

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LAND DIVISION
AT MOSHI**

MISC. LAND APPLICATION No 32 of 2021
(C/F Land Case No. 8 of 2016)

MS ASLAM AKBAR KHAN (as Administrator of the Estate of the late Gulfiroz Begum)**APPLICANT**

Versus

MS. ASHRAF AKBAR KHAN.....**1ST RESPONDENT**

M/S MAWALLA TRUST LIMITED.....**2ND RESPONDENT**

MS. FRESHO GROUP OF COMPANIES

LIMITED.....**3RD RESPONDENT**

RULING

2/8/2022 & 26/8/2022

SIMFUKWE, J.

The applicant herein has filed an application for extension of time within which to apply for setting aside an ex parte ruling and order. The application has been brought under **section 14(1) of the Law of Limitation Act, Cap 89** and **section 95 of the Civil Procedure Code, CAP 33 R.E 2002**. It is supported by applicant's affidavit which was contested by a counter affidavits of the respondents deponed by the learned counsels of the first and third respondents and the principal officer of the second respondent.

The brief facts as captured from the records is that, the applicant herein instituted a land case before this court against the respondents for the



court to nullify the transfer of the disputed land to the respondents. The respondents raised the preliminary objection and this court heard the same ex parte. The applicants applied for setting aside the ex parte ruling and the same was struck out for wrong citation of the enabling provision of the law. Since by that time the application to set aside the ex parte ruling was time barred, the applicant successfully applied for extension of time to set aside the ex parte ruling whereas he was granted 14 days to apply for setting aside the said ex parte ruling. However, for some reasons which the applicant advanced in this application he did not manage to file the said application on time hence, the instant application.

The first reason advanced by the applicant for failure to file his application within 14 days granted to him was that he requested to be supplied with copies of the said ruling and order since the same are prerequisite condition. However, the said copies were supplied to him on 7/12/2020. That, the applicant was supposed to file the said application on 11/12/2020 but due to the fact that his counsel did not appear on the date of ruling and the fact that the applicant is a layman who understood that time will start to run from the date of being supplied with the copies of the said ruling or order; he filed Misc. Land Application No. 79 of 2020 on 14th day of December 2020, 3 days after the expiry of time granted by this court. The said application was later on withdrawn for being filed out of time. Thus, the applicant filed the current application for extension of time so that he can get room of challenging the ex parte ruling and order of this court and he believes that he has a better chance of success.

Further to that, Mr. Abdallah submitted that granting the order of extension of time is in the discretion of this court depending on the circumstances of each case and upon good cause being shown by the

applicant. He referred to the case of **Jumanne Hassan Bilingi vs Republic, Civil Application No. 23 of 2013** (unreported) as quoted in the case of **Ms. Henry Leonard Maeda and Another vs John Annael Mongi and Another, Civil Appeal No. 31 of 2013** which stated that:

"In essence, what amounts to good cause is upon the discretion of the court and it differs from case to case. But basically, various judicial pronouncements defined good cause to mean reasonable cause which prevented the applicant from pursuing his action within the prescribed time."

It was the opinion of Mr. Abdallah that in the circumstances of certain cases as the one at hand, certain factors may be taken into account. That is, whether the applicant has shown good cause warranting his or her delay. He stated further that among the factors to be taken into account so as to enable to ascertain that good cause has been advanced by the applicant for the court to exercise the judicial discretion in granting or refusing an application for extension of time, was stated in the case of **Lyamuya Construction Company Limited vs Board of Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010** in which the Court stated that:

- 1. The applicant must account for all the period of delay*
- 2. The delay should be inordinate*
- 3. The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take and*



4. If the court feels that there are other sufficient reasons such as the existence of a point of sufficient importance; such as the illegality of the decision sought to be challenged.

It was Mr. Abdallah's belief that the applicant justly and reasonably advanced sufficient or reasonable grounds for the delay in filing an application to set aside the ex-parte order through the affidavit sworn by Mr. Aggrey Kamazima. That, the delay was not inordinate and never being caused by laxity on his part but rather a series of events occurred after his application to set aside an ex-parte order which was timely filed but struck out for improper citation of the law delivered by Hon. Mwingwa J, on 12th June 2017. Also, delay of being supplied with requisite copies of ruling and order granting the applicant 14 days to file his application as provided under **Rule 1(1) Order XXXIX** read together with **Order XL Rule 2 of the Civil Procedure Code, Cap 33 R.E 2019** as reiterated in the case of **Kotak Ltd vs Kooverji [1967]1 EA 348**.

Mr. Abdallah argued further that there are good causes advanced by the applicant for the delay in filing his application to challenge the ex parte ruling and order which is tainted with illegalities as no issuance of summons was exercised as to warrant the court to deliver ex parte ruling and order against the applicant contrary to the law. He also contended that there is no any degree of prejudice which the respondent may suffer if the application for extension of time is granted to the applicant.

The learned advocate prayed the court to find that reasons advanced by the applicant have merit and further exercise the judicial discretion in granting the application. He cited the case of **Mobrama Gold Corporation Limited vs Minister for Energy and Minerals and the**

Attorney General and East African Gold Mines Ltd as intervenor [1998] TLR 425 and urged the court for interest of justice, to exercise its discretion and grant the application.

In addition, the learned advocate for the applicant argued that the applicant filed his application for setting aside ex parte order timely then, the series of event arose. Thus, the applicant has diligently been pursuing his right as he has throughout been in court corridors trying to exercise his legal remedy available which resulted to technical delay to file his application as required by the law of the land. That, the applicant herein has never slept on his right and for that reason he prayed to file his application to set aside the ex parte order of this court in the interest of justice.

Replying the above submission, the learned advocates for the 2nd and 3rd respondents stated that this is a second attempt for the applicant to have time extended after he squandered the time granted to him by this court in Misc. Land Application No. 22 of 2019. The learned counsels were reminded by Chinese saying extracted from a work titled "*Ancient China Knowledge, the 36 Stratagems in Ancient China War by Stefan H. Verstappen writing- He who blames others has a long way to go on his journey. He who blames himself is halfway there. He who blames no one has arrived.*"

On the basis of the above quotation, it was stated that the applicant's journey is far from having chosen to blame this court, the opposite counsels, registry and his own ignorance. Thus, the trial and error should not be at respondents' expenses and the application should be dismissed.



The learned counsels revisited the gist of this matter which I shall not summarize. From the applicant's affidavit and the submission in chief, the counsels for the 2nd and 3rd respondent noted the following seven grounds; **First**, sickness of the applicant's advocate who was reported unwell at the time when the matter proceeded ex parte; **second**, the applicant being a layman followed up a wrong case namely Execution Application No. 4/2016 instead of Land Case No. 8 of 2016; **third**, failure to be notified when an order dated 21/2/2017 ordered the matter to proceed ex parte on 27/3/2017, **fourth**, withholding of information on Land Case No. 8 of 2016 by the counsel for the 3rd respondent, **fifth**, illegality on what the applicant believes was his right to be notified on the date when the matter proceeded ex parte; **sixth**, failure to timely obtain copy of the ruling and drawn order in Misc. Land Application No. 22 of 2019 and lastly, technical delay as can be read from the applicant chronologically of time spent prosecuting numerous applications.

Countering the cited cases by the applicant's counsel particularly the case of **Ms. Henry Leonard Maeda and Another** (supra) it was stated that the same established the position of the law as far as applications of this nature are concerned while the case of **Kotak Ltd** is unhelpful as it relates to documents to be attached in memorandum of appeal as opposed to applications.

Also, through the applicant's submissions the learned advocates for the 2nd and 3rd respondents noted the ground of illegality and degree of prejudice to the respondent. However, it was their view that the applicant's affidavit advances no sufficient grounds for this court to exercise the discretion being sought and that his submission is based on general assertions.



The learned counsels for the 2nd and 3rd respondent concurred with the learned counsel for the applicant that applications of this nature are entirely within the discretion of the court which must be exercised judicially, that is within the confines of laws and principles. They referred to the case of **Lyamuya Construction Company Limited** (supra) to cement their argument.

Answering the question as to what amount to good cause, the learned counsels cited the case of **Attorney General vs Consolidated Holdings Corporation and Another, Civil Application No. 26 of 2014** (unreported) in which the Court of Appeal stated that a good cause;

"...is principally a question of fact in each case and would definitely vary from case to case but it has generally been accepted that in each case the court must be satisfied; by the reason(s) of the delay, the length of delay, the degree of the prejudice to the respondent if the application is granted; and the point of contention in the intended action."

The learned counsels also re-cited the case of **Lyamuya Construction Ltd** (supra) which have developed guidelines /factors to be considered in extending the time.

Contesting the first ground that the applicant's advocate was reported unwell thus lost the track of the case for three months, it was argued that no proof of medical report was presented to justify the nature and extent of sickness which barred the counsel from entering appearance; second it is not shown for how long the advocate was sick and how it is related to the duration of delay. Also, from 11/12/2020 to 15/12/2020 time was

extended but never utilised and from 20/8/2021 to 21/9/2021 when the second application for extension of time was filed after the first application had been withdrawn on 28/8/2021 was not accounted for.

It was argued that as per the affidavit the proof of the said advocate being unwell does not correspond with the duration delayed. That, the applicant was granted 14 days within which to lodge the application for extension of time from 27/11/2020. However, he lodged it on 15/12/2020 delaying for five days. Thus, the reason for the advocate being unwell on 21/2/2017 is irrelevant as it falls outside the time from 11/12/2020 to 15/12/2020 as well as from 20/8/2021 to 21/9/2021. In support of the contention above, the learned advocates for the 2nd and 3rd respondents referred to the cases of **Aziz Mohamed vs Republic, Criminal Application No. 84/07 of 2019** CAT at page 8; **Benjamin Amon vs Republic Criminal Application No. 106/11 of 2018** (unreported) and the case of **Christina Alphonse Tomas (As administratrix of the late Didas Kasele Deceased) vs Saamola Masingija, Civil Application No. 1 of 2014** CAT (unreported).

On the strength of above arguments, the learned counsels contended that it was not enough for the advocate to depone that he was unwell without attaching medical proof. Also, it was not stated which period of delay the applicant intends to justify with the alleged sickness. Thus, in absence of proof, the point that the advocate was unwell was an invented story, an afterthought, irrelevant and unreliable.

Turning to the 2nd and 6th ground as deponed under paragraph 4 and 13 of the affidavit of the applicant, that the applicant was a layman and that he made follow up of the wrong case and that he believed that time would

start to run from the date when the ruling was made available. The learned advocates argued further that the applicant did not furnish this court with any proceedings showing that he was indeed attending the execution he referred to.

Regarding the reason that the applicant was a layman, the learned counsels submitted that ignorance of the law or procedures has never been an excuse. He referred to the case of **Dominic Yohana vs Salma Shite, Civil Application No. 120/03 of 2020** to support their position. It was their opinion that, the reason that the applicant was a layman should not stand since he engaged a qualified and trained advocate to run his matter. Thus, the excuse as found under paragraph 13 is more of embarrassing than uncomfortable (sic) and is an afterthought since the applicant could have inquired anything from the court clerk and or registry but he opted not to inquire on the same.

Responding to the sixth ground that the applicant was not timely supplied with ruling and drawn order of Misc. Land Application No. 22 of 2019, it was stated that **section 19(2) of the Law of Limitation Act Cap 89 R.E 2019** provides for automatic exclusion of time spent in preparation of necessary documents for taking an action. This was also stated in the case of **Mohamed Salimin v Jumanne Omary Mapesa, Civil Appeal No. 345 of 2018** (unreported) and the case of **Alex Senkoro and Others vs Eliambuya Lyimo, Civil Appeal No. 16 of 2017** (unreported). However, for the time to be excluded there must be proof of the dates of the critical events reckoning of the prescribed limitation which are one, date of the impugned decision and two; the date on which the copy of the decree or judgment was requested and three the date of supply of the requested documents. In the instant matter, the learned

counsels blamed the applicant for failure to attach the letter requesting for the said documents, or communication from the registry endorsed by Registry Registrar. Thus, it is difficult to establish when the request was made, who delayed and when the applicant was supplied with the requested document. As to the letter signed by the court clerk, the learned advocates stated that the same cannot be of use since it was supposed to be received from the Deputy Registrar as he is the one to supply the applicant with requested documents.

It was also submitted that through the affidavit in Misc. Land Application No. 79 of 2020 which was filed after the ruling by Hon. Mwenempazi J on 27/11/2020 and which faced preliminary objection on time and later on withdrawn by the applicant, was deponed and attested on 9/12/2020. That such assertions under paragraph 13 are lies. That, the applicant would not have compiled an application and swear an affidavit affirming among other things being in possession of ruling by Hon. Mwenempazi J as per annexure 3 within time and at the same time allege to be supplied with the same lately.

Also, the learned advocates stated that even if it is assumed that the documents were supplied to the applicant lately, still the delay from 20/8/2021 when the ruling was withdrawn by Hon. Mkapa J to 21/9/2021 when the present application was filed no explanation was offered.

In respect of the 3rd ground on failure to be notified on the outcome of proceedings of 21/2/2017 when the hearing was ordered to proceed ex parte on 27/3/2017; it was the learned counsels' reply that the plaintiff having failed to enter appearance common sense would have required him to inquire what transpired but he did not. The reason that the 3rd

respondent withheld information from him is misconceived since the applicant has not cited any decision or provision requiring the 3rd respondent to inform the non-attending plaintiff about the conduct of his matter which he had failed to prosecute.

Moreover, it was submitted that it is illogical for one to allege losing a track of a case and follow up on a wrong case and at the same time complain that he was not informed of what transpired in a particular court.

Responding to the issue of illegality as a ground of extending time, it was stated that this ground will open floods of litigants to those who deliberately default appearance and place the blame to the court. That there is no law to that effect especially when the applicant was present in court on last appearance. In addition, it was argued that this ground is not on the face of the record and is discoverable by long drawn processes as it was held in the case of **Lyamuya Construction** (supra).

The learned counsels for the 2nd and 3rd respondents also challenged the said illegality by arguing that the same does not qualify to be points of law as they based on no known provision, legal principle or case law.

Concerning the reason of technical delay, the learned counsels submitted that as per the case of **Shabir Tayabali Essaji vs Farida Seifuddin Tayabali Essaji, Civil Application No.206/06 of 2020**, the same is ground for extension of time. However, the learned advocates were of the view that it does not sufficiently account for specific duration as required which are from 21/2/2017 to 26/6/2017, 11/12/2020 to 15/12/2020, from 20/8/2021 to 21/9/2021. That as per the case of **Lyamuya**, the applicant must account for each day of delay which he has failed to do so. Thus, this application should be dismissed.



The learned advocates insisted that the applicant and his advocate repeated mistakes and so they should not be permitted to form basis for allowing the present application. Reference was made to the case of **Kambona Charles (As administrator of the Estate of the Late Charles Pangani) vs Elizabeth Charles, Civil Application No. 529/17 of 2019.**

On the strength of the above submission, it was the prayer of the learned advocates that the application should be dismissed in its entirety with costs to the 2nd and 3rd respondents since the 1st respondent is the applicant's own accomplice.

In rejoinder, Mr. Abdallah reiterated what had been submitted in chief. He added that what amount to good cause differ from one case to another but only that they must constitute elements which by its clear nature can be the reason for the delay in pursuing certain rights. To substantiate this point, he cited the case of **Ms. Henry Leonard Maeda and Another** (supra).

Moreover, it was submitted that the series of event as demonstrated in an affidavit in support of this application include the delay of being supplied with the requisite copy of order granting the applicant 14 days to file his application to challenge the ex parte order of this court.

Also, the learned advocate for the applicant emphasized that the illegality being among the reasonable grounds for the court to invoke its discretion to grant an order for extension of time, he implored the court to take such account and grant this application.

Replying to the allegations that the case of **Kotak Limited** is of no help, it was stated that they are only guided by ratio decidendi of the court and

not otherwise. On that basis, it was stated that the cited cases by the respondents should be disregarded for containing uncalled materials and urged the court to exercise its discretion and grant the application sought.

The applicant's advocate also reiterated what has been submitted in chief in respect of accounting for each day of delay.

At the end, he insisted his prayer that the application for extension of time be granted.

Having examined intensely the records of this application and the parties' submissions, the following are the court's observations. It is on record and is not disputed fact that on 27/11/2020 through Misc. Land Application No. 22 of 2019, the applicant was granted 14 days to file an application to set aside the ex parte order of this court. The applicant failed to file the said application within 14 days granted to him. Hence this application. Therefore, in this application I will only deal with the reasons for failure to utilise 14 days granted to the applicant.

In respect of the 2nd and 3rd respondents' submissions, I have noted that the learned counsels emphasised more on the time from when the ex parte ruling was delivered. This is not the position of the instant application as such time was discussed by this court when 14 days extension was granted by Hon. Mwenempazi J. in Misc. Land Application No. 22/2019.

Having established as such, my duty is to see if the applicant has managed to account for the delay to file the application within 14 days granted to him by this court.

According to case law jurisprudence in Tanzania, granting extension of time is the discretion of the court and the same must be exercised



judiciously. There are so many decisions to that effect some of them have been cited by the learned advocates. In the case of **NGAO GODWIN LOSERO v. JULIUS MWARAIJU, CAT, Civil Application No. 10 of 2015** (Unreported) it was held that: -

"As a matter of general principle that whether to grant or refuse an application like the one at hand is entirely in the discretion of the Court. But that discretion is judicial and so it must be exercised according to the rules of reason and justice."

In the instant case, the applicant's reason for failure to exercise his right of filing application within 14 days are elaborated under paragraph 12 and 13 of his affidavit. That, the ruling which granted him 14 days was delivered on 27/11/2020 and as per Annexure-4 (letter from Principal Clerk) the ruling was supplied to him on 7/12/2020. That, after being supplied with the said ruling he erroneously filed Misc. Land Application No. 79 of 2020 which is application for setting aside ex parte ruling on 14/12/2020 after elapse of 3 days. The same was withdrawn on 20/8/2021 after conceding to the preliminary objection raised in respect of the said delay.

Basing on this argument, I am of considered view that the applicant had tirelessly and vigorously fought for his right to set aside the ex parte ruling of this court. After a delay of 3 days from the 14 days granted to him, he even filed his application for setting aside the ex parte order. A delay of 3 days was not inordinate at all. This shows that the applicant herein eagerly wishes to pursue his right. In the case of **Mpoki Lutengano Mwakabuta v. Jane Jonathan (As a Legal**



Representative of the late Simon Mperasoka), Court of Appeal,
Hon. Kitusi J.A held that:

"I feel inclined to conclude that the period of delay being only four days, the justice of the case is in favour of granting the application. For the reason that the applicant's counsel was diligent and that the period of the delay is not at all inordinate, I grant the application."

Under paragraph 8 of the applicant's affidavit, the applicant lamented that during the hearing of the impugned application, he was not afforded fundamental right to be heard. The respondents' counsels said that the same cannot be termed as illegality since it will take long argument to ascertain it. With due respect to the learned advocates of the respondents, it is on the face of record that the ruling of this court was *ex parte* thus the applicant was not heard. Thus, such illegality is on the face of the record. It has been insisted by the court that once there is illegality on the impugned ruling then even if the applicant did not account for each day of delay, time has to be extended for such illegality to be cleared. This was stated in the case of **The Principal Secretary, Ministry of Defence and National Service v. Devram Valambia [1992] TLR 182**, that: -

"In our view when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty even if it means extending the time for the purpose of ascertaining the point and if the alleged illegality be established to make appropriate measures to put the matter and record right."



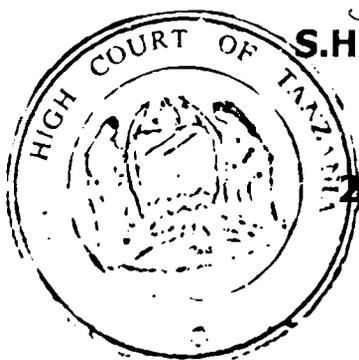
The learned advocate for the respondents had misplaced their submission as they were trying to submit and reckoning the time from when the impugned ex parte ruling was delivered while they ought to start counting from when the applicant was granted 14 days as seen in his entire submission. I am of considered opinion that the respondents will not be prejudiced any how if this court grant the extension sought since the matter will be heard on merit. In the case of **Mbogo and Another vs Shah [1968] 1 EA 93** the defunct Court of Appeal for Eastern Africa emphasized that: -

*"All relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reason for the delay, whether there is an arguable case on the appeal and **the degree of prejudice to the defendant if time is extended.**" [Emphasis added]*

For the foregoing reasons, this court is of settled opinion that there are enough materials presented to this court to grant extension of time sought in the chamber summons. Therefore, I hereby grant 21 days to the applicant to file his application as sought. Time shall commence to run from the date of being supplied with a copy of this ruling and drawn order. No order as to costs.

It is so ordered.

Dated at Moshi this 26th day of August ,2022.



S.H. Simfukwe
S.H. SIMFUKWE

JUDGE

26/8/2022