IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO.422 OF 2021

(Originating from Land Case No. 26 of 2010)

MARIAM MANYANGA ..... 1ST APPLICANT

ROGATI KANIKI ..... 2ND APPLICANT

ARUNANYAEL NKO ..... 3RD APPLICANT

PETER KUNDY ..... 4TH APPLICANT

EUNICE A. NDIMBO ..... 5TH APPLICANT

VERSUS

PERFECT PETER SAO (as the Administrator of

the Estate of the late Peter V.X.SAO) ..... RESPONDENT

RULING

Date of last order: 16.09.2021

Date of Ruling: 22.09.2021

A.Z.MGEYEKWA, J

This is an omnibus application. I am called upon in this matter to decide whether this court should exercise its discretion under the provisions of section 14 (1) of the Law of Limitation Act, Cap. 89 [R.E

2019] , Order IX Rule 13 of the Civil Procedure Code Cap.33 [R.E 2019] to extend time within the applicant to file an application to set aside an *exparte* judgment and Decree dated 5th December, 2013 in Land Case No.26 of 2010. The application is supported by an affidavit deponed by Peter Kundy, the applicant. The application has encountered formidable opposition from the respondent and has demonstrated his resistance by filing counter affidavit, deponed by Perfect Peter Sao, for the respondent.

When the matter was called for hearing on 16th September, 2021, the applicants enjoyed the legal service of Mr. Kagirwa, learned counsel and the respondent enjoyed the legal service of Idd Msawanga, learned counsel.

In support of the application, Mr. Kagirwa, learned counsel for the applicants, has begun by stating that the instant application is for extension of time and setting aside exparte Judgment. He urged for this court to adopt the applicant's application and form part of his submission.

Mr. Kagirwa asserted that the applicant was not aware of the existence of Land Case No.26 of 2010 until when he received the demolition order. For that reason, it was his view that the applicant was not able to set aside the *exparte* Judgment on time. Mr. Kagirwa went on to submit that the respondent in his counter-affidavit argued that summons was issued vide

Uhuru Newspaper. He stated that they are not challenging the publication order but they claimed that the respondent had an ill motive. Fortifying his submission he cited the case of **Nasra Said v KBC Bank Tanzania Limited,** Commercial Cause No. 40 of 2015. He urged this court to be pursued by the cited case and find that the respondent took advantage of the procedure to the detriment of the applicant. Insisting, Mr. Kagirwa argued that summons was not issued by the court as a result the court delivered an exparte Judgment. To bolster his submission he cited the case of **Cosmas Construction Company Ltd v Arrow Garments** (1992) TLR 127.

Stressing, he stated that even if they did not take part, the respondent was duty-bound to inform the applicants of the date of Judgment. It was his view that this is a fit case for extension of time. Supporting his submission he cited the case of **Zito Zuberi Kabwe & Others v Attorney General**, Civil Application No.365 /01 of 2019. The learned counsel for the applicants did not end there, he submitted there is an issue of illegality mentioned in paragraph 28 of the applicant's affidavit. He added that the points of law involved are in regard to publication and summons and *exparte* judgment.

Mr. Kagirwa urged this court to grant the applicants' application for the court to dispense justice and give the applicants an opportunity to be

heard. Insisting, he stated that the ground of illegality is a good ground for extension of time. To support his position he cited the cases of **Mwita Monai @ Wana v R**, Criminal Application No.34 (unreported). He claimed that the applicants have stated the reasons why the application to set aside the *exparte* judgment was not lodged within time. He added that the same reasons warrant this court to invoke its power under section 14 (1) of the Law of Limitation Act and Order IX Rule 13 (1) of the Civil Procedure Code Cap. 33 [R.E 2019] to extend time to the applicants to lodge their application for setting aside the Judgment and to set *exparte* Judgment and Decree and order the matter to proceed with hearing interparties. He said the reasons warranting recusal were stated in the case of **Pride Tanzania Ltd v Mwanzani Kasatu Kasamia**, Misc. Commercial Cause No. 230 of 2015.

On the strength of the above submission, Mr. Kagirwa, the learned counsel for the applicants beckoned upon this court to grant the applicant's application and each party to bear his own costs.

Responding, Mr. Idd, learned counsel for the respondent was brief and straight to the point. He prayed for this court to adopt the counter affidavit and form part of his submission. He began his submission by referring this court to the applicant's affidavit and argued that the affidavit was sworn by the 4th applicant in exclusion of other applicants. Submitting on

the application he contended that the respondent took effort to serve the applicants with a summons. He added that affixation was not possible therefore they opted for a substitution of service and the summons was published in Uhuru Newspaper.

He continued to submit that the matter was first lodged at the Primary Court in respect to Land Case No. 34 of 1989 thus it was his view that the applicants were aware that there was a pending case Land Case No. 26 of 2010 before the High Court. He claimed that the applicants have failed to account for days of delay from the year 2010 to 13th August, 2021 thus there was no any sufficient reasons for their delay. Stressing he argued that failure to file the instant application after 10 years is an abuse of court process and a delay tactic since the respondent is restrained to proceed with his activities.

On the strength of the above submission, Mr. Idd insisted that the applicants were aware that there was a case before the court.

In his rejoinder, Mr. Kagirwa reiterated his submission in chief. He added that the issue of defective affidavit was not featured in the counter affidavit therefore he urged this court to ignore the facts which were not pleaded in the counter affidavit. he went on to state that the 4th applicant signed on behalf of other applicants and the decree as per Order IX Rule

9 of the Civil Procedure Code Cap.33 is required to be set aside against all parties. Mr. Kagirwa continued to argue that the respondent was required to exhaust the means of service since the issue of affixation was not featured in the counter affidavit he urged this court to ignore the said complaint. He argued that the reasons for delay are based on account of each day of delay. To support his submission he referred this court paragraphs 7 to 20 of the affidavit and. Stressing, Mr. Kagirwa claimed that the applicants were not aware that there was a matter before the court of law. In conclusion, Mr. Kagirwa urged this court to grant his application.

In determining the prayers of the applicants contained in the omnibus application, I have to determine first whether this court can determine the combination of the applicants' prayers as stated in the case of **Tanzania Knitwear Ltd v Shamshu Esmail** (1989) TLR 48, Mapigano, J (as he then was) held that:-

> *" In my opinion the combination of the two applications is not bad in law. I know of no law that forbids such a course. Courts of the law abhor multiplicity of proceedings. Courts of law encourage the opposite."*

Guided by the above authority I find that the two prayers are proper before this court as they are not diametrically opposed to each other, but one easily follows the other. Once extension of time is granted then

an application for setting *exparte* Judgment and Decree follows, as it was held in the case of **MIC Tanzania Ltd v the Ministry for Labour and Youth Development and the Attorney General,** Civil Appeal No. 103 of 2004 Dar es Salaam (unreported) delivered in December, 2006. Therefore, I proceed to determine both prayers and find out whether the applicant has adduced sufficient evidence to move this court to grant what he has sought.

In addressing the first prayer, the central issue for consideration and determination is whether sufficient reasons have been advanced to warrant the extension of time sought by the applicant.

In accordance with the applicant's application, the main issue that emerges and cries for my determination is whether the applicant has disclosed a sufficient cause to warrant the court to grant his application for extension of time to set aside *exparte* Judgment.

There is no gainsaying that the power to extend time is at the court's discretion. It is settled law that a party who seeks an extension of time must disclose sufficient cause for the delay. The decisions are equally relevant for the requirement to account for each day of delay and failure to do so the Court cannot exercise its discretion in his favour. That position is reflected in several decisions of the Court of Appeal in

applications for extension of time, and I have no doubt the principle applies to this court too. It is equally not in dispute, and indeed it is settled law that such discretion must be exercised judiciously on the basis of material placed before the court for its consideration.

I have keenly followed the grounds contained in the applicant's affidavit and the respondent's counter affidavit with relevant authorities. The position of the law is settled and clear that an application for extension of time is entirely the discretion of the Court. But, that discretion is judicial and so it must be exercised according to the rules of reason and justice. The decisions are equally relevant for the requirement to account for each day of delay and failure to do so the Court cannot exercise its discretion in his favour. That position is reflected in several decisions of the Court of Appeal such as the case of **Mbogo and Another v Shah** [1968] EALR 93, and I have no doubt the principle applies to this court too.

Additionally, the Court will exercise its discretion in favour of an applicant only upon showing good cause for the delay. The term "good cause" having not been defined by the Rules, cannot be laid by any hard and fast rules but is dependent upon the facts obtained in each particular case. This stance has been taken by the Court of Appeal in a number of its decision, in the cases of **Regional Manager, TANROADS Kagera v Ruaha Concrete Company Ltd**, Civil Application No.96 of 2007, **Tanga**

Cement Company Ltd v Jumanne D. Massanga and another, Civil Application No. 6 of 2001, **Vodacom Foundation v Commissioner General (TRA)**, Civil Application No. 107/20 of 2017 (all unreported). To mention a few. The applicant is also required to account for days of delay. The Court of Appeal of Tanzania in the cases of **FINCA (T) Ltd and Another v Boniface Mwalukisa**, Civil Application No. 589/12 of 2018 (unreported) which was delivered in May, 2019 and the case of **Bushiri Hassan v Latifa Lukio Mashayo,** Civil Application No.3 of 2007 (unreported) held that:-

> *"Dismissal of an application is the consequence befalling an applicant seeking an extension of time who fails to account for every day of delay."*

Applying the above holding in the instant application, I have noted that the applicants in their affidavit specifically paragraphs 6 and 8 generalized that from the year 2000 to 2021 there was no any dispute brought against the applicant. They were aware after been called to attend receiving the execution order on 5th July, 2021, they were ordered to vacate the suit premises. On the other side, the respondent valiantly objected to the application by stating that the applicants were served to appear thus they were aware of the matter in court. There is a proof of service by way of substitution of service whereas this court issued the said summons on 24th

May, 2010 through Uhuru Newspaper dated 31ˢ Mei, 2021, the applicant were summoned and the hearing was set on 30th June, 2020 a month later. I do believe that the applicants were aware of the matter pending in court since the substitution of service was effected. Once a summons is published it is presumed that the party was aware of the matter.

Nevertheless, let us assume the applicants were not aware of the pending case and deliverance of the said judgment. The execution order was served to the applicants on 05th July, 2021 claiming that they were making follow-up to the District Commisisoner's Office about the matter. In paragraph 20 they said that on 20th July, 2021 they received a letter that was not attached to the applicants' application thus there is no proof. From 20th July, 2021 to 13th August, 2021 a delay of approximately 23 days which are not accounted for. Fortifying his submission, the learned counsel for the applicants referred this court to the case of **Mwita Sagamo Nyikana v Joyce Mang'era Kemanga**, Misc. Civil Application No. 05 of 2020.

Videlicet for this court to grant extension of time in the situation at hand, the applicant was required to account for each day of delay from the year 2010 to 2020, a lapse of 10 years is a long time that requires depth explanation instead of simply claiming that the applicants were not aware that there was an existing case before this court. It is my considered view

that the applicants' application before the court is an afterthought after finding that the respondent is proceeding to execute the decree of this court. There is a Latin maxim that *'vigilantibus non dormientibus jura subverniut'* which means the law serves the vigilant, not those who sleep.

The applicants' Advocate also raised the issue of illegality, the appellants' gravamen of the complaint is that point of law is involved in publication and summons. The learned counsel for the applicant lamented that illegality is a fit ground for extension of time. It is worth noting although the issue of illegality is regarded as a sufficient ground in applications of extension of time, however, the same does not mean that any illegality raised by a party intending to appeal constitutes a point of law.

In the case of **Lyamuya Construction Company Limited v Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No.2 of 2010 (unreported), the Court of Appeal of Tanzania held that:-

> *" Since every party intending to appeal seeks to challenge a decision either on points of law or facts,* ***it cannot in my view be said that in Valambhia's case the Court meant to draw a general rule*** *that every applicant who demonstrates that his intended appeal raises points of law* ***should, as of right, be granted extension of time if he applies for one. The Court there emphasized that such point of law must***

be that of sufficient importance *and, I would add that it must also be apparent on the face of the record, such as the question of jurisdiction, (but), not one that would be discovered by a long drawn argument or process." [Emphasis added].*

Equally, in the case of The Commissioner of Transport v The Attorney General of Uganda and Another [1959] E.A 329, the Court of Appeal held that:-

" In other words, the Court refused to extend time because the point of law at issue was not of sufficient importance to justify the extension. ***The corollary of that is that in some cases a point of law may be of sufficient importance to warrant extension of time while in others it may not****. "[Emphasis added].*

Applying the above authority, it cannot in my view, be said that the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for it. Each *case has to be determined on its own merit and all pertinent circumstances must be considered. In the case of* **Moto Matiko Mabanga v Ophir Energy PLC and 2 Others**, Civil Application No.463/01 of 2017, delivered on 17th April, 2019, the Court of Appeal of Tanzania emphasized that:-

*"... for the ground of illegality to stand, the challenged **illegality of the decision must clearly be visible on the face of the record**, and the illegality in focus must be that of sufficient importance." [Emphasis added].*

After taking into consideration what has been stated in the affidavit and the applicant's Advocate submission, I would like to make an observation that in the applicants' affidavit particular paragraph 28 the applicants complained that the issue of granting *exparte* proof without proof of summons affixed to the applicant's properties. The question of illegality related to affixation of summons cannot stand as long as substitution of service was published and adverse possession and *exparte* judgment.

The issue of adverse possession is not on the face of the record, it requires evidence thus the same cannot, as a matter of law, be termed as illegality thus cannot be a ground for applying for extension of time. It should be noted that extension of time is not a right of a litigant against a Court but a discretionary power of courts which litigants have to lay a basis [for] where they seek [grant of it] the same was held by the Supreme Court of Kenya in the case of **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others**, Sup. Ct. Application No. 16 of 2014. I recapitulate that I accede to Mr. Idd's views that the applicants' application is devoid of merit.

The learned counsel for the applicants claimed that the applicants were not served or notified of the date of delivering the judgment. It is my view that this is a good reason to set aside the *exaprte* judgment, however, as long as the first limb of application, application for extension of time is not granted thus even the second limb of the application based to set aside the exparte judgment cannot stand.

The upshot of the above is that, I am inclined to disallow the application for extension of time to file an appeal against the District Land and Housing Tribunal for Mwanza. No order as to the costs.

Order accordingly.

Dated at Dar es Salaam this date 22nd September, 2021.

A.Z.MGEYEKWA

JUDGE

22.09.2021

Ruling delivered on 22nd September, 2021 via audio teleconference whereas Mr. Jovinson Kagirwa, learned counsel for the applicant, and Mr. Idd Msawanga, learned counsel for the respondent were remotely present.

A.Z.MGEYEKWA

JUDGE

22.09.2021