IN THE HIGH COURT OF THE NITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISRTY OF ARUSHA

AT ARUSHA

MISC. LAND APPLICATION NO 60 OF 2018

(Originating from the High Court of Tanzania, Arusha Registry land Case No 60/2015)

ENOCK JACOB SAMBOTO ..... 1ST APPLICANT

FRANCIS URIO..... 2ND APPLICANT

SETH ZACHARIA ..... 3RD APPLICANT

JACOB YOHANE ..... 4TH APPLICANT

VERSUS

JESCA ENOCK AKYOO .....RESPONDENT

RULING

ROBERT, J:-

This is an application for extension of time to file an application to set aside ex parte decree extracted from ex parte judgment of the High Court

of the United Republic of Tanzania in the District Registry of Arusha, Land Case No. 60 of 2015 (Hon. Dr. Opiyo, J). The application is brought under section 14 (1) and 14 (2) of the Law of limitation Act, Cap 89 R.E 2002 and is supported by the sworn affidavit of Mr. Jacob Enock Samboto, the first Applicant and Mr. Jacob Yoane, the fourth Applicant.

The Applicants were represented by Mr. Ronlick E.K Mchami, learned counsel whereas the Respondent was present in person unrepresented. The court ordered the application to be heard by way of written submissions as prayed by the parties.

Having scheduled written submissions in respect of this application on 17th March, 2020 it came to the attention of this court that there was a Notice of Preliminary objection filed in respect of this application before Hon. Mwenempazi, J which remained unattended after his transfer. On 27th July, 2020 this court found it imperative for the preliminary objection filed by the Respondent to be attended before determination of the main application. The court ordered for hearing of preliminary objection by way of written submissions with a view of incorporating the Ruling thereof in the decision of the main application in case the preliminary objection fails,

and if the preliminary objection succeeds then the Ruling thereof would have to dispose of the whole matter.

The Respondent raised two points of preliminary objection against this application to the effect that:

(i) The application is hopelessly time barred;

(ii) The purported application is incompetent as it contravenes the provisions of the Law of Limitation Act, (Cap. 89 R.E. 2002) in support of it hence this Honourable court has not been moved properly.

Submitting in support of the first point of preliminary objection the Respondent argued that the trial court entered judgment in favour of the Respondent on 2nd October 2017 and the Applicant having been aggrieved with the ex parte judgment filed an application to set aside an ex parte judgment on 22nd May, 2018 which is two hundred and thirty three days (233) later. He argued that Applicants were required by law to file this application within thirty (30) days from the date of ex parte Judgment. He cited the provisions of section 3(1) and item II of Part II of the schedule to

the Law of Limitation Act, Cap 89 R.E.2019 and section 3(2)(c) of the Act to buttress his submissions on this point.

He argued further that, the Applicants delay to file the application to set aside ex parte judgment from the date when the judgment was delivered on 2/10/2017 up to 22/5/2018 when Applicants filed this application has no sufficient explanation. He maintained that the Applicant failed to account for each day of delay.

Submitting on the second point of preliminary objection that the application is incompetent as it contravenes the provisions of the Law of Limitation Act, (Cap. 89 R.E. 2002), he argued that since the application is filed under section 14(1) of the Law of Limitation Act the Applicants were required to show good cause for the delay by accounting on every day of delay.

In response to the first point of preliminary objection, counsel for the Applicant argued that applications for extension of time are not time barred because section 14(1) of the Law of Limitation Act, Cap. 89 R.E. 2019 allows the court to extend the period of limitation. He submitted further that the Respondent is misdirected by regarding Miscellaneous application

No. 60 of 2018 as an application for setting aside the ex parte decree in Land Case No. 60 of 2015 as opposed to what appears in the pleadings which indicates that this is an application for extension of time to file an application to set aside the ex parte decree in Land Case No. 60 of 2015. The learned counsel prayed for the first point of preliminary objection to be overruled with cost.

Coming to the second point of preliminary objection, the learned counsel submitted that the Respondent failed to mention which provision of the Law of Limitation Act, Cap. 89 R.E. 2002 was contravened by this application, therefore he failed to argue in support of the second point of preliminary objection, due to this he prayed for the second point of preliminary objection to be overruled with cost for lack of merit.

In a brief rejoinder, the Respondent reiterated the submissions made in support of her points of preliminary objection.

Having considered the points of preliminary objection raised by the Respondent and the submissions from both parties it appears to this court that the Respondents submissions in support of her points of preliminary objection are entirely misplaced. As rightly stated by the learned counsel

for the Applicant, It is obvious that the Respondent considers the present application as the application to set aside ex parte judgment instead of the application for extension of time to file an application to set aside ex parte decree extracted from ex parte judgment (see page 2 para 5; page 4 para 4 and 5; page 7 para 4; and page 8 para 5 of the written submission in support of the preliminary objection). Consequently, the points of preliminary objection raised by the Respondent erroneously flawed the present application for being filed out of time.

Section 3(2)(c) of the Law of Limitation Act, Cap. 89 R.E.2019 cited by the Respondent to buttress her argument that this application is time barred provides for dismissal of proceedings instituted after the prescribed time of limitation. It should be noted that this is what the present application is intended to address by applying for extension of time to file an application which would otherwise be dismissed for being filed out of time. I therefore find no merit on the first point of objection raised by the Respondent.

On the second point of preliminary objection, this court is in agreement with the submissions made by the learned counsel for the Applicant that the Respondent failed to mention which provision of the Law of Limitation

Act, Cap. 89 R.E. 2002 was contravened by this application. Indeed, the Respondent, through the services of her lawyer, in what appears to be very long and detailed submissions failed to address the court on the specific provisions of the Law of Limitation Act, Cap. 89 R.E. 2002. Since the Respondent failed to address this court on the point of law allegedly contravened by this application, the second point of preliminary objection is equally overruled for lack of merit. As a consequence, this court finds no merit in the points of preliminary objection and dismisses them accordingly.

Having decided against the points of preliminary objection filed by the Respondent, I will now move to the written submissions filed by the parties in respect of this Application. Submitting in support of the application, counsel for the Applicants argued that, one of the reasons for the delay by the Applicants to file the application for setting aside ex parte decree on time was because the Applicants were not aware that the ex-parte decree was delivered against them in Land Case No. 60/2015 until 15th May, 2018 when they received the file containing the pleadings, proceedings, ex-parte judgment and ex-parte decree regarding Land Case No. 60 of 2015 and when they became aware they filed this application within four days. This

was stated by the 1st Applicant in his affidavit at paragraph 5 and by 4th Applicant at paragraph 6 of his affidavit.

He argued further that the law governing the granting of an application like this has been stated in a number of cases including the reported case of **Caritas Kigoma vs. Kg Dewsi Ltd** (2003) TLR page 42, where the Court of Appeal of Tanzania held that:

> "In an application for extension of time, the question to be considered is whether sufficient cause has been shown by applicant for the delay in applying to set aside the ex-parte judgment"

Submitting further, counsel for the Applicants argued that the contents of the affidavits supporting this application provided for reasons in support of this application. Since the Respondent was given 14 days' leave by this court to file a proper counter affidavit but she failed to do so, he maintained that the court should regard the Respondent's failure to contradict the statements made under oath by the 1st and 4th Applicants as genuine.

Another reason adduced by the Applicants' counsel for filing this application is illegality in the proceedings of Land Case No. 60 of 2015. He

argued that this is stated in paragraph 7 of the 1st Applicant's affidavit paragraph 8 of the 4th Applicant's affidavit. He submitted that the presence of illegality in the judgment to be challenged has been held out as one of good reasons for extension of time. He cited the case of **the Principle Secretary Ministry of Defence and National Services vs. Devram Valambia** (1992) page 189 which held that;

> "In our view the point at issue is one alleging illegality of the decision being challenged; the court has duty, even if it means extending time for the purpose, to ascertain the point and the alleged illegality is established to take appropriate measure to put the matter on record right".

Based on the stated reasons, he prayed for this application to be allowed with costs to set aside the Ex-parte decree in land Case No. 60 of 2015.

In response, the Respondent argued against the reason stated by the Applicants that, they were not aware that an ex-parte decree was delivered against them. She submitted that when the ex-pate judgment was delivered on 2.10.2017 Timoth Maeda and Henry Kimaro, learned counsel for the Applicants, by then defendants, were present. The

Applicants were represented by their counsel hence they were aware of the ex-parte decree and judgment through their advocates. For that reason she prayed for their application to be dismissed.

Responding on the second reason that there is illegality in the proceedings and ex parte judgment in the Land Case No. 60 of 2015 as stated in paragraph 7 of the 1st Applicant's affidavit and in paragraph 8 of the 4th Applicant's affidavit, she argued that, the reasons adduced in the cited paragraphs are not sufficient to allow this court to extend time to file application to set aside ex-parte judgment and decree of land Case No. 60 of 2015 delivered on 2.10.2017.

She argued that, statements in their affidavits are contradictory, while the 1st Applicant stated that they filed written statement of defence on 28.07.2017, the 4th Applicant submitted that they filed written statement of defence on 28.07.2018 while the matter ended on 2.10.2018. Their written statement of defence was filed out of time that's why the matter proceeded ex-parte and one for the defendants called Kanaeli Kaaya did not file his written statement of defence. Therefore there was no need for this court to be bound to issue summons to a person to attend the matter who was present at the previous scheduled date.

She argued further that, when the court in Land case No 60 /2015 ordered the Applicants' written statement of defence to be filed on or before 27/07/2017 and mention on 07/08/2017 the 1st Applicant was present. On 7/08/2017 none of the Applicants appeared and instead of filling their WSD on 27.07.2017 they filed on 28.07.2017. To that effect, the Respondent's counsel by then, prayed to proceed ex-parte and his prayer was granted. For that reason there was no smell of illegality as per paragraph 7 and 8 of the 1st and 4th applicants' affidavits respectively. For that reason this application lacks merit and she prayed for it to be dismissed with costs.

In rejoinder, the Applicants' counsel submitted that, Respondent's reply to the Applicant's submission lacks merit and it should be disregarded by this court. He maintained that since the Respondent has failed to raise any legal arguments to fault the arguments raised by the Applicants, the court should disregard the Respondent's submission and allow the application with costs.

Having considered the rival submissions from both parties, I find the main question for determination by this court to be whether the Applicants adduced sufficient reasons to move this court to grant the orders sought.

One of the reasons adduced by the Applicants to move this court to extend time to set aside x-parte judgment and decree is that, when the ex-parte judgment and decree was delivered the Applicants were not aware. Having gone through the records in land case No. 60 of 2015, I have noted that when the ex-parte hearing was taking place on 8.9.2017 and when the ex-parte judgment was delivered on 2.10.2017, the learned counsel for the Applicants were present in the court. It is trite that when the counsel for the Applicant is present in court it's the same as if the Applicant himself is present. The reason that Applicants were not aware of the ex parte judgment is just an afterthought, it lacks merit and it cannot move the court to grant the order sought.

Another reason adduced by the Applicants is the presence of illegality in the proceedings and ex-parte judgment by this honorable court on Land Case No 60 of 2015. On the issue of illegality the Respondents raised three (3) points as per paragraph 7 of the 1st Applicant's affidavit and paragraph 8 of the 4th Applicant's affidavit.

The first point is that, the amended WSD which was filed on their behalf on the 28th day of July, 2017, is still part of the court's records and it was not expunged from the court's records of the Arusha District Registry

in land case no 60 of 2015. I have gone through the proceedings of Land case No. 60 of 2015, and noted that on 7/8/2017 the Respondent's counsel by then, submitted that the Applicants filed their WSD out of time without the leave of this court. Instead of filling on 27/7/2017 they filed on 28/7/2017, for that reason he prayed for the matter to proceed ex-parte against them and the prayer was granted by the court. The granting of a prayer sought by the counsel for the Respondent and ordering the ex-parte hearing to proceed against the Applicants had the effect of obliterating the applicants' WSD and therefore the said WSD cannot be said to be part of the court records. Be that as it may, the Applicants cannot rely on this point as a reason for extension of time.

The second point is that, after the amended plaint was filed by the Respondent no fresh mediation process was conducted before the ex-parte hearing was ordered and conducted against them.

Order VI Rule 17 of the Civil Procedure Code, cap. 33 R.E 2002 provides that;

> "The court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just and all such amendments shall be made as may be

necessary for the purpose of determining the real questions in controversy between the parties."

This court is of the firm view that the cited provision allows amendment of pleadings to take place at any stage of proceedings as may be necessary. The Hon. Judge was therefore right to allow the amendment of plaint after the mediation. However, given that the amendments did not bring any material alterations, there was no justification for any fresh mediation as argued by the learned counsel for the Applicants.

The third point was to the effect that, the Applicants were not served with summons informing them when the ex-parte judgment on Land Case No. 60 of 2015 would be delivered against them. As alluded earlier in this judgment, when the Land Case No. 60 of 2015 was heard on 8.9.2017 and when the ex-parte judgment was delivered on 2.10.2017 the learned counsel for the Applicants namely Timoth Maeda and Henry Kimario were both present in court. This argument does not reveal any illegality in the proceedings to warrant extension of time. Having said that, this point also lacks merit.

For the reasons adduced herein, this application lacks merit and I hereby dismiss it with costs.

It is ordered.

K.N. ROBERT
JUDGE
4/12/2020