

**(LAND DIVISION)**

## AT DAR ES SALAAM

**MISC. LAND CASE APPLICATION NO. 353 OF 2020**

**MOSTAQUIM MURTAZA DARUGAR**      **APPLICANT**

## VERSUS

**MAGERETH JOHN MBOMBO** ..... **1<sup>ST</sup> RESPONDENT**

GERVAS NDYMKAMA ..... 2<sup>ND</sup> RESPONDENT

**EMMANUEL MOLEL** ..... **3<sup>RD</sup> RESPONDENT**

(Originating from the Order of the High Court of Tanzania at Land Division Land  
Case No. 102 of 2016 dated 9<sup>th</sup> October 2019)

**RULING**

**Date of Last Order: 01/09/2021 &**

**Date of Ruling: 06/10/2021**

**A. MSAFIRI, J**

This Application is brought under Section 14 (1) of the Law of Limitation Act Cap. 89 R.E 2002. By way of chamber summons supported by affidavit of Mustaquim Murtaza Darugar, the applicant is seeking for an order of extension of time to file an application to set aside dismissal order made by this Court in Land Case No. 102 of 2016 dated 09<sup>th</sup> October 2019.

The reasons for delay as reflected in the affidavit involves applicant health issues, whereby he claims that, on 28<sup>th</sup> September 2018, his right

knee was injured and became unable to bend , this led him to be admitted to hospital until 18<sup>th</sup> June 2020.

On 03<sup>th</sup> May 2021, when the matter came for mention, it was ordered that the Application be disposed by way of written submissions. Upon the date of filing their submissions both applicant and respondents appeared in person and unrepresented.

In his submission in support of this Application, the applicant reflected what was averred in his affidavit that, all the delay was caused by health challenges since 28<sup>th</sup> September 2018 whereby he was admitted in hospital even before the matter was dismissed for want of prosecution. And due to his serious injury, he failed to make follow up to his advocate who was not aware of the problem facing his client. He is in opinion that, he was not negligent to file the Application on time and that this Application has been brought in good faith and will not prejudice the respondents. He cemented his submission by citing the decision of Court of Appeal of Tanzania in **Ramadhani Kipanga and Another vs. Peter Peter Junior and Another** Civil Application No.172/17 of 2019 at DSM (unreported). He attached a medical report to his affidavit.

In reply to the applicant's submission, the respondents contested that there is no good and sufficient cause to warrant this Application because in ten months' delay the applicant has failed to account for each day. They argued that the applicant could have acted on time, and there is nowhere in his medical report that shows that he was admitted, no discharge report to the effect that he was admitted from 3<sup>rd</sup> October 2018 to 18<sup>th</sup> June 2020. Therefore, there is no valid reasons for him to have failed to prosecute his case.

They further added that, the applicant does not stand a chance of winning the dismissed case since the claim for recovery of the land in dispute is time barred and brought without leave of the Court. The respondents have cited numerous cases among them is, **Oswald Masatu Mwizarubi vs. Tanzania Fish Processors Limited, Court of Appeal, Civil Application No. 13 of 2010** (Unreported).

Having gone through the pleadings and rival submissions from the parties, I gather that the question for my determination is whether the application is meritorious, that is to say whether the applicant have been able to demonstrate that the delay in filing the application to set aside the dismissal order was occasioned by "*good cause*" or "*sufficient cause*".

There is unbroken chain of authorities to the effect that, when the Court is called on issue of time extension and the reason for the delay being sickness then Court has never doubted that sickness is a good or sufficient cause for extension of time. See the decision on **Jehangir Aziz Abdulrasul vs. Balozi Ibrahim Abubakar Bibi Sophia Ibrahim**, Civil Application No. 79 of 2016 (CAT-DSM) (unreported). In the cited case, the Court of Appeal held that:

*"According to the medical records attached to the applicant's affidavit, the applicant was hospitalized at Agakhan Hospital between January 10 and January 16, 2016 before traveling out of the country for medical treatment. The illness of the applicant is sufficient to constitute good cause."*

It is true that, there are circumstances where courts insisted that applicants should produce medical attendance charts proving that he/she was in fact hospitalized. But I am aware that each case has to be determined on its own merits regard being to its circumstances. I am persuaded by the decision of the High Court of Uganda in **Kibuuka vs. Uganda Catholic Lawyers Society & 2 Others** (MISC. APPLICATION NO.696 OF 2018) [2019] UGHCCD 72 (11 April 2019) where it was held that;

*"A party could have been feeling unwell and opted to rest and or took simple medication to feel better. It is not a requirement of the law that whenever a person is ill he/she must produce medical documents in proof of sickness or illness... Under Order 19 rule 3 of the Civil Procedure Rules, **in applications like the present one an affidavit may contain evidence of this nature to prove sickness/illness.**" [Emphasis Mine]*

In the affidavit filed in support of the present application, the applicant stated that, the delay in filing the Application to set aside dismissal order in Land Case No. 102 of 2016 was occasioned by health challenges where the applicant's right knee was injured resulting him to be admitted in hospital. He has annexed to this Application a medical report together with photo of him proving what he averred in his affidavit. The respondents has challenged these reasons as not sufficient to warrant grant of leave since there is no discharge report proving he was admitted.

I disagree with the respondents' arguments because the requirement to have medical report is really not a statutory requirement,

all that the applicant is required to do is to provide sufficient facts or evidence of their sickness, depending on circumstances an affidavit may do just that. I am of the view that, basing on evidence on record, the reasons adduced by the applicant amount to sufficient causes to warrant the grant of Application. This view is supported by the Court of Appeal decision in **John David Kashekya vs. The Attorney General**, Civil Application No. 1 of 2012 (Unreported-CAT), where the Court had this to say about sickness:

*"... sickness is a condition which is experienced by the person who is sick. It is not a shared experience. Except for children who are not yet in a position to express their feelings, it is the sick person who can express his/her condition whether he/she has strength to move, work and do whatever kind of work he is required to do. In this regard it is the applicant who says he was sick and he produced medical chits to show that he reported to a doctor for checkup for one year. There is no evidence from the respondent to show that after that period, his condition immediately became better and he was able to come to Court and pursue his case. Under such circumstances, I do not see reasons for doubting his health condition. I find the reason of sickness given by the applicant to be sufficient reason for granting the application for extension of time..."*

Furthermore, the respondents has raised the concern that the applicant stand no chance of winning the intended suit for being time



barred. It is my opinion that, this is not the time to discuss this concern but rather the same should be discussed during the determination of the Application intended to set aside the dismissal order when the leave will be granted and the Application filed. Furthermore, the determination as to whether the suit is time barred can be done during entertaining the Land Case once allowed to do so. For now, I feel no need to put the Horse before the Cat.

In light of the above discussion, I find that, the applicant has been able to advance "*good cause*" for this Court to exercise its discretion in extending the time sought. Consequently, the Application is allowed. Costs to be shouldered by the applicant. The applicant is to file the Application to set aside dismissal order in Land Case No. 102 of 2016 in accordance with Order IX Rule 9 (1) of the Civil Procedure Code Cap. 33 R.E 2019 within 30 days after delivery of this Ruling.

It is so ordered.

Dated at Dar es Salaam this 06<sup>th</sup> of October, 2021.



**A. MSAFIRI**

**JUDGE**

