IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

LAND APPEAL NO. 32 OF 2020

(Arising from ruling of the District Land and Housing Tribunal for Tarime at Tarime in Land Application No. 456 of 2019)

ELIAS MWITA GETARY ..... 1ST APPELLANT

THE REGISTERED TRUSTEES OF THE TANZANIA MISSIONARY REVIVAL CHURCH ..... 2ND APPELLANT

VERSUS

LUCAS SINDA MARWA ..... RESPONDENT

JUDGMENT

19th March and 13th April, 2021

KISANYA, J.:

The above named appellants were sued before the District Land and Housing Tribunal for Tarime at Tarime for trespassing into the respondent's land. They defaulted to file their Written Statement of Defence (WSD). Therefore, the hearing proceeded *ex parte*. On 8/02/2019, the Tribunal entered an *ex parte* judgment and decree in favor of the respondent. The appellants' application to set aside the *ex parte* judgment was struck out on 31/10/2019 for being time barred.

On 5/12/2019, the appellants filed an application for extension of time within which to file an application to set aside the *ex parte* judgment. In its ruling dated 3rd April, 2020, the Tribunal dismissed the said application for want of merit. That decision was based on the reason that; every day of delay had not been accounted for by the appellants.

Aggrieved, the appellants lodged the appeal at hand. The following grounds were argued by the parties.

1. The Tribunal erred in law and fact in failing to consider that the 2nd appellant representative was sick.
2. That, the Tribunal erred in law and fact in failing to consider that the appellants had the right to be heard.
3. That the Tribunal erred in law and fact in failing to take into account that the 2nd appellant had nominated John Serya Nyarangita to represent her.

During the hearing, the appellants and respondent were represented by Messrs. Emanuel Gervas and Baraka Makowe, learned advocates, respectively.

Mr. Gervas, commenced his submission by addressing the issue of sickness, He contended that the Tribunal failed to consider that the delay was caused by sickness of John Serya Nyaragita, who was representing the 2nd

appellant. Referring to the decision of the cases of **Kumpondi vs the Plant Manager, Tanzania Breweries Limited**, Civil Appeal No. 6 of 2010, CAT at Dar es Salaam (unreported) and **Saulo Malima vs Petrol King'oni,** Misc. Land Application No. 8 of 2020, HCT at Musoma (unreported), Mr. Gervas argued that sickness is a sufficient reason for extension of time.

As regard the third ground, the learned counsel went on to submit that, the Tribunal erred in holding that John Serya Nyarangita was no representing the 2nd appellant. He argued that the 2nd appellant had, on 13/03/2018 submitted a letter which appointed the said John Serya Nyarangita as his representative.

The learned counsel went on to submit that the Tribunal failed to consider that the appellants were entitled to the right to be heard. He stated that the appellants had been appearing before the Tribunal and that there was no need of proceeding *ex parte*.

When probed by the Court on whether each day of delay was accounted for by the appellants, Mr. Gervas's answer was in affirmative. That was after going through the affidavit in support of the application.

In view of the above submission, Mr. Gervas urged me to allow the appeal with costs, quash and set aside the ruling of the Tribunal and grant him leave to file an application to set aside the *ex parte* judgment.

Contesting the appeal, Mr. Makowe started by tackling the 2nd ground on the right to be heard. He was of the view that right to be heard is not absolute and that it has to be exercised in accordance with the law. The learned counsel went on to submit that the appellants denied themselves of their right to be heard after defaulting to file the WSD.

In relation the ground of sickness, Mr. Makowe was of the view that even if sickness is considered, the appellants did not account for the delay of 34 days from 31/10/2019 when their previous application was struck out for being incompetent to 5/12/2019 when the application subject to this appeal was filed in the Tribunal. The learned counsel pointed out that although the first appellant verified the affidavit on 25/11/2019, it was on 5/12/2019 when the application was filed. Therefore, he moved the Court to dismiss the appeal with costs for want of merit.

Rejoining, Mr. Gervas reiterated that the appellants' right to be heard was not observed by the Tribunal. As regards to the delay from 30/10/2019 to 5/12/2019, Mr. Gervas contended that the appellants were preparing the record for application subject to this appeal.

I wish to preface by appreciating that, in terms Order VIII, Rule 15(1) of the Civil Procedure Act [Cap. 33, R.E 2019] the time within which to file an application for an order to set aside the *ex parte* decree is 30 days from the date of judgment. If a party is unable to file the application within time, the Court is empowered to extend time if reasonable or sufficient cause is given by the applicant. This is pursuant to section 14(1) of the Law of Limitation (Cap. 89, R.E. 2019) which reads: -

> *"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."*

Looking at the above provision, it is clear that the decision whether or not to extend time is within the sphere of the court or tribunal hearing the application. Thus, it is a decision exercised at discretion of the court or tribunal. I am mindful of the circumstances in which the discretionary power may be interfered with. The said circumstances were stated in **Mbogo and Another vs Shah** (1968) EA 93 to include, misdirection, acting on matters it should not have acted, or failure to take into consideration matters which ought to have been considered thereby arriving at a wrong jurisdiction. See

also the case of **BG International Limited vs Commissioner General (TRA)**, Civil Reference No. 7 of 2018, CAT at Dodoma (unreported).

I will therefore be guided by the above position of law in considering the merit of this appeal. Thus, the Tribunal was required to extend time within which to file the application upon being satisfied that the appellants were prevented by sufficient or reasonable cause. The phrase sufficient or reasonable cause is not defined in the Law of Limitation Act (supra). It is considered and determined basing on the circumstances of each case.

However, case law has set factors to be taken into account in determining whether there is sufficient or reasonable cause (also known as good cause). The said factors include, the length of delay, the reasons for the delay, the conduct of the parties and the degree of prejudice that the respondent may suffer if the application is granted to mention but a few. There is a plethora of legal authorities decided by this Court and the Court of Appeal of Tanzania in this respect. For instance, in **Tanga Cement Company Limited vs Jummanne D Masangwa and Amos A. Mwalwanda**, Civil Application No 6 OF 2001 (unreported), the Court of Appeal held that:-

> *"what amounts to sufficient cause had not been defined. From decided cases a number of factors have to be taken into account, including whether or not the application has been*

brought promptly, the absence of any valid explanation for delay, lack of diligence on the part of the applicant

The law is also settled that, a person seeking for extension of time is duty bound to account for each day of the delay. See **Lyamuya Construction Company Ltd vs Board of The Registered Trustees of Young Women's Christian Association of Tanzania,** Civil Application No. 2 of 2010, CAT (unreported).

In this appeal, the appellants stated in the 2nd ground that the Tribunal failed to take into account that they were denied the right to be heard. This ground was also deposed in paragraphs 4 and 10 of the affidavit in support of the application. In other words, the appellants advanced illegality as a ground for extension of time.

Generally, illegality is in itself a sufficient ground for extension of time. However, it should be apparent on face record and not discovered by argument. This stance was taken in **VIP Engineering and Marketing Limited,, Tanzania Revenue Authority and Liquidator of TRI-Telecommunications (T) Ltd v. Citibank (T) Ltd**, Consolidated Civil References No. 6, 7 and 8 of 2006 where the Court of Appeal held:-

"The Court there emphasized that such point of law must be that 'of sufficient importance' and, I would add that it must be apparent on the face of the record, such as the question of

jurisdiction; not one that would be discovered by long drawn argument or process."

The Tribunal did not make any decision on the above ground. This being the first appellate Court, it may step into the shoes of the Tribunal which heard the application and consider the said ground.

In the first place, I agree with the learned counsel for both parties that every person is entitled to right to be heard. However, that right is exercised in accordance with the law. The case at hand proceeded *ex parte* on because the appellant failed to file their WSD. In terms of Order VIII, Rule 14 of the CPC, the court is entitled to proceed *ex parte* if the defendant/respondent fails to file WSD. In my view, the defendant whose case proceeds *ex parte* due to his failure to file the WSD cannot be said to have been denied the right to be heard. It is for that reason that the second ground is found not meritorious.

The appellants went on to fault the Tribunal for failing to consider that the delay was caused by sickness of the 2nd appellant's representative one, John Serya Nyarigita. I am at one with Mr. Gervas and the authority cited that, sickness is a sufficient cause for extension of time. It is a reason beyond human control.

However, the Tribunal did not hold that sickness is not a sufficient cause as argued by Mr. Gervas. That ground was not considered for want of proof that, John Serya Nyarangita was the 2nd appellant's representative. Did the Tribunal error in arriving at that decision? It is on record that, on 13th March, 2018, the Tribunal received a letter to effect that the 2nd appellant had appointed John Serya Nyarangita to represent her. For ease of reference, the relevant part of the said letter authored by the Secretary General of the 2nd appellant is reproduced hereunder:

> *"...bodi ya wadhamini waliosajiliwa (THE REGISTERED BOARD OF TRUSTEES) imemteua mtajwa hapo juu kuwa msimamizi/kutuwakilisha katika kesi Na. 19/2017 katika kesi ya Lucas Sinda na Elias Mwita Gentari na Bodi ya Wadhamini (The Tanzania Missionary Revival Church Registered Board of Trustees)."*

In that regard, I am in agreement with the learned counsel for the appellants that the Tribunal erred in holding that John Serya Nyarangita was not representing the 2nd appellant. Had the Tribunal considered the above named letter, it would have arrived at a different decision.

I have shown herein that, the *ex parte* judgment was delivered on 8th February, 2019. Thus, the application to set aside the *ex parte* judgment ought to have been lodged on or before 7th April, 2019. It was deposed in

the affidavit in support of the application that the said John Serya Nyarangita was sick from 25th February, 2019 to 10th May, 2019. The relevant bus tickets to the hospital in Mwanza, discharge forms and medical reports were tendered. For that reason, the Tribunal ought to have considered that the 2nd appellant had advanced sufficient cause. However, this ground covers the delay up to 10th May 2019.

The Tribunal dismissed the application on the reason that the appellants had failed to account for the delay from 31st October to 4th December, 2019. That was after considering that the appellant had spent time to prosecute Misc. Application 365 of 2019 which was struck out on 31st October, 2019 for being incompetent.

The appellants did not file an appeal against that finding. Upon being probed by the Court, Mr. Gervas submitted that the days were accounted for and that the appellants used that time in preparing the records for the application. His submission is not supported by evidence. The appellants did not state that fact in their affidavit. As rightly pointed out by Mr. Makowe, the appellants' affidavit was dated and verified on 25th November, 2019. However, they filed the application 10 days later on, 5th December, 2019. No supplementary affidavit was filed to account for the delay from 31st October to 5th November, 2019. Having considered that delay of a single

day has to be accounted for, I find no reason of interfering with the discretionary power of the trial chairperson.

In the upshot, the appeal is dismissed for want of merit. The costs shall be borne by the appellants.

DATED at MUSOMA this 13th day of April, 2021.

E. S. Kisanya
JUDGE

Court: Judgment delivered this 13th April, 2021 in the absence of the appellants and in the presence of the respondent in person.

Right of appeal to the Court of Appeal explained.

E. S. Kisanya
JUDGE
13/04/2021