

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 336/17 OF 2021

CHAUSIKU KITWANA MABOGA.....APPLICANT

VERSUS

VICTOR BENARD (Administrator of the

Estate of HAMISI KOWELO).....RESPONDENT

**(Application for Extension of Time against the Judgment of the High Court of
Tanzania (Land Division) at Dar es Salaam)**

(Mgetta, J.)

dated the 29th day of September, 2014

in

Land Appeal No. 28 of 2013

.....

RULING

15th February & 3rd March, 2023

RUMANYIKA, JA.:

This is an application for extension of time made under rules 10 and 48 of Tanzania Court of Appeal Rules, 2009 (the Rules). Chausiku Kitwana Maboga, the applicant is seeking the indulgence of the Court to enlarge time for her to file an application for revision against the decision of the High Court in Land Appeal No. 28 of 2013 dated 29/09/ 2014. The

application is supported by affidavits sworn by Chausiku Kitwana Maboga and Adam John. Victor Bernard, the respondent opposed the application by filing an affidavit in reply.

The background of the matter is that, the applicant claimed ownership over a piece of surveyed land located at Vikindu, Mkuranga District in Coast Region (the disputed land) where she carried out some agricultural activities. Before the local Ward Tribunal, she won the battle. Aggrieved by that decision, the respondent successfully appealed to the District Land and Housing Tribunal at Kibaha (the DLHT) but was advised to institute a suit against the applicant. Later, he successfully filed Application No. 9 of 2009 thereat. However, it is the applicant's contention that she was never served therefore, the resultant *ex parte* decision and orders were ineffectual. She further averred that, she knew about the impugned judgment in May, 2012 after the respondent had taken over the disputed land and uprooted the existing crops. Then, she reported the matter to the police and learnt that, the respondent was in execution of judgment of 2020.

It is also on record that, on 06/06/2012 the applicant filed an application to set aside the said *ex parte* judgment before the DLHT.

However, his application was dismissed on 05/03/2013. Aggrieved by it, she appealed to the High Court Land Division vide Land Appeal No. 28 of 2013 which was dismissed for being time-barred. Undaunted, she applied for an extension of time to file appeal but it was dismissed on 30/03/2017. It is the applicant's averments further that, upon perusing the record, she noticed two irregularities that is; first, the summons intended to be served on her were directed to a different village and; second, the location of the suit property was misstated, which irregularities were subject to revision, but time-barred, hence the present application.

The applicant has pegged this application on four grounds which are reproduced as follows;

- 1. There is an illegality on the face of the records in determination of Land Appeal No. 28 of 2013, where the High Court Judge dismissed the appeal without giving an opportunity to the parties to address the issues raised by the Court.*
- 2. That there is an illegality on the processes of serving the summons in respect of Application No. 9 of 2009 at the District Land and Housing Tribunal for Mkuranga at Mkuranga to the applicant .*
- 3. That there is an illegality on the publication of summons in respect of the name of the applicant, on account that the trial Tribunal issued the summons on aspect of the name of the applicant, the summons*

published was written Chausiku Boga while the real name of the Applicant is Chausiku Kitwana Maboga.

- 4. That there is an illegality on the location of the disputed premises on which the respondent is claiming, it was alleged that the suit land is located at Vianzi village, Mfuru Mwambao- Mkuranga, Box Mkuranga while in reality the suit land is located at Magodani Village, Vikindu ward-Mkuranga District and the proceedings of the probate cause No. 360 of 2015 the respondent stated that the deceased left the farm which is located at Vianzi village, Mfuru Mwambao-Mkuranga.*

At the hearing of the application, Messrs. Innocent Mwelelwa and Sylvester Aligawesa learned counsel appeared for the applicant and the respondent respectively.

In support of the application, after adopting the contents of the supporting affidavit Mr. Mwelelwa contended that, the denial of the parties' right to be heard manifested itself in the issue of time-bar raised by Judge *suo motu*, the unjustified *ex parte* judgment and misstatement of the ward where the disputed land was situate. He contended further that, the three illegalities constituted good cause for the grant of extension of time.

Responding to the first ground that, the learned Judge denied the applicant a right to be heard, Mr. Eligawesa averred that, the Judge had

inherent powers derived from section 95 of the Civil Procedure Code Cap 33 R.E.2019 not to hear them on the issue in due cause raised by the court. As regards the second ground of the application he argued that, efforts were made twice to serve her but the applicant avoided service then, was served by publication through Tanzania Daima Local News Paper of 13/05/2009. He filed written statement of defence but defaulted appearance hence the *ex parte* judgment complained of.

On the third grounds about wrong naming of the applicant leading to failure of service, Mr. Aligawesa averred that, all along the former was referred to as Chausiku Boga and Chausiku Maboga interchangeably.

About the fourth ground, Mr. Aligawesa averred that, the applicant was dully served and appeared. Therefore, the issue of use of a wrong contact address leading to failure of service on her cannot arise. To round up, he urged me to regard the alleged illegalities as an afterthought and dismiss the application.

Having read the record and considered the arguments of both counsel, the issue is whether the applicant has met the necessary conditions to warrant the grant of extension of time.

A prerequisite condition for the grant of the order of extension of time is set forth under rule 10 of the Rules. It is good cause to be shown by the applicant. However, what amounts to good cause is case to case- based. We have pronounced so in a number of cases including **Sumry High Class ltd & Another v. Musa Shaibu Msangi**, Civil Application No. 403/16 of 2018 (unreported).

In the matter at hand, the applicant has raised four points on illegality one of which being a denial of right to be heard. In law failure to afford parties a right to be heard constitutes good cause for the grant of extension of time. See- **VIP Engineering and Marketing Limited and 2 Others v. Citibank Tanzania Limited**, Consolidated Civil Reference Nos. 6, 7 and 8 of 2006 (unreported).

In the matter at hand, it is not disputed, just as the record speaks loudly that, the issue of time-bar came out of the learned Judge's discovery when he was composing the decision, as it is appearing at pages 2, 3 and 4 of the judgment. That is to say that, no party was afforded a chance to address the court about the issue of time bar and it is on that basis only that he dismissed the appeal.

The illegality of the impugned decision as demonstrated above is sufficient to dispose of the application without necessarily having to consider other grounds of application. For the above reasons, the applicant is granted an extension of time to file an application for revision against judgment of the High Court dated 29/09/2014. She is given thirty days from the date of this rules to do the needful. Costs shall abide the outcome of the intended application.

Order accordingly.

DATED at DAR ES SAALAM this 1st day of March, 2023.

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Ruling delivered this 3rd day of March, 2023 in the presence of Mr. Innocent Mwelelwa, learned counsel for the Applicant and Mr. Sylivester Aligawesa, learned counsel for the respondent, is hereby certified as a true copy of the original.




F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL