

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC. LAND APPLICATION NO.238 OF 2022**

(Arising from Land Case No.132 of 2011)

ALPHONCE KIHWELE APPLICANT

VERSUS

**IRENE LAZARO MOLLEL (as Administratrix of the estate
of the late PRUCHERIA MEITORIS MOLLEL,
suing by attorney LAZARO LOKAJI MOLLEL) RESPONDENT**

RULING

Date of last Order: 08.09.2022

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A.Z.MGEYEKWA, J

This ruling is in respect of an application for an extension of time to set aside the *exparte* Judgment and Decree mended by Hon. Kalombola, J (as he then was). The application, preferred under the provisions of section 14 (1) of the Law of Limitation Act, Cap. 89. The application is supported by an affidavit

deponed by Alphonse Kihwele, the applicant'. The applicant has set out the grounds on which an extension of time is sought. The respondent has stoutly opposed the application by filing a counter-affidavit deponed by Irene Lazaro Mollel, the respondent.

When the matter was called for hearing on 8th September, 2022, the applicant enlisted the legal service of Mr. Boniphace Erasto, learned counsel and the respondent enjoyed the legal service of Mr. Kimana Magau, learned counsel.

In his submission, Mr. Boniphace urged this court to fully adopt the affidavit to form part of his submission. The learned counsel for the applicant submitted that the applicant is praying for an extension of time to file an application to set aside the *ex parte* Judgment. He stated that it is the direction of the Court to extent time and such direction must be exercised judiciously. To buttress his submission he cited the cases of **Usafirishaji Mkoani Union Ltd v Minister for Land Housing & Human Settlement Development & 2 Others**. Misc. Land Application No. 11 of 2019 HC –Land Division and **Wambele Mtumwa Shahame v Mohamed Hamisi**, Civil Reference No. 8 of 2016 CAT (unreported).

The Court of Appeal of Tanzania cited with approval the case of **Bertha Bwire v. Alex Maganga**, Civil Application No. 7 of 2016, the Court of Appeal of Tanzania held that:-

“ It is trite that extension of time is a matter of discretion on the part of the Court and that such discretion must be exercised judiciously and flexibly concerning the relevant facts of the particular case. ... Court is enjoined to consider, inter-alia, the reasons for the delay, the length of the delay, whether the applicant was diligent, and the degree of prejudice to the respondent if time is extended... ”

The learned counsel for the applicant continued to submit that the Court of Appeal of Tanzania in the case of **Lyamuya Construction Company Ltd v Board of Registered Trustees of Young Women’s Christian Association of Tanzania**, Civil Application No.2 of 2010 (unreported), laid down several principles to be considered in the application for extension of time; account for the days of delay, a delay should not be ordinate and if there is a ground of illegality.

Mr. Boniphace went on to submit that the applicant has raised a ground of illegality h that he was not summoned to appear in Court and after the hearing, the matter *exparte* the applicant was not summoned to appear on the date when the Court delivered the Judgment. To fortify his submission

he referred this Court to paragraphs 7 and 9 of the applicant's affidavit and cited the case of **Tanzania Breweries Ltd v Herman Bildad Minja**, Civil Application No. 11/18 of 2019.

The learned counsel for the applicant continued to submit that if an issue of illegality is alleged then the Court has a duty to extend time. Fortifying his position he cited the case of **VIP Engineering and Marketing Ltd and 3 Others v Citibank Tanzania Ltd** Consolidated Civil Reference 6, 7, and 8 of 2006 CAT, **Cosmas Construction v Garment Ltd** (1992) TLR 127, and **Continental Digital Media v The Board of Trustees National Security Funds**, Civil Appeal No. 10 of 2020. HC- Labour Division at Mwanza (unreported), whereas this Court granted an extension of time in a similar situation where the applicant was not summoned to appear in Court.

The learned counsel for the applicant did not end there, he submitted that the applicant was required to be notified of the date when the Judgment will be delivered. Fortifying his position he cited the case of **Juvenary Sprian & Another v Edwin Christian**, Misc. Land Case No. 28 of 2020 (unreported). To fortify his position he cited the case of **Mbeya Rukwa Autoparts & Transport Ltd v Yestina George** (2003) TLR 52. He added that the Court insisted that the fundamental principles of Natura Justice must be observed. Mr. Boniphace lamented that the applicant was not given an opportunity to

be heard contrary to Article 13 of the Constitution of the United Republic of Tanzania.

On the strength of the above submission, Mr. Boniphace beckoned upon this court to grant the applicant's application for an extension of time to file an application to set aside the *ex parte* Judgment.

Responding, the learned counsel for the respondent from the outset urged this Court not to grant the applicant's application as the applicant has not adduced sufficient reason to move this Court to exercise its judicial powers. He prayed this Court to adopt the counter affidavit to form part of his submission. Mr. Magau argued that the applicant has not stated the ground of illegality. The learned counsel for the respondent spiritedly argued that the applicant was summoned to appear in Court. He contended that the applicant is misleading this Court because he was aware that there is a matter in Court.

The learned counsel for the respondent continued to argue that the dispute between the parties was known by the Ministry for Land and there are corresponding letters that were served to the applicant. To support his submission he referred this Court to annexure PAI-2. He added that in 2015,

the parties were before the Commissioner for Land to settle the matter thus he insisted that the applicant was well informed about the case.

The learned counsel for the respondent went on to submit that the reason for the delay was ignorance of the law while the application is related to non-appearance. He stressed that the applicant was summoned to appear in Court. He added that the applicant did not state in his affidavit that he was not summoned to appear in court, in his view, the said submission is from the bar. He went on to submit that the ground that he was not summoned to appear on the date when the Judgment was delivered is immaterial and the same is not a ground of illegality. To support his submission he cited the case of **Abdulahiman Islam v Africaris Ltd**, Misc. Commercial Application No. 203 of 2018.

Mr. Makau went on to submit that the applicant in his affidavit did not account for each day of delay. he added that the attached letter of 2015 and 2018 shows that the applicant had knowledge of what transpired in Court but he opted not to account for the days of delay. To fortify his submission, he cited the case of **Jeremiah Philipo v Boniphace Damiano Ngao**, Misc. Application No. 6 of 2019. He insisted that the applicant did not act expeditiously. The learned counsel went on to submit that parties have the

right to be heard, however, if the party does not show an appearance in Court then he cannot exercise his rights.

On the strength of the above submission, the learned counsel for the respondent stressed that no sufficient cause has been advanced and hence the applicant's application for extension of time is without merit and the same be dismissed with costs.

In his rejoinder, the learned counsel for the applicant reiterated his submission in chief. Mr. Boniphace lamented that the Commissioner for Land is not the right person to summon the applicant instead it was the Court process server and he added that there is no evidence to prove that the applicant received the said letters. The counsel for the applicant distinguished the cited case of **Jeremiah** (supra) in the sense that in the instant case the applicant was not aware until when the respondent started to execute the order of the Court.

In conclusion, the learned counsel for the applicant urged this court to grant the applicant application with costs.

So much for the submissions of the learned counsel for both parties. The ball is now in my Court. I wish to start by underscoring, first, that it is now

settled law that an applications of this nature will only succeed upon the applicant showing good cause for the delay.

The position of the law is settled and clear that an application for an extension of time is entirely the discretion of the Court. However, such discretion is judicial and so it must be exercised according to the rules of reason and justice as was observed in the case of **Mbogo and Another v Shah** [1968] EALR 93.

Moreover, 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.

I have keenly followed the application and the grounds deposed in the supporting applicant's affidavit and the respondent's counter-affidavit, I have

shown the path navigated by the applicant and the backing he has encountered in trying to reverse the decision of this court. In his submission, the applicant's advocate relied solely on the ground of illegality. The applicant's counsel alleges that the applicant was not summoned to appear in Court and also he was not summoned to appear on the day when the impugned Judgment was delivered. On his side, the learned counsel for the respondent opposed the application. Mr. Magau valiantly argued that the applicant was required to account for each day of delay and he claimed that the raised ground of illegality is baseless.

It has been held in times without number that where illegality exists and is pleaded as a ground the same as well constitute a good cause for an extension of time. This principle was accentuated in the **Permanent Secretary Ministry of Defence & National Service v D.P. Valambhia** [1992] TLR 185, to be followed by a celebrated decision of **Lyamuya Construction Company Limited and Citibank (Tanzania) Limited v T.C.C.L. & Others**, Civil Application No. 97 of 2003 (unreported) and **Ngao Godwin Losero v Julius Mwarabu**, Civil Application No. 10 of 2015 (unreported). In **Principal Secretary, Ministry of Defence and National Service v Devram Valambhia** (supra) the Court of Appeal of Tanzania in page 89 held that:-

"In our view, when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and the record straight." [Emphasis added].

Guided by the above authorities, it is clear that the ground of illegality is a sufficient cause for an extension of time in order to rectify the raised anomaly. See also the case of **Badru Issa Badru v Omary Kilendu** (supra) the Court of Appeal of Tanzania held that:-

"...I am of the considered view that even though there is a considerable delay in the application, pertinent issues have been raised. First,.. there is an allegation of illegality, irregularities, and impropriety... which cannot be brushed aside."

The illegality is alleged to reside in the powers exercised by this court in excess of its hearing the Land Case No.132 of 2011, the applicant claims that he was not aware that there was a pending case before this Court. The applicant also claims that he was not summoned to appear on the date when the Judgment was delivered. I consider the point of illegality as stated in the applicant's affidavit, particularly in paragraph 9, the applicant stated that the

ex parte Judgment and Decree which emanates from Land Case No. 132 of 2011 was obtained on illegality since the applicant was not afforded the right to be heard. Also in paragraph 12, the applicant is complaining that he has failed to defend his case and was not aware of any proceedings. In my view, I find that the applicant has raised a ground of illegality.

Moreover, the applicant in paragraph 7, lamented that he was no any point in his lifetime he was served to appear in Court that include the Judgment date. Once a case is heard *ex parte*, then a summons to the party who was absent must be issued. In the case of Cosmas Construction (*supra*) the Court held that:-

“ A part who falls to enter an appearance disables himself from participating when the proceedings are consequently ex parte, but has to be told when the Judgment is delivered so that he may if he wishes, attend to take it as a certain consequence may follow.”


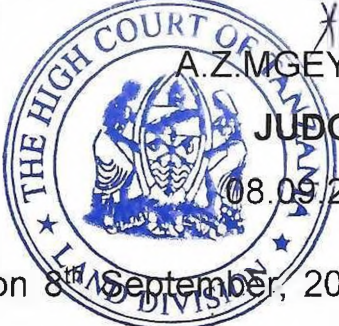
Applying the authority stated in the above cases, it is clear that illegality exists and is pleaded as a ground and the same constitutes a good cause for an extension of time.

In sum, based on the foregoing analysis I am satisfied that the above-ground of illegality is evident that the present application has merit. Therefore, I

proceed to grant the applicant's application to lodge an application to set aside the *ex parte* Judgment within forty-five days from the date of this Ruling.

Order accordingly.

Dated at Dar es Salaam this date 8th September, 2022.


A.Z. MGEYEKWA
JUDGE
08.09.2022


Ruling delivered on 8th September, 2022 via video conferencing whereas both counsels were remotely present.


A.Z. MGEYEKWA
JUDGE
08.09.2022
