

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 116 OF 2016

SULTAN BIN ALI BIN HILAL EL ESRI APPLICANT

VERSUS

MOHAMED HILAL

MANSOUR HILAL

BERA ANDREW

..... RESPONDENTS

22nd June & 4th November, 2016

RULING

MWAMBEGELE, J.:

This is a ruling in respect of an application for, *inter alia*, leave to file witnesses' statements out of time. The application is made by the applicant Sultan Bin Ali Bin Hilal El Esri. It is made under the provisions of section 14 (1) of the Law of Limitation Act, Cap. 89 of the Revised Edition, 2002 (hereinafter "the Law of Limitation"), rule 49 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 (hereinafter "the Rules"), section 95 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (hereinafter "the CPC") and any other enabling provisions of law. It is supported by an affidavit affirmed by Yussuf Sheikh and resisted by the counter-affidavit of Bera Andrew; the third respondent.

The background to this application has amply been explained by the applicant in the supporting affidavit. Suffice it to say that mediation between the parties having failed on 10.05.2016, the parties were required to file the witnesses statement within seven days pursuant to rule 49 (1) of the Rules. The applicant filed a statement in respect of only one witness. It is stated in the affidavit that the applicant could not file statements in respect of three other witnesses because their names have not been made available by the Ministry responsible for land matters.

The application was argued before me on 22.06.2016 during which Mr. Yussuf Sheikh and Mr. Charles Semgalawe, both learned counsel, advocated for the applicant and respondents respectively.

Mr. Sheikh's submissions were as stated in the background of the application above. He only added that the applicant and his counsel have neither been negligent at all in the delay nor playing delaying tactics as claimed by the respondents in the counter-affidavit. He cited ***Michael Leseni Kweka Vs John Eliafe*** [1997] TLR 152 for the proposition that the Court has power to grant an extension of time if sufficient cause has been shown for doing so and ***the National Housing Corporation Vs Etienes Hotel***, Civil Application No. 10 of 2005 (CAT unreported) for the stance that rules of procedure are handmaids of justice which must facilitate rather than impede decisions on substantive justice. The learned counsel thus prayed that the application be allowed and summons to issue to the Commissioner of Land.

Mr. Semgalawe, learned counsel, strenuously resisted the application submitting that the applicant has not brought to the fore sufficient reasons to deserve the grant of the orders sought. Learned counsel added that preparation of a case has to be made even before mediation, thus there was

no reason why the applicant could wait to prepare the statements until after mediation.

As for the summons to the Commissioner for Lands, the learned counsel argued that the summonses cannot issue to a witness before filing his or her statement.

Rejoining, Mr. Sheikh, learned counsel for the applicant was very brief stating that they could not get the names of the intended witnesses because government employees are subject to transfers and reshuffle.

I have anxiously considered the learned arguments of both leaned counsel for the parties to this application. As rightly submitted by Mr. Sheikh, and concede by Mr. Semgalawe, an application of this nature will only succeed upon supply to the court sufficient materials upon which to exercise the discretion and grant an extension. There is a long line of authorities on this point. One such authority is **Michael Leseni Kweka** (supra), a case cited by the learned counsel for the applicant. Others are **Benedict Mumello Vs Bank of Tanzania**, Civil Appeal No. 12 of 2002, **Jaluma General Supplies Limited Vs Stanbic Bank Limited**, Civil Application No. 48 of 2014 and **Daud s/o Haga Vs Renatha Abdon Machafu**, Civil Reference No. 19 of 2006, all unreported, to mention but a few.

To grant or not to grant is entirely in the discretion of the court. In **Benedict Mumello** (supra) the Court of Appeal held:

"It is trite law that an application for extension of time is entirely in the discretion of the court to grant or refuse it, and that extension of time is where it has

been sufficiently established that the delay was with sufficient cause."

In ***Jaluma General Supplies*** (supra) it was held:

"All the Applicant should be concerned is showing sufficient reason why he should be given more time and the most persuasive reason that he can show is that the delay has not been caused or contributed by the dilatory conduct on his part."

Likewise, in ***Daud s/o Haga*** (supra) the court stated that:

"Where an extension of time is sought consequent to a delay the cardinal question is whether sufficient reason is shown for the delay".

The question which pops-up at this stage is: has the applicant shown sufficient reasons to warrant this court exercise its discretion to grant an extension? Having gone through the reasons for delay as deposed in the affidavit, I think the applicant, on the balance of probabilities, has sufficiently shown why the intended statements could not be obtained and filed within the prescribed time. Despite the fact that I agree with Mr. Semgalawe that preparation of a case has to be made even before mediation, but on the other hand, I think the applicant has explained well on this; that in view of the fact that the intended witnesses are public officers; they could not earmark any name then because public servants are subject to transfers and reshuffles.

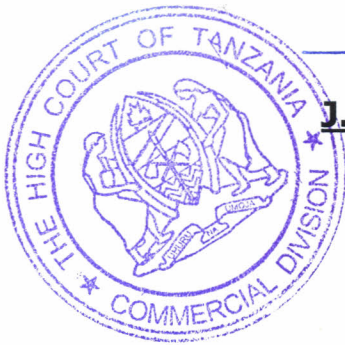
As for the summons to the Commissioner for Lands, I think Mr. Semgalawe is right that the same is not necessary at this time. What is important in the

meantime is to get the names of the witnesses whose statements are sought to be filed and the bridge will be crossed upon reaching it. In the circumstances, the prayer for issuance of summons to the Commissioner for Lands is, in the meantime, refused.

In the final analysis, this application for extension of time within which to file the witnesses' statements in Commercial Case No. 91 of 2013 is granted. The statements should be filed in court within seven days from the date hereof.

Order accordingly.

DATED at DAR ES SALAAM this 4th day of November, 2016.




J. C. M. MWAMBEGELE
JUDGE