

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT IRINGA

MISCELLANEOUS LAND CASE APPLICATION NO. 30 OF 2013

PATRICK M. NGAILO & ANOTHER APPLICANTS

VERSUS

THE BOARD OF TRUSTEES OF THE NATIONAL
SOCIAL SECURITY FUND RESPONDENT

13/10/2015 & 10/11/2015

RULING

Kihwelo J.

This is an omnibus application made under Section 14(1) of the Law of Limitation Act, Cap 89 RE 2002 and Order XXXV Rule 3(1) of the Civil Procedure Code Act, Cap 33 RE 2002 seeking for the following orders namely:-

- (a) The honourable Court may be pleased to grant an extension of time to the Applicants to apply for leave to appear and defend the suit instituted by the Respondent against them vide Summary Procedure.*

(b) The honourable Court may be pleased to grant leave to the Applicants to appear and defend the suit instituted by the Respondent vide Summary Procedure.

The background to this matter, briefly, is that on 28th July, 2013 the respondent filed a suit under Order XXXV of the Civil Procedure Code to wit Summary Procedure against the applicants for recovery of possession of the suit property to wit Plot No. 509 Block "O" Njombe. That on 3rd September, 2013 the first applicant was served with a summons which required him to appear in Court on 15th October, 2013 before Honourable M. S. Shangali, Judge.

However the second applicant was not served with the summons and instead was informed by the first applicant about the existence of the suit and which was coming on 1st October, 2013.

On 15th October, 2013 the applicants appeared in court and the matter was mentioned before the then Acting District Registrar. The applicants did not manage to lodge the application for leave to appear and defend the suit in good time hence the present omnibus application.

The application was supported by separate affidavits sworn by Patrick Mubalalah Ngailo and Geoffrey Myumbilwa. The applicants also filed a joint reply to the counter affidavit.

Without looking at the other averments deposed to by the Applicants, I think, the Applicants are trying to attribute the delay to lodge the application for leave in time to reasons furnished in paragraphs 5, 6 and 7 for the first applicant and paragraphs 5 and 6 for the second applicant.

The first applicant averred at paragraphs 5, 6 and 7 I will quote them.

"5. That numerous factors detained me to lodge the application within the appropriate time, among the prime factor is based on the uncertainty of service warranted by the respondent who previously used to serve all documents related to this matter to my instructed advocate Msemwa unlike the instant summons which was served to me.

6. That after being served with the summons I took various endeavors to communicate with my advocate for purpose of proving if he has also been served with a particular summons and complied with it accordingly however, I did not manage to find him.

7. That pursuant to the directives disclosed in the summons served to me which inter alia indicated that the case was scheduled for mention before the Honourable Judge Shangali, I was dully prepared to lodge an oral application to plead the Court to grant me ample time for filing a leave to appear and defend the suit however, on the fixed date i.e 15th October, 2015 I failed to

execute my intention of praying for the same due to the fact that the matter was not mentioned before her Ladyship Honourable Judge Shangali other than the Acting District Registrar who needless to say has no powers to grant orders deserved for the Honourable Judge.”

The second applicant in addition to repeating at paragraph 6 what has been averred by the first applicant at paragraph 7 he stated at paragraph 5;

“5. That numerous factors detained me to lodge the application within the appropriate time, among the prime factor is based on the fact that the respondent has not served to me (sic) personally the summons to appear despite the fact that the particular plaint indicates me as a relevant person to be served with the copy of the plaint.”

These affidavits were complemented by the applicants' joint reply to the counter affidavit of the respondent which essentially reiterated what is stated in the affidavits.

In further support of the prayer for leave to appear and defend the suit the applicants averred that the suit in question constitutes triable issues of fact and law since the issue of ownership of the suit land has to be determined through trial.

From the affidavits and counter affidavits of the parties, the issue that clearly emerges and cries for determination is whether the applicants have disclosed sufficient cause to warrant both extension of time and leave to appear and defend the suit.

At the outset I must confess that counsel were not very useful in their submissions in support and opposition of the omnibus application such that I expressed to them my displeasure without offending them in anyhow.

Mr. Nyato, learned counsel who has since been engaged to pursue the application, submitted briefly that the applicants were prevented from filing the application in time owing to the uncertainty of service. He argued that whereas the first applicant was served in person unlike the previous service which was done through their counsel advocate Msemwa, the second applicant was not served with the summons at all hence making him incapable and unaware of the suit in question until on 13th October, 2013 when he was informed by the first applicant. He invited this court to the case of **Benedict Mumelo V Bank of Tanzania** [2006] 1 EA 227 and **The Registered Trustees of the Archdiocese of Dar es Salaam V The Chairman Bunju Village Government**, Civil Appeal No. 147 of 2006 Court of Appeal of Tanzania at Dar es Salaam (unreported). He finally contended that on the strength of the submission made and the authorities cited the reasons advanced are sufficient to warrant the court grant the sought extension.

Amplifying on the second prayer to the application Mr. Nyato was conspicuously very brief and he submitted that the suit at issue constitutes triable issues of fact and law since the same does not fall under the ambit of summary procedure because it is a land dispute as clearly revealed in the applicant's affidavit. He cited the case of **David Sassan & Co. Ltd V Navichandra Patel & Others** [1972] HCD 71 to buttress his argument further and prayed that the court be pleased to grant leave to the applicants to appear and defend the suit.

On his part Mr. Mambosasa, learned counsel for the respondent was not impressed. He valiantly and spiritedly argued that the respondent filed the summary suit on 28th July, 2013 and the first and the 2nd applicants were served on 3rd September, 2013. Unfortunately Mr. Mambosasa did not prove this assertion and claimed that the summons are in Civil Case No. 2 of 2013 which is not before me and the respondent's counsel did not even bother to attach copies of the summonses to the counter affidavit.

Mr. Mambosasa further contended that the applicants did not file the application until on 29th October, 2013 which is beyond the time stipulated under Part III item 1 of the Law of Limitation Act, Cap 89 RE 2002. He distinguished the cited cases in that they were not relevant to the instant application and strenuous argued that the instant application has no merit.

I will begin with the first issue on whether the applicants has demonstrated sufficient cause which prevented them from filing the application in time. To put things into their right perspective I will quote in extenso the provision of Section 14(1) of the Law of Limitation Act, Cap 89 RE 2002.

“14(1) Notwithstanding the provisions of this Act, the court may, for any reasonable or sufficient cause, extend the period of limitation for the institution of an appeal or an application, other than an application for the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application.”

The catchwords in the section are “***the court may for any reasonable or sufficient cause extend time.***” In ordinary legislative language, the word ***may*** implies ***discretion***. The principles for the exercise of discretionary powers of the court, are now well established. Such powers must be used justly (see **Berry V British Transport Commission** [1962] 1 QB 306). It must be exercised according to the rules of reason and justice, not according to private opinion.

The Court of Appeal of Tanzania set a yardstick to be considered in the case of **Benedict Mumelo V Bank of Tanzania** [2006] 1 EA 227 when it religiously held;

"It is trite law that an application for extension of time is entirely in the discretion of the court to grant or refuse it, and that extension of time may only be granted where it has been sufficiently established that the delay was with sufficient cause."

Conscious of those principles, I believe, counsel in this matter, have centered their arguments on whether or not the Applicants have disclosed reasonable or sufficient cause to justify extension of time within which to file the application. Mr. Nyato learned counsel, has forcefully argued that the delay was occasioned by the uncertainty of service caused by the respondent. Mr. Mambosasa learned counsel for the respondent argued that service was dully done to the applicants but did not sufficiently prove this because there was no proof of this both in the affidavit and submission.

In my respectful opinion the applicants have sufficiently established good cause which prevented them from filing the application in time. Records reveals that the respondent served some of the documents to the first applicant while others were served upon his advocate. As if that was not a serious problem the second applicant was not served at all according to the records. Extension of time is therefore granted.

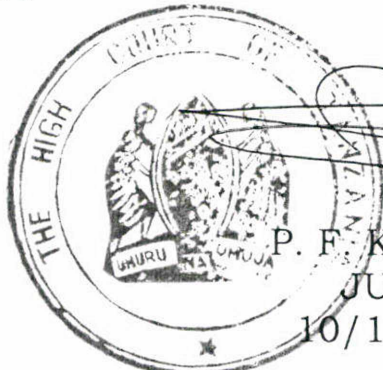
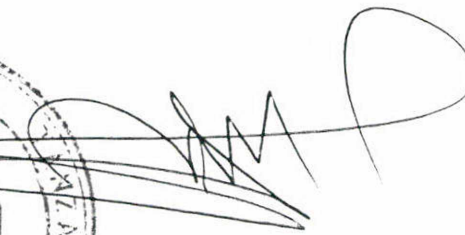
Turning to the second issue of leave to appear and defend the position of the law is settled and clear. In the case of **Zola and Another V Ralli Brothers Ltd and Another** [1969] EA 196 and **Ms.**

Mechabec Engineers cited with approval by Kalegeya J (as he then was) in **National Bank of Commerce Ltd V Abraham Elangwa Shogoilo**, Commercial Case No. 115 of 2002 (unreported) in which the Court held;

“Principles which guide courts in granting or refusing leave to defend are now well settled. The applicant must establish triable issues. If the court is satisfied that the intended defence is but a “sham”, “moonshine”, “illusory” and which for all intents and purposes is merely intended to delay the plaintiff’s rightful enjoyment of his dues, it should be refused.”

With the above in mind, having carefully considered the competing affidavits, the submissions and the law, I have concluded that there are conspicuously triable issues as the matter does not clearly seem to be falling within the ambit of Order 35 of the Civil Procedure Code and that the matter relates to land ownership which can only be determined at the trial. That said I would therefore grant the applicant’s leave to appear and defend Civil Case No. 2 of 2013.

Accordingly ordered.



P. F. KIHWELO
JUDGE
10/11/2015