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

MISC. LAND APPLICATION NO 501 OF 2020
(Arising from land Case No.67 of 2016 and Execution No.08 of 2018)

BENEDICT MASANJA MAGANGA .....APPLICANT

VERSUS

NICO BASIL SANGA.....1ST RESPONDENT
OMARI BAKARI@ IDD ALLY
@ OSTADH SALUM.....2ND RESPONDENT

Date of Last Order: 28.10.2021
Date of Ruling 15.12.2021

RULING

V.L. MAKANI, J

This application is by BENEDICT MASANJA MAGANGA. He is applying for extension of time within which to file an application for setting aside dismissal order for want of prosecution and default judgment in Land Case No.67 of 2016 delivered on 18th October,2017 (Hon. Makuru, J).

The application is made under section 14(1), of the Law of Limitation Act, CAP 89 RE 2019 (**The Limitation Act**), and section 95 of the Civil Procedure Code Cap 33 RE 2019. This application is supported by an affidavit sworn by the applicant.

The application proceeded by way of written submissions. Ms. Marietha Mollel, Advocate drew and filed submissions on behalf of the applicant. Mr. Silas Adam, Advocate drew and filed submissions in reply on behalf of the 1st respondent. The 2nd respondent did not enter appearance and therefore the matter proceeded ex-parte against him.

Submitting in support of the application, Ms. Mollel said that the impugned decision was delivered on 18/10/2017 in favour of the 1st respondent whereby the applicant's case was dismissed for want of prosecution as he did not enter appearance because he was not served with the 1st respondent's written statement of defence (WSD) and counter claim. She said the said written statement of defence was filed in court on 23/04/2016 and was not served to the applicant on 14/04 /2016 as alleged as the applicant was not in Dar es Salaam on the dates that the alleged service was effected. She said the applicant had travelled to his home town for family matters. That throughout the proceedings of Land Case No.67 of 2021 the applicant was represented by Advocate Ngassa Ganja and the said advocate was required to defend the applicant and all communications were

channelled to him. Ms. Mollel said that failure to prosecute the case should not be used as weapon to punish the applicant.

On the issue of illegality Counsel said that the court entered default judgment while the same was contrary to the law. She said the court was required to order the 1st respondent to prove his case ex-parte. Counsel argued further that the court dismissed the plaintiff's case on 31/05/2015 while the plaintiff/applicant filed Land Case No.67 of 2016 on 18/03/2016. That any dismissal of the plaintiff's case was supposed to be from the day of filing the case counting forward and not backward. Ms. Mollel added that the applicant was never notified of the existence of the default judgment, neither by the court nor by the 1st respondent. She insisted that it is trite law that once a decision is entered in absence of a party, the said party is supposed to be notified of the decision as he may exercise his legal right in any way. That the applicant was not served with the copy of the default judgment. Counsel relied on the cases of **Cosmas Construction Co. Limited vs. Arrow Garments Ltd [1992] TLR 127** and **Chausiku Athumani vs. Atuganile Mwaitege, Civil Appeal No.122 Of 2007.** She added that the court's order in the said Land Case No.67 of 2016 was not respected. She said the court had ordered the 1st

respondent to effect service to the applicant but the said order was not abided by the 1st respondent. She relied upon the case of **Tanzania Breweries Litd vs. Edson Dhobe & 19 Others, Misc. Application No. 96 of 2000 (CAT)** (unreported) That illegality is good ground for extension of time. Ms. Mollel insisted that the applicant has been diligent enough in prosecuting this application. She prayed for this application to be granted.

In reply, Mr. Silas said that the application at hand is not No.502/2020 as cited by the applicant rather it is application No.501/2020. He said that the 1st applicant served WSD to the applicant on 14/04/2016 vide Mr. Ngassa Ganja, Advocate and not 23/04/2016 as alleged by the applicant. That copies of the WSD and official receipt No.979772 dated 14/04/2016 has been attached as proof of service (**Exhibit 01** and **02**). That the case was filed by the applicant herein and not his advocate and that the applicant has failed to supply sufficient reasons for his failure to appear in court for all 12 court sessions. That the applicant did not even make follow-up of his case in all the 12 sessions. He said that both the applicant and his advocate were supposed to make follow-up of their case.

As to the issue that the court erred in issuing default judgment as the sum involved was above one thousand, Counsel said that the applicant has not substantiated his allegation in terms of the Civil Procedure Code Cap 33 RE 2019 (the **CPC**). He said the case was dismissed on 31/05/2017 for want of prosecution after the applicant and his Counsel failed to appear in 12 sessions since the filing of the case.

On the allegation that the court did not notify the applicant on the existence of the default judgment, Counsel said that the applicant has not cited any law which obliges the court or 1st respondent to notify the applicant as alleged. That the case of **Cosmas Construction** (supra) is distinguishable to this at hand as the former was heard ex-parte where this application was dismissed for want of prosecution. He said that this court has never issued the alleged order by the applicant dated 26/05/2016, 29/09/2016 and 31/05/2017. Counsel further argued that if dismissal order was irregular as alleged, the applicant ought to substantiate what provision of the law was violated by the court. Counsel insisted that, the court dismissed the applicants suit on 18/03/2017 and this application was filed on 31/03/2020 which is 3 years and 5 months. That the this delay has not been

accounted for by the applicant. That from when the plaint was filed to when dismissal order was entered there were 12 court sessions where the applicant and his advocate never appeared. That the said non-appearance persisted for about 1 year and 2 months the period which has not been accounted by the applicant. He said that even the alleged illegality has not been demonstrated by the applicant. Counsel prayed for the court to dismiss this application with costs.

The issue is whether sufficient reasons have been adduced for the court to grant extension of time.

It is now a settled principle of law that in determining an application for extension of time the court examines if the applicant has adduced sufficient reasons for the court to grant the application sought. The court must exercise its discretion in granting such an application. In the case of **Yusuf Same & Another vs. Hadija Yusufu, Civil Appeal No. 1 of 2002) (CAT-DSM)** (unreported), the Court of Appeal stated:

> *"It is trite law that an application for extension of time is entirely in the discretion of the court to grant or refuse it. This discretion however has to be exercised judicially*

and the overriding consideration is that there must be sufficient cause for so doing. What amounts to "sufficient cause" has not been defined. From decided cases a number of factors have to be taken into account including whether or not the application has been brought promptly; the absence of any or valid explanation for the delay; lack of diligence on the part of the applicant".

According to paragraph 6 of applicants' affidavit, the reasons for delay in filing an application to set aside dismissal order is that the summons to defend the counter claim was not properly served on the applicant nor his advocate. In paragraph 7 of the affidavit, the applicant further averred that on 11/04/2016 he travelled to his home town and when he came back, he did not find any summons in his place nor proof that his advocate was served with any. He further alleged illegality on the impugned decision.

Land case No.67 of 2016 was filed by the applicant herein in 2016 and as alleged the applicant engaged the services Mr. Ganja Ngassa, Advocate. The applicant complains that he was never served with summons to defend his counter claim. It should be noted that the plaintiff's case was dismissed for want of prosecution. This means

that Mr. Ngassa who had instructions of the applicant did not appear to prosecute the said case. In my considered view this was negligence and loss of interest to prosecute the case which led to dismissal order and eventually default judgment in favour of the respondent. Indeed, an advocate is supposed to make a follow-up in a case that he is engaged, equally the client has also got a duty to make a check of his case specifically to communicate with his advocate to know what is going on. Dumping a case in the advocates chambers is clear lack of diligence and interest on the part of the applicant. Failure to enter appearance for 12 sessions is not a short period and the ecuwe given by the applicant were quite lame. The circumstances suggest that there was negligence on both the advocate and his client in the management of the case.

On the other hand, the applicant has alleged that even his advocate was not served or that there is no proof that his advocate was at any time served with the summons. This allegation stands unsupported since there is no affidavit sworn by the said advocate to the effect that he was never served with the said summons. Therefore, this court cannot rely on mere unsupported allegations. Further according to the counter-affidavit paragraph 5 and the judgment in Land Case

No. 67 of 2017 the applicant was served copies of the WSD. As aforesaid, it was the applicant who initiated Land Case No. 67 of 2016 whereof a counter claim was raised. It was the duty of the applicant to make follow up of his case short of which serious negligence on the part of the applicant is observed.

On the issue of illegality, it has been stated times and again that for illegality to stand as a reason for extension of time it should be apparent on the face of the records. Illegality was discussed extensively in the case of **Moto Matiko Mabanga vs. Ophir Energy PLC & Others, Civil Application No.463/01 of 2017 (CAT-DSM)** (unreported) where the Court of Appeal stated that once it is established that illegality is clearly visible on the face of record, then it can be termed as a sufficient cause to warrant extension of time. In the present case the alleged illegalities that have been raised by the applicant are not apparent on the face of the record because it would take an extensive process to interpret the alleged illegalities on the points raised. This process cannot be termed as an obvious illegality apparent on the face of record. I am therefore not persuaded that, the illegality in this application constitutes a good cause to warrant extension of time to file notice of appeal.

For the reasons I have endeavored to address hereinabove, it is apparent that the applicant has failed to establish sufficient reasons to warrant the court to exercise its discretionary powers to grant extension of time to file an application set aside the dismissal order. Subsequently, the application is hereby dismissed with costs for want of merit.

It is so ordered.

V.L. MAKANI
JUDGE
15/12/2021