

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 465 OF 2022

NAZARENO MAKILIKA1st APPLICANT

AVELINA MAKILIKA2nd APPLICANT

VERSUS

**HAMISA SALUM MOHSIN (As Administratrix of the Estate of Salum
Mohamed Hassan Muhsin).....1st RESPONDENT**

**NYANYA MOHAMED HOHSIN (As Administratrix of the Estate of
Salum Mohamed Hassan Muhsin).....2nd RESPONDENT**

MOHAMED SEIF.....3rd RESPONDENT

R U L I N G

21/09/2022 & 26/10/2022

Masoud, J.

The applicants wanted this court to set aside its ex-parte judgment in Land Case No. 200 of 2020 delivered on 20/07/2022. They wanted this court to proceed to allow them to file written statement of defence and enter appearance to defend the matter after setting aside the ex-parte judgment. The application was brought under section 95, Order viii rule 15(1) of the Civil Procedure Code, cap. 33 R.E 2019.

The application was supported by the joint affidavit of the applicants which provided the background to this application. The background is, among other things, characterised by two orders that were granted in the favour of the applicants extending the time for filing written statement of defence at the early stages of the proceedings in Land Case No. 200 of 2020. It was also characterised by a ruling against the applicants in respect of their earlier application for setting aside the ex-parte order, and for extension of time within which to file written statement of defence.

The reasons upon which the order setting aside the ex-parte judgment is sought were adduced by the applicants in their joint affidavit. They were that the applicants were sick in bed. The first applicant paralysed while the second applicant tested positive with covid-19. With such sicknesses, they could not sign the written statement of defence in time.

There was shown a medical chit for the first applicant dated 18/05/2021, bearing results of medical investigation carried by Best Diagnostic Centre Ltd, and another medical chit from PCMC Health Care Ltd dated 25/05/2021 requesting investigation for the first application.

The other thing advanced in the said affidavit of the applicants was that the suit land had since been transferred to Najeeb Yeslam Saieed

who was not a party to the proceedings in Land Case No. 200 of 2020. This fact, it was averred was brought to the attention of the court.

The first and the second respondents resisted the application. They filed counter affidavit which showed that, there was an admission on the part of the applicants that the ex-parte proceedings were a result of their failure to file written statement of defence within the prescribed time; there were no medical chits shown to the effect that both applicants were sick at the time they ought to have filed the written statement of defence; there was admission on the failure to comply with the order extending the time within which the applicants could file written statement of defence by 11/03/2020; there was no proof of the allegation that the applicants' advocate was also sick.

The third respondent also resisted the application. He filed a counter affidavit deposed by Mr Abdul Aziz, the third respondent's learned counsel. The application was disputed in that the applicants were admittedly duly served with the plaint and failed to file written statement of defence within time. They could also not file the same after obtaining extension of time. They had a representation of an advocate and their advocate should have appeared if they were truly sick and take necessary steps. The medical chits relied on were fabricated as they were not annexed to the affidavit

supporting Misc. Land Application No. 369 of 2021 in which the applicants unsuccessfully sought for an order setting aside ex-parte hearing order.

Hearing of this application saw the applicants' learned counsel adopting the affidavit supporting the application. He reiterated the claim that the applicants were sick and could not sign the written statement of defence for filing before this court. As a result, the ex-parte hearing order was entered against them. In addition, the learned counsel submitted on matters which were not part of the affidavit. They were therefore submissions from the bar, which need not to be considered herein.

In reply, Mr Ahmed Mwita, learned Advocate for the first and second respondents, attacked the allegation by the applicants that they were sick. He argued that there was no sufficient documentary evidence to establish that the applicants were indeed sick.

There was also no information as to how the applicants' counsel got the information of the applicants' sickness. The reason advanced in this application, it was argued, was the same as the reason raised in the previous application. Consequently, the application did not show good cause for setting aside the ex-parte judgment.

In reply, Mr Abdul Aziz, learned counsel for the third respondent, argued that the applicants' affidavit did not disclose any sufficient cause

warranting the court to exercise its discretion in favour of setting aside the ex-parte judgment as is required by the law. In relation to the argument that the applicants failed to show good cause, the court was reminded that there was previous extension of time which was granted to the applicants to file their written statement of defence out of time which extension was not honoured by the applicants.

It was also argued that the two medical chits shown were in respect of the first applicant only for 18/5/2021 and 22/5/2021. As such, it was submitted, there was no proof that the second applicant and the applicants' advocate were also so sick that they were unable to enter appearance and sign the written statement of defence.

As to the annexed medical chits, it was similarly brought to the attention of the court that the chits were not produced and shown in the previous application for setting aside ex-parte hearing order, namely, Misc. Land Application No. 369 of 2021.

In his rejoinder, the learned counsel for the applicant reiterated the averments about sickness, maintaining that sickness is a good cause warranting setting aside ex-parte judgment.

On my part, I have considered the application having due regard to the affidavit, counter affidavit and the rival submissions on the record.

Apparently, the said medical chits were neither for the second applicant, nor for Mr Mluge Karoli Fabian, the applicants' learned counsel, who were in the said affidavit also alleged to be so sick in bed.

As the medical chits shown were not only for the first applicant, but also for only 18/05/2021 and 22/05/2021, it is evident that they were insufficient to constitute a good cause for the failure of the applicants and/or their learned counsel to enter appearance and file written statement of defence before expiry of time after being served and before the expiry of the extended time.


It is to be recalled that the second order of 4/3/2021 granting the applicants extension of time for filing written statement of defence in Land Case No. 200 of 2020 required the applicants to file the said defence by 11/03/2021 which was before the dates (i.e 18/05/2021 and 22/05/2021) of the first applicant's sickness shown in the medical chits.

Although sickness is ordinarily a good cause if and only if it is established by evidence, there is no proof of sickness on the part of the applicants and their counsel as alleged to warrant this court exercising its discretion in favour of setting aside the ex-parte judgment. The other reason, and in particular, the alleged transfer of the suit property, it is of no relevance in the instant application.

In the final result, I am inclined to find that the applicants having failed to sufficiently show that the applicants were ill throughout the period of their failure to file the written statement of defence have not shown good cause. The orders sought cannot as such be granted. The application is accordingly not allowed. It is dismissed with costs.

It is so ordered.

Dated at Dar as salaam this 26th October 2022.


B. S. Masoud
Judge

