

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

MISC. LAND APPLICATION NO. 593 OF 2020
(Original Land Case No. 148 of 2014)

AMIRI SALEH MWAMBAAPPLICANT

VERSUS

BARCLAYS BANK LIMITED1ST RESPONDENT
YONO AUCTION MART LTD2ND RESPONDENT
PATRICK MOSES NYAMOHANGA3RD RESPONDENT
COMMISSIONER FOR LANDS4TH RESPONDENT
HON. ATTORNEY GENERAL5TH RESPONDENT

Date of last Order:18/05/2021

Date of Ruling: 30/07/2021

R U L I N G

MANGO, J.

The Applicant instituted Land Case No. 148 of 2014 against the First Respondent claiming ownership of Plot No. 243 and 245 Block 9, Bunju Kinondoni Dar es salaam with Certificates of Title No. 107159 and 107170. He alleged to have purchased the disputed land via an auction sale conducted by the Second Respondent on 16th February 2013 following the 3rd Respondent default in paying the loan advanced to him by the first Respondent. The first Respondent joined the third Respondent as a third party. In his defence, the Third Respondent raised a counter claim against the Applicant and the remaining four Respondents in this Application. On

19th February 2018, this Court dismissed the Applicant's Case for failure to serve the 4th and 5th Respondents who are party to the Counter claim as the 4th and 5th Defendants. Aggrieved by the dismissal order, the Applicant lodged a notice of appeal before the Court of Appeal. The notice of appeal was later withdrawn. The Applicant is now seeking extension of time to make an application to set aside the dismissal order. The Application is by way of Chamber Summons made under section 14(1) of the Law of Limitations Act, [Cap. 89 R.E 2019] and Section 95 of the Civil Procedure Code, [Cap. 33 R.E 2019]. The application was argued by way of written submissions.

In his submission, Emanuel Ally, learned counsel for the Applicant adopted the contents of the affidavit and reply to counter affidavit filed by the Applicant to form part of his submission. He argued that, the delay to set aside the dismissal order in Land Case No. 148 of 2014 was caused by the Appeal which was lodged before the Court of Appeal. He argued further that on 19th February 2018 when his case was dismissed, the Applicant was not aware the suit was dismissed under which provision of law. He found out that the suit was dismissed under Order IX Rule 2 of the Civil Procedure Code on 4th March 2020 when he was served with Court record for appeal purposes. As the Applicant had already lodged a Notice of Appeal before the Court of Appeal, he failed to apply to set aside the dismissal order because this Court had no jurisdiction to entertain the application. The Applicant had to withdraw his Notice of Appeal before filing the application at hand. The withdrawal order was communicated to the Applicant on 24th September 2020. The learned counsel is of the view that the Applicant's delay is merely a technical delay because the Applicant spent the period immediately after the dismissal order to 24th September 2020 in the Court of Appeal. He

referred this Court to the case of **Fortunatus Masha versus William Shija and another** [1997] TLR 154 in which the court distinguished actual delays from technical delays as the one in this Application.

The Applicant's counsel is also of the view that the dismissal order in Land Case No. 148 of 2018 is tainted with illegality. In this he argued that, the Hon. Trial Judge misdirected himself by dismissing the suit for want of service to the 4th and 5th Respondents while the Court had not issued any summons so as to require the Applicant to serve them. Thus the dismissal order under Order IX Rule 2 does not match the circumstances of the case. Citing the case of **Samwel Kobelo Muhulo versus National Housing Cooperation**, Civil Application No. 302/17/2017, Court of Appeal of Tanzania at Dar es salaam and the case of **Ministry of Defence and National Service versus Devran P. Valambia** (1992) TLR 387 he submitted that illegality of the order can be considered to be a good ground for extension of time.

He also prayed to have the dismissal order set aside on the ground of illegality.

In his reply submission, Samson Mbamba, learned counsel for the third Respondent, argued that the Applicant failed to account for the delay to set aside a dismissal order within time. He argued that, the alleged lack of knowledge of the provision of law under which the suit was dismissed is not a sufficient ground for extension of time as the applicant was represented by an advocate. Instead of checking the under which law the suit was dismissed, the Applicant's advocate filed a Notice of Appeal against the dismissal order. He is of the view that, the action of the Applicant to file an

appeal against un-appealable order is purely ignorance of law which has never been a sufficient cause for extension of time.

On the failure to serve the fourth and fifth respondents, the learned counsel argued that the applicant was ordered to serve the fourth and fifth Respondent but he failed to comply with court order the act which moved the court to dismiss his suit. He is of the view that, the dismissal order was correctly issued and it is not tainted with any illegality. He argued that the dismissal order is commensurate to the previous order of the court directing the Applicant to serve the fourth and fifth Respondent, the order which the Applicant failed to comply with. He cited the case of **MZA RTC Trading Company Limited versus Export Trading Company Limited** Civil Application No. 12 of 2015 Court of Appeal of Tanzania at Mwanza and argued that, not every point of law can be considered to be considered to be a sufficient ground for extension of time. He concluded his submission by praying to have the application dismissed with costs.

Kause K. Izina, learned state attorney for the fourth and fifth Respondents adopted the contents of the counter affidavit sworn by Jenifer Msanga to form part of his submission. He highlighted the requirement for the Applicant to account for the entire period of delay with a reasonable or sufficient cause. He cited the case of **Lyamuya Construction Company Limited versus the Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Appeal No.2 of 2010, Court of Appeal of Tanzania at Arusha as among the cases in which the Court of Appeal formulated some guidelines in determining applications for extension of time. Among the issues to be

considered is whether the Applicant has accounted for the entire period of delay with a sufficient cause.

Submitting on the reason advanced by the applicant that he did not know the provision under which his case was dismissed, he argued that the assertion is misleading the Court because courts do indicate provisions of law under which its decisions are pegged. He is of the view that the Applicants delay was caused by inadvertence on the part of the Applicant's counsel. He cited the case of **AH. Muhumbira and others versus John K. Mwanguku** Misc. Civil Application No. 9 of 2002 which was cited with approval in the case of **Independent Power Tanzania Limited Versus Venerabilis Jigge and Another** Misc. Application No. 206 of 2017. In the cited case, the Court held that inaction, laxity and negligence on part of the advocate for the Applicant does not constitute sufficient reason for extending time.

Learned State Attorney conceded that illegality may be considered to be sufficient ground for extension of time however, in this application, the Applicant failed to establish the alleged illegality in the court order dismissing his suit. He argued that, Court record indicates that the Applicant was ordered to serve the 4th and 5th Respondents. The Applicant counsel admitted that he has served the 4th and 5th Respondents via a letter and not court summons. Thus, it is true that the Applicant did not comply with the order and the court correctly dismissed his case under the provisions of Order IX Rule 2.

On the prayed to have the case restored, he argued that the Applicant has not advanced any good ground for restoration of the suit as the alleged illegality does not exist.

In his rejoinder, the Applicants counsel reiterated his submission in chief.

I have considered submissions made by both parties and Court record. From the submissions it is not disputed that the Applicant failed to apply to set aside dismissal order in Land Application No. 148 of 2014 within the prescribed time limit. With due respect to the Applicant's counsel, the delay was contributed by negligence on part of the Applicant's Counsel. I hold so because it is not disputed that this Court indicated in its proceedings that the dismissal order was issued under order IX Rule 2 of Civil Procedure Code, [CAP. 33 R. E. 2002]. Instead of perusing Court record, and take a proper legal action, the Applicant's Counsel moved blindly and filed a Notice of Appeal to the Court of Appeal of Tanzania.

Despite such negligence, on the part of the Applicant counsel, I have noted that when the Court ordered the fourth and fifth Respondents to be served it was not clear what exactly should be served to the fourth and fifth Respondents Defendants. Court Record indicated that the fourth and fifth Defendants were dully served with the Counter Claim and they filed a Written Statement of defence to the amended Counter Claim on 7th day of June, 2017.

In addition, the fourth and fifth Respondents Defendant have been attending Court proceedings. On 2nd August 2017 when the matter was scheduled for final pretrial settlement and scheduling conference, the fourth and fifth Respondents Defendants were represented by Mr. Mtae, State Attorney. The

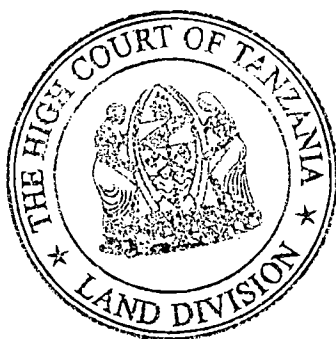
matter was then scheduled for hearing on 16th August 2017 in the presence of the State Attorney, Mr. Mtae. Despite such knowledge the fourth and fifth Respondents Defendant never entered appearance on 16th August 2017 and all other dates that the matter was called by the Court.

It should be noted that the fourth and fifth Respondents are not party to the main case but to the Counter Claim raised by the third Respondent in which the Applicant has been sued as the 3rd Defendant. Thus, if the Court stated orally that the Plaintiff should serve the fourth and fifth Defendants, it meant, the Plaintiff to the Counter Claim and not the Applicant who is a mere defendant to the counter claim.

In such circumstances, I am of the view that the order dismissing the Applicant case was issued in forgetfulness of the fact that the Applicant was not the Plaintiff to the Counter Claim thus, he had no duty to serve his codefendants the fourth and fifth Defendant.

For that reason, I hereby grant extension of time for the Applicant to file an Application to set aside the dismissal order on ground that the dismissal order was issued in forgetfulness that the Applicant, as the 3rd Defendant to the Counter Claim, had no duty to serve the fourth and fifth Defendant to the Counter Claim. I hereby set aside the dismissal order on the same ground.

Given circumstances of this Case I award no costs.




Z. D. MANGO
JUDGE
30/07/2021