

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOROGORO SUB-REGISTRY

AT MOROGORO

LAND APPEAL NO. 3803 OF 2024

(Appeal arising from the decision of the District Land and Housing Tribunal of Morogoro in Misc. Land Application No. 158 of 2023 before Hon. Khasim, Chairman dated 15th December 2023)

SHABANI MAULID 1ST APPELLANT

MOHAMED GUNDA..... 2ND APPELLANT

VERSUS

KARITAS DIMOSO..... RESPONDENT

JUDGEMENT

06/05/2024 & 23/05/2024

KINYAKA, J.:

The appellants, who were the applicants in in Misc. Land Application No. 158 of 2023 at the District Land and Housing Tribunal of Morogoro at Morogoro, hereinafter, "the Tribunal" preferred the present appeal after they were dissatisfied with the decision of the Tribunal dated 15th December 2023 dismissing the appellants' application for extension of time.

The appellants' application before the Tribunal was for extension of time to lodge an application to set aside *ex parte* judgement made by the Tribunal

against the appellants on 22nd February 2023 in Land Application No. 107 of 2019 between the parties herein.

Before this Court, the appellants preferred two grounds of appeal as reproduced herein below:-

1. That the trial Tribunal erred in fact and law in holding that the applicant failed to adduce sufficient cause for extension of time to file the application to set aside *ex parte* judgement out of time while sickness is one of the sufficient cause for extension of time; and
2. That the trial Tribunal erred in law and fact by failure to take into account the point of illegality as ground for extension of time since the applicant herein was denied fair hearing by not afforded him an opportunity to heard contrary to the principle of natural justice.

At the hearing of the appeal, both parties appeared themselves and unrepresented. They both agreed to the disposition of the appeal by way of written submissions. The appeal was canvassed in writing. The appellants and the respondent lodged their submissions in chief and reply submissions, respectively, on time. However, on 6th May 2024 when the appeal was set for judgement, the appellants complained that the respondent delayed to serve her reply submissions upon them. They prayed for extension of time



to lodge their rejoinder submissions, a prayer which was not objected to by the respondent. The appellants were given up to 13th May 2024 to file their rejoinder submissions which they duly complied.

The appellants began their submissions by narrating the applicable provision of section 14(1) of the Law of Limitation, Cap. 89 R.E. 2019, hereinafter "the LLA" and the principles applicable in applications for extension of time that it is discretionary upon showing good cause for delay which include promptness, length of delay, illegality, the degree of prejudice to the respondent and delay in being supplied with copies of proceedings. They referred to the decision of the Court of Appeal in the case of **Moses Mchunguzi v. Tanzania Cigarette Co. Ltd, Civil Reference No. 3 of 2018** (unreported).

In support of the first ground, the appellants contended that their delay to file an application to set aside *ex parte* judgement was caused by the 1st appellant's sickness as per the medical evidence attached to the affidavit as annexure "A2". They referred to Article 13(6) (a) of the Constitution of the United Republic of Tanzania, 1997 as amended from time to time, hereinafter "the Constitution" on a right of fair hearing. They also referred the Court to the case of **Magdalena Theresia Ngodo v. Avor Ngonyani,**

Land Appeal No. 12 of 2020 which cited in the case of **Niemco Ltd v. Milo Construction Co. Limited, Civil Revision No. 29 of 1997** which held that substantial justice should be advanced when there is no negligence, laxity, laches, and indolence, imputed on the applicant.

The appellants further cited the case of **Halima Idi Kidanga v. Nasibu Shabani Mwinjaku, Misc. Land Application No. 58 of 2022** which held that health problems and financial hardships qualified for legal aid, and that the delay of 4 months was not inordinate as it was out of control. They also cited the decisions of the Court of Appeal in the cases of **Loshilu Karaine & 3 Others v. Abraham Melikizedeck Kaaya (suing as Legal Personal Representative of Gladness Kaaya), Civil Appeal No. 534 of 2020,** and **Emmanuel R. Maira v. The District Executive Director Bunda District Council, Civil Application No. 66 of 2010,** which cemented that health matters or sickness is not a matter of choice of a human being. They concluded that they were diligent in pursuing their case by preferring Application No. 158 of 2023 and the present appeal immediately upon recovery from sickness. They cited the case of **Wilbard Mathew Sanga (Administrator of the Estate of the late Mathew Orestes Senga v. Mkwega Gerge Mathew Sanga & Another, Civil Application No. 508**

of 2020 which cited the case of **Royal Insurance Tanzania Limited v. Kiwengwa Strand Hotel Limited, Civil Application No. 166 of 2008** (unreported) which held that the Court must satisfy that the applicant acted expeditiously and in good faith upon becoming aware that he is out of time. The appellants submitted for the second ground of appeal that the *ex parte* judgement was issued without hearing the appellants based on the reasons that the appellants were given chances to file their written statement of defence three times but they failed. They cited the cases of **Nyanza Road Works Limited v. Giovanni Guidon, Civil Appeal No. 75 of 2020** on page 13, **CRDB Bank PLC v. Heri Microfinance Limited and Another, Civil Appeal No. 20 of 2020**, **Petrobert D. Ishengoma v. Kahama Mining Corporation LTD & 2 Others, Civil Application No. 172 of 2016**, and **Independent Power Tanzania Ltd & Another v. Standard Chartered Bank (Hong Kong) Limited, Civil Revision No. 1 of 2009** on page 26 which restate the position that the decision which is arrived in violation of the right to be heard will be nullified even if it is made in good faith.

They argued that as the appellants were lay persons, unrepresented and unaware of the time frame of the applications, the proper course was for the

Tribunal to explain to them, give them the chance to file their written statement of defence and accord them the right of hearing. They contended that speed in delivery of justice is not essential if it does not lead to justice and that there cannot be equal justice if for no compulsive reason, a party is condemned unheard. They referred to the case of **VIP Engineering and Marketing Limited & 2 Others v. Citibank Tanzania Limited, Consolidated Civil Reference No. 6, 7 and 8 of 2006** where the Court of Appeal considered breach of natural justice as illegality warranting an order for extension of time. The appellants concluded by praying for the appeal to be allowed.

Opposing the appeal, the respondent submitted that the Tribunal's ex parte judgement was delivered on 22nd February 2023 in Land Application No. 107 of 2019 but the appellants' application for extension of time was filed before the Tribunal on 18th July 2023. She argued that section 14 of the LLA provides for the court's discretion to grant extension of time where an applicant advances reasonable or sufficient cause relying on the case of **Kalunga and Company Advocates v. National Bank of Commerce Limited (2006) TLR 235** which held that there ought to be some kind of

explanation or material upon which the court can exercise the discretion given.

Against the first ground of appeal, the respondent submitted that the allegation of sickness was false and unworthy. She contended that the applicant had a duty to account for each day of delay relying on the case of **Okech Akomo v. Konsilata Adoyo, Civil Application No. 625 of 2022 [2022] TZCA 810** and **Oceanic Bay Hotel v. Real Insurance (T) (2013) EALR 214**. She stated that although sickness may constitute good cause but the case of **Halima Idi Kidanga** (supra) was distinguishable from the appellants' application as in the said case, the applicant pleaded and submitted evidence to prove his kidney complications including patient history from 10th October 2018 to 20th July 2022, X-ray pictures for kidney diagnosis, and NHIF form to prove that she was undergoing serious medical treatment. Contrary to the said case, the respondent argued, the medical report showed that the first appellant attended hospital on 10th July 2023 but it did not prove that he was sick and attended hospital from 22nd February 2023 when the *ex parte* judgement was delivered. She argued further that the medical report was prepared specifically for the application that was filed later on 18th July 2023.

Against the second ground of appeal, the respondent submitted that the allegation that the appellants were not heard in Land Application No. 107 of 2019 is unfounded. She contended that the appellants were at first given 21 days, then 14 days to file their written statement of defence but they failed to do so which constituted waiver of the appellants' rights under Article 13(6)(a) of the Constitution. She argued that the Tribunal properly invoked Order VIII Rule 14 of the Civil Procedure Code, Cap. 33 R.E. 2019. She prayed for the dismissal of the appeal with costs.

Rejoining, the appellants cited the case of **Halima Idi Kidanga v. Nasibu Shabani Mwinjaku Misc. Land Application No.58 of 2022 High Court of Tanzania** and insisted that since the 1st appellant was impeded by health problems it is just and equitable to grant the extension of time as the delay was not inordinate and the same was out of his control.

They reiterated their submission in chief by making reference to the holdings of the Court of Appeal in the cases of **Loshilu Karaine a 3 Others v. Abraham Metkizedeck Kaaya (Suing as Legal Personal Representative of Gladness Kaaya) Civil Appeal No. 534 of 2020 Court of Appeal of Tanzania at Arusha (unreported) at page 9** which referred the case of **John David Kashekya v. Attorney General, Civil**

Application No. 107 of 2012 and Emmanuel R. Maira v. The District Executive Director Bunda District Council Civil Application No. 66 of 2010 Court of Appeal of Tanzania at Dar es Salaam (unreported).

As for the ground of illegality, fortified by the case of **Independent Power Tanzania Ltd 6 Another v. Standard Chartered Bank (Hong Kong) Limited, Civil Revision No. 1 of 2009**, and **Petrobert D. Ishengoma v. Kahama Mining Corporation LTD & 2 Others Civil Application No. 172 of 2016**, the appellants maintained that they were not afforded an opportunity to be heard contrary to the principle of natural justice. In the end, they urged the Court to allow their appeal and grant the prayers prayed in the petition of appeal.

The conclusion of the parties' submission leads to the Court's determination of whether the decision of the Tribunal to dismiss the appellants' prayers for extension of time to file an application to set aside *ex parte* judgement was improper.

In the first ground of appeal, the appellants fault the decision of the Tribunal to hold that the appellants failed to adduce sufficient cause for extension of time while sickness is one of the sufficient cause for extension of time. Indeed, the 1st appellant stated in paragraph 4 of the affidavit that he

became sick after he received a copy of the *ex parte* judgement on 21st March 2023. The medical report attached as annexure "A2" dated 10th July 2023 demonstrate that the 1st appellant went to the hospital in March 2023 and he was given medication, counselling and copying skills.

But the report does not indicate if the 1st appellant was hospitalized since March 2023 to 10th July 2023 or was throughout undertaking medications or counselling or copying skills. The report only show that the 1st appellant went to the hospital in March 2023. It means that the appellants were able to explain the period of delay from 22nd February 2023 when the *ex parte* judgement was pronounced to 21st March 2023 when a copy of the *ex parte* judgement was supplied to them, and from 21st March 2023 to sometimes in the same month of March when the 1st appellant became sick.

The affidavit does not disclose any reason for the 2nd appellant's failure to prefer an application to set aside the *ex parte* judgement within time as he was not the one who was sick. Again, the 1st appellant failed to explain the period of delay after he was treated at the hospital in March 2023 until 18th July 2023 when the appellants filed Application No. 158 of 2023.

It is clear from the affidavit in support of the appellants' application for extension of time that the appellants failed to account for each day of delay.

It has been held in a number of courts' decisions that an order for extension of time is granted when the applicant demonstrates good or sufficient cause including accounting for the period of delay. [See the decisions in the cases of **Elius Mwakalinga v. Domina Kagaruki & Five Others, Civil Application No. 120/17 of 2018, Lyamuya Construction Company Ltd vs Board of Registered Trustee of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010 CAT at Arusha**, and **Yazid Kassim Mbakileki vs CRDB 1996 Ltd Bukoba Branch & Another, Civil Application 412 of 2018** (all unreported)]. In Yazid Kassim Mbakileki (supra), the Court of Appeal on page 13 stated:-

"It must be insisted that this Court has consistently emphasized on the requirement for the applicants for extension of time to account or every day of delay (See Bariki Israel v. The Republic, Criminal Application No.4 of 2011 and Sebastian Ndaula v. Grace Rwamafa (legal personal representative of Joshua Rwamafa) Civil Application No.4 of 2014 (both unreported). Indeed, in Sebastian Ndaula (supra) the Court went further and stated that the need to account for every day of delay becomes more

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important especially in a matter which has taken longtime since it was decided"

In my profound view, the delay from March 2023 when the 1st appellant went to the hospital and treated to 18th July 2023 when he filed the Application No. 158 of 2023 is inordinate and demonstrate inaction and lack of diligence on part of the appellants. The first ground of appeal lacks merit and is dismissed.

In the second ground of appeal as it was in paragraph 5 of the affidavit in support of the application, the appellants contended that the Tribunal committed illegality by denying them the right of a hearing guaranteed under Article 13(6)(a) of the Constitution. The record show that the Tribunal reveal that the appellants were given 21 days to file their written statement of defence. Upon their failure to file the written statement of defence within the 21 days due to financial hardship, the Tribunal gave the appellants 14 days to file the same. On 3rd October 2019, the appellants informed the Tribunal that they failed to file the written statement of defence as they did not hear properly the deadline for filing the same. In the presence of the appellants, the Tribunal ordered hearing of the Land Application No. 107 of 2019 *ex parte*.



Regulation 7 of the Land Disputes Courts (the District land and Housing Tribunal) Regulations, G.N. No. 174 of 2003, hereinafter "the Regulations" provides for the right of the respondent to file a written statement of defence. Regulation 7(3) of the Regulation provides:-

(3) The chairman may, on good cause being shown by any party to the proceedings, extend the time within which to file the written statement of defence or counter claim as the case may be, except that in any case such extension shall not exceed:

(a) 14 days in case of filing a written statement of defence; or

(b) N/A.

My understanding of the above provision is that the restriction on extension of time to file written statement of defence is that the time so extended should not exceed 14 days but it does not mean that an order for extension time cannot be granted more than once, twice or thrice, depending on the circumstance of a particular case. In my considered position, as long as there is reasonable or good cause for extension of time, the same can be granted. Again, it is Regulation 11 (1) (c) of the Regulation that allow the Tribunal to proceed with hearing of an application *ex parte* in cases where the respondent is absent. It provides:-

11(1)(c) Where the respondent is absent and was duly served with notice of hearing or was present when the

hearing or was present when the hearing date was fixed and has not furnished the Tribunal with good cause for his absence, proceed to hear and determine the matter ex parte by oral evidence.

It is clear that an order for *ex parte* hearing is issued when the defendant (the respondent in land applications before the Tribunal) does not appear.

On page 2 of the Tribunal's *ex parte* judgement in Land Application No. 107 of 2019, the Tribunal stated:-

*"Wadaiwa katika shauri hili walihudhuria barazani tarehe 26/7/2019 na wakapewa amri ya kusajili majibu yao (written statement of defence) ndani ya siku 21 kama sheria inavyotaka lakini hawakusajili na tarehe iliyofuata wadaiwa waliomba kuongezewa muda wa kusajili majibu kwa sababu walisema walikuwa na tatizo la kifedha, baraza liliwaongezea siku 14 na kesi ilipangwa kutajwa tena tarehe 3/10/2019 ya **tarehe hiyo wadaiwa walieleza kuwa walishindwa kusajili majibu kwa wakati lakini hawana sababu yoyote na hawakujua/kusikia vizuri muda wa mwisho wa kusajili. Kwa sababu hiyo baraza lilitoa amri ya kusikiliza kesi upande mmoja.**"* [Emphasis added]

In the above quotation, the Tribunal was unclear whether the appellants gave reasons that they did not know or hear properly on the deadline for

filing their written statement of defence or that they did not have had any reason at all. However, it is clear that the appellants gave reason for their failure to file their written statement of defence as they did not know or hear properly the last date for filing the same. It was required of the Tribunal to decide whether that reason was or was not sufficient to extend time to the appellants to lodge their written statement of defence. Not only that, but also the circumstance in which the order was made in the presence of the appellants was incorrect and contrary to the dictates of Regulation 11(1)(c) of the Regulations. In the circumstance where the appellants were in attendance and determined to defend the suit, it was wrong for the Tribunal to order an *ex parte* hearing. I therefore agree with the appellants at this juncture that the Tribunal denied the appellants a right of a hearing. In **Anthony M. Masanga v. Penina (mama Mgesi) and Another, Civil Appeal 118 of 2014**, on page 8, the Court of Appeal held:-

"In fact, nowadays, courts demand not only that a person should be given a right to be heard, but that he be given an "adequate opportunity" to be heard so as to achieve the quest for a fair trial. See the case of The Judge i/c High Court Arusha & Another v. N.I.N. Munuo Ng'uni [2006] T.L.R. 44"

Insisting on the right to be heard in light of the Constitution of the United Republic of Tanzania, the Court of Appeal in **Kumbwandumi Ndemfoo Ndossi v. Mtei Bus Services Ltd , Civil Appeal 257 of 2018** on page 6 of the decision, stated:-

"This Court has always emphasized that the right to be heard is a fundamental principle of natural justice which should be observed by all courts in the administration of justice. Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 provides that: -

"When the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned."

Therefore, a denial of the right to be heard in any proceedings would vitiate the entire proceedings...."

From the above observations, I allow the second ground of appeal that the Tribunal abrogated the appellants' right of a hearing which is guaranteed under the Constitution by denying them the right to participate in the

proceedings in Land Application No. 107 of 2019, despite the appellants' presence before the Tribunal when the order for *ex parte* hearing was made. The violation of the right to be heard being a point of law, it suffices to dispose of the appeal in favour of the appellants. That being said, the present appeal is allowed to the extent above demonstrated.

The appellants are given thirty (30) days from today to lodge their application to set aside *ex parte* judgement. Based on the nature of the present appeal, I order each party to bear its own costs.

It is so ordered.

Right of appeal fully explained.

DATED at MOROGORO this 23rd day of May 2024.


H. A. KINYAKA

JUDGE

23/05/2024

