

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

**AT ARUSHA**

**MISCELLANEOUS LAND APPLICATION NO.71 OF 2023**

**PENDAEL TAIKO.....APPLICANT**

**VERSUS**

**LENGARAM MEOLI.....RESPONDENT**

**RULING**

**26/03/ & 30/04/2024**

**KIWONDE, J.:**

The applicant, Pendael Taiko, filed an application by way of chamber summons supported by his affidavit praying for the court orders below:

- (a) That, this honourable court be pleased to order extension of time allowing the applicant to file an application to set aside the ex parte judgment of this court in Miscellaneous Land Appeal No. 44 of 2017 dated 26/11/2019.
- (b) Cost be borne by the respondent.
- (c) Any other relief this court may deem fit to grant.

The respondent filed a counter affidavit refuting some facts deposed by the applicant, and so, the matter became ripe for hearing.




During hearing, the applicant was represented by Mr. Alpha Ng'ondya, advocate, while the respondent enjoyed the service of Mr. Daudi Saimarie, advocate.

In his submissions in-chief, the counsel for the applicant argued that the reason for delay to file an application to set aside *ex parte* judgment in Miscellaneous Land Appeal No. 44 of 2017 is that the applicant was deprived of his right to be heard. The appeal was heard *ex parte* without notifying the applicant.

According to the counsel for the applicant, the applicant on 13<sup>th</sup> June 2023 was called by a person who introduced himself as a court broker and told him that the documents would be collected at the Village Executive Officer of Shambasha. On 15<sup>th</sup> and 16<sup>th</sup> June 2023, the applicant made follow-up of the said documents but the Village Executive Officer chased him.

As to the period of delay, the counsel submitted that the applicant became aware of the appeal in court on 19/06/2023 upon making follow-ups and the application was filed on 23<sup>rd</sup> June 2023. He said the period from when he became aware to the filing of the application was spent in preparing this application. The counsel asked this court to allow the application.

In reply, the counsel for the respondent opposed the application on reason that the applicant was served with summons via Village Executive



Officer of Sambasha Village. He said the applicant did not know about the appeal after writing the letter in this court.

The counsel went further to submit that, according to annexure D1, there is Miscellaneous Application No. 315 of 2021 in the District Land and Housing Tribunal, where the applicant gave reasons why execution should not proceed on 25/11/2021 and under paragraph 4 (b) of the affidavit, he said his application to set aside the *ex parte* judgment was pending in this court

The counsel argued that at the same time, in paragraph 7 of the applicant's affidavit, he said he came to court on 19/06/2023 to make follow up if there was any appeal and he knew there was an Appeal No. 44 of 2017.

According to the counsel, the affidavit is part of evidence and any deponent or witness who deceives will not be believed. He cited the case of Mohamed **Said Versus Republic**, Criminal Appeal No.145 of 2017, Court of Appeal of Tanzania at Iringa (unreported).

Also, the counsel submitted that the reason for delay is not deponed in the affidavit and that the respondent will be prejudiced since execution has been done.



In brief rejoinder, the counsel for the applicant said nowhere it is shown in the proceedings that the applicant was served by the Village Executive Officer. He insisted that the applicant was deprived of his right to be heard in the appeal in question.

From the pleadings, records and oral submissions, the main issue for determination is whether sufficient cause has been shown for the court to issue an order for extension of time.

In law, the court can extend time within which the applicant can file application out of time to set aside *ex parte* judgment if the applicant establishes sufficient or good cause for his delay. The good cause depends on the circumstances of each case.

However, the factors which the court takes into consideration before granting order extending time include; **one**, length of time of delay, **two**, reason for delay, **three**, if the applicant was not diligent to pursue his rights, **four**, whether grant of the order extending period will prejudice the respondent and **five**, if the applicant can account for each day of delay, **six**, whether there is arguable case such as a point of law or illegality apparent on the face of record.

This was a position in **Mohamed Salum Nahdi Versus Elizabeth Jeremiah**, Civil Application No. 474/01 of 2016 and **Wambele Mtumwa**



**Shahame Versus Mohamed Hamis**, Civil Reference No.8 of 2016, Court of Appeal of Tanzania at Dares Salaam (both unreported).

In the application at hand, the applicant fights for his right to be heard. He said he was deprived of it in Miscellaneous Land Appeal No. 44 of 2017. I have gone through the proceedings of this court in the mentioned appeal. On 4<sup>th</sup> September 2018, the counsel for the then appellant, Daudi Saimarie, requested for summons to serve on the respondent (now applicant) and the court allowed it.

On 11<sup>th</sup> October 2018, the counsel informed the court that service was done via Village Executive Officer of Sambasha Village. The matter was set for hearing of an appeal on 13/12/2018 and later on, on 8/7/2019, it was ordered that the appeal be argued by filing written submissions. The order was given in the absence of the applicant in this application.

Therefore, it is apparent that there was no proof of service on the applicant (then respondent). The counsel had to produce in court proof to that effect. Even the Village Executive Officer did not do so to ascertain that service was effective.

Leave this alone, even the order of disposing of the appeal by filing written submissions, was issued without the knowledge of the applicant. Thus, it is clear that the applicant was deprived of the right to be heard. It has to

be borne in mind that this is a fundamental right which should not be easily denied.

This violation of the principle of natural justice, is what amounts to illegality. In **Stephen B. K. Mhauka Versus The District Executive Director Morogoro District Council and 2 others**, Civil Application No.68 of 2019, Court of Appeal of Tanzania at Dar-es salaam (unreported) it was categorically stated that illegality which is apparent on the face of record is a good ground for allowing application for extension of time however long period of delay may be.

The applicant said immediately after being aware of the *ex parte* judgment, prepared the documents and filed this application. Besides that, it was alleged by the respondent that execution has been done, but the applicant denied it. This fact thus, required proof if at all, execution has taken place to its finality.

If the *ex parte* judgment will be reversed and the execution has been done, the applicant will take necessary steps according to law.

It is my firm view that the applicant has demonstrated good cause for delay to file application to set aside *ex parte* judgment in Miscellaneous Land Appeal No. 44 of 2017. He deponed such facts in the affidavit supporting the application.

Eventually, I find the application with merits and it is hereby granted. The applicant is availed with fourteen (14) days from the date of this ruling to file an application to set aside *ex parte* judgment. No order as to cost given the circumstances of the matter.

**Dated at Arusha** this 30<sup>th</sup> April 2024



  
**F. H. Kiwonde**  
**Judge**  
**30/04/2024.**