IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 03 OF 2021

(Originating from the Decision of the High Court of Tanzania at Land Division Land Case No. 115 of 2010 dated 22nd July 2015)

SIWEMA HAMIS ALI ..... **APPLICANT**

VERSUS

KAISI HAMISI (As Administrator of Estate of the Late HAMISI ALI)..... **1ST RESPONDENT**

ZAITUNI HAMISI ALI ..... **2ND RESPONDENT**

RULING

Date of Last Order: 25/08/2021 &
Date of Ruling: 27/09/2021

MSAFIRI, J

The Application is accompanied by the affidavit of Khalfan Hamis Msumi the learned advocate. The chamber summons to this Application is brought under Section 14 (1) and (2) of the Law of Limitation Act Cap. 89 R.E 2019 and Section 93 and 95 of the Civil Procedure Code Cap. 33 R.E 2019, seeking for the following Orders;

1. *The Court be pleased to grant an extension of time for the applicant to file an application to set aside the decision of this High Court in Land Case No. 115 of 2010 delivered on 22/07/2015.*

2. *Any other orders and reliefs which the Honourable Court may find fit and just to grant.*

Among the reasons adduced for the delay to file the Application on time as reflected in the applicant's affidavit is that she was not aware of the presence of the main suit since she was not party to the suit and she reside outside the jurisdiction of the court and outside the country that is Germany.

The Application was contested by way of written submissions. Advocate Msumi drew and filed submission on behalf of the applicant, Advocate Robert Rutaihwa appeared for 1st respondent while the 2nd respondent appeared in person.

In his submission, Mr. Msumi stated that according to Item 21 of Part III of the Schedule to the Law of Limitation Act Cap. 89 R.E 2019, the time framed to set aside a judgment and decree is 60 days. However, in all six years delay the applicant was not aware of the existence of Land Case No. 115 of 2010 before this Court. The applicant's reason relied on illegality that the Honourable Court wrongly vested to the 1st respondent the suit property while the applicant was not joined to the suit and hence had no opportunity to be heard and therefore wrongly alienated of her interests in the suit property. He cited the case of the **Principal Secretary Ministry of Defence and National Service vs. Devram Valambia** (1992) TLR 185. He is in opinion that since the applicant was not joined as necessary party the decision thereon is capable of being set aside as it was decided by the Court of Appeal in the case of **Farida**

Mbaraka and Farid Ahmed Mbarak vs. Domina Kagaruki Civil Appeal No. 136 of 2006.

In reply, Mr. Robert advocate for the 1st respondent vehemently disputed the Application on the sense that, the same is untenable since the applicant was not a party to the suit hence the intended Application to set aside the judgement of the Court cannot succeed as intended remedy is not available to the applicant.

He further submitted that the affidavit to this Application is defective since out of 13 paragraphs, only three paragraphs are based on deponent's knowledge. The rest are based on information contrary to Order XIX Rule 3 of the Civil Procedure Code Cap 33. He cited the decision in **Lalago Cotton Ginnery and Oil Mills Company Ltd vs. Loans and Advances Realization Trust**, Civil Case No.80 of 2002 CAT (Unreported) the same decision was cited with approval in the case of **Joseph Peter Daudi & Another vs. Attorney General & 3 Others**,Misc. Civil Application No. 447 of 2020 HC (Unreported) at page 6 court said

> *"An advocate can swear and file an affidavit in proceedings in which he appears for his client but on matters which are in the advocate's personal knowledge only. For example, he can swear an affidavit to state that he appeared earlier in the proceedings for his client and that he personally knew what transpired during these proceedings." And that "from above an advocate can swear and file an affidavit in proceedings in which he appears for the client*

but on matters which are within his personal knowledge. These are the only limits which the advocate can make an affidavit in proceedings on behalf of his client"

He further submitted that although Item 21 of Part III to the Law of Limitation Act provide time limit for the Application to set aside Judgment and decree to be 60 days, the applicant has failed to account for each day delay among them is as for when he became aware of the impugned judgement to the date of filing this Application. The applicant has delayed for six years without proper explanation. He cited the case of **Interchick Company Ltd Vs. Mwaitanda Ahobokile Michael**, Civil Application No. 218 of 2016 Court of Appeal at Dar es Salaam where the court said that delay of even a single day has to be accounted for otherwise there would be no point of having rules prescribing the procedures.

He further argued that the point of illegality raised doesn't hold water since the law requires that the objection of misjoinder of a party must be brought as earlier as possible before the judgment being pronounced in accordance to Order I Rule 3 of the Civil Procedure Code. Therefore, the Court is functus officio to entertain this matter. On the other hand, the 2nd respondent conceded the Application.

Having gone through the submissions of both parties and the affidavit and counter affidavits thereon, together with annexures on record, let me repeat the cardinal principle of the 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. See the case of **Benedict Mumello vs. Bank of Tanzania** (2006) 1 EA 227.

The applicant reason for delay is that she was not aware of the existence of the main suit Land Case No. 115 of 2010 in which the judgement was entered for the 1st respondent on 22/07/2015. The reason for not to challenge it on time is because the applicant resides outside the jurisdiction of the court also outside the country that is German. Upon my perusal I could not find any evidence to justify that in all six years of the delay, the applicant was in German. The affidavit is silent on this important fact. There is no annexure or documents available to justify the averment that truly the applicant resides in German but for the mere words from her advocate. Furthermore, the applicant has failed to disclose as to when did she became aware of the existence of the impugned judgment so that the court could assess on her promptness and diligence in pursuing the matter.

Having said that I find no need to dig further in to this Application. The fact that there is no proof to justify the applicant's delay, amount to no sufficient causes adduced before this Court. Therefore, I proceed to dismiss it with costs.

It is so ordered.

Dated at Dar es Salaam this 27th Day of September 2021.

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A.MSAFIRI

JUDGE