

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

LAND APPEAL NO. 277 OF 2021

(Arising from the Temeke District Land and Housing Tribunal in Misc. Land Application No. 452 of 2020; Originating from Land Application No. 223 of 2008)

NGWANE PIO AZARIAH (as Legal representative of the
late CECILIA JOACHIM LWOGA).....**APPELLANT**

VERSUS

HAMIS SHOMARI OMARI.....**RESPONDENT**

Date of Last Order: 15.08.2022
Date of Judgment: 14.09.2022

JUDGMENT

V.L. MAKANI, J.

The appellant is NGWANE PIO AZARIAH, suing as a Legal Representative of the late Cecilia Joachim Lwoga. The appeal is from the ruling of Temeke District Land and Housing Tribunal (the **Tribunal**) in Misc. Land Application No. 452 of 2020 (Hon. J.M. Bigambo, Chairman).

The application at the Tribunal was for two orders: one, extension of time for the appellant (then applicant) to apply for orders to set aside the ex-parte decree passed in Land Application No. 233 of 2008 on 15/06/2017, and secondly, for the Tribunal to set aside the exparte

order in the above application. The application was dismissed with costs for want of merit. Being dissatisfied with the decision of the Tribunal the appellant has filed this appeal with the following grounds of appeal:

- 1. That the Chairman of the Tribunal erred both in law and in fact by holding that the appellant has failed to account for each day of the delay so satisfy the extension of time.*
- 2. That the Chairman of the Tribunal erred both in law and in fact by holding that the appellant had not adduced sufficient reason for the Tribunal to grant orders sought in Misc. Land Application No. 452 of 2020.*
- 3. That the Chairman of the Tribunal erred both in law and in fact by failure to give proper weight to the evidence adduced by the appellant to warrant the orders sought in Misc. Land Application No. 452 of 2020.*

The appellant prayed for the court to quash the ruling of the Tribunal, extend the time, and set aside the ex-parte decree in Land Application No. 223 of 2008.

The appeal was argued by way of written submissions. The appellant's submissions were drawn and filed by Mr. Khalfan Hamisi Msumi, Advocate and Mr. Kipeche drew and filed submissions on behalf of the respondent.

As for the first ground, Mr. Msumi submitted that the appellant was appointed as administrator of the estate of his mother, the late Cecilia Joachim Luoga, and he became aware of the case after being served with execution forms in Execution No. 418 of 2020 which was served on him on 04/08/2020 and fixed for mention on 20/08/2020. He said the appellant immediately filed two applications for extension of time (Misc. Land Application No. 452 of 2020) and stay of execution (Misc. Land Application No. 453 of 2020). He said the appellant was a layman, but he managed to account for each day after being aware of the pending case against his late mother. He cited the case of **Ramahani Nyoni vs. M/S Haule & Company Advocates [1996] TLR 72 (HC)**.

Mr. Msumi further said it was sufficiently established that in Misc. Land Application No. 452 of 2020 that the late Cecilia Joachim Luoga had been in the court corridors constantly in pursuit of her matter and the majority of time during the proceedings in Land Application No. 223 of 2008 she was ill and suffering which came to be diagnosed as Severe Septicaemia (Infection) which resulted to renal disease, hypertension, spinal spondylosis, and dementia. He said with such diseases the delay may be termed technical as elaborated in the case

of **Dimond Motors Limited vs. K-Group (T) Limited, Civil Application No. 72/01 of 2019 (CAT-DSM)** (unreported) which quoted the decisions of **Fortunatus Masha vs. William Shija & Another [1997] TLR 154** and **Salvand K.A. Rwegasira vs. China Hennan International Group Company Limited, Civil Reference No. 18 of 2006** (unreported). He prayed for the court to adopt the position laid down in these cases and find the delay to be a technical delay and that the appellant accounted for each day as all the time she was in court corridors constantly pursuing this matter. Mr. Msumi said the Tribunal erred to hold that the appellant has failed to account for each day of the delay.

As for the second ground Mr. Msumi submitted that the late Cecilia Joachim Luoga did not enter appearance in court and therefore Land Application No. 223 of 2008 was dismissed for non appearance. He said this was not caused by negligence, but it was due to the illness of the late Cecilia Joachim Luoga in the majority of time. He said due to the severe diseases that the late Cecilia Joachim Luoga was suffering she sadly died on 15/03/2019. He said the appellant adduced sufficient reason for the Tribunal to grant the orders sought in Misc. Land Application No. 452 of 2020 but the Tribunal Chairman

failed to do so hence he erred in law. He said the discretionary powers with regard to the extension of time is supposed to be exercised judiciously and upon good cause being shown depending on the circumstances of the case. He said what constitutes a good cause cannot be laid down by any had and fast rules, but it is relative depending on the circumstances of different cases. He relied on several cases including **Oswald Masatu Mwinzarubi vs. Tanzania Fish Processors Limited, Civil Application No. 13 of 2010 (CAT-Mwanza)** (unreported), **Amani Girls Home vs. Isack Charles Kanela, Civil Application No.; 325/08 of 2019 (CAT-Mwanza)**(unreported) and **S.L. Isangi Auction Mart & Court Brokers vs. Samwel Kimaro, Misc. Land Application No. 75 of 2020 (HC-Mwanza)** (unreported). He further said that sickness is permissible and sufficient cause in extending time to appeal as was held in the case of **Mathias Abai vs. Anne John, PC Criminal Appeal No. 07 of 2021 (HC-Mwanza)** (unreported). Mr. Msumi concluded that there were sufficient reasons that was adduced by the appellant in seeking for extension of time.

In submissions in reply, Mr. Kipeche also gave a brief factual background of the matter. He said the late Cecilia Joachim Lwoga

filed in the Tribunal amended Application No. 223 of 2008 on 16/03/2016 against five respondents namely (1)Azania Bank Limited, (2)Jane Kahonga (3) Chilambo General Trade Co, (4) Chilambo and (5) Hamis Shomari in the Tribunal praying for ownership of the house located at Plot No. 131, Block 11, Keko Juu Dar es Salaam and an order for return of Certificate of Occupancy and for a declaration that the house was wrongly mortgaged to the 1st respondent. The 5th respondent who is the respondent in this appeal filed a counterclaim against the late Cecilia Joachim Lwoga. The late Cecilia Joachim Lwoga did not file written statement of defence (**WSD**) to the counterclaim and hearing was fixed for three consecutive dates on 24/04/2017, 02/05/2017 and 05/05/2017. He said on the first date of the hearing Cecilia Joachim Lwoga did not enter appearance and the case filed by her was dismissed for non-appearance and since there was no WSD to the counterclaim, the Tribunal ordered ex-parte hearing on the counterclaim on 02/05/2017 which proceeded and judgement on the counter-claim was delivered on 15/06/2017. On 05/07/2017 the late Cecilia Joachim Lwoga filed Misc. Application No. 221 of 2017 praying for an order to set aside the ex-parte judgment. The said application was dismissed on 27/03/2018 for non-appearance. On 13/04/2018 the late Cecilia Joachim Lwoga filed Misc.

Application No. 103 of 2018 praying for restoration of the application for setting aside the ex-parte judgment. The application was struck out by the Tribunal on 10/07/2018 for want of prosecution. The late Cecilia Joachim Lwoga died on 15/03/2019 and the appellant was appointed administrator on 22/07/2019 and he was served with notice of execution of the ex-parte judgment in his capacity as the Legal Representative of the late Cecilia Joachim Lwoga. The appellant on 18/08/2020 filed Misc. Land Application No. 452 of 2020 seeking for extension of time to apply for orders to set aside the ex-parte decree in Misc. Application No. 223 of 2008 which was delivered on 15/07/2017. The Tribunal on 27/10/2021 dismissed the application for want of merit. The said decision of the Tribunal resulted to this appeal.

Mr. Kipeche argued the grounds of appeal together. He said in an application for extension of time the applicant has to account for each day of delay. He said the ex-parte judgment on the counterclaim was delivered on 15/06/2017 and Cecilia Joachim Lwoga passed away on 15/03/2019. He said it was clear that before her death Cecilia Joachim Lwoga knew that there was an ex-parte judgment because on 05/07/2017 she filed Misc. Application No. 221 of 2021 praying for an

order to set aside the ex-parte judgment, which application was dismissed on 27/03/2018 for non-appearance. Following the dismissal, the late Cecilia Joachim Lwoga again filed Misc Application No. 103 of 2018 praying restoration of the application for setting aside the ex-parte judgment. The said application was struck out on 10/07/2018 for want of prosecution. Mr. Kipeche said the late Cecilia Joachim Lwoga passed away eight months later on 15/03/2019 after the latter application was struck out. He said the appellant as an administrator did not account for these eight months nor did he inform the Tribunal why the late Cecilia Joachim Lwoga did not challenge the order of the Tribunal to strike out the application for restoration of the application for setting aside the ex-parte judgment despite that in Application No. 223 of 2008 he was being represented by this same Counsel who did not appear in court for unknown reasons.

Mr. Kipeche said the reason for the intensive sickness of the late Cecilia Joachim Lwoga during the majority of the time of the proceedings in Application No. 223 of 2008 and is an afterthought and not supported by evidence on record. He said as correctly observed by the Tribunal the medical summary (**Annexure NP-2 to**

the affidavit) showed that the late Cecilia Joachim Lwoga was admitted at TMJ hospital but was discharged on 22/04/2017 in stable condition and this means she was discharged before the hearing and delivery of the ex-parte judgment. He said it is also worth noting that the appellant was served with notice of execution on 04/08/2020 and he filed Land Application No. 452 of 2020 on 18/08/2020 which is 14 days later which days have not been accounted for. He said most importantly the said Land Application No. 452 of 2020 was filed out of context because a similar application was filed by the late Cecilia Joachim Lwoga as Misc. Application No. 221 of 2017. He said the Tribunal was right in holding that Misc. Application No. 452 of 2020 was an abuse of court process because the Tribunal had dismissed Misc. Land application No. 221 of 2017 which had similar prayers. He said it is public policy that litigation has to come to an end.

Mr. Kipeche went on saying that even if the ex-parte judgment on the counterclaim were to be set aside still the counterclaim would have been heard ex parte as there is no WSD filed by the late Cecilia Joachim Lwoga. He said all the cases cited by his colleague are distinguishable to the present case. He said there was no error by the Tribunal in its decision as the appellant failed to account for each day

of delay and failed to adduce sufficient reasons for the delay to justify the extension of time. He said the appeal was meritless and he prayed for the same to be dismissed with costs.

Mr. Msumi did not file submissions in rejoinder.

I have gone through the record of the Tribunal and the submissions filed herein by Counsel for the parties. The main issue for consideration is whether this appeal has merit. I will consider the grounds of appeal raised generally.

It is not in dispute that there were applications at the Tribunal by the late Cecilia Joachim Lwoga and the same were dismissed and or struck out for want of appearance. As correctly stated by Mr. Kipeche when the first application was dismissed for want of appearance the counterclaim remained and this is the crux of the execution. The late Cecilia Joachim Lwoga was not able to restore and or set aside the dismissal orders because she did not enter appearance to prosecute the main application and did not do so to the subsequent applications. The cry in the latest Misc. Land Application No. 452 of 2020 by the appellant as the Legal Representative of the Cecilia Joachim Lwoga is

that the Tribunal did not consider the reasons advanced by for the delay to grant orders for extension of time and to set aside ex-parte order in Land Application No.223 of 2008.

It is a settled principle of the law that a party seeking for extension of time must show good cause for the court to exercise its discretionary power to grant or refuse such an extension. What amounts to good cause depends on the circumstances of each case; certain factors may be considered by the court in determining whether the applicant had advanced good cause. See the case of **Joel Silomba Vs. Republic, Criminal Application No. 5 Of 2012 (CAT)**(unreported) and **Vodacom Foundation vs. Commissioner General (TRA), Civil Application No.107/20 of 2017, (CAT-DSM)** (unreported).

Looking at the records and submissions, I wish to state that the Tribunal exercised its discretionary powers judiciously. The main reason advanced by the appellant at the Tribunal is that the Cecilia Joachim Lwoga was sick so she did not enter appearance. But according to the background there seemed to be a customary trend of the late Cecilia Joachim Lwoga to file application and not appearing

to prosecute the same. And even if sickness was to be considered, it has been pointed by Mr. Kipeche, and correctly in my view, that the late Cecilia Joachim Lwoga was admitted at TMJ hospital but was discharged on 22/04/2017 before the hearing and delivery of the ex-parte judgment. And there are no reasons that were given for her not to attend the case after she was out of the hospital whereas according to the medical certificate she was discharged in stable condition. Further, after the death of the Cecilia Joachim Lwoga on 15/03/2019 nothing was done by the appellant as a Legal Representative until when execution notice was served upon him on 04/08/2020 and even then, the appellant did not account for the 14 days as he filed Land Application No. 452 of 2020 on 18/08/2020.

Further, the claim that the late Cecilia Joachim Lwoga was sick in the majority of the proceedings cannot be feasible, either because the late Cecilia Joachim Lwoga had representation of this very same advocate during the proceedings and there is nowhere he has stated that he was at some time discharged from his duties. So, in my view, the Tribunal was right to reject the application because litigation has to come to an end, and this is no exception considering that the late Cecilia Joachim Lwoga had opportunities to rescue the situation.

In the result I don't find any fault in the decision of the Tribunal.

Subsequently, the appeal is dismissed with costs for want of merit.

It is so ordered.



V.L. Makani

**V.L. MAKANI
JUDGE
14/09/2022**