IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS LAND APPLICATION NO. 534 OF 2020

(originating from ex parte judgment and decree of Land Case No. 37 of 2017 delivered on 12/12/2018 by Hon. Mgonya, J and the ruling of Misc. Land Application No. 572 of 2019 delivered on 31/8/2020 by Hon. J.S Mgetta, J both cases filed in this Hon Court)

DUNCANI SHILLY NKYA .....1ST APPLICANT

KIWANGO SECURITY CO. LTD.....2ND APPLICANT

VERSUS

OYSTERBAY HOSPITAL CO. LTD.....RESPONDENT

RULING

Dated 25th & 2nd June, 2021

J.M. KARAYEMAHA, J.

This Court has been moved under section 14 (1) of the Law of Limitation Act, (Cap 89 R.E. 2019) to grant orders prayed in the chamber summons namely:

i) That the honourable court be pleased to grant an order for extension of time to file an application to set aside *ex parte* judgment and decree of this Hon. Court passed on 12/12/2018 by hon. Mugonya, J in Land Case No. 37 of 2017.

ii) The costs of this Application be paid.

iii) That this Honourable Court be pleased to grant any other relief it may deem fit to grant.

The application is brought by way of a chamber summons supported with an affidavit sworn by Mr. Samson M. Russumo duly instructed by the applicants who together with other records gives the background of this

matter. The application traces its existence in **Land Case No. 37 of 2017**. To properly defend his case, he engaged the advocate namely Godwin Muganyizi of Decorum Attorneys. When the case was proceeding, the applicant and the advocate groomed misunderstandings as far instruction fees was concerned. When they failed to fix the disagreement, the 1st applicant resorted to withdraw the instructions. Unhappy and unwilling to accept the withdrawal, Mr. Muganyizi made no effort to make follow up on the progress of the matter in court.

In order to know what was transpiring in court the applicants made several follow ups in court only to be notified orally by the court clerk that the case was heard *ex parte* and *ex parte* judgment was delivered on 12/12/2018 by Hon. Mugonya, J.

In order to rescue the situation, the applicants instructed advocate Samson Russumo to take over the case. It is averred under paragraph 10 of the affidavit that the successor advocate struggled unsuccessfully to peruse the court record. On 7/10/2019 they file they filed application No. 572 of 2019 praying for stay of execution but was struck out for being time barred by Hon. Mgeta, J, hence this application.

The respondent filed a counter affidavit sworn by Mr. Ashiru Hussein Lugwisa, in which conduct of the applicant was put on spotlight. He, however, averred that the blamed learned advocate wrote a letter to withdraw after Land Case No. 37 of 2017 had passed through mediation and failed. He averred further that the applicant's children, namely, Upendo and Nurdeen were in court and knew the status. It is averred further that there was no follow up mad either by the parties or their advocate because there is no affidavit of the clerk to prove the

contentions. To him the applicants and their counsel acted negligently and diligently apart from the fact that the judiciary introduced new systems of online filing.

The hearing of this matter took place on 25/6/2021 whereby Mr. Samson Russumo learned advocate featured for the applicants and Mr. Ashiru Lugwisha learned advocate appeared for the respondent.

Adopting the affidavit, Mr. Russumo adding submitted that the applicants still have a right to be heard as enshrined under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 (the Constitution). Guided by the case of **Sadick Athuman v R,** [1986] TLR No. 235, the learned counsel stated that the right to be heard is very fundamental meaning that it is un alienable right. He urged this court to be guided by Article 107 A of the Constitution, to avoid to being bound by technicalities.

The applicant prayed that the application be allowed by enlarging time to file application for stay of execution.

The respondent enjoyed the services of Mr. Lugwisa, whose submission began by holding the view that there are insufficient reasons to warrant this court exercise discretionary powers to grant the application. He referred to the case of **Mwita s/o Ibrahim Mhere v R** [2005] TLR 107 to buttress his conviction. He submitted adding that to exercise its discretion, the court must be satisfied that there is material base. He contended that the Law of Limitation Act, Part III of the schedule item 21 provides for 60 days which begin from the date the applicants got the notice of execution. He observed that the entire affidavit contains no reason why applicants were late to file their application. In the contrary

he said the affidavit was confined to immaterial and irrelevant facts. The learned counsel argued that even if Misc. Land Application No. 572 of 2019 was struck out on 31/8/2020and lodged the current application on 31/9/2020, a period of 21 was to be accounted for. He fortified his contention by citing the Court of Appeal's decision in **MZA RTC Trading Company Ltd v Export Trading Company Limited**, Civil Application No. 12 of 2015 and the HC's decision in the case of **Integrated Property Investment (T) Limited & others v The Company for Habitat and Housing in Africa**, Misc. Commercial Application No. 8 of 2019.

In respect to Article 13 (6) (a) of the constitution and the case of **Sadick Athuman** (supra), the learned counsel argued that they relate to issues of equality before the law. He, however, stated that the applicants have legal responsibilities to give reasons for delay. He took the similar view on Article 107A of the constitution and added that the issue of technicalities is irrelevant because the applicants have to give reasons for the delay.

In his rejoinder, Mr. Russumo stressed that the affidavit contains sufficient causes by explaining what transpired from the beginning to the end. He contended that the delay was caused by the former advocate. He was sure that delaying in filing the application is a technicality in terms of article 107 A of the Constitution. To him this article is very important because it protects people against unwelcome technicalities.

I have dispassionately examined the record of the trial tribunal, the chamber summons and the supporting affidavit and considered the submissions of the applicant. The question that needs determination in this application is whether the applicant has demonstrated a good cause

to warrant the court to exercise its discretion and enlarge the time prayed for.

The law on extension of time is well settled in our land. First of all, extension of time is in the discretional powers of the courts. See the case of **Mwita s/o Ibrahim Mhere v R** (supra). The applicant in an application for extension of time is required to establish good cause in order for the court to exercise its discretional powers to extend the time. In the famous case of **Alliance Endurance Corporation Ltd vs. Arusha Art Ltd,** Civil Application No. 33 of 2015 (unreported) the Court of Appeal of Tanzania explained that extension of time is a matter of discretion of the Court and the applicant must put material before the Court which will persuade it to exercise its discretion in favour of an extension of time. Also, in the case of **Regional Manager TANROAD Kagera vs. Ruaha Concrete Co. Ltd**, Civil Application No. 96 of 2007 (unreported) the Court of Appeal of Tanzania had insisted at pages 6 and 7 that:

> *"For the court to grant extension of time there must be sufficient material in order to enable it exercise its powers. A person who proposes to have time extended he must have sufficient material in order to enable the Court to move away from its time table for disposal of case, that is; cases must have time limit."*

Again, in **Wambele Mtumwa Shahame v Mohammed Hamis,** (supra) the CAT set out criteria for a court to extend time as:

1. Length of delay;
2. Reasons for delay;
3. The degree of prejudice to the other party, if granted;

4. The chances of success if the application is granted

In this case Applicants are blaming advocate Muganyizi for not handling their case and give them feedback. The original record of the High Court indicates that Mr. Muganyizi appeared for the last time in court on 8/6/2018 for mediation with Upendo and Nirdeen (the 1st applicant's children) before Madam Justice Wambura, J. on that day the trial judge had this to say:

> *"I cannot proceed to mediate the parties with children of the defendants as they are not parties of the suit. If the defendant is not willing to attempt mediation what ii shall do is to return the trial judge..."*

Following that observation, the mediating judge returned the file to the trial magistrate for necessary orders. On 19/6/2018, Mr. Muganyizi did not appear as well as the 1st applicant's children. On 6/8/2018 the case was fixed for *ex - parte* hearing. It is obvious that the 1st applicant failed to make follow up for almost three months. The argument by applicants is lack of feedback. However, I am informed that the 1st applicant and Mr. Muganyizi disagreed on the instruction fees. Logically, he had to check the progress of the case in court in person rather than banking in an advocate whose services were precipitated by instruction fees disagreement. This, in my humble opinion, is considered to be proactive.

I have read the record and the affidavit closely. I have to comment that the applicants' affidavit is full of concealments. It is not clear from the affidavit as to when the 1st applicant stopped the advocate from acting

on his behalf. It is similarly not clear when the applicants came to court to inquire about their case. More so, there is no evidence showing that the court clerk informed them that the court file was misplaced and request for the affidavit. At least they had to produce the court clerk's affidavit to increase weight to the allegations. The affidavit does not state on what date the court clerk verbally told the applicants' counsel that the *ex parte* judgment was delivered on 12/12/2018.

Let me state at this juncture that, the claim that it was a court clerk who informed/mislead the applicants is devoid of merit because the name of the court clerk and his/her identity were not stated in the applicant's affidavit hence it was not possible to authenticate the appellants claim. Besides, it is principle of law that when an affidavit mentions another person as source of information, such person should depone a separate affidavit to confirm what has been deponed in the affidavit but this was not done. This rule has been articulated in numerous cases including in Benedict **Kimwaga vs Principal Secretary, Ministry of Health,** Civil Application No. 31of 2000, Court of Appeal of Tanzania at Dar es Salaam where it was held that:

> *"If an affidavit mentions another person, then that other person has to swear an affidavit. However, I would add that that is so where the information of that other person is material evidence because without the other affidavit it would be hearsay. Where the information is unnecessary, as is the case here, or where it can be expunged, then there is no need to have the other affidavit or affidavits."*

It appears that the applicants lodged Misc. Land Application No. 573 of 2019 which sadly was struck out by Hon Mgeta, J. struck out for being time barred on 31/8/2020. On 21/9/2020 lodged the instant application.

Wholly immersed in these circumstances, I drift from Mr. Russumo's reasoning that applicants had good reasons for a delay. I side with Mr. Lugwisa to hold that the applicants have not advanced good reasons sufficient to trigger exercise of this court's discretion.

Mr. Russumo has tried to ask the court to invoke Article 13 (6) (a) of the Constitution to express his belief that applicants have a right to be heard. He stretched further guided by Article 107A of the constitution to cajole this court not to be bound by technicalities. Mr. Lugwisa has a point on discarding Mr. Russumo's line of argument. I share his views that applicants had to account for the delay not to rely on these Articles and attain the court's sympathy.

In the case of **ZuberiMussa v. Shinyanga Town Council**, civil application no.100 of 2004 unreported the Court of Appeal laid down some helpful guidelines which contain the principles to be applied in interpreting Article 107A (2) (e) of the Constitution of the United Republic, 1977. The Court stated:

> *"...in our decided opinion, article 107A (2) (e) is so couched that in itself it is both conclusive and exclusive of any opposite interpretation. A purposive interpretation makes it plain that it should be taken as a guideline for court action and* ***not as an iron clad rule which bars the courts from taking cognizance of salutary rules of procedure which when properly employed help to enhance the quality of***

justice delivered. It recognizes the importance of such rules in the orderly and predictable administration of justice."[Emphasis mine]

That is quite true. One cannot be said to be acting wrongfully or unreasonably when he is executing the dictates of the law. Not every procedural rule can be outlawed by Article 107 A 2 (e) of the Constitution. I find support of my argument in the Court of Appeal's decision in the case of **China Hinan International Cooperation Group v Salvand K.A. Rwegasira,** Civil Reference No. 22 of 2005 (unreported) where it was held that:

> *"The role of rules of procedure in the administration of justice is fundamental... That is, their function is to facilitate the administration of justice..."*

No doubt procedural law plays an important role in the administration of the law. The forms and formalities of court processes ensure the smooth operation of the legal system. They entail a minimum amount of certainty as to substantive rights. They set out a clearly ascertainable procedure of pursuing those rights. Hence, procedural law provides human society with a systematic manner of handling legal problems and a determinate mode of settling disputes.

In the instant matter, the applicant is duty bound to put before this court materials that to trigger to exercise its discretionary powers. It is obvious that the applicant has mercilessly to explain the delays which is fundamentally wrong. my considered opinion therefore that when a party to a case has to establish why he delayed to pursue his rights promptly.

Therefore, an approach that seeks to apply Article 107A of the constitution to all circumstances even where one has to give reasons for his inaction, laxity or negligence or all procedural rules would certainly result in chaotic justice and a disorderly or endless process in justice delivery. Otherwise there would be endless litigations.

To underscore my views, I am attracted by B. B. Mitra - **The Limitation Act 1963**, twentieth Edition who explains that laws of limitation are founded on public policy. He cites **Halsbury' Laws of England** where the policy of Limitation Act is laid down as follows:

> *'The Courts have expressed at least three different reasons supporting the existence of statutes of limitation, namely, (i) that long dormant claims have more cruelty than justice in them, (ii) that a defendant might have lost the evidence to dispute the stated claim, (iii) that persons with good causes of actions should pursue them with reasonable diligence" (**Halsbury's Laws of England, 4th Ed. Vol.28 p. 266, para 605)'***

Mitra also cites Andrew McGee in **Limitation Periods (2nd Edition 1994)** wherein he states:

> *"Arguments with regards to the policy underlying statutes of limitation fall into three main types. The first relates to the position of the defendant. It is said to be unfair that a defendant should have a claim hanging over him for an indefinite period and it is in this context that such enactments are sometimes described as 'statutes of peace'. The second looks at the matter from a more objective point of view. It suggests that a time limit is necessary because with the lapse of time, proof of a claim becomes more*

difficult, documentary evidence is likely to have been destroyed and memories of witnesses will fade. The third relates to the conduct of the plaintiff, it being thought right that a person who does not promptly act to enforce his rights should lose them. All these justifications have been considered by the courts."

These are no doubt good principles from which we can draw inspiration.

Mitra made the following observation to which I subscribe:

"An unlimited and perpetual threat of litigation creates insecurity and uncertainty; some kind of limitation is essential for public order."

In this case the applicants ought to act as soon as they had disagreement with advocate Muganyizi. Their laxity and negligence do not call for this court to invoke Article 107 A of the constitution. Consequently, and on the basis of the foregoing, I hold that the applicant has spectacularly failed to convince this court that delays in lodging the application for extension of time to file an application to set aside *ex parte* judgment and decree within the prescribed time were caused by any sounding reasons that fall in the realm of sufficient cause. In view thereof, I find that the applicant has failed the test set for grant of extension of time. Accordingly, I dismiss the application with costs.

It is so ordered.

Dated at Dar es Salaam this 2nd day of July, 2021

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J. M. KARAYEMAHA
JUDGE