

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

MISC. LAND APPLICATION NO.19 OF 2023

*(Originating from Land Case No.02 of 2023 High Court of Tanzania at SHINYANGA
Registry)*

GODFREY PANTALEO MALLYA } **APPLICANTS**
ESTER MWITA NYARAGWA }
GEORGE MARWA MIGERA }

VERSUS

1. ESTER SELELI NGASSA (*Administration
of the estate of late Seleli Ngassa Ndalaka*)
2. THE ATTORNEY GENERAL
3. SHINYANGA MUNICIPAL COUNCIL } **RESPONDENTS**
4. REGISTRAR OF TITLE }
5. COMMISSIONER FOR LANDS }
6. SELELI SHIJA }
7. DUES SENI SHIJA }

RULING

7th & 31st August 2023

F. H. Mahimbali, J.

This is an application made by the applicants pleading this Court to set aside an order issued by this Court in Land Case No. 02 of 2023 (Via my brother A. Matuma, J) dated 30th March 2023 which ordered the suit to proceed ex parte amongst others, against the applicants. In essence this application is a twin to this (Misc. Land Application No. 16 of 2023).

The brief facts behind these applications are due to Court's order issued on 30th March 2023. To appreciate the gist of the current applications, I better reproduce what transpired in Court on 30th March 2023 vide Land Case No. 2 of 2023 which is the basis of the current applications. The record in the original case file provides:

Date: 30/3/2023

Coram: Hon. A. Matuma, J.

For Plaintiff: Ijani Augustion Adv holding brief of Mr. Frank Samwel

For 1st – 4th Defendants – Mr. George Kalenda (S/A).

For 6th – 9th Defendants – All Absent.

B/C – Beatrice.

Mr. Advocate Ijani:

All defendants were dully served and acknowledged service. Here are the return of summons. They have yet filed their respective defenses. The 1st to 4th Defendants are present through the state attorney but have as well not yet filed the defense. That is all.

Mr. George Kalenda:

It is true that we have been dully served since 6th March 2023. We were required to file that defense on or prior to 27th March, 2023 so that we file the same within 21 days. Unfortunately, we completed to draft our defense on 29/03/2023 when the time had expired. We could not therefore file the same without an order extending the time. I thus pray that we file our defense today because we intend to file the defense. I pray so under Order VIII, Rule 1 (3) of the CPC. That is all.

Advocate Ijani: We have no objection. That is all.

Ruling.

The defendants were dully served and acknowledged service as per returned summons which required them to file their respective written statements of defences. None of the defendants has filed such defense nor appeared to show cause why he or she failed to file such a defense except the 1st to the 4th defendants who have entered appearance through Mr. Kalenda, learned state attorney and prayed for extension of time to file the written statement of defense under Order VIII, Rule 1 (3) of the CPC. The State Attorney admitted that they were dully served since 6th March 2023 and thus ought to have filed their respective defense on or before

27/03/2023. He did not however state what caused them to delay to prepare their defense and file it on time.

Although Mr. Ijani Augustino learned advocate did not reject the prayer, I will not grant such prayer for extension of time to file defense. This is because we do not grant a prayer merely because the parties are not at issue on it but in accordance to the guidelines of law.

Now under Order VIII Rule 1 (3) of the CPC (supra), extension of time to file the defense is only grantable when defendant shows good cause for failure to file the defense on time. In the instant matter no any reason leave alone a good cause for failure of the 1st, 2nd, 3rd and 4th Defendants to file their respective defense on time. It is a mere prayer for extension of time. We have ruled in a number of cases that court's time is so precious, we are jealous of it when one wants to misuse it. Thus, for instance in the case of Nyamunini Ntarambigwa Versus Simoni Kikoti, Misc. Land Application No. 19/2020 (HC) at Kigoma, I ruled:

Court's time is so precious, we are jealous of it when one wants to consume the same with irrelevant arguments to camouflage his mistakes, wrongs, mischief or please his client

who by the time of such arguments is looking at him with a speaking eye that, "but I was making follow ups to you and always told me to be patient, now look, what have you done!"

In the instant matter had the defendants filed their respective defences, the same would have to go to the next step further. Failure to file such defense seeks to misuse the court's time for not moving to the next step.

I therefore reject the prayer by the learned state attorney. I proceed to order exparte proof of the plaintiff's claims under Order VIII, Rule 14 (1) of the CPC. It is so ordered.

**A. MATUMA
JUDGE
30/03/2023**

In supporting the applicants' application, Mr. Audax learned advocate submitted that since by the time the Court ruled that the matter should as well proceed exparte against the applicants, the order was prematurely made as the applicants were served just few days before the Court's order of exparte proof. He was thus of the considered view that, that order shouldn't have been extended against the applicants as done.

Mr. Lwenge learned state attorney didn't oppose this application though he commented that there ought to have been sufficient cause.

On the other hand, Mr. Frank Samwel learned advocate for the first respondent who is also the plaintiff in the main case, opposed the application contending that there are no convincing grounds for the grant of the application since neither of them appeared on the 30th March, 2023. Thus, pursuant to order IX of the CPC there are listed consequences for non-appearances.

However, he submitted further that as per order V, Rule II of the CPC, any sane adult member in which a person resides, service can be effected through him and it is an effective as per law. On that basis, he humbly prayed that let the application be dismissed for want of compelling grounds.

I have thoroughly digested the applicants' prayers for setting aside the order for exparte proof issued by this Court vide Land Case No. 02 of 2023 dated 30th March 2023. It is true that the applicants had not filed their WSDs as per law by 30th March 2023. However, it is undisputed that the applicants were just served on 23rd March 2023. Thus, by 30th March 2023, the applicants had only 7 days since the reception of the 1st respondent's plaint. That means, by the time of making an order of exparte proof on 30th March 2023, the applicants as a matter of law had remained with a total of 14 days' time to file their WSDs.

In my considered view, in the full digest of the facts of this case, the applicants have shown good cause as to why they had failed to file their WSDs in Land Case No. 02 of 2023 as they still had ample to do that. As it ruled so against the other defendants, it shouldn't have been extended so against the applicants. Considering the fact that the applicants' none-attendance on the date the case was scheduled for necessary orders had still time to file their WSDs, that is a good cause for the Court to allow the applicant's application in line of Order VIII, Rule 14(2) of the CPC. It is thus true that, in the 1st place, in fact, the pleadings must be complete for the provisions of Order IX of the CPC to come into play.

Regarding the 1st Applicant, it is undisputed that the service was not as per legal compliance. Under order V Rule 12 of the CPC summons should be effected by service officer. There ought to have been an affidavit of service stating how the 1st Applicant was duly served. In that absence, it is uncontroverted that it was.

That said, the applicants' application is allowed. Their WSDs should be filed in ten days from today pursuant to **Order VIII, Rule 1(3)** of the CPC.

It is so ordered.

DATED at SHINYANGA this 31st day of August, 2023.



F.H. Mahimbali
Judge