

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

**LAND CASE NO. 104 OF 2011
BY COUNTER CLAIM**

PETER JOSEPH SWAI PLAINTIFF

VERSUS

HILDER EMMANUEL MAKELEMO (As Administratrix of the Estate of the late Emmanuel Lazaro Makelemo) **1ST DEFENDANT**

GABRIEL MPAKATAMWIU MIKWAMBA 2ND DEFENDANT

RULING

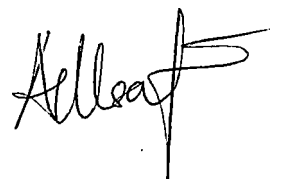
Date of Last Order: 17/9/2021

Date of Ruling: 01/10/2021

A. MSAFIRI,J:

On 09/9/2021 this matter came for setting of hearing schedule. Mr. Mayenje was appearing for the plaintiff on a Counterclaim while Mr. Sangura was for the 1st defendant, also on a Counterclaim.

However, before the setting of the schedule, Mr. Sangura made an oral prayer before the Court praying for the leave to file the Written Statement of Defence (herein as WSD) to the Counterclaim. His prayer was based on the Ruling of this Court dated 09th September, 2021 in Land Case No. 104 of 2011, where this Court made an order that, since the 1st defendant's WSD



was expunged from the record on 15th March, 2018, and since there is an order of the Court for hearing of this matter inter-parte, the 1st defendant will have to seek the leave of this Court to refile her WSD. Mr. Sangura for the 1st defendant also prayed that the name of Hilder Emmanuel Makelelemo who is administratrix of the estate of the late Emmanuel Lazaro Makelelemo to appear as the 1st defendant in the said WSD.

On the reply, Mr. Mayenje who was now joined by advocate Karoli Tarimo, strongly opposed the two prayers and stated that, on the first prayer, the 1st defendant's counsel has not supported his prayer with any reasons, also, as per Part III Item 21 of the Law of Limitation Act Cap 89, the time limit for any application is 60 days. The order of setting aside the ex-parte judgment was delivered on 22/4/2020, however, the 1st defendant did not make the prayer to refile WSD at that time so as the time prescribed is 60 days, the 1st defendant is now time barred to make such a prayer. Mr. Mayenje argued that, granting leave for the 1st defendant to file WSD is equivalent to modification of the Ruling of Hon. Wambura, J dated 15/3/2018 which expunged the same.

On the second prayer, on which the 1st defendant prayed for the name of the administratrix of the estate of Emmanuel Makelelemo to appear on the WSD of the 1st defendant, Mr. Mayenje pointed that, since the WSD was expunged from the court record, the counsel cannot make a prayer to amend it as it does not exist. He pointed further that despite that, the 1st defendant was supposed to make that prayer as per Order XXII Rule 4(1) of the Civil



Procedure Code, and is now time barred as provided under Part III Item 16 of the Law of Limitation Act. He concluded that the consequence of an application which is time barred is dismissal of that application as per section 3 of the Law of Limitation Act.

Mr. Karoli Tarimo, also submitting for the plaintiff, objected the prayers stating that the application for leave to file WSD is not tenable because the order of Hon. Wambura, J dated 15/3/2018 is still valid and intact, so, there is no room for the 1st defendant to bring an application which has effect of defeating the said order and that this court is functus officio.

Mr. Karoli Tarimo objecting the second prayer by the 1st defendant regarding the bringing in of administratrix of the estate of Emmanuel Makelele as legal representative, he submitted that, already Hilder Emmanuel Makelele is on court records as the administratrix and legal representative of the late Emmanuel Makelele. He concluded that therefore, this prayer should not be entertained and the two applications should be dismissed with costs.

The rejoinder was made by Mr. Luteja who joined Mr. Sangura, both counsels for the 1st defendant. On the first objection of time limit to file the WSD, he submitted that it is their understanding that following the ruling to set aside the ex-parte judgment, the position regarding parties' pleadings became as it was before the issuance of order to proceed ex-parte, i.e. all the parties had their pleadings filed in Court. By that understanding, that is why the 1st defendant did not make an application for leave to file WSD until



9th September 2021 when the court delivered its Ruling regarding the uncertainty which was brought by the previous Rulings of this court. He submitted further that, it is the Ruling dated 9th September, 2021 which gave the room for the 1st defendant to apply for leave to file her WSD. Hence, in his opinion, the time to file WSD starts to run from 9th September 2021. He stated that, for the whole time, the 1st defendant has been busy defending her case under bonafide belief that the WSD filed was in order until when the court cleared the position through its Ruling dated 9th September, 2021. He argued that the prayer is timely made.

On objection regarding the prayer to join the administratrix, Mr. Luteja stated that going through the records, they have found that Hilder Emmanuel Makelema was joined as administratrix of the estate of Emmanuel Makelema and thus made party of this case by order of this Court dated 9th February, 2018 before Hon. Wambura, J. On that discovery, Mr. Luteja prayed for the court to disregard the prayer to join the said administratrix as the same has already been determined and decided by this court. In conclusion, he prayed for leave of this Court to file the 1st defendant's WSD so that the matter can be heard inter-parte.

Having heard the submission on both sides, the major issue for determination is whether the application for the leave to refile the 1st defendant's WSD is out of time.



Mr. Mayenje has submitted before this court, objecting the application, that any application made to the court has a time limit, and should be supported by the reasons for that application. He argued that, since the order of setting aside ex-parte judgment was delivered on 22nd April 2020 and the 1st defendant did not make that prayer for leave to refile WSD from that time, he is now barred to make such application. He stressed that, the ex-parte judgment was on 22/4/2020, therefore, the time to file WSD lapsed on 22/6/2020.

Mr. Luteja, arguing on that point, he stated that, their reason for the delay to file the WSD within time was due to their bonafide belief that the ex-parte judgment delivered on 22nd April 2020, had the effect of setting aside all the orders by the court in this matter including the order of 15th March 2018 by Hon. Wambura, J which expunged the WSD of the 1st defendant.

In determination of this matter, I have considered the peculiar circumstances of this case by which there are several Rulings by this Court on the same matter.

On 15/3/2018, by the ruling of this court, the WSD of the 1st defendant was expunged and the matter proceed ex-parte whereby the ex-parte judgment was delivered.

However, on 22/4/2020 by the Ruling of this court, the ex-parte judgment was set aside and there was an order of hearing inter-parte. On 07/9/2021, the counsel for the plaintiff raised an issue that the WSD of the 1st defendant was expunged from the court records so the hearing of the matter cannot

proceed. By Ruling of this court, there was an order that the 1st defendant should seek for the leave to refile WSD.

Basing on the peculiar circumstances surrounding the matter, I agree with the reasons advanced by Mr.Luteja, for the 1st defendant that they have bonafide belief that the Order of this Court of 22/4/2020 of hearing inter-parte has the effect of resuming the matter to the status it was before the ex-parte order and the order of expunging the WSD.

I agree with Mr. Mayenje for the plaintiff that, in every application, whether oral or in writing, the reasons for that application has to be advanced. In this matter, the reasons which has been advanced is that the 1st defendant having seek and was granted the order of setting aside the ex-parte order, believed that the matter is set for hearing inter-parte as the status of the matter has been reversed to the way it was before the ex-parte order.

In the case of **Abdallah Salanga & 63 others vs. the Tanzania Harbours Authority (THA)**, Civil Application No. 4 of 2001 CAT (unreported), it was held that;

*" This Court in a number of cases has accepted certain reasons as amounting to sufficient reasons. But no particular reason or reasons have been set out as standard sufficient reasons. **It all depends on the particular circumstances of each application**"(emphasis mine).*



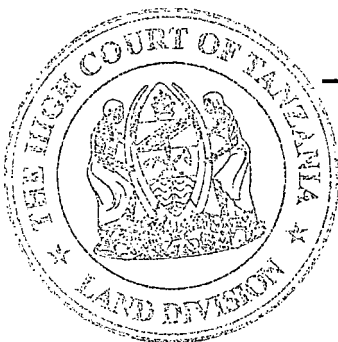
Therefore, it is my belief that each case should be looked at on its own facts, merit and circumstances, and as pointed earlier, the circumstances of this matter before me is peculiar one.

In this matter, although I agree that the 1st defendant was supposed to refile her WSD immediately after the Ruling of 22/4/2020 by Hon. Maghimbi, J which I have also pointed in my Ruling dated 09/9/2021, after considering the circumstances of this case, I am satisfied that the 1st defendant has explained away the reason for her failure to file her WSD after the Ruling of 22/4/2020.

Therefore, I hereby grant leave for the 1st defendant to refile her WSD within 14 days from the day of delivery of this Ruling.

On the issue of this Court being functus officio regarding the Ruling of Hon. Wambura, J dated 15/3/2018 which was AGAIN raised by the counsels for the plaintiff, I need not address the same as I have already address the same issue and determined it in my Ruling dated 09/9/2021.

It is so ordered. Right of appeal explained.



A. MSAFIRI

JUDGE

01/10/2021