

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

AT ARUSHA

MISCELLANEOUS LAND APPLICATION NO. OF 2023

(Originated from Land Case No. 35 of 2021)

MARY MALAI APPLICANT

VERSUS

EMANUEL MARIMARI 1ST RESPONDENT

JOSEPH SAMWEL SANARE 2ND RESPONDENT

ATHANAS SABO CHENYA 3RD RESPONDENT

MSAFIRI JACOB BORORO 4TH RESPONDENT

JUMAAM SELEMAN KIURE 5TH RESPONDENT

EDWARD AUFORO MOSHI 6TH RESPONDENT

MARTIN MLUKUZA 7TH RESPONDENT

THERESIA KASHAMBA 8TH RESPONDENT

ASSISTANCE REGISTRAR OF TITLES 9TH RESPONDENT

ATTORNEY GENERAL 10TH RESPONDENT

RULING

& 15th September, 2023

TIGANGA, J.

The applicant is seeking for extension of time so that she can file application to set aside Ex-parte Order made by this Court (Tiganga, J.) in Land Case No. 35 of 2021, which was delivered on 21st September, 2022. The application is by chamber summons made under section 14 (1) of the **Law of Limitation Act**, [Cap 89, R.E 2019], Order XLIII, Rule 2 and section

95 of the **Civil Procedure Code**, [Cap 33 R.E 2019]. It is also supported by the applicant's affidavit containing the grounds for application in which she deposed that, she was not aware of the ongoing Land Case No. 35 of 2021 in this Court. That, she became aware after being told by her neighbour on 20th January, 2023, according to him the said neighbour came to Court for her own bussiness and heard the applicants name being called out in the speaker. Thereafter she made follow up and found the *ex-parte* order had already been issued in her absence hence she filed this application.

Her appliation was opposed by the 1st respondent who filed his counter affidavit and vehemently disputed the fact that, the applicant was not aware of the ongoing Land Case No. 35 of 2021. He stated that, the applicant had personal knowledge of the case as she was with served the summons through her Advocate Mr. George Mwaria trading as Hakika Law Firm on 15th November 2021. Further, that the applicant made appearance before this Court twice on 06th and 09th March, 2023, and that, she even made appearance before Hon. Kamuzora, J. on 24th October, 2022 during mediation. Therefore, he cannot deny that she was aware of the existence of the case, Land Case No. 35 of 2021.

Hearing of this application proceeded by way of written submissions, the applicant was represented by Mr. George Gasper Mwaria while the 1st respondent was represented by Mr. Reginald Rogati Lasway, both learned Advocates. Other respondents neither filed their counter affidavits to oppose the application nor made appearance hence the matter proceeded *ex-parte* against them.

Supporting the application, Mr. Mwaria prayed that the applicant's affidavit be adopted to form part of his submission and averred that, the issue to be determined is whether the applicant has demonstrated sufficient cause for the delay to file the application to set aside an *ex-parte* order in Land Case No. 35 of 2021. He argued that, the applicant was never served with summons by plaintiff in the Land Case No. 35 of 2021 informing her of the on-going case thus she had no knowledge of the same. He referred the Court to the decision in the cases of **Lyamuya Construction Company Ltd vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 02 of 2010 and **Principal Secretary Ministry of Defence and National Service vs. Devram Valambhia** [1991] TLR 387 CAT all which established the principle that extension of time can only be granted after the court has been satisfied that,

there are sufficient grounds. He also cited the case of **Victoria Real Estate Development vs. Tanzania Bank Limited**, Civil Application No. 225 of 2014 where the Court of Appeal observed that, where there is a claim of illegality of the challenged decision, the same constitutes sufficient reason for extension of time regardless of whether or not reasonable delay has been explained.

Guided by the above authorities, the learned counsel went on submitting that, the fact that the applicant was never served any summons in the Land Case No. 35 of 2021 is a sufficient cause for her to be granted extension of time so that she can also be heard. He insisted that, the applicant failed to challenge the *ex-parte* order in time because she was not aware of the ongoing case, therefore she could not be in a position to file the application for setting aside the said expert judgment timely.

He prayed that, the Court let the applicant exercise her constitutional right to be heard under Article 13 (b) (a) of **The Constitution of United Republic of Tanzania, 1977**, which can only be attained if the Court grants her extension of time to file application to set aside *Ex-parte* Order in Land Case No. 35 of 2021. He prayed that, this application be allowed.

Opposing the application. Mr. Lasway prayed to adopt the counter affidavit filed in opposition of the application to form part of his submission and asserted that, in determining extension of time what is to be considered is the fact that, the applicant must account for all the days of the delay, the delay should be ordinate, he must show diligence not apathy, negligence or sloppiness in the prosecution of the action that he intends to take as emphasized in the case of **Lyamuya Construction** (supra).

Starting with the first element, the learned counsel submitted that, the *ex-parte* order was entered on 21st September, 2022 and this application was filed on 13th February, 2023 after the lapse of 146 days. However, applicant made appearance before Hon. Kamuzora, J. for mediation on 22nd 24th October, 2022, hence she was well aware of the case. Apart from that, she has admitted in her affidavit that, she got information on 20th January, 2023 but yet she filed the application on 13th February, 2023 after the lapse of 23 days without explaining the time in between. Mr. Lasway referred the Court to the case of **Tanzania Coffee Board vs. Romb Millers** Ltd, Civil Application No 13 of 2015 where the Court of Appeal emphasized that, delay even of a single day has to be accounted for otherwise, there would be no

point of having rules prescribing periods within which certain steps have to be taken.

On the second element, he submitted that, the delay of 146 days is not reasonable and cannot be tolerated. On the third element he submitted that, the applicant did not show high level of diligence in the prosecution of her case because she was first served with summons in person but instructed the same to be served to her advocate, Mr. George Mwaria and respondent did so, but on her own whims decided to default appearances.

Lastly, the learned counsel submitted that, without any other sufficient reasons such as the existence of a point of law of sufficient importance; such as illegality of the decision sought to be challenged, applicant's application cannot stand a chance because there is no any illegality claimed. Further to that, she cannot claim to be denied right to be heard while she was properly notified of the Land Case No. 35 of 2021 but decided to sit on such right. He prayed for the application to be dismissed with cost for lack of merit.

After the rival arguments from both parties the question for determination is whether this application for extension of time has merit. It is worth noting that, the law with regard to extension of time has been

extensively litigated. To start with, powers vested in Courts in granting extension of time is discretionary in nature, but they must be exercised judiciously and according to the rules of reason and justice. Other factors to be considered in extending time is the sufficient and reasonable cause for delay as demonstrated by the applicant as emphasized in the decision of the cases of **Attorney General vs. Tanzania Ports Authority & Another**, Civil Application No 87 of 2016 CAT(unreported), See; **Benedict Mumello vs. Bank of Tanzania**, Civil Appeal No 12 of 2012. Moreover, such delay must fully be accounted for even if it is just for one day as held in the case of **Ramadhan J. Kihwani vs. TAZARA**, Civil Application No. 401/18 of 2018, CAT (unreported). Based on these principles, the point for determination is whether good cause has been demonstrated.

Applying the above positions, I the application at hand, the applicant through her affidavit told the Court that, she was never aware of the Land Case No. 35 of 2021 which proceeded *ex-parte*, a fact which is vehemently objected by the 1st respondent. Perusing the records of the Land Case No. 35 of 2021, the applicant herein who was the 6th defendant in the said case was dully served with summons to appear and she was present on 24th October, 2022 during Mediation before Hon. Kamuzora, J. She was also

present on 6th February, 2023, 9th March 2023 when the matter was scheduled for the pre-trial conference. From thereon she never attended to the Court again.

The *ex-parte* order against her was made on 21st September, 2022 and the record shows that, she was served with summons which was dully signed by her Advocate, who was the same Advocate who is representing her in the current application, on 26th July, 2022. The learned counsel herein dully signed the summons to confirm receipt of the service. In the circumstances, she cannot claim that she was never aware or hide under the umbrella of right to be heard because it is clearly that she sat on her right.

However, considering the fact that, the suit has not been heard yet, and in the spirit of substantive justice which urge Courts to do away with technicalities and deal with matters on merit, applicant's inaction can be pardoned.

In the circumstances, I allow the application and grant the applicant extension of time to file application to set aside the Exparte Order made on 21st September, 2022, and allow the applicant herein to file application within 14 days.

It is so ordered.

DATED and delivered at **ARUSHA** this 15th day of September, 2023




J.C. TIGANGA

JUDGE