

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

MISC. APPLICATION NO. 700 OF 2018

(Arising from Probate No. 200 of 2012 before Magomeni Primary Court and Civil Appeal
No 64 of 2012 before Kinondoni District Court)

**ATHUMAN HUSSEIN ZIBE.....APPLICANT
VERSUS
ZUBERI ZIBE..... RESPONDENT**

RULING

14th and 18th December 2020

MASABO, J.:-

Athumani Hussein Zibe has moved this Court under section 14 (1) of the Law of Limitation Act [Cap 89 RE 2019] and order IX Rule 4 and 8 of the Civil Procedure Code [Cap 33 RE 2019]. He has fronted two prayers namely: Leave to file an application for extension of time with which to file an application for setting aside a dismissal order by Kitusi J in Misc. Application No. 62 of 2015 dated 15th February 2017; and a subsequent order setting aside the impugned order.

The application is supported by an affidavit deposed by the applicant in which he states that, the application being an administrative of the estate of one Time Hussein Zibe who was the appellant in Civil Appeal No. 64 of 2012 before the District Court of Kinondoni was disgruntled by the decision of the court and having failed to apply for revision on time he filed an application for extension of time within which to apply for revision

of the said the decision of the District Court. The application was registered in this court as Misc. Civil Application No. 162 of 2015. That as the application was still pending in court he secured a job in South Africa and travelled to partake the employment leaving everything in the hands of his advocate. That, on his return, about three years later, he was told that the matter had been dismissed for want of prosecution.

It is his disposition that the dismissal and the delay to file an applicant for restoration was negligently occasioned by his counsel, one Fatuma Rashid who not only acted negligently but failed or refused to cooperate with the applicant. He deposed further that there is an illegality in the decision as the court determined the ownership of the disputed property a house located in Plot 194 Block 3 Hananasif area in Kinondoni District while it was not clothed with jurisdiction.

Upon the application being filed, efforts to serve the respondent ensured with not fruition. An order for substituted service was issued and on July 30, 2020 he was served by way of publication of the summons through Uhuru Newspaper. Therefore, the requirement as to service was duly complied but still the respondent did not show up hence an ex parte hearing.

On the hearing date the Applicant was represented by Mr. Munil Abdallah learned counsel having narrated the background of the application, he submitted that the applicant was not negligent as he had travelled leaving the matter being attended by a counsel who was duly instructed but

acted negligently by failure to enter appearance in court and for that reason the application was dismissed. He cited the decision of the court of Appeal in **Yusufu Same and Hawa Dada V. Hadija Yusufu**, Civil Appeal No. 1 of 2002, Court of Appeal of Tanzania (unreported) and argued that negligent of a counsel is a good reason for extension of time. He further argued that the District Court determined a matter to which it had no jurisdiction. He argued that the Primary Court and the District Court being Probate Courts for the purpose of the application were not clothed with jurisdiction to determine ownership of a landed property. He submitted further that such mandate is exclusively vested in Land Courts as per S. 3 (1) of the Land Dispute Act, Cap 216 RE 2019 and section 167 of the Land Act, Cap 133 RE 2019.

I have carefully considered the submissions made by the applicant. Accordingly, to section an application for setting aside a dismissal order is filed within 30 days from the date to the decision. In the instant case the matter was dismissed on 15/2/2017 whereas this applicant was filed on 9/11/2018. This the delay is for approximately 11 months. While it is true that this time may be extended under S. 14 (1) of Cap 89, the extension can only issue upon the applicant demonstrating a good cause. Two reasons have been advanced by the applicant. The first one is negligence of his counsel. With aspect to the counsel, I outright reject this ground. As stated in the case cited, **Yusuf Same and Hawa Dadav. Hadija Yusufu** (supra), an error or negligence by advocate does not constitute a good cause save in exceptional circumstances where pertaining to the circumstances of the case

it is in the broader interest of justice that the time be extended. In the instant case, there are no such circumstances to warrant the exception for the settled rule.

Coming to the 2nd ground of illegality, it is now a settled law that a point of illegality of the decision sought to be challenged suffices as a good ground if it is of sufficient importance, apparent from the record and is not one that can be discovered through long arguments (see **Lyamuya Construction Company Limited Vs Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 02 of 2010; **Ngao Godwin Losero Vs Julius Mwarabu**, Civil Application No. 10 of 2015, and in **Samwel Munsiro v Chacha Mwikwabe**, Civil Application No. 359/08 of 2019 (all unreported).

Upon examination of the record placed before me, I have observed that as alleged by the applicant, in the decision sought to be challenged the court determined ownership of the disputed plot. For this single reason, I have come to the conclusion that a good cause has been demonstrated. Accordingly, I allow the application and grant the two prayers. The dismissal order in Misc. Civil Application No. 162 of 2015 is hereby set aside.

Dated at Dar es Salaam this 18th day of December 2020.




J. L. MASABO
JUDGE