

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB - REGISTRY OF MWANZA
AT MWANZA**

MISC. LAND APPLICATION NO.12 OF 2020

(Arising from Land Case No. 68 of 2017)

MKAMA MAGESA.....APPLICANT

Versus

AMANA BANK LIMITED.....RESPONDENT

RULING

Nov. 25th, 2022 & Dec. 6th, 2022

Morris, J

This is one of the typical cases of forum shopping by litigants. The Applicant filed land case no. 68 of 2017 in this Court *albeit* simultaneously with land application no. 2 of 2016 before the District Land and Housing Tribunal for Mwanza (DLHT). On January 11th, 2018 the case before this Court was stayed on *res subjudice* basis pending determination of the matter in DLHT. The latter application was dismissed by DLHT for want of prosecution on July 16th, 2018. About a year later, on May 16th, 2019 – to be precise; the matter before this Court was also dismissed for want of prosecution.

The applicant was tardy in setting aside any of these dismissal orders. He is now moving the Court to determine his application for

extension of time. Upon being successful, the applicant intends to set aside the dismissal order and purportedly proceed with the trial in land case no.68 of 2017. The respondent is contesting the application. Both sides filed respective affidavits sworn by Mkama Magesa and Athuman Julias respectively. During hearing of the application, the affidavits were adopted as part of their submissions.

The applicant appeared in person, unrepresented; while Mr. Peter Ndege, learned advocate appeared for the respondent. The rivalry submissions from each side are summarized as follows: The applicant submits by almost reiterating the depositions in his affidavit. That, after he was ordered to prosecute his application at DLHT first, he kept going to the tribunal to no avail. Later the respondent appointed a court broker to sell his mortgaged property. That is when he realized that both the application and the case above had long been dismissed. Evidently, the applicant had nothing significant to submit in form of ground(s) for his delay than simply giving a historical account of a few events

To counter the application, the respondent, through Advocate Ndege, submitted that the applicant did not give any reason for the delay to warrant grant of extension of time. Further, the counsel argued that the applicant is also a habitual litigant who shows no seriousness in prosecuting his cases. That is why all his matters preferred in different

courts end up being dismissed for want of prosecution. He cited, as an example, that land case no 68 of 2017 was filed by him on November 24th, 2017 but he did not appear in court ever since. To the counsel, the applicant has always been seeking hopeless court redresses as a tactic to delay the respondent's right to recover the seven-year unpaid loan.

To determine this application, two questions need to be answered: one, applicant's justification for the delay herein; and two, the legitimacy of this application. I will start with the delay. In law, the court's leave for extension of time, is not a matter of an applicant's automatic right. It is grantable upon the court being satisfied that certain conditions have been fulfilled. Courts' pronouncements have recited such conditions a million times.

In ***Jonas Ntaliligwa v Fedia Nyayagara***, Misc. Land Application No. 20/2021(unreported), for example; it was held that the Courts are enjoined to consider, among other factors, length of the delay; reason(s) for the delay; an account for each day of delay; and existence of illegality curing of which results into significant public importance. Another case in such connection is ***Hamis Babu Bally v The Judicial Officers Ethics Committee and 3 Others***, CAT-Dar Es Salaam, Civ. Application No. 130/01 of 2020 (unreported)].

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The essence of setting the time limits in law is, among other objectives, to promote the expeditious dispatch of litigation, [*Costellow v Somerset County Council* (1993) 1 WLR 256]; and to provide certainty of time tables for the conduct of litigation [*Ratman v Cumara Samy* (1965) 1 WLR 8]. Subsequently, the present applicant is not, as I hold, supposed to benefit from her alleged ignorance of the law. The first ground lacks merits and it is, thus, disallowed.

I have taken sufficient interest in the applicant's depositions *vis-à-vis* the record in order to check whether or not requisite factors have been fulfilled in the present application. In the applicant's affidavit containing 11 paragraphs, I did not find a single paragraph stating—even by passing, the ground upon which the prayers in the application are based. That omission notwithstanding, the suit herein was dismissed on May 16th, 2019 but the present application seeking to extend time within which to apply to for setting the dismissal order aside was filed on February 25th, 2020. These are about nine (9) months in total.

The applicant is not deposing how the foregoing duration passed by without him taking the necessary action. Thus, it is obvious that the applicant slept on his right for all this time. Further, the entire affidavit contains no express evidence of any illegality inherent in the dismissal which would otherwise constitute a ground for this Court to consider

granting the application [*Khalid Hussein Muccadam v Ngulo Mtiga (As A Legal Personal Representative of the Estate of Abubakar Omar Said Mtiga) and Another* CA-Dar Es Salaam, Civ. Appl. No. 234/17 of 2019 (unreported); *Shabir Tayabali Essaji v Farida Seifuddin Tayabali Essaji*, CA-Dar Es Salaam, Civ. Appl. No. 206/06 of 2020 (unreported); *Hassan Ramadhani v R.*, CA- Tabora, Crim. Appeal No. 160 of 2018 (unreported); *Eqbal Ebrahim v Alexander K. Wahyungi*, CA-Dar Es Salaam, Civ. Appl. No. 235/17 of 2020 (unreported); *Ngolo S/O Mgagaja v R.*, CA- Tabora, Crim. App. No. 331 of 2017 (unreported); *Lyamuya Construction Co. Ltd. v Board of Trustees of Young Women's Christian Association of Tanzania*, Civ. Appl. No.2 of 2010, CA-Arusha (unreported); *Lycopodium (T) Ltd v Power Board (T) Ltd and Others*, Comm. Appl. No. 47 of 2020, HC-Dar es Salaam(unreported); *Chandrakant Joshubhai Patel v R [2004] TLR 218; PS Ministry of Defence & National Service v Devram Valambia* [1993] TLR 185; and *Keres and Others v Tasur and Others* [2003]2EA 531, followed]. Hence, the first limb of this application is unfavourable to the applicant.

I now turn to the legality of the applicant's present step. As outlined before, the suit above was stayed pending hearing and determination of the application at DLHT. The latter was dismissed for want of prosecution

earlier that the dismissal of the suit. In law, dismissal of the matter is, as a general rule, equivalent to determination of rights of the parties. Meaning that, therefrom, a party against whom the dismissal order applies is precluded from instituting another similar action. The subsequent matter becomes *res judicata*. See, for instance, ***Rajab Hassan Mfaume (administrator of estate of late Hija Omari Kipara) v Permanent Secretary, Ministry of Health, Community Development, Gender, Elderly and Children***, Court of Appeal (Mtwara) Civil Appeal No. 287 of 2019 (unreported).

In line with the foregoing legal position, it is obvious that when the application was dismissed by the DLHT, the applicant was hence-from prevented from pursuing a similar cause at DLHT or this Court. Indeed, the applicant's decision to abandon the DLHT trial and in lieu thereof seek to continue with the case before this Court is nothing less than pursuit of *res judicata* proceedings. It is illegal. If the zeal of the applicant is to pursue justice by setting aside the dismissal, he should be expected to do so at DLHT. Consequently, if he succeeds to pursue the matter to finality, the *res subjudice* will change phase to *res judicata*. See the cases of ***Quality Group Limited v Tanzania Building Agency***, Court of Appeal (Dar Es Salaam) Civil Appli. No. 182 of 2016(unreported); ***Ester Ignas Luambano v Adriano Gedam Kipalile***, Civil Appeal No. 91 of 2014

(unreported); and ***Ngoni - Matengo Cooperative Marketing Union Ltd v Ali Mohamed Osman*** [1959] E.A 577; ***Peniel Lotta v Gabriel Tamaki and two others***, Civil Appeal No. 61 of 1999 (unreported). In other words, the applicant should pursue the application at the DLHT to fruition or let go litigation altogether.

Furthermore, this Court through miscellaneous land application no. 254 of 2017 between parties herein decided that it cannot legally adjudicate on the proceedings whose subject matter is the same in the case pending in another judicial forum. It partly pronounced as follows:

*'Coming to our instant case, the applicant filed Land Application No.2 of 2016 at the District Land and Housing Tribunal on 8th January 2016. The subject matter is the same house located at Plot 56 Block B situated at Nyegezi, Mwanza City. That being the case therefore, **unless Land Application at DLHT is withdrawn**, High Court Land Case No. 68 of 2017 is res subjudice'* (bolding done for emphasis).

Mindful of the above decision, if the present application were to be allowed the resultant effect will be futile. DLHT dismissed it. The applicant did not withdraw it. Accordingly, the court will be *functus officio*. That position was bolstered in ***Mohamed Enterprises (T) Ltd v Masoud Mohamed Nasser***, Court of Appeal Civil Appl. No. 33 of 20112; and ***Leopold Mutembei v Principal Asst. Registrar of Titles, Ministry***

for Lands, Housing and Urban Development and Another, Court of Appeal (Mwanza) Civil App.57 of 2012 (both unreported). That is, so long as the application at DLHT was not withdrawn, the case before the high court (if it had not suffered dismissal) remains to be *res subjudice*. That is the clothing of section 8 of the **Civil Procedure Code**, Cap 33 R.E. 2019. Should the applicant wish to still keep alive the spirit of seeking justice, he may pursue restoration and prosecution of proceedings at the DLHT.

The above conclusions and reasons having been given; this application does not pass the just-test of law. It is dismissed. Considering the nature of this matter, no party is awarded costs.

It is so ordered.



C.K.K. Morris
Judge
December 6th, 2022

Ruling delivered in presence of Mr. Mkama Magesa, the applicant and Advocate Yahya Masoud holding brief of Mr. Peter Ndege, learned advocate for the respondent.



C.K.K. Morris
Judge
December 6th, 2022

