

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

AT DAR ES SALAAM

MISC. APPLICATION NO. 171 OF 2019

(Arising from Ex parte Judgement and Decree of this Court in Land Case No. 83 of 2016)

KIBERITI JEROMINI MASUMBUKO

@ MASSAWEAPPLICANT

VERSUS

HOLIDAY WILFRED NGONYA..... RESPONDENT

RULING

Date of Last Order 8/2/2021

Date of Ruling: 26/2/2021

MASABO, J.:-

The applicant has moved this Court under section 14 (1) of the Law of Limitation Act [Cap 89 RE 2019] praying for an extension of time within which to file an application for setting aside an ex parte judgement and decree of this court in Land Case No. 83 of 2016 dated 27th April 2017. The application is supported by an affidavit deposed by the applicant in which he states that, sometimes in 2012 he purchased a house at a public auction conducted by the 4th respondent and after he had paid the purchase price, he was availed the title and thereafter he successfully moved the responsible authorities to affect the transfer of the title. Meanwhile, the respondent and his wife entered caveat and instituted a suit against him (Civil Case No. 21 of 2013 before this court claiming to be the rightful owners of the suit but the suit ended unsuccessful on 8th February 2018 after he successfully argued a preliminary objection. Thereafter, he was neither informed nor served with any court proceedings until 11th March 2019 when he was served

with a notice of Execution in respect of the Ex parte Judgment for which the leave for extension of time is now sought.

Upon the application being filed, efforts to serve the respondents ensured with no fruition, in respect of the 2nd, 3rd and 4th Respondent. An order for substituted service by way of publication was issued on March 26, 2020 and the same was published on 11th June 2020 and 26th June 2020 in Uhuru Newspaper. Therefore, the requirement as to service was duly complied but still the respondent did not show up hence an ex parte hearing against them. On his party, the 1st respondent entered appearance and filed a counter affidavit.

Hearing proceeded in writing inter parties the 1st respondent who was represented by Mr. Thomas Joseph Massawe, learned counsel. The applicant was represented by Mr. Joseph Msengezi, learned counsel. Both parties filed their submission on time. I have carefully considered the submission filed.

According to item 5 of Part III of the Law of Limitation Act, Cap 89 RE 2019, the time limit with which to file an application for setting aside an ex parte decree is 30 days reckoned from the date of the decree. In the instant case the ex parte judgment and decree were pronounced on 27/4/2018 whereas this application was filed on 29/3/2019. Thus, total period of delay is for 11 months. While it is true that this time may be extended under section 14 (1) of Cap 89, the extension can only issue upon the applicant demonstrating a good cause. The question to be determined, therefore, is whether the

applicant has demonstrated a good cause. The existence of a good cause is established by considering the relevant factors and materials surrounding the case to see whether the applicant has accounted for all the period of delay, whether the delay is inordinate; the applicant acted with diligence and not apathy, negligence or sloppiness or whether there is point of law of sufficient importance such as the illegality of the decision sought to be challenged (see **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, CAT (unreported)).

In the affidavit in support of the application, the applicant has demonstrated one ground, namely lack of knowledge of the existence of the proceedings. He has argued that after the first suit was dismissed, he never received information as to a new suit and was surprised to be served with an execution order. The respondent has disputed this ground and argued, with reference to the *ex parte* judgment appended to the application that, there is solid evidence on record that not only was the applicant aware of the proceedings but he engaged a counsel who appeared once in court to represent him.

Before I dwell on this ground, I have noted that the applicant has raised a new ground in the course of submission whereby he has argued that there is an irregularity in the proceedings of the court. While I agree with him that a point on irregularity suffices as a good cause for extension of time, I will outright reject this ground as it was raised merely raised from the bar. The

law is settled that submissions are not evidence hence should not be entertained or accorded weight if not based on affidavit or counter affidavit (**East Zone Tobacco Growers Cooperative Union Ltd vs Michael Junga**, Civil Application No. 10 of 2000, Court of Appeal at Mwanza **and African Marble Ltd vs Tanzania Saruji Corporation**, Civil Application No. 44 of 2000, Court of Appeal of Tanzania at Dar es Salaam).

Reverting to the issue of notice, I have noted as correctly submitted by the respondent's counsel that the Ex parte judgment shows that the applicant was duly informed of the proceedings and sent an advocate to appear on his behalf. However, in my firm view, whereas this may be a good point of objection in the application for setting aside the ex parte order, it does not suffice in objecting the prayer for extension of time. Since the respondent has not disputed that the ex parte judgment was brought to the knowledge of the applicant on 11th March 2019 when he was served with the execution notice and since this matter was filed on 29th March 2019 which is only 18 days after he was notified of the ex parte judgment, the applicant cannot be condemned of apathy or sloppiness in challenging the ex parte order. Accordingly, I allow the application and grant him leave to file the application within 14 days. Costs on the cause.

Dated at Dar es Salaam this 26th day of February 2021.


J. L. MASABO
JUDGE

