IN THE HIGH COURT OF TANZANIA

LAND DIVISION

TANGA SUB-REGISTRY

AT TANGA

MISC. LAND APPLICATION NO. 21 OF 2023

ABEDI ABDALLA ..... APPLICANT

VERSUS

HALIMA SHABANI ..... RESPONDENT

(Arising from Land Appeal No. 39 of 2022 of the High Court of Tanzania as also arising from Land Appeal No. 17 of 2020 of the Korogwe District Land and Housing Tribunal at Korogwe and Originating from Case No. 9 of 2019 of Kwasunga Ward Tribunal at Handeni)

RULING

20/05/2024 & 06/06/2024

NDESAMBURO, J.:

Abedi Abdalla, the applicant in this matter, is seeking an extension of time to apply to set aside the *ex-parte* judgment issued on the 10th of February 2023, by this court in Land Appeal No. 39 of 2022. The application is made by way of chamber summons under Section 14(1) of the Law of Limitation Act, Cap 89 R.E 2022, in conjunction with Order IX Rule 13(2) of the Civil Procedure Code, Cap 33 R.E 2022, and is supported by an affidavit from the

applicant. The respondent filed a counter affidavit resisting the application.

The brief facts of this application are as follows: the applicant successfully sued the respondent for ownership of a plot located at Kwamsisi Village, claiming lawful ownership before the Kwasunga Ward Tribunal. Dissatisfied, the respondent appealed to the District Land and Housing Tribunal of Korogwe (the DLHT) but was unsuccessful. Undeterred, the respondent further, appealed to this court, resulting in an *ex-parte* judgment entered in her favour. It is this *ex-parte* judgment that the applicant is now seeking an extension of time to challenge by applying to this court to set it aside.

It was agreed that the matter would be heard through oral submission (viva voce), with the applicant represented by Advocate Justus Joseph. The respondent chose to appear in person, without legal representation.

When the applicant's advocate was allowed to address this court, he strongly supported the application, asserting that his client

had not been given a chance to defend himself in the appeal because he was not being served with any notice. He argued that the applicant became aware of the case in June 2023 and attempted to follow up, but by then, it was too late to seek a remedy to set aside the judgment. As a result, the applicant decided to file this application.

The advocate further submitted that the applicant's affidavit in paragraph 3 clearly stated that he had not been summoned to hear his case either when the hearing was conducted or when the *ex-parte* judgment was pronounced. In addition, paragraphs 5 and 6 of the affidavit disclose that while the parties were involved in an execution process before the DLHT, the respondent never informed the applicant about the proceedings in the High Court concerning her case. The applicant became aware of the appeal, which overturned the DLHT decision, only about two months later.

Advocate Justus further asserted that the delay in applying to set aside the *ex-parte* judgment was due to the applicant not being summoned. He highlighted that the *ex-parte* judgment intended to be challenged is tainted with irregularities and illegality. He pointed

out several areas as follows: first, the alleged summons was not supported by an affidavit from the court process server who effected the service; second, the person who endorsed the summons had no mandate to do so as he was not an approved court process server. He cited the case of **Elfazi Nyatega and Others v Caspian Mining Ltd**, Civil Application No. 44/08 of 2017 to support his argument. Third, the applicant was not summoned to appear during the pronouncement of the *ex-parte* judgment.

Due to these discrepancies, the advocate urged the court to grant the application with costs to abide by the outcome of the matter.

In response, the respondent vehemently opposed the application. As a layperson, she had little to submit orally but insisted that the summons was duly served and requested the court to adopt her counter-affidavit in her submission.

The learned counsel had nothing to add in rejoinder.

After carefully considering the submissions of both parties and the accompanying legal authorities, the central issue for this court to

determine is whether this application has merit. This determination will focus on whether the applicant has demonstrated reasonable or sufficient cause, as required by law.

This application has been made under Section 14(1) of the Law of Limitation Act, Cap 89, and Order IX, Rule 13(2) of the Civil Procedure Code, Cap 33. For ease of reference, the provisions are reproduced below:

> *"14. Extension of the period in certain cases*
>
> *(1) Notwithstanding the provisions of this Act, the court may, for any reasonable or sufficient cause, extend the period of limitation for the institution of an appeal or an application, other than an application for the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application".*

Order IX, Rule 13(2) reads that:

> *"Where judgment has been entered by a court pursuant to paragraph (ii) of sub-rule (1) of the rule 6 of this Order or sub-rule 2 of the rule 14 of Order VIII it shall be lawful for the court, upon application being made by an aggrieved party within twenty-one days*

from the date of the judgment, to set aside or vary such judgment upon such terms as may be considered by the court to be just:

Provided that, where a decree has been issued before such application being made, the provisions of the law of Limitation Act, shall apply".

The time limit for lodging an application for setting aside an *ex-parte* decree is 21 days. By the time the applicant approached this court to lodge his application, 92 days had already lapsed from the date when the *ex-parte* judgment was delivered. However, due to the intricacies mentioned by the applicant in his affidavit, he failed to file his application on time and is now before this court seeking an extension to file his application to set aside the *ex-parte* judgment and decree.

The applicant's application is based on irregularities and illegality and the learned counsel has pointed out three areas, first, the alleged summons was not supported by an affidavit from the court process server who effected the service; second, the person who endorsed the summons had no mandate to do so as he was not an approved court process server. Third, the applicant was not

summoned to appear during the pronouncement of the *ex-parte* judgment.

I will begin by addressing the notification of the date of the *ex-parte* judgment. The advocate submitted that the applicant was not notified of the *ex-parte* judgment, asserting this as a point of illegality.

The law stipulates that illegality in a decision being challenged is a valid ground for an extension of time. In the case of **Lyamuya Construction Limited v Board of Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, it was clarified that in the **Valambhia** case, it was not intended to suggest that any plea of illegality in an application for an extension of time should automatically be granted. The Court emphasized that such a point of law must be "of sufficient importance" and must be apparent on the face of the record, such as a question of jurisdiction; not one that would be discovered by a long-drawn argument or process.

In the present application, the applicant has argued, both through his affidavit and main submission, that the decision he seeks to challenge was pronounced without notifying him of the date of the *ex-parte* judgment. As established by the authorities cited above, a court hearing an application for an extension of time is obligated to thoroughly examine the material presented to determine whether there is indeed an illegality of sufficient importance to justify granting an extension.

Following this principle, I have reviewed the record of this application. There is a summons in the record of Misc. Land Appeal No. 39 of 2022, issued on the 27th of October 2022, notifying the applicant of the date of the mention. The applicant failed to appear and the appeal was ordered to proceed *ex parte* against him. The appeal was heard on the scheduled date, and the *ex-parte* judgment was delivered in the presence of the respondent but in the absence of the applicant. Notably, no summons was issued to notify the applicant of this date.

Having reviewed the application and the records, it is evident that the applicant's complaint about the *ex-parte* judgment being

delivered without proper summons is valid. This omission violates Order XX, Rule 1 of the Civil Procedure Code, Cap 33 R.E 2022, which mandates that parties be notified of the date of judgment. Order XX, Rule 1 of Cap 33 stipulates that due notice must be issued to the parties regarding the delivery of the judgment. The provision states that:

> *"The court, after the case has been heard, shall pronounce judgment in open court, either at once or on some future day, of which due notice shall be given to the parties or their advocates".*

The above provision has been tested by our courts, which have established that in an *ex-parte* hearing, the party against whom the hearing proceeded *ex-parte* has the right to be notified of the date of judgment delivery. Failure to do so is fatal and renders the decision a nullity. The primary purpose behind this requirement is to afford such a party the opportunity to take necessary steps to protect their rights if the judgment is prejudicial. This principle was emphasized by the Court of Appeal in the case of **Cosmas Construction Company** (supra), where it held:

" ... a party who fails to enter an appearance disables himself from participating when the proceedings are consequently ex parte, but that the furthers extent he suffers. Although the matter is therefore considered without any input by him, he is entitled to know the final outcome. He has to be told when the judgment is delivered so that he may if he wishes, attend to take it as certain consequences may follow".

Yet in another decision of this court of **Chausiku Athumani v Atuganile Mwaitege**, Civil Appeal No. 122 of 2007, it was stated:

"...in ex parte proceedings, failure to notify the defendant when the ex parte judgment will be delivered render such proceedings null because it denies the defendant the right to take necessary steps to protect his or her rights where the judgment is prejudicial to his or her interest."

Based on the aforementioned analysis, this court is satisfied that the applicant has successfully demonstrated sufficient cause for granting the extension of time sought to file an application to set aside the *ex-parte* judgment. This finding is sufficient to determine the application, rendering it unnecessary to consider the other reasons provided by the applicant. Therefore, the application is

granted, and the applicant is given thirty (30) days from the date of this ruling to file the said application in this court. Each party shall bear its costs.

It is so ordered.

DATED at **TANGA** this 6th day of June 2024.

H. P. NDESAMBURO

JUDGE