

**THE UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**IN THE HIGH COURT OF TANZANIA**  
**(IRINGA SUB-REGISTRY)**  
**AT IRINGA**  
**MISCELLANEOUS LAND APPLICATION NO. 08 OF 2020**  
(Arising from Misc. Land Application No. 42 of 2016)

**NJOMBE DISTRICT COUNCIL ..... APPLICANT**

**VERSUS**

**BEDON KINYUNYU ..... RESPONDENT**

**RULING**

Date of Last Order: 23/03/2023 &  
Date of Ruling: 31/03/2023

**S. M. Kalunde, J.:**

In this Application, the applicant, Njombe District Council has moved the Court seeking for extension of time within which to file an application to set aside the dismissal order of this Court dated 10<sup>th</sup> day of April 2018 in Misc. Land Application No. 42 of 2016. The application has been brought under section 14 (1) of **the Law of Limitation Act [Cap. 89 R.E. 2019]** (hereinafter "the LLA").

The brief facts leading up to the present application are as follows: in the year 2012 the respondent filed **Land Case No. 2 of 2012** against the applicant. The suit was for compensation for trespass and unlawful occupation of his land measuring 25 acres situated at Makambako. The applicant were dully served with the plaint and necessary documents. However, they failed to file their defense within the prescribed timeline. On 07<sup>th</sup> June, 2012 the Court ordered the

matter to proceed ex parte against the applicant. The applicant attempted to set aside the ex parte order through **Misc. Land Application No. 02 of 2012**. The efforts were futile as ultimately on 17<sup>th</sup> April, 2015 the application was struck out with costs for being incompetent. Subsequently, ex parte hearing proceeded on 19<sup>th</sup> day of January, 2016. The trial terminated in favour of the respondent. In a judgment delivered on 22<sup>nd</sup> March, 2016 the court determined that the respondent was the lawful owner of the suit property. In addition to that, the Court resolved that the applicant had trespassed and illegally occupied the suit property. The respondent was awarded Tshs. 65,000,000 in general damages and costs of the suit.

The applicant were aggrieved by the decision of this Court and wished to have the same set aside. However, being out of time, on 19<sup>th</sup> October, 2016, the applicant lodged **Misc. Land Application No. 42 of 2016**. The application sought to set aside the ex parte judgment and decree dated 22<sup>nd</sup> March, 2016 in Land Case No. 2 of 2012. The application was supported by an affidavit of **Ms. Ansila Makyao**, then a solicitor of the applicants. Unfortunately, on the 10<sup>th</sup> day of April, 2018, this Court (**Hon. Shangali, J**) dismissed Misc. Land Application No. 42 of 2016 for non-appearance. It is this decision which is the subject of the present application.

In the current application, the applicant is seeking an extension of time within which to file an application to set aside the dismissal order of this Court dated 10<sup>th</sup> day of April 2018 in Misc. Land Application No. 42 of 2016. The application is being supported by an affidavit dully sworn by **Mr. George Brown Makacha** Principal and Authorised Officer of the applicant. The application was challenged by the

respondent through a counter affidavit dully sworn by **Bedon Kinyunyu**, the respondent. Sadly, on 07<sup>th</sup> August, 2021 the respondent passed away, the court was dully notified of the efforts to appoint an administrator of his estates. The records show that, on 08<sup>th</sup> September, 2022, **Mr. Methusaeler Lucas Kinyunyu** applied and was joined to the matter as an administrator of the estate of the late Bedon Kinyunyu.

By consent of the parties, the application was disposed by way of written submissions. Submissions of the applicant were drawn and filed by MR. GEORGE BROWN MAKACHA, learned State Attorney whilst those of the respondent were drawn and filed jointly by MR. INNOCENT PAULOS MWELELWA and HAFIDHI MOHAMED MBINJIKA learned Advocates. Parties complied with the schedule issued for filing submissions hence the present decision.

In accordance with the affidavit filed in support of the application and submissions made before the Court, the main reason for the delay in filling the application for setting aside the dismissal order was poor handling of the casefile by the solicitor of the applicant, Mr. Innocent Kihaga. It is alleged that the matter was initially being handled by Ms. Ansila Makyao. She was later transferred to Hai District. Upon her transfer, Mr. Innocent Kihaga took over the prosecution of the matter.

The averments in the affidavit and submissions are to the effect that the said Mr. Innocent Kahanga took over the prosecution of the matter. However, on 20<sup>th</sup> February, 2018 the said officer absconded from duty from. He was subsequently subjected to disciplinary charges. At the end of the disciplinary proceedings, Mr. Kihanga was found

guilty. Subsequently, on 01<sup>st</sup> day of November 2018, his employment was terminated.

It was further claimed that as a result of his abscondment and termination it became difficult and nearly impossible for the applicant to follow through and know what was happening with Misc. Land Application No. 42 of 2016. As a result, on 10<sup>th</sup> April, 2018 the application was dismissed. The counsel for the applicant alleges that it was not until the 09<sup>th</sup> day of April 2020 that the applicant became aware of the dismissal order in Misc. Land Application No. 42 of 2016. He contended that, immediately after becoming aware on 14<sup>th</sup> day of April 2020 they applied to be supplied with copies and order sought to be challenged. The same were supplied on 16<sup>th</sup> day of April 2020 and on the 06<sup>th</sup> May, 2020 the present application was filed.

Relying on the above set of facts the learned counsel for applicant believe that the applicant have been diligent in prosecuting the matter sufficient for the court to exercise its discretion in granting the application.

In the replying counter affidavit and submissions the respondent denied the applicant's allegations. The counsel for the respondent contended that throughout the pendency of the impugned decision the applicant was being represented by several other advocates or solicitors who were aware of the matter. The respondent maintained a view that the office of the applicant were aware of the proceedings in the impugned application and made several appearances in other applications including an application for execution in Land Case No. 2 of 2012. The respondent argued further that the applicant were negligent and have failed to account for the delay. It was the respondents

conclusion that the applicant has failed to establish good cause for this court to exercise its discretion in granting the application. The respondents prayer was that the application be dismissed with costs.

In determining the present application, I have gone through the pleadings and submissions of the parties, and gathered that the crucial issue for my determination is whether the applicant has been able to present good or sufficient cause within the meaning of section 11(1) of the AJA. The respective section reads:

*"11.-(1) Subject to subsection (2), **the High Court** or, where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned, **may extend the time** for giving notice of intention to appeal from a judgment of the High Court or of the subordinate court concerned, **for making an application for leave to appeal** or for a certificate that the case is a fit case for appeal, **notwithstanding that the time for giving the notice or making the application has already expired.**" [Emphasis is mine]*

My reading and understanding of the above section is that it is in the discretion of the court to grant or refuse an application for extension of time. However, that discretion is not absolute since it must be exercised judiciously and in accordance with the rules of reasoning and justice, and not according to private opinion. For the application to be granted, the applicant must demonstrate **"good or sufficient cause"**.

However, the term "good or sufficient cause" does not have a statutory definition. Nonetheless, through judicial decisions, guidelines have been developed to assist courts in ascertaining whether or not an applicant has demonstrated "good or sufficient cause" so that a court

may exercise its judicial discretion. The guidelines may be found in the Superior Court decisions in **Lyamuya Construction Company Ltd. vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010; **Bertha Bwire v. Alex Maganga**, Civil Application No. 7 of 2016, **Tanga Cement Co. v. Jumanne Masangwa and Another**, Civil Application No. 6 of 2001; **Dar es Salaam City Council v. Jayantilal P. Rajan**, Civil Application No. 27 of 1987; **Tanzania Revenue Authority v. Tanga Transport Co. Ltd**, Civil Application No. 4 of 2009; and **Farida F. Mbarak & Another vs Domina Kagaruki & Others** (supra) [2021] TZCA 600 (20 October 2021) (all unreported)."

For example in In the case of **Bertha Bwire's Case** (supra) the Court of Appeal stated as follows: -

*"...It is trite that extension of time is a matter of discretion on the part of the Court and that such discretion must be exercised judiciously and flexibly with regard to the relevant facts of the particular case. Whilst it may not be possible to lay down an invariable definition of good cause so as to guide the exercise of the Courts discretion the Court is enjoined to consider, inter-alia, the reasons for the delay, the length of the delay, whether the applicant was diligent and the degree of prejudice to the respondent if time is extended.*

Equally, in **Farida F. Mbarak & Another vs Domina Kagaruki & Others** (supra) [2021] TZCA 600 (20 October 2021) (unreported) the Court of Appeal (**Mwampashi, J.A**) stated:

*"There is, however, no invariable definition or hard and fast rules as to what constitutes "good cause". In exercising its discretion and determining whether good cause has been shown to warrant extension of*

*time, the Court, depending on the circumstances of each case, has to look at a number of factors such as whether the applicant was diligent, reasons for the delay, the length of the delay, the degree of prejudice to the respondent if time is extended, whether there is an arguable case such as whether there is a point of law or the illegality or otherwise of the impugned decision ..."*

To sum up the above pronouncements, I would say that it is now settled that, in determining whether or not there is reasonable and sufficient cause for extension of time, a court must consider: **one**, whether the applicant has accounted for all the period of delay; **two**, whether the delay is inordinate; **three**, whether the applicant has shown diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take; and **four**, whether 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 instant case, there is no disputed that the dismissal order in **Misc. Land Application No. 42 of 2016** was delivered on 10<sup>th</sup> day of April 2018. It is also not disputed that the present application was filed on 06<sup>th</sup> May, 2020. That is the delay of almost 757 days, that is almost two years and 27 days. Without mincing words, I must state at the outset that, by any measure, a delay in logging the application for two years is an exceedingly inordinate delay. That said, the next question is whether there any reasonable and justifiable explanation for this delay? In other words, has the applicant accounted for all the period of delay?

In accordance with the affidavit and submissions of the applicant, the delay was actuated by the abscondment of the counsel who was handling the matter before the Court. The allegation is that upon his abscondment the said officer was dismissed from work. The letter attached to the affidavit demonstrates that the counsel was terminated from employment on 01<sup>st</sup> day of November 2018. Since terminated counsel was assigned to handle the case it became difficult for the officers of the applicant to know what was transpiring in court. Is this argument true or even correct?; and if so, is it a sufficient reason for extension of time?

Having gone through the records and submissions, I must say that I am not persuaded that the abscondment and subsequent termination of the said counsel is a sufficient reason for the extreme delay in the instant case. I say so because, having glanced through the records, I have not seen any set facts or materials in the applicant's affidavit and submissions demonstrating that the applicant, a public institution, failed to ensure the matter was being attended because one of their counsel absconded or was terminated. If the applicant, wished this court to grant the application, he should have paraded sufficient materials within which the court may ascertain whether or not there is good or sufficient cause. This was not satisfactorily done in the present case.

I not further that, in the instant case, it was the applicant who filed an application for extension of time before this court and not the said counsel. It was therefore duty of, and in the interest of, the accounting authority or officer of the applicant to see to it that the matter pending in court was being attended to and that the applicant



was always being represented in court. The applicant had a duty to ensure the matter was attended with or without the presence of Mr. Kihanga. A failure to ensure that a matter in pending in court was being attended to is sheer demonstration of inaction, negligence and laxity on the part of the applicant and his solicitors.

The position of the law is well settled that inaction; sloppiness; and negligence of the applicant or his advocate is not is not a good cause. The above principle has been applied by the Court of Appeal in several of its previous decisions including in **Umoja Garage vs. National Bank of Commerce** [1997] TLR, 109; **VIP Engineering and Marketing Limited vs. Said Salim Bakharesa LTD**, Civil application No. 52 of 1998; **Ali Vuai Ali vs. Suwedi Mzee Suwedi**, ZNZ Civil Application No. 1 of 2006; **H. Muhimbira & 2 Others vs. John K. Mwanguku**, Civil Application No. 13 of 2005 (all unreported).

In **Umoja Garage vs. National Bank of Commerce** (supra) for example, **Kisanga, J.A** (as he then was) stated thus:

*"I am quite clear in my mind that the state of affairs in this case was brought about by the failure of the applicant's counsel to act diligently...It seems plain to me...lack of diligence on the part of counsel or an oversight ...would be even more devoid of merit as a plea for extension of time . In the result , therefore, I am of the view that no sufficient cause has been disclosed for enlarging the time as prayed. "*

Now that inaction, laxity and or negligence on the part of the counsel or the applicant himself does not constitute a good reason for extending time, I am not persuaded by the applicants in this case that that there are sufficient grounds to exercise my discretion in granting the application.

On the other hand, even if it were to be accepted that the applicants failed to pursue the matter as a result of the abscondment and termination of the said counsel, the records, particularly the letter attached to the affidavit, shows that the alleged counsel was charged with disciplinary offences on 28<sup>th</sup> March, 2018. This was prior to the dismissal of the impugned decision which was dismissed on 10<sup>th</sup> April, 2018. Being aware that the said counsel was handling matters before the court, the applicant had an opportunity to assign the case file and the affairs of the legal office to another person. However, as the records shows, that was not done for almost two years. It would seem, therefore, that the abscondment and eventual termination of the solicitor was not the actual reason for failing to file an application in time.

The protracted prosecution of this case also shows lack of seriousness and diligence in handling the matter. First of all the applicant failed to file their defense in **Land Case No. 2 of 2012**. Subsequently, the Court ordered the matter to proceed exparte against the applicant. Secondly, it is on record that aggrieved the exparte order, the applicant logged **Misc. Land Application No. 02 of 2012** with a view to set aside the exparte order through. The said application was struck out with costs for being incompetent. Thirdly, it is not disputed that the exparte judgment was delivered on 22<sup>nd</sup> March, 2016. However, the applicant failed to challenge the same within the prescribed limitation and hence the present application. in view of the above history of the matter, the applicant cannot, at least on the face of records, claim diligence on their part.

Furthermore, even assuming, without deciding, that the period between 10<sup>th</sup> April, 2018 when the application was dismissed and 01<sup>st</sup> November, 2018 when the counsel was terminated had been accounted for, it is evident that the applicant has further failed to account for the delay between 02<sup>nd</sup> November 2018 to 06<sup>th</sup> May, 2020 when the present application was filed. This, additionally, confirms lack of diligence and accountability on the part of the applicant.

Lastly, I have noted that, in his submissions, the counsel for the applicant attempted to discuss additional grounds for extension of time which not covered in the affidavit. However, in view of the settled position that the reasons and supporting materials for extension of time must be contained in the affidavit I shall not consider the same, as doing so would be elevating submissions into evidence.

All said and done, I am satisfied that the applicant has failed to show good or sufficient cause for the delay to warrant the grant of the orders sought. Therefore, the application is dismissed for being devoid of merits.

**It is so ordered.**

**DATED at IRINGA this 31<sup>st</sup> day of MARCH, 2023.**



A handwritten signature in blue ink, appearing to read "S.M. Kalunde".

**S.M. KALUNDE**

**JUDGE**