

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB - REGISTRY

AT ARUSHA

MISC.LAND APPLICATION NO. 94 OF 2022

(C/f Land Case No. 23 of 2019)

LAZARO BAJUTA 1ST APPLICANT

LAMECK CHACHA 2ND APPLICANT

JACKLINE RWEZAULA 3RD APPLICANT

ELISIFA AMMA 4TH APPLICANT

JOSEPH SAMWEL MTUI 5TH APPLICANT

JOSEPH SLAA BAYYO 6TH APPLICANT

HAYSHI TARMO SULE 7TH APPLICANT

PAULO SAFARI TEKOD..... 8TH APPLICANT

JAMES PAULO 9TH APPLICANT

MOSHI MANONGA SULLE 10TH APPLICANT

SIXBERT S.T. TEKOD 11TH APPLICANT

GABRIEL HIITI SARWATT 12TH APPLICANT

EPIMACK MARGWE 13TH APPLICANT

PAULO PETER WILLIAM 14TH APPLICANT

VITALIS VIRGIL JACOB 15TH APPLICANT

FAUSTINE SAFARI TEKOD 16TH APPLICANT

AUGUSTINO BURA AMNAAY 17TH APPLICANT

LALA NOYA SULLE 18TH APPLICANT

CHRISTOPHER KASTULI MATLE 19TH APPLICANT

VERSUS

DANIEL AWET TEWARESPONDENT

RULING

20th February & 20th April 2023

KAMUZORA, J.

The Applicants herein preferred this application praying for extension of time within which to file an application to set aside ex-parte judgment, decree and order of this court in Land Case No. 23 of 2019. The application was brought by way of chamber summons under section 14(a) of the Law of Limitation Act Cap. 89 R.E 2019 and the Schedule (part II) item 5 of the Law of Limitation Act Cap 89 R.E 2019 and section 68 (e) and 95 of the Civil Procedure Code Cap 33 R.E 2019. The application was supported by an affidavit deposed by one Lazaro Bajuta, the first Applicant herein. The Respondent filed counter affidavit contesting the application.

As a matter of legal representation, the Applicants enjoyed the service of one Ms. Bora Mfinanga, learned advocate while the Respondent was ably represented by Mr. Qamara, learned advocate.

In her oral submission in support of application the counsel for the Applicant adopted the affidavit in support of application and submitted that the law gives this court jurisdiction to grant extension of time to file application to set aside the ex-parte decree. The Applicant's counsel acknowledges that under the law of limitation, an application to set aside the ex-parte decree must be filed within 30 days from the date when the ex-parte judgment was delivered. She submitted that, when the Applicants became aware of the ex-parte decree in Land Case No. 23 of 2019, 253 days have already passed. That, immediately after they became aware of the ex-parte decision, they decided to exhaust the only remedy available by filing Misc. Land Application No. 97 of 2021 to set aside ex-parte judgment and decree. That, the said application was dismissed with costs following the preliminary objection raised by the Respondent. That, the Applicants obtained copy of the ruling on 21st June 2022 and instructed their advocate to file application for extension of time on 22nd June 2022 and the same was prepared on 24th June 2022 but since 25th and 26th June 2022 were weekends, all Applicants were able to sign the affidavit in support of application on 27th and the application was filed before this court on 28th June 2022.

The Applicants' counsel insisted that the Applicants were able to account for each day of delay as they acted immediately in time after

the pronouncement for the ex-parte judgment by filing Misc. Land application No 97 of 2021 which was found incompetent. Referring the cases of **Hamis Paschael Vs. Sisi kwa Sisi Panel Beating and 2 others**, Misc. Application No 5 of 2020, **Vodacom Tanzania Public Co. Ltd Vs. Commissioner General**, Civil Application No. 465/20/of 2019 and **Emmanuel Burihafi & another Vs. Janas Mrema**, Civil Appeal No 314 of 2019 the Applicants' counsel was of the view that extension of time should be granted on ground of technical delay.

The Applicants' counsel also raised issue of illegality as a ground for extension of time. She contended that the proceedings in Land Case No. 23 of 2019 contained procedural irregularities and illegalities. She pointed three limbs of illegalities; unauthorised change of advocate, failure to serve the Applicants with notice of ex-parte judgement and failure to assign reason for change of trial judge.

On the first limb of illegality the counsel argues that the advocates gave instruction to each other without involving the Applicants. That, the Applicants engaged advocate Saitoti Zelothe but during the proceedings on 14th July 2020 he was appointed a District Administrative Secretary and transferred to Mbeya Region. That, on 21st September 2021 Advocate Eliman Mungure appeared in court holding belief for Advocate Saitoti Mungure and informed the court that he had no instruction to

proceed with the case. That, on 17th February 2021 Mr. Nickolaus Leon appeared and claimed to have instruction without any proof of engagement letter from the Applicants or official letter by advocate Saitoti Zerote to withdraw himself from representing the Applicant. That, neither of the Applicants was present before the court that day and Advocate Leon continued with final pre-trial conference before Hon. Masara J and the date for hearing was set. That, when all these were happening, the Applicants were not aware of the fact that their advocate was already appointed as District Administrative Secretary and was transferred to Mbeya as they were not notified on the same. That, the Applicants were also not aware that Mr. Siatoti instructed another advocate to handle the case. That, it would have been wise for the Trial Judge to direct for the Applicants to be served to appear personally instead of entertaining another advocate who without any kind of proof claimed to act on behalf of the Applicants. That, due to this, the Applicant's right to be heard provided under article 13 (6)(a) of the Constitution was breached. Reference was made to the case of **NBC Tanzania Limited Vs. Princes Baha Tanzania Ltd**, Civil Appeal No 248 of 2017.

On the second limb of illegality, it was submitted by the Applicants' counsel that the Applicants were not served with notice of ex-parte

judgement as required by the law. She was of the view that failure to do so contravened the mandatory provision of Order XX rule 1 of the CPC Cap 33 RE 2019. To support the above argument she referred the case of **Joflo Co. Ltd and 3 others Vs. Bank of Africa Tz. Ltd**, Misc. Civil Application No. 562 of 2021.

Referring paragraph 5 of the Respondent's counter affidavit the counsel for the Applicants submitted that the Respondent claimed to serve the Applicants by way of publication as per Order V Rule 16 (1) of the CPA. She insisted that this rule requires the court to be satisfied that the Applicants are avoiding service or it was not practicable to serve them in ordinary way. That, in the case at hand sufficient enquiry was not made by this Court as to the whereabouts of the Applicants, whether they were avoiding service before substituted service was issued. That, even the record does not show if the Respondent was issued an order to serve the Applicants by way of publication in the newspaper. To support her argument she referred the case of **Werema Marwa Wankogere Vs. Mseti Marwa Wankogere**, Misc. Land Appeal No. 124 of 2020.

On the third limb of illegality, is the submission by the Applicants' counsel that there was failure of the successor judge to assign reason for taking over the matter from the predecessor judge. That, the record

shows that the case was before Hon. Masara J until the final PTC was conducted. That, on 15th July 2021 the parties appeared for hearing before Kamuzora J and the records are silent as to the reason for transfer of the case file. That, the proceedings is contravention of Order XVIII Rule 10 of the CPC. Reference was also made to the cases of **Erick C. Nzuluile and another Vs. Annosiatha Chrizostom**, Land Case Appeal No 35 of 2020 and **Leticia Mwombeki Vs. Faraja Safarali and 2 others**, Civil Appeal No. 133 of 2019. It is the Applicants prayer that, basing on the illegality pointed above, the application for extension of time be granted.

Submitting in opposing the application, Mr. Qamara, the counsel for the Respondent acceded that Misc. Application No 94 of 2022 was filed before this court on 20th July 2021 and the Ruling in respect of the PO was delivered on 13th day of June 2022. That, under Paragraph 10 of the Applicant's affidavit, the advocate of the Applicants Mr. Kizito claimed that he tried to obtain copy of the ruling on 14th June 2022 but could not get the same until 21st June 2022 when he obtained the copies of the ruling. The counsel for the Respondent argued that there is a lapse of 7 unaccounted days as no letter to the court to request the said copies.

Pointing at Paragraph 12 of the Applicants' affidavit, to which the Applicants claimed that they processed to file this application between 22nd to 28th June 2022, the counsel for the Respondent submitted that the record shows that the application was filed on 20th July 2022 and not 28th June 2022 as averred. That, there was delay of 24 days unaccounted making a total of about 31 days after the ruling was delivered leave aside ex-parte judgment. The Respondent's counsel referred this court to various decisions including; **Interchick Co Ltd Vs. Mwaitenda Ahobokile Michael**, Civil Application No. 218 of 2016, CAT at DSM and **Abdu Issa Bano Vs. Maro Daolio**, Civil Application No. 563/02/2017, where it was emphasised that the delay of even a single day has to be accounted for.

Responding to the issue of technical delay, the Respondent's counsel submitted that, there is no technical delay in this matter as the gap shown does not count for technical delay. The Respondent's counsel distinguished the cited case by the Applicants' counsel with the present case and claimed that the Applicants have failed to account for each day of delay.

On the point of illegality pleaded at paragraph 14 of the affidavit, the Respondent's counsel submitted that as held by the CAT in Civil Application No. 563/02/2017(supra) illegality must be of sufficient

importance and must be apparent in the face of record. He contended that, the raised illegalities in this application are not in face of record as the Applicants counsel was giving evidence on the illegalities. He was of the view that the points raised may only be points for appeal but not illegalities which the court can rely to grant extension of time.

On claim that the advocates gave instruction to each other, the Respondent's counsel submitted that, advocate-client relationship is not the matter for the court to decide. That, the advocate's conducts are guided by the Advocates Act and the ownership of any case before the court is the liability of client and his advocate and not the court. That, it is not the courts' duty to interfere the client's duties and their advocates. He insisted that the case of NIC Bank (supra) is distinguishable from the present case because, in that case two advocates appeared all together instructing each other and neglected the case. That, the position is different in this case because the advocate appeared representing the Respondent. That, the argument based on Article 13 of the Constitution and the case of Mbeya Rukwa (supra) should be considered as the Applicants were not denied right to be heard rather, they neglected their case.

Responding to the issue of notice of the date of judgment the Respondent's counsel submitted that, as per the attachment to the

counter affidavit at paragraph 5, the Applicants were notified in compliance to Order XX rule 1 read together with Order V Rule 16(1). That, the Applicants were served by way of substituted serves as the Applicants' addresses could not be found.

On the issue that the successor judge did not assign the reason for transfer of the case, the counsel for the Respondent agreed that Order XVIII Rule 10 (1) of the CPC Cap 33 and the CAT decision in Civil Appeal No 490 of 2021, **Josephine Mangala Msema Vs. The registered Trustees of PEFA, Kigoma**, reason for change must be given and or brought to the attention of the parties before continuation of the hearing. He submitted that at page 13 of the proceedings of Land Case No. 23 of 2019, on 15th July 2021, when the parties appeared before Hon. Kamuzora J, the issue of change of Judge was addressed that the case was re-assigned. The counsel however argued that the reason for stating the change is to ascertain the credibility of the witnesses and integrity of judicial proceedings and transparency. The Respondent contended that, at the stage the case was taken over by another judge, no evidence or witness had testified therefore, there was no change of judge from the date hearing of evidence started. It was further submitted by the Respondent that, it is on record that on 15th July 2021

when the parties appeared before Kamuzora J, neither the defendants (Applicants herein) nor their advocate were present.

The Respondent's counsel distinguished the cases cited by the Applicants especially the case of **Leticia Mwombeki** from the case at hand. He argued that in that case, hearing a judge who composed a judgement was different from the one who conducted the hearing and that is not case in matter at hand. In concluding the Respondent's counsel insisted that the Applicants have not advance sufficient cause for extension of time therefore prayed for the application to be dismissed with costs.

In a rejoinder submission the Applicants' counsel reiterated her submission in chief and added that, through online filing system the application was submitted on 28/06/2022 but returned back to the Applicants. That, after being admitted the Applicants were issued with control number to pay court fee. The Applicants' counsel insisted that the Applicants were able to account for each day of delay and the reasons for technical delay suffice for extension of time.

On the argument that illegalities must be seen in the face of record, she re-joined that, the illegalities referred here are in the face of record. On the issue of service, the counsel added that the rule referred requires service by publication to be a last resort. He insisted that, there

was no order of the court to serve the Applicants by way of publication thus, the service was premature. On the argument that no hearing had commence at the time of taking over the case the counsel argued that, final PTC is the last stage for hearing and that at any stage the reason must be assigned. She insisted that it is not true that the reasons for taking over was stated by the successor judge and this is an illegality sufficient to grant extension of time. She further added that where illegality is established, there is no need to account for each day of delay.

Having heard the submissions made by the parties for and against this application, the pertinent issue for the adjudication by this court is whether the Applicant has adduced sufficient reasons for grant of extension of time. It should be clearly noted that, grant of extension of time is a matter of discretion of the court, the discretion which however must be exercised judiciously, see **Mbogo Vs. Shah** [1968] EA 93. In that case the court highlighted factors to be taken into account by the court in deciding to either grant or refuse to grant extension of time. It was held: -

*"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".

The Court of Appeal of Tanzania also formulated the guidelines to be considered in granting the extension of time in the case of **Lyamuya Construction Company Limited Vs. Board of Registered Trustees of Young women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (Unreported). The court held that: -

"On the authorities however, the following guidelines may be formulated:

- a) The Applicant must account for all the period of delay;*
- b) The delay should not be inordinate;*
- c) The Applicant must show diligence, not apathy, negligence or sloppiness in the prosecution of the action that he intends to take; and*
- d) If the court feels that there are other reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged"*

In the case at hand, the Applicants pleaded two grounds for the extension of time; technical delay and illegality premised on the proceedings of the case.

Regarding the first ground which is based on technical delay, I assessed the court records, the affidavit in support of the application and the submission by the counsel for the Applicants and the following were observed.

The ex-parte judgment in Land Case No. 23 of 2019 was pronounced on 18th October 2021 by this court. An application to set aside the ex-parte judgment was preferred to this court by the Applicants on 16th November 2021, Misc. Application No. 97 of 2021 which was well within time. However, that application was struck out by this court in its ruling dated 13th June 2022 for being supported by a defective affidavit. As the Applicants were out the statutory time to file an application, they preferred the present application seeking time enlargement within which an application to set aside the ex-parte judgment can be lodged. The exchequer receipt with number EC101399582633 evidencing the filing was issued on 20th July 2022. Based on that analysis, this application was filed after the expiration of the period of one month and 7 days from the date of ruling in Misc. Application No. 97 of 2021. Now the question is whether the Applicants delay was reasonable, and whether the Applicants accounted for the days of delay as it was so propounded in the case of **Bushiri Hassan V Latifa Lukio Mashayo**, Civil Application No 3 of 2007 CAT at Arusha (Unreported). In that case it was held that a delay of even a single day, has to be accounted for, otherwise, there would be no need of having rules prescribing periods within which certain steps have to be taken.

The counsel for the Applicants' counsel explained that the Applicants obtained copy of ruling on 21st July 2022 and after obtaining copy, they proceeded on instructing the advocate and prepare and file the current application and the same was filed on 28th June, 2022 through online filing system. Based on record, the Applicant did not support the claim that they received copy of ruling on 21st June 2022 and at the same time they were unable to demonstrate if the current application was filed online on 28th June 2022. Even if I assume that the said application was filed online on 28th June 2022, the exchequer receipt as earlier noted evidences that the court fee was paid on 20th day of July 2022. If the Applicants want this court to consider the online filing date as filing date, in my view, it was upon them to demonstrate the reasons for not paying the court fee for more than 22 days after filing the application. It must be noted that, payment of court fees justifies filing of case and the payment date is mostly considered as filing date of the case in court. For this, see the case of **John Chuwa Vs. Anthony Ciza** (1992) TLR 233.

Although the above case was decided before we introduced new filing system which allows parties to file their pleadings online, it is my view that, the new filing system simplifies the process but does not take away parties' responsibilities in ensuring that matters are filed and heard

on time. By imposing the requirement to pay court fees, the law wanted commitment for the parties in prosecuting the claim. Court fees therefore justifies among others the propriety of the matter before the court. Thus, while online filing simplifies the process, the date of payment of court fees should stand as filing date. I say so not to discourage online filing but to make the parties accountable for whatever they file online. In my view, if left for the parties to decide when to pay court fees merely because the document is already filed online, we will be encouraging a number of cases hanging for a long time in online filing system and at the same time circumventing the purpose of the law which set time limit for every case. Having said so I do not agree with the Applicant's counsel that there was technical delay. Technical delay would have been established if the Applicants were able to account for the period from when they claimed to have received a copy of ruling, that is 21st June 2022 to the date the court fees was paid to justify filing on 20th July 2022. I therefore find this ground not sufficient to grant extension of time.

Regarding points illegality, it is clear that illegality by itself constitute a sufficient ground for an extension of time. However, for the illegality to be the basis of extension of time it is now settled that it must be apparent on the face of record and of significant importance to

deserve the attention of the court. In determining the illegality, it does not mean that the court must determine the facts establishing the alleged illegality, rather it will have to determine as whether the pointed illegalities are well established and are on the face of record.

On issue of illegalities based on instruction of advocates without the consent of the parties, I find the same baseless. I agree with the counsel for the Respondent that advocate-client relationship is not the matter to be adjudicated upon by this court in this matter. It is not true that the court will only entertain an advocate upon receiving a letter from a client or another advocate passing instruction. That is not the requirement of the law. An Advocate is an officer of the court and whenever he appears representing a party to the case, it is expected that the advocate had agreement and instruction from that party. Thus, if an advocate who appeared representing the Applicants was not duly instructed, that cannot be considered as illegality. That, goes on ethical issues of an advocate and this is not a right forum to address the advocate misconduct or ethical issues. I therefore find that, whether the advocates instructed each other without involving the Applicants, that cannot be considered illegality which this court can consider in granting extension of time.

On the arguments that the Applicants were not properly served with notice of ex-parte judgment, I find the same baseless. It is my view that the issue on whether there was proper service of the notice for ex-parte judgment does not justify extension of time. In other words, that is not an issue of illegality which guarantees extension of time. That could only stand as ground for setting aside ex-parte judgment because, it is a fact to be proved and not illegality in the face of record.

On the argument that the successor judge did not assigning the reason for taking over the matter, it is true that no reason was recorded for taking over the case. As submitted by the counsel for the Respondent and evidenced by page 13 of the proceedings of Land Case No. 23 of 2019, on 15th July 2021 when the parties appeared in court, the neither the Applicants nor their advocate was present. The counsel for the Respondent Mr. Emmanuel Safari addressed the court acknowledging that they were informed on the re-assignment of the case. However, the court itself did not address the parties on the reason for re-assignment. Now the question is whether the court contravened the provision of Order XVIII Rule 10 of the CPC. The said provision read:-

*"10. -(1) Where a judge or magistrate is prevented by death, transfer or other cause **from concluding the trial of a suit, his successor may deal with any evidence or memorandum***

taken down or made under the foregoing rules as if such evidence or memorandum has been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it.”

Based on the above provision, assigning reasons will only be necessary where the evidence for one or more witnesses is already recorded and the trial Judge is unable to conclude the trial. As it was well argued by the counsel for the Respondent, the purpose for stating reason for the change of trial judge is to ascertain the integrity of judicial proceedings hinges on transparency. That is also the holding of the Court of Appeal in **Leticia Mwombeki** (supra) and **Josephine Mangara Msema** (supra).

However, it is my view that the above two cases are distinguishable from the present matter. In **Leticia Mwombeki** (supra) the proceedings were nullified on the reasons that the successor judge took over partly heard case without assigning the reason and was found in contravention of Order XVIII Rule 10 (1). In **Josephine Mangara Msema** (supra) the Chairperson of the District Land and Housing Tribunal presided over the proceedings by receiving all evidence and final submissions but the judgment was composed and delivered by another Chairperson without recording the reason for doing so. The change of trial judge in the current matter was before recording

evidence of any witness hence technically there was no change. Even if so, on the date the matter was called before a predecessor judge, neither of the Applicants nor their advocate was present and the Applicants were unable to demonstrate how they were prejudiced with such failure. In concluding the ground of illegality, I am convinced that the Applicants were unable demonstrate existence of illegality in the proceedings or judgment of this court in Land Case No. 23 of 2019 which could justify the grant of extension of time.

In the final analysis, this court is satisfied that the Applicants have failed to prove technical delay by accounting for each day of delay. Similarly, the Applicants were unable to prove points of illegality to justify the grant of extension of time. I therefore find this application devoid of merit and it is hereby dismissed with costs.

DATED at **ARUSHA**, this 20th day of April, 2023.



A handwritten signature in blue ink, appearing to read "D.C. Kamuzora".

D.C. KAMUZORA

JUDGE