

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 39 OF 2018

(Originated from the High Court of Tanzania at Land division in Land
Case No. 199 of 2014)

SALIM O. KABORA APPLICANT

VERSUS

ILALA MUNICIPAL COUNCIL 1ST RESPONDENT

DEOGRATIOUS C. MALIMA 2ND RESPONDENT

ABDALLAH KUDYA 3RD RESPONDENT

RULING

Date of Last Order: 27/04/2021 &
Date of Ruling: 11/06/2021

S.M KALUNDE, J: -

In 2014 the applicant filed before this Court Land Case No. 199 of 2014 against the defendants. The case was subsequently dismissed for want of prosecution on 29th June 2021. Aggrieved by the dismissal order the applicant filed the present application. The application is preferred under **Order IX Rule 4; Section 95 of Civil Procedure Code, Cap. 33 R.E 2019, ("the CPC")** and **Section 14 of the Law of Limitation Act Cap. 89, R.E. 2019 ("the LLA")**. In the present application the applicant is seeking for the following orders:

- 1. That this Court be pleased to set aside an order of dismissal of Land Case No. 199 of 2014 and restore the same for full hearing on merits;**
- 2. That this Honorable Court be pleased to condone the delay thereat;**
- 3. Costs of the Application be provided for; and**
- 4. Any other Relief as the Court may deem just and fit to grant.**

The application is supported by the affidavit of **Salim Omary Kabora**, the Applicant. In his affidavit the applicant alleged that Land Case no. 199 of 2014 was filed alongside an application for injunctive orders. He stated that the on 04th April, 2014 the application for injunctive orders was struck out and being aggrieved by that decision the applicant filed Civil Application No. 173 of 2014 at the Court of Appeal. He applicant stated that, on 03rd August, 2015 he notified this Court of the Civil Application No. 173 of 2014 which was pending at the Court of Appeal. The applicant stated that, after that notification the Court ordered that the main suit be deferred pending determination of Civil Application No. 173 of 2014.

Further to that, the affidavit states that, from 03rd August, 2015 the applicant stopped appearing before the Court as he was following up his application at the Court of Appeal believing that the proceeding before this Court had been deferred. The applicant stated that, on 04th October, 2017 the Civil Application No. 173 of 2014 which was pending at the Court of Appeal was struck out. Subsequently, on 03rd January, 2018 he discovered that Land Case

no. 199 of 2014 had been dismissed on 29th June, 2017 whilst his application at the Court of Appeal had not been determined. The applicant complained that Land Case No. 199 of 2014 kept on been called without him being served with summons. He thus prayed that the granted and the suit be heard on merit.

The 1st respondent filed a counter affidavit denying the averments made by the applicant and added that, the applicant was negligent in prosecuting Land Case No. 199 of 2014 leading to its dismissal and further that the present application was filed a year and five (5) months after Land Case No. 199 of 2014 had been dismissed. They insisted that the applicant has not accounted for the delay.

In relation to the adjournment the 1st respondent contended that Land Case No. 199 of 2014 had not been adjourned *sine dine* as it was fixed for mention in subsequent dates where the applicant did not enter appearance.

The second and third respondents filed a joint counter affidavit vehemently objecting to the application and contended that the applicant had neglected in following up Land Case No. 199 of 2014 leading to its dismissal.

It was scheduled that the application be heard by way of written submission. The applicant submissions were drawn and filed by Advocate **Mr. Abraham Hamza Senguji**, while **Mr. Hussein Kambi**, Municipal Solicitor filed for 1st respondent reply, while 2nd and 3rd Respondents filed their reply in person.

In support of the application Mr. Senguji submitted that on 03rd August, 2015 the applicant notified this Court of the Civil Application No. 173 of 2014 which was pending at the Court of Appeal. He added that, upon the notice, this Court ordered that suit be deferred pending determination of Civil Application No. 173 of 2014. He argued that from that day on the applicant became minded to follow-up the matter before the Court of Appeal believing that the proceedings before this Court had been adjourned pending determination of the application before the Court of Appeal.

Mr. Senguji insisted that as long Land Case No. 199 of 2014 proceeded before Civil Application No. 173 of 2014 was heard and determination, then the main suit proceed contrary to the Court order and without notifying the applicant. He argued that proceeding without the applicant and without notifying him contradicted constitutional provisions in relation to the rules of natural justice of the right to be heard. To support his argument, he cited the case of **Abbas Sherally & Another Vs. Abdul S.H.M Fazal boy, Civil Application No. 33 Court of Appeal** (Unreported).

In response, the 1st respondent submitted that the applicant has failed to account for each day of the delay. They submitted that whilst Civil Application No. 173 of 2014 was struck out by the Court of Appeal on 04th October, 2017 the present application was filed on 18th January, 2018. The applicant argued that that was a delay of more than 104 days. As for the merits the 1st respondent submitted that orders of the Court on 03rd August, 2015 were that:

“ ... hearing of the application together with the main suit is hereby deferred pending determination of Civil Application No. 173 of 2014 which is currently pending in the Court of Appeal of Tanzania. Meanwhile the matter is set to come for mention for necessary orders on 23^d September 2015”

It was the respondents' arguments that, in accordance with the order, the matter was not adjourned *sine die*. Hence the applicants chose to abandon the case.

On their part, the 2nd and 3rd respondents submitted that the respondents were negligent in filing an application for revision to the Court of Appeal. Their view was that since the application was struck out the applicant could have filed a fresh application instead of filing revision proceedings to the Court of Appeal. In addition to that, it was also argued that it took more than ninety days for the applicant to follow up on the matter to this Court. In support of this argument the 2nd and 3rd respondents argued that Civil Application No. 173 of 2014 was struck out by the Court of Appeal on 04th October, 2017 but the applicant discovered that Land Case No. 199 of 2014 had been dismissed on 03rd January, 2018 and the present application was filed on 18th January, 2018. The 2nd and 3rd respondents implored that the applicant has failed to account for the delay.

On the substance of the application the 2nd and 3rd respondents argued that there was no order that the matter was adjourned *sine die* as the phrase “**deferred**” used was synonymous

to “**adjourning**”. They argued that absence of an order staying hearing of the suit, the application was unmerited.

In rejoining Mr. Senguji stated that the present application was not an application for extension of time but rather an application for restoration of the Land Case No. 199 of 2014. He argued that the present application emanated for the breach of the right to be heard. He also argued that it was wrong for the Court to dismiss the suit without issuing summons to the applicant.

Having gone through the pleading and submissions of the parties, the fore question for my determination is whether the present application is merited.

In accordance with the chamber summons, this application is brought *inter alia* under **Order IX Rule 4** of the CPC. The said provision reads:

"Where the court has adjourned the hearing of the suit ex-parte and the defendant at or before such hearing, appears and assigns good cause for his previous non- appearance, he may, upon such terms as the court may direct as to cost or otherwise, be heard in answer to the suit as if he had appeared on the date fixed for his appearance"

Further to that the application is also brought under **section 14 (1)** of the **LLA**. Section 14 (1) provides that:

"14.- (1) 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.”

As correctly submitted by the parties, Land Case No. 199 of 2014 was dismissed on 29th June, 2017. In accordance with Part III of the Schedule to the LLA, an application to set aside the dismissal of the suit was supposed to be filed within thirty (30) days. Item 3 reads:

| | |
|--|--------------------|
| <i>For an order under the Civil Procedure Code or the Magistrates' Court Act, to set aside a dismissal of a suit.”</i> | <i>thirty days</i> |
|--|--------------------|

It is also on record that the present application was filed on **16th January, 2018**. Given that the suit was dismissed on **29th June, 2017**, that is a lapse of more than five (5) months. That is clearly beyond the limitation period prescribed by the LLA.

However, despite citing section 14 (1) of the LLA in the Chamber Summons and including a prayer that this Court be pleased to condone the delay thereat, Mr. Senguji insisted that this was not an application for extension of time, instead it was an application for restoration of Land Case No. 199 of 2014. It turns out that Mr. Senguji had forgotten that his application contained two applications, that is, an application for extension of time under section 14 (1) of the LLA and an application for restoration of Land Case no. 199 of 2014 brought under Order IX Rule 4 of the CPC The application would otherwise be entertained despite being omnibus.

Apparently, Mr. Senguji abandoned the application for extension of time, he did so after noticing that he had failed to account for the five months. It is also on record that the present application was filed on **29th June, 2017** when the suit was dismissed to **16th January, 2018** when the present application was filed. Further to that, even assuming that the period between **29th June, 2017** to **03rd January, 2018**, is excluded, the applicant has failed to account for the 13 days delay between **03rd January, 2018** to **16th January, 2018** when the present application was filed. The position of the law is that delay even of a single day must be accounted for. In present case the applicant has failed to present materials demonstrating that he took reasonable steps in prosecuting the matter as soon as he became aware of the alleged irregularity.

In his submissions, Mr. Senguji said that this was not an application for extension of time, but rather an application for a restoration of a suit under Order IX Rule 4, assuming that we go by that line of argument, the applications were thus filed out of time and without leave of the Court. The appropriate procedure would have been for him to apply for extension of time first then file an application for restoration. Which was what Mr. Senguji did, only that, this time the two applications were made in one application. Having failed to submit on an application for extension of time, the counsel for the applicant sought to abandon the application. Unfortunately, this Court cannot be bullied by that inadvertence on the counsel for the applicant.

For the forgoing reasons, this Court finds that the applicant has failed to demonstrate good cause for the extension of time. That said, there no application for restoration of Land Case No. 199 as intimated by the counsel as the same was filed out of time. I will therefore not proceed to the merits of the second limb of the application.

The application is thus dismissed with costs for lack of merits.
It is so ordered.

DATED at DAR ES SALAAM this 18th day of JUNE, 2021.

A handwritten signature in blue ink, appearing to read 'S.M. Kalunde'. The signature is stylized and fluid.

S.M. KALUNDE

JUDGE