

TANZANIA / JUDGMENT

Rita Alex Maro vs Emmanuel Alex Maro Others Civil Application No

COURT
TANZLIIDECIDED
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IN THE COURT OF APPEAL OF TANZANIA AT ARUSHA CIVIL APPLICATION NO. 382/02 OF 2023
MARY KASHURA..... APPLICANT VERSUS SHOSE
MARTIN..... 1st RESPONDENT ZATTUNI
HAMADI..... 2ND RESPONDENT WILMINA BENJAMINI
LYIMO..... 3rd RESPONDENT (Application for extension of time to file notice
of appeal against Judgment and Decree of the Resident Magistrate Court of Arusha at Arusha)
(Mahumbuga, SRM. Ext. Jurist dated the 17th November, 20 in Land Appeal Number 24 of 2020

RULING

6th & 23rd August, 2024 RUMANYIKA. J.A.: Mary Kashura, "the applicant" herein seeks extension of time to file notice of appeal against the judgment and decree of the Resident Magistrate's Court of Arusha (Extended Jurisdiction) ("the first appellate court") which was issued in Land Appeal No. 24 of 2020. It is by notice of motion under rule 45A (1) (a) of the Tanzania Court of Appeal Rules, 2009 ("the Rules"), after it was refused by Chitanda, PRM (Extended i Jurisdiction) on 10th February, 2023. The application is supported by affidavits of Alfred Joseph Kapongo, Neema Mtayangulwa, Henry Simon Katunzi, for the original motion. Her advocate Gwakisa Kakusulo Sambo sworn an affidavit supporting the amended notice of motion. The factual brief background to this matter goes as follows; The applicant successfully sued the respondents vide Application No. 43 of 2011 in the District Land and Housing Tribunal for Arusha, at Arusha ("the DLHT") as alluded to previously. She was declared the lawful owner of the disputed land. Aggrieved, the respondents appealed to the High Court but the appeal bore no fruit. In exercise of the power of attorney donated by the applicant, to justify the delay, Alfred Joseph Kapongo asserted that, as the applicant had appeared late on the judgment day, on 26th November, 2021, she requested to be supplied with copy of the proceedings, repeatedly but vainly. Finally, on 21st January, 2022, advocate Neema Mtayangulwa notified her to have obtained the said documents. However, it took the advocate quite some time to prepare and advise the applicant. On 27th January, 2022, the advocate approached the applicant on the way forward, however, the former had do direct answer since she had to communicate with the Donor of the powers first. The applicant was not reachable until on 29th January, 2022. Due to such a lapse of time, therefore, she had to file the original application. Chitanda, PRM (Extended Jurisdiction) dismissed it for

want of merits on 10th February, 2023. Undaunted, the applicant filed the instant application on 24th February, 2023, just a day before the deadline. It is noteworthy that, for this application, the 2nd respondent did not enter appearance, despite being served by way of publication through Mwananchi and The Citizen Local Newspapers, pursuant to the Court order dated 20/02/2024. The 1st and 3rd respondents have resisted the application by filing a joint affidavit in reply. At the scheduled hearing of the application, Mr. Duncan Oola, learned counsel appeared for the 1st and 3rd respondents. He also held the briefs for Mr. Gwakisa Sambo, learned counsel, for the applicant, instructed to proceed and he readily conceded to the application. The grounds for extension of time in the amended notice of motion, albeit briefly read: one; that, the DLHT was improperly composed, two; that the assessor's opinion was not read out to the parties, three; that, the DLHT acted without jurisdiction, four; that the DLHT ignored the precedent in reaching at its decision, Five; that DLHT misinterpreted section 5 (1) (a) of (b) and 47 (1) of the Stamp Duty Act, six, the two courts below improperly invoked section 55 of the Law of Contract, and seven, that, the applicant was not notified to collect copy of the DLHT's judgment timely. Being prompted by the Court, on whether the applicant had accounted for each day of the delay, Mr. Oola contended that, the delay was there, and it may have been contributed by the applicant who held her attorney Alfred Joseph Kapongo waiting for further direction. More importantly, Mr. Oola said, there is illegality of the impugned decision, namely, the assessors' opinion not being read to the parties. As regards the applicant's complaint on the DLHT's chairman invoking section 55 of the Law of Contract, Mr. Oola stated that, the complaint was a ground of appeal and not an illegality of the decision. Upon hearing the arguments of Mr. Oola and considering the record, the following question therefore, is whether the applicant has shown any sufficient cause for granting of extension of time. Besides Mr. Oola's concession, I had to go through the 1st and 3rd applicant's written submission in support of the amended notice of motion. Expounding on a point that illegality of a decision constitutes a sufficient cause, Mr. Oola relied on our decision in *The Principal Secretary Ministry of Defence and National Services v. Devram Valambhia* [1991] 387. For the alleged illegality one, Mr. Oola contended that, the DLHT was clothed without jurisdiction which anomaly, the DLHT grossed over. That it should have annulled the proceedings, the resultant judgment and decree. About the second complaint of illegality, the learned counsel asserted that, the failure of DLHT's chairman to cause the assessors' opinion to be read to the parties, contravened section 23 (i) and (ii) of the Land Disputes Court Act which vitiated the proceedings. To concretize his stance, Mr. Oola cited, among others, our decisions in *Tubone Mwarnbeta v. Mbeya City Council* (Civil Appeal No. 287 of 2017)

[2018] TZCA 392 (5 December 2018: TanzLII) and *Eliumba Ezekiel v. John Jaja* (Civil Appeal No. 30 of 2020) [2022] TZCA 232 (5 May 2022: TanzLII). By that omission, Mr. Oola contended, not only the parties were not afforded a hearing, but also, it is as good as the presiding Chairperson sat without assessors, which is another fatal ailment. As regards the complaint on of the case succession between the two chairmen without assigning reasons therefor, Mr. Oola also regarded it to be an illegality. That, it is likely to erode transparency in the quasi-judicial proceedings which may lead to chaos in the administration of justice. To support his point, he cited the Court's decision in *M/s Georges Centre Ltd v. The*

Attorney General & Another (Civil Appeal No. 29 of 2016) [2016] TZCA 629 (28 July 2016: TanzLII) where we followed our previous decision in Priscus Kimaro v. R (Civil Appeal No. 301 of 2013) [2015] TZCA 13 (27 February 2015: TanzLII) testing Regulation 19 (2) of the Land Disputes Courts (The Land and Housing Tribunal) Regulations, 2003 GN No. 174 of 2003. The other alleged illegality is the unexplained changing of the assessors unceremoniously in the proceeding. Mr. Oola contended that, at times, the chairperson sat with a different set of assessors contrary to section 23 (1) and (2) of the Act and sometimes sitting with only alone assessor. He added that, the omission vitiated the proceedings since the DLHT was not properly constituted, thus, having no jurisdiction. About non-compliance of section 47 (1) of the Stamp Duty Act, which is ground five, Mr. Oola contended that, the reliance by the DLHT 6 on a sale agreement for which no stamp duty was paid, constituted an illegality of the resultant decision. In conclusion, the learned counsel contended that, the illegalities pointed out are sufficient for the granting of extension of time. He therefore beseeched me to grant the application. From the foregoing, the issue for my consideration is whether the points above constituted illegalities hence, sufficient cause for the granting of extension of time. In resolving that question, I am guided by the Court's decision in Ngao Godwin Losero v. Julius Mwarabu (Civil Application No. 10 of 2015) [2016] TZCA 2099 (18 October 2016: TanzLII). I want to stress, at this juncture that, granting or refusing to grant an extension of time depends on the Court's discretion. It is more so where it is common ground that, what constitutes sufficient cause is objective. I note that, on a number of occasions, including in The Principal Secretary Ministry of Defence (Supra) we have stated that, an illegality of a decision alone constitutes a sufficient cause for the granting of extension of time. Without running the risks of jumping into merits of the intended appeal, it is trite that, any alleged illegality must be such one whose proof may not need long drawn arguments. It has to be apparent on the face of the record. See for instance, Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010 (unreported). With regard to grounds one, two and three on the issues of the assessors' opinion not being read the parties or improper constitution of the DLHT, they need long drawn arguments to be established. That is not a characteristic of a point of illegality of a decision. Moreover, in the wake of the Overriding Objective Principle, the alleged anomaly has to be resolved by the prejudice test. In this case, the complaint is more of a ground of appeal than being a point of illegality. Nor does it suggest the DLHT to assumed the jurisdiction, as alleged. For the 5th point, the DLHT may have arrived at the impugned decision per incurium or by bad faith, violating the doctrine of precedent. However in my view, that one does not constitute an illegality of the decision in question to invoke the rule in The Principal Secretary Ministry of Defence (supra). Equally, the 6th-9th alleged points of illegality are not worth it. It is so because, the invocation of sections 5 (1) (a) and (b) 47 (1) of Stamp Duty Act or section 55 of the Law of Contract may have resulted into an erroneous decision, which is may not necessarily be an illegality. I wish to stress that, at times, an error in a decision and its illegality are border lined by such a thin thread, so easily to be mistaken for each other. However, the potential of an

illegality is more fatal than is the case where there is mere decisional error. Without prejudice to the foregoing, there is yet another requirement that, whoever applies for extension of time has to account for each day of the delay, however slight the delay may be. See - Bushiri Hassan v. Latifa Lukio Mashayo, Civil Application No. 03 of 2007. That; "...Delay of even a single day, has to be accounted for, otherwise there would be no point of having rules prescribing period within which certain steps have to be taken" (Emphasis added) It is very unfortunate, in the present application that, the applicant did not discharge that obligation. Moreover, the matter may have had such a checkered long history, as alleged. However, it is settled law that, however long is the narrative of the matter, it does not constitute a sufficient cause for the granting of extension of time. I wish to stress that, whatever had happened in the two courts below causing a technical, still the applicant herein has failed to account for each day of about ten days' delay between 21-31/01/2022. At paragraph 13-18 of the affidavit, while exercising special powers of attorney, Alfred Joseph Kyango averred that, during that period he had to communicate with the applicant first before they could act. In my view this was improper. Nor was that delay technical in the circumstances. I am aware that, under rule 30(1) and (2) of the Rules, appearance in this Court is by the parties in person or by advocates, and where one resides outside the country, by an authorized attorney. For this application and regarding the averments above, therefore, I feel indebted to hold that, once a party has donated the power, special or general for any judicial proceedings, he may not be "home and dry". However, during that period of assignment, any delay allegedly caused by the assignor is inexcusable. 10 In conclusion, I am satisfied that, no good cause has been shown for the granting of extension of time. Consequently, I hereby dismiss the application with costs for being unmerited. It is so ordered. DATED at ARUSHA this 22nd day of August, 2024. S. M. RUMANYIKA JUSTICE OF APPEAL The Ruling delivered this 23rd day of August, 2024 in the presence Ms. Beatrice Raphael Kivuyo, holding brief for Mr. Gwakisa Sambo, learned advocate for the applicant and Jeff George Sospeter, holding brief for Duncan Joel Oola, learned advocate for the 1st and 3rd respondents is hereby certified as a true copy of the original. li

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