

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC LAND APPLICATION NO. 120 OF 2019

(Original Land Case No. 250 of 2016)

DANFORD ELISANTE NGOWO (as Legal
Personal Representative of the estates of
the late **ROBERT ELISANTE NGOWO**) **APPLICANT**

VERSUS

JENERALI UNLIMWENGU **1ST PLAINTIFF/RESPONDENT**

DR. GIDEON SHOO **2ND PLAINTIFF/RESPONDENT**

SHABAAN KANUWA **3RD PLAINTIFF/RESPONDENT**

RULING

Date of Last Order:

Date of Ruling: 06/09/2019

MALLABA, J

The applicant **Danford Elisante Ngowo**, as a legal personal representative of the estate of the late Robert Elisante Ngowo, applies for extension of time within which to apply to set aside the judgment and decree of this court in

Land Case No. 250 of 2016. The application has been made by way of Chamber Summons supported by an affidavit of the applicant.

When the application came before the court, the applicant was represented by the learned advocate Mr. Sylvester Shayo, assisted by the learned Mrs. Shayo, Advocate. On the other hand, the respondents were all represented by the learned advocate Mr. Benson Ngowi.

The learned counsel Sylvester Shayo submitted that, the late Robert Elisante Ngowo died on 18/06/2005. Copy of the respective death certificate was annexed to the affidavit in support of the application. Following death of the late Robert Elisante Ngowo, the applicant herein was appointed administrator of his estate by the Bugu Primary Court on 13/12/2016. It was claimed that, the suit subject matter of this application was instituted in this court after the death of the said Robert Elisante Ngowo. The learned counsel Mr. Shayo cited **Sarkar's Law of Civil Procedure**, 8th Edn, Vol. 2, 1995 reprint, where the learned author at page 1162 states that, a decree against a person who was dead at the time of institution of the suit is a nullity. In the present matter, the late Robert Elisante Ngowo was dead when the suit

against him was instituted. Mr. Shayo prayed to this court to extend the time within which to set aside the *ex parte* judgment, so that the illegality may be addressed. He added that, his client discovered the illegality after he was appointed administrator of estate.

On the other hand, the learned counsel Mr. Benson Ngowi cited a number of Court of Appeal authorities, to the effect that, an applicant has to account for every day of delay, even of a single day (**Wambele Mtumwa Shahame Vs. Mohamed Hamis**, Civil Reference No. 8 of 2016; **Elifazi Nyatege and 3 others Vs. Caspian Mining Ltd**, Civil Application No. 44/ 08 of 2017). The learned counsel added that, there is another defect. The applicant does not indicate as to when he became aware of the need to set aside the *ex parte* judgment. Also, he submitted that, the *ex parte* judgment in Land Case No. 250 of 2016 was delivered on 4/5/2018 and the applicant filed the first application which was struck out, on 6/6/2018. The applicant does not account for the delay during the duration. Also, after the previous application was struck out on 7/12/2018, the applicant filed this application on 11/3/2019. Again, the learned counsel submits that, the applicant has not accounted for the delay. The learned counsel for the respondents,

generally submits that, the applicant has not shown diligence and effort in pursuing the matter and thus does not deserve an extension of time of apply to set aside the *ex parte* judgment. He asked this Court not to assist a person who decided to sleep over his rights. He cited the case of **Stanley Kalamu Maliki Vs. Chilio Kwise** [1981] TLR 143. The applicant has failed to account for everyday of delay.

In rejoinder, the learned Mr. Shayo submitted that, the applicant has all along been knocking at the doors of courts in pursuit of setting aside the *ex parte* judgment. He also wondered as to who was being served in the circumstances, as the late Robert Elisante Ngowo was dead by the time the suit was instituted. He went on to submit that, the case of the late Robert Elisante Ngowo was not heard as he was already dead when the case was instituted.

This court will now turn to consider the application on the basis of affidavit and counter affidavit filed by the parties in this matter and also on the basis of the forceful rival oral submissions by counsels for the parties.

In the first place, this court agrees with the learned counsel for the respondents that, extension of time to pursue any step has always to be based on good and sufficient account of the delay. That is indeed the principle established by the cases cited by the learned counsel. However, this court also agrees with the learned counsel for the applicant that, allegation of illegality in itself, is now established as another good and sufficient reason for grant of extension of time.

Regarding extension of time due to illegality, there are the cases of **Patrobert D. Ishengoma V. Kahama Mining Corporation Ltd and 2 Others**, Civil Application No. 2 of 2013 (CAT-Tbr) (unreported); **Principal Secretary, Ministry of Defence and National Service V. Devram Valambhia** [1992] TLR 182; and **VIP Engineering and Marketing Limited and Three others V. Citibank Tanzania Limited**, Civil References No.6, 7 and 8 of 2006; in which the Court of Appeal came to the conclusion that, a claim of illegality in the challenged decision, constitutes sufficient reason for extension of time regardless of whether or not a reasonable explanation has been given by the applicant for the delay. In other words, illegality in itself constitutes sufficient cause or reason for extension of time. Where there is an illegality, under no circumstances

should such an illegality be left to stand. Opportunity to appeal is the only way to provide a cure to such an illegality. As such, an applicant would be entitled to extension of time, if he establishes a *prima facie* case that, there is an illegality in the decision intended to be appealed against.


In the present matter, the allegation of existence of illegality, that is, the suit having been instituted after the person who was defendant therein had long died, was not addressed at all by the respondents herein. The same needs to be looked into.

On the basis of the allegation of existence of an illegality, this court uses its discretion to extend the time within which the applicant may apply to set aside the *ex parte* decision in Land Case No. 250 of 2016.

The applicant may apply to set aside the decision within 30 days from the date of this ruling.

No order as to costs.

It is ordered accordingly.



J.B. MALLABA
JUDGE

06/09/2019