

IN THE HIGH COURT OF TANZANIA  
(LAND DIVISION)  
AT IRINGA

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MISCELLANEOUS LAND CASE APPLICATION NO. 23 OF 2010

MAMA SAMBAGE ..... APPLICANT

VERSUS

ELIZABETH NINDI ..... RESPONDENT

17/10/2014 & 24/10/2014

**RULING**

Kihwelo J.

The applicant herein above has filed an application to this court seeking orders that this honourable court be pleased to grant an extension of the limitation period for filing an application under Order XXXIX Rule 21 of the Civil Procedure Code, Cap. 33 of the Revised Edition 2002, the ex-parte judgment dated 30<sup>th</sup> April, 2014 be vacated to allow for the re-hearing of the appeal and costs of this application be provided for. The application has been supported by two affidavits sworn by Mama Sambage and the late Nelson Mwakingwe.

Mr. Kingwe, learned counsel appeared for the applicant while Mr. Kenyunko, learned counsel appeared for the respondent.

When this matter came for hearing of the application on 17<sup>th</sup> October, 2014 the counsel for the applicant prayed that this matter should be argued by way of written submission a prayer which was not objected by the counsel for the respondent. However, this court thought that this matter would better be argued by way of oral submission hence ordered that the matter should come for hearing on 20<sup>th</sup> October, 2014.

During the initial stage of his submission the counsel for the applicant opted to abandon the second prayer for vacating the ex - parte judgement on account that it was pre-mature because the applicant has not been granted the order for extension of time yet by this honourable court.

In this submission in chief the counsel for the applicant prayed to adopt the affidavits sworn in support of the application. On her part the applicant (Mama Sambage) among other things she stated in her affidavit that sometime in May, 2010 she learnt from one Vitus Kasike that the house on Plot No. 110 Block "CC" Mkwawa Area, Iringa Municipality which was the subject matter in the above stated appeal was due for demolition by the order of the District Land and Housing Tribunal for Iringa when she was shown a ruling of the said Tribunal dated 30/04/2010. That, after

perusing the ruling she discovered that the respondent had appealed against the judgement of the District Land and Housing Tribunal in Land Case Appeal No. 9/2008 to the High Court of Tanzania. That, she consulted her lawyer the late N. T. Mwakingwe to look into the matter. That, later on the same date her lawyer informed her that he had made inquiries and discovered that there was Miscellaneous Land Appeal No. 13/2008 before the High Court of Tanzania, Land Division between her and the respondent. That, she was not aware about the existence of Miscellaneous Land Appeal No. 13 of 2008. That, she had never on any single date been served with any prior notice of hearing by the High Court of Tanzania in Miscellaneous Land Appeal No. 13 of 2008 nor was she served with any notice to come and receive the ex-parte judgement. That, the ex-parte judgement by the High Court of Tanzania, Land Division on 30/04/2009 in Miscellaneous Land Appeal No. 13 of 2008 was arrived at without her knowledge as she never took part in the entire proceedings. That, the copy of the ex-parte judgement in Miscellaneous Land Appeal No. 13 of 2008 was given to the applicant by her advocate on 16/09/2010.

On the other hand the then counsel for the applicant stated in his affidavit that after being instructed by the applicant on 04/06/2010 and given a ruling of the District Tribunal in Land Case Appeal No. 9 of 2008 he discovered that the respondent had appealed to the High Court of Tanzania against the judgement of the District Land and Housing Tribunal but in the said ruling the

appeal number was not indicated. That, he went to the civil registry of the Land Division of the High Court of Tanzania and discovered that a Miscellaneous Land Appeal No. 13 of 2008 between the respondent and the applicant had been registered. That, on the same date i.e 04/06/2010 on behalf of the applicant he applied for copies of the judgement and decree in Miscellaneous Land Appeal No. 13 of 2008. That, he had perused through the court record meticulously and discovered that Miscellaneous Land Appeal No. 13 of 2008 had been filed without knowledge of the applicant. That, the honourable judge made an order to the effect that the respondent (now the applicant) 'had failed to appear although she was dully served and therefore ordered the hearing to proceed ex-parte. Mr. Kingwe prayed that the extension of time be granted so that the applicant can file the intended application.

Similarly the counsel for the respondent in his reply submission prayed to adopt the counter affidavit sworn by the late Basil Mkwata, learned counsel. The counsel for the respondent contended that the application should not be granted for a simple reason that the applicant has a tendency of ignoring court summonses whenever they are issued and duly served to the applicant. It was pointed out by the counsel for the respondent that this has always been the tendency of the applicant ever since at the Ward Tribunal level.

To substantiate further his submission the counsel for the respondent went to specifically mention the summonses issued on 17<sup>th</sup> October, 2008 and 25<sup>th</sup> November, 2008 which according to him besides being dully served upon the applicant but the applicant chose not to appear. The counsel for the respondent humbly submitted that the applicant was negligent to take the appropriate steps from the time when she became aware of the ex-parte judgement and it is apparent that the applicant slept on her right to file this present application within reasonable time.

Finally Mr. Kenyunko submitted on behalf of the respondent that considering the length of time under which this matter has stayed pending before this court it would occasion further injustice if this court will grant the present application. He therefore strongly argued that this application be dismissed with costs.

In his very brief rejoinder submission Mr. Kingwe submitted on behalf of the applicant that in the absence of proof of service by the serving officer in the court records it is only fair that the prayer in this application be granted.

I have carefully gone through the records of the court and after listening the submissions made by both counsels of the applicant and the respondent. I have come to the conclusion that the crucial issue for determination by this court is whether the applicant has any reasonable or sufficient cause to warrant this court extend the

period of limitation for filing an application under Order XXXIX Rule 21 of the Civil Procedure Code Cap. 33 Revised Edition 2002.

Section 14(1) of the Law of Limitation Act, Cap. 89 of the Revised Edition 2002 provides that;

*“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.”*

What is apparent in the face of record before this court coupled with the submissions made by both counsels the main reason for the applicant's inability to take the appropriate steps in time was due to the fact that the applicant was unaware of the existence of the Land Case Appeal No. 13 of 2008.

A cursory perusal to the court record in Land Case Appeal No. 13 of 2008 reveals the existence of two court summonses which were purportedly served upon the applicant on 3<sup>rd</sup> November, 2008 and 25<sup>th</sup> November, 2008. Whereas the first summons was endorsed at the bottom by the Ward Executive Officer that they have been unable to trace the applicant and leaves the matter to the court, the second summons was purported to have been affixed on

the house of the applicant by the same Ward Executive Officer and consequently this court Chingwile J. went ahead with the ex-parte hearing and therefore the ex-parte judgement.

The law on service of summons upon the defendant is very loud and clear. Order V Rule 12 of the Civil Procedure Code Cap. 33 Revised Edition 2002 requires that service of summons shall be made on the defendant in person, unless he has an agent empowered to accept the service of summons, in which case service on such agent shall be sufficient.

The Civil Procedure Code Cap. 33 Revised Edition 2002 provides the procedure when the defendant can not be found. Order V Rule 17 reads;

*“Where the serving officer, after using all due and reasonable diligence, cannot find the defendant and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall within fourteen days of affixing such copy then return the original to the court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he*

*did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.”*

The Civil Procedure Code, Cap. 33 Revised Edition 2002 further elaborates the procedure for examination of the serving officer under Order V Rule 19 which reads;

*“ Where a summons is returned under Rule 17 the court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.”*

The above provisions of the law makes it mandatory for the serving officer to verify an affidavit explaining the circumstances of service or to be examined under oath. However, none of the above were complied with in respect to the summonses acted by the court in this particular circumstances.

I am pretty sure that the circumstances explained above amounts to **a reasonable** or **sufficient cause** on which this court



may exercise its discretion and extend the time for the filing of the intended application.

In **Mumello V. Bank of Tanzania** [2006] 1 EA 227 (CAT), it was held that;

*“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 may only be granted where it has been sufficiently established that the delay was with sufficient cause.”*

In the circumstances above, I find that the applicant has shown sufficient cause for allowing her application. In the result extension of time is granted to the applicant to file the intended application. The applicant should file her application to his court within fourteen (14) days from the date of this ruling.

Each part shall bear its own costs.

It is so ordered.

**P.F. KIHWELO**

**JUDGE**

**24/10/2014**

Ruling delivered on 24<sup>th</sup> October, 2014 in the presence of Mr. Ngoda holding brief for Mr. Kingwe for the Applicant and Mr. Edward Kenyuko for the Respondent.

**P.F. KIHWELO**

**JUDGE**

**24/10/2014**