apply for revision. He went on to argue that the Ward Tribunal proceedings show that the public way was shown in the master plan but the same was blocked, hence, the tribunal ordered that no one is allowed to block or close the public way. Mr. Chuwa submitted that there is no any illegality and claimed that the applicant cannot challenge illegality by way of revision. On the strength of the above submission, the learned counsel for the respondent stressed that no sufficient cause has been advanced and hence 4 the applicants' Application for extension of time is without merit and the same be dismissed with costs. In his rejoinder, Mr. Mbogela reiterated his submission in chief. Stressing that the 2nd respondent was not a party to the previous application but was affected by the decision of the District Land and Housing Tribunal. Mr. Mbogela submitted that the ground of illegality alone can move the court to grant the applicants' application. In conclusion, the learned counsel for the applicants urged this court to grant the applicant application to file a revision out of time. Having carefully considered the submissions made by the learned counsels in their oral submission and examined the affidavit and counter-affidavit, the issue for our determination is whether the application is meritorious. The position of the law is settled and clear that an application for an extension of time is entirely the discretion of the Court. But, that discretion is judicial and so it must be exercised according to the rules of reason and justice as was observed in the case of Mbogo and Another v Shah [1968] EALR 93. 5 Additionally, the Court will exercise its discretion in favour of an applicant only upon showing good cause for the delay. The term "good cause" having not been defined by the Rules, cannot be laid by any hard and fast rules but is dependent upon the facts obtained in each particular case. This stance has been taken by the Court of Appeal in a number of its decision, in the cases of Regional Manager, TANROADS Kagera v Ruaha Concrete Company Ltd, Civil Application No 96 of 2007, Tanga Cement Company Ltd v Jumanne D. Massanga and another, Civil Application No. 6 of 2001, Vodacom Foundation v Commissioner General (TRA), Civil Application No. 107/20 of 2017 (all unreported). To mention a few. I have keenly followed the application and the grounds deposed in the supporting applicants' affidavits and the respondent's

counter-affidavit, I have shown the path navigated by the applicant and the backing he has encountered in trying to reverse the decision of this court. In his submission, the applicant's Advocate relied solely on the ground of illegality. The applicant's counsel alleges at the Ward Tribunal decision was un- executable. On his side, the learned counsel for the respondent opposed the application. He valiantly argued that the applicant was required to account for each day of delay and not otherwise. Mr. Chuwas also argued that there was no any illegality. 6 I agree that the applicant and his Advocate have not accounted for the days of delay. However, it has been held in times without number that where illegality exists and is pleaded as a ground the same as well constitute a good cause for an extension of time. This principle was accentuated in the Permanent Secretary Ministry of Defence & National Service v D.P. Valambhia [1992] TLR 185, to be followed by a celebrated decision of Lyamuya Construction Company Limited and Citibank (Tanzania) Limited v T.C.C.L. & Others, Civil Application No. 97 of 2003 (unreported) and Ngao Godwin Losero v Julius Mwarabu, Civil Application No. 10 of 2015 (unreported). In Principal Secretary, Ministry of Defence and National Service v Devram Valambhia (supra) the Court of Appeal of Tanzania on page 89 held 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 straight." [Emphasis added]. Applying the above authority in the matter at hand, it is clear that the applicants and their advocate have stated that the ward Tribunal judgment 7 was in a form of mediation, the same was not executable. In my view, I find that the raised illegality is a sufficient cause for an extension of time to enable the upper court to rectify the raised anomaly. Therefore the said illegality cannot be brushed aside. See the case of Badru Issa Badru v Omary Kilendu, Civil Application No. 97/17 of 2020 (unreported), the Court of Appeal of Tanzania held that:- ".../ am of the considered view that even though there is a considerable delay in the application, pertinent issues have been raised. First,, there is an allegation of illegality, irregularities, and impropriety... which cannot be brushed aside." The reasoning in the above excerpt followed in the footsteps of the decision in the case of Praygod Mbagu v The Government of Kenya, Criminal Investigation Department and The Hon. Attorney General of Tanzania, Civil Reference No. 04 of 2019. It is clear that where illegality exists and is pleaded as a ground, the same as well constitute a good cause for an extension of time. In sum, based on the foregoing analysis I am satisfied that the above-ground of illegality is evident that the present application has merit. Therefore, I 8 proceed to grant the applicants' application to lodge an application for revision before this court within twenty-one days from today. Order accordingly. Dated at Dar es Salaam this date 26th August, 2022. A.Z.MGEYEKWA JUDGE 26.08.2022 Ruling delivered on 26th August, 2022 via audio teleconference whereby Mr. Mbogela, learned counsel for the applicant also holding brief for Mr. Chuwa, learned counsel for the respondent was remotely present. A A.Z.MGEYEKWA JUDGE 26.08.2022 9

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