IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 487 OF 2022

(Arising from the Judgment of the High Court – Land Division at Dar es Salaam in Land Case No. 127 of 2008 by Hon. G.A.M Ndika, J. dated 23 January 2015)

KELLEN ROSE RWAKATARE KUNTU .....1st APPLICANT

HUMPHREY KAULILA KENNETH RWAKATARE.....2nd APPLICANT

TIBE KENNETH RWAKATARE.....3rd APPLICANT

MUTTA ROBERT RWAKATARE

(As the legal representative of deceased Rev. Dr. G.P Rwakatare) **...4th APPLICANT**

THE REGISTERED TRUSTEES OF MIKOCHENI

ASSEMBLIES OF GOD.....5th APPLICANT

VERSUS

ZITHAY KABUGA .....RESPONDENT

RULING

Date of last Order: 22/11 /2022
Date of Ruling: 14/12/2022

K. D. MHINA, J.

The Applicants, Kellen Rose Rwakatare Kuntu, Humphrey Kaulila Kenneth Rwakatare, Tibe Kenneth Rwakatare, Mutta Robert Rwakatare ((As the legal representative of deceased Rev. Dr. G.P Rwakatare), the Registered Trustees of Mikocheni Assemblies of God, lodged this application by way of chamber summons, made under Section 14 (1) of the Law of Limitation Cap 89 R. E. 2019 and Order IX Rule 9 of the Civil Procedure Code [Cap. 33 R. E. 2019] ("the CPC")

The applicants are in pursuit of an extension of time within which to file an application to set aside exparte against the Exparte Judgment and Decree of this Court in Land Case No. 107 of 2008, dated 23 January 2015.

The chamber summons is supported by the affidavit sworn by Mr. Emmanuel M. Augustino, the counsel for the applicants, which expounds the grounds for the application.

The reason for seeking an extension of time to set aside exparte judgment is the alleged illegality in the impugned decision.

After being served with the application, the respondent confronted the application with a notice of preliminary objection to the following effect;

(i) The application is incompetent for the failure of being supported by an affidavit from each applicant in contravention. of Order XLIII Rule 2 of the Civil Procedure Code, Cap 33 R: E 2019.

Having been seized with the preliminary objection, as it is a trite, this Court has to deal with the objection first before going into the substance, i.e., merits or demerits of the application.

However, in order to expedite the trial, this Court adopted the style of hearing both the preliminary objection and the substance of the application.

But before going to the preliminary objection and the substance of the application, a brief background is significant to appreciate what prompted the filing of this application.

Before this Court in Land Case No. 127 of 2008, the respondent sued the applicants for;

i. *Payment of the sum of TZS 700,000,000/= being the costs of the plaintiff's house illegally demolished by the defendants.*
ii. *Defendants be evicted from the plaintiff's property, and vacant possession of that property be granted to the plaintiff.*
iii. *An order that the illegal sale agreement entered between the second defendant, on one hand, and the first and third defendant, on the other hand, for the sale of the property*

in dispute be nullified or declared void ab initio as the seller had never been the owner of the aforesaid house.

iv. *Punitive and general damages and loss of use of the demolished house at the amount of TZS 250,000,000/=*

v. *An order for the refund of rent which the plaintiff was forced to pay to various landlords to date following the demolition of her house by the defendants*

vi. *Cost of the suit*

Payment of compound interest on items (i) and (v) above at the rate of 21% per annum from the date of demolition to the date of the judgment and thereafter at the court rate of 12% computed from the date of judgment to the day of full satisfaction of the decree.

vii. *Any other relief which the Court shall deem fit and just to grant.*

The records indicated that the applicants were duly served with the summons and the plaint, but they failed to file the written statement of defence; therefore, on 12 March 2013, this Court ordered the hearing of the suit to proceed exparte.

The applicants tried to set aside that order, but on 4 August 2014, the application was dismissed because the applicants had shown no sufficient cause as to why the order for an exparte hearing should be vacated. Subsequently, the hearing proceeded exparte, and the

respondent successfully proved her claim, and this court entered a judgment in her favour.

Undaunted, the applicants delayed to lodge a notice of appeal within the prescribed time; therefore, they approached this Court again to seek an extension of time to file leave and notice of appeal to the Court of Appeal. On 24 June 2016, the application was dismissed vide Misc. Land Application No 273 of 2015 for failure to take essential steps promptly; therefore, the court found that there was no sufficient justification for exercising the discretion of the court to grant the extension of time.

Dissatisfied, the applicants lodged at the Court of Appeal a "second bite" for an extension of time to file a notice of appeal but vide Civil Application No. 204 of 2016, on 30 November 2016, the single justice of appeal dismissed the application for failure to file written submissions.

Aggrieved by the dismissal, the applicants lodged an application for reference (Reference No. 12 of 2016) to challenge the decision of

the single justice of appeal. On 17 October 2018, the reference was struck out.

After that, the applicants approached the Court of Appeal again with the application for an extension of time to file a notice of appeal. On 24 May 2019, vide Civil Application No. 485/17 of 2018, the extension was granted, and the applicants filed the appeal titled Civil Appeal No. 406 of 2020.

At the hearing of that appeal, the respondent challenged the competency of the appeal, and on 9 August 2022, the appeal was struck out for being incompetent.

Then, the applicants filed this application seeking an extension of time to set aside the exparte judgment of this court.

At the hearing, the applicants were represented by Mr. Emmanuel Augustino, learned counsel, while Ms. Jackline Kulwa, also a learned counsel, appeared for the respondent.

In support of the preliminary objection, Ms. Kulwa submitted that the affidavit supporting the application does not meet the requirements of law because none of the five applicants swore the affidavit.

She further submitted that if the affidavit is claimed to be sworn by the advocate, the same contravened the law because there was no evidence that he was given that authority. To bolster her argument, she cited **Mohamed Abdillah Nur and four others v. Hamad Masauni and two others**, Civil Application No. 436/16 of 2022 (TanZlii), where the Court of Appeal held that;

> *"...a person purporting to swear an affidavit on behalf of another person who is a party to a court proceeding must do so after consultation with and obtaining instructions from the party whose behalf the affidavit is being sworn. We hasten here to emphasize that, such instructions and authorization must be presumed to the advantage of a party who fails or neglects to file pleadings or affidavit which are of the essence of the matter before a court of law."*

She concluded by citing **CATS Tanzania Ltd and four others v. International Commercial (T) Ltd,** Misc. Commercial Application No. 116 of 2022 (HC-Commercial Division), where it was held that the absence of the affidavit by the applicants is fatal.

In reply, Mr. Augustino submitted that apart from the application being proper as it satisfies the provisions of Order 43 Rule 2 of the CPC.

Further, the two cases cited by the counsel for the respondent are distinguishable because, in **Mohamed Abdillah Nur** (Supra), there were numerous applicants, but only two swore the affidavit, and in **CATS Tanzania Ltd** (Supra), there were five applicants, but two did not swear the affidavit.

He further submitted in **Joseph Peter Daudi and another v. The Attorney General and three others**, Misc. Land Application No. 447 of 2020 (HC-Land Division), which cited the holding of the decision of the Court of Appeal in **Lalago Cotton Ginneryand Oil Mills Co. Ltd v. The Loans and Advances Realization Trust (LART),** Civil Application No. 80 of 2002 (unreported), it was held that an advocate is allowed to swear an affidavit for his client, but it should be on matters which are in the advocate's personal knowledge.

He concluded by arguing that in the application, that was what is indicated in paragraphs 1 to 13 of the affidavit; therefore, the application is not defective.

In rejoinder, Ms. Kulwa submitted that the cited cases are relevant to this application and reiterated that in **Mohamed Abdillah Nur**

(Supra), it was stated that the advocate must be instructed to swear the affidavit.

In this application, there is no express statement in the affidavit to indicate that the advocate was authorized and instructed to swear an affidavit.

She concluded by insisting that the affidavit was defective and fatal.

Having considered the oral submission made by the learned counsel for the parties, I find that the gist of the objection is that the applicant's affidavit is defective because none among the applicants swore the affidavit, and there is no express statement in the affidavit to indicate that the advocate was authorized and instructed to swear an affidavit.

In deliberation and determination of the preliminary objection, the entry point is the decision of the Court of Appeal of Tanzania in **D.B Shapriya v. Bish International BV** (2002) EA 47, where the term affidavit has been defined as;

"A written document containing material and relevant facts or statements relating to the matters in question or issue and sworn or affirmed and signed by the deponent before a person or officer duly authorized to administer any oath or affirmation or take any affidavit."

From the above definition, going straight to the issue in dispute, the point for consideration is whether a counsel could swear an affidavit on behalf of the client.

The above-stated scenario is not new because it has been settled by the Court of Appeal in a number of cases, such as in **Arbogast c. Warioba v. National Insurance Corporation (T) Ltd and another**, Civil Application No.24 of 2011, where the court held that;

*"The Court did not therefore lay down a general rule that advocates cannot swear affidavits in the client's cases, but in my understanding, such affidavits should not contain hearsay. In **AUGUSTINE MREMA's** case, again the High Court said nothing about whether or not advocates could swear affidavits, but in a way supported the position in RAJPUT's case that, whether the deponent is an advocate or not, just like other evidence, subject to scrutiny".*

Again, in the cited case of **LaLago Cotton Ginneryand Oil Mills Company Ltd (Supra),** the Court of Appeal stressed that;

> *"An advocate can swear and file an affidavit in proceedings in which he appears for his client but on matters which are in the advocate's personal knowledge only. For example, he can swear an affidavit to state that he appeared earlier in the proceedings for his client and that he personally knew what transpired during these proceedings." And that "From the above, an advocate can swear and file an affidavit in proceedings in which he appears for his client but on matters which are within his personal knowledge. These are the only limits which the advocate can make an affidavit in proceedings on behalf of his client."*

Therefore, from the above, it is quite clear that an advocate could swear an affidavit for their client as there is no law that prohibits that act.

In connection with that, another point is whether an express statement in the affidavit indicates that the advocate was authorized and instructed to swear an affidavit is needed to be contained in affidavit.

In cementing her supporting argument on the issue, Ms. Kulwa cited **Mohamed Abdillah (Supra)**, where the Court of Appeal held that;

> *"...a person purporting to swear an affidavit on behalf of another person who is a party to a court proceeding must do so after consultation with and obtaining instructions from the party whose behalf the affidavit is being sworn. We hasten here to emphasize that, such instructions and authorization must be presumed to the advantage of a party who fails or neglects to file pleadings or affidavit which are of the essence of the matter before a court of law."*

I have read the cited case above, and upon my scrutiny, I find that there were four applicants in that application. Two of the applicants, the first and second, did not swear the affidavit to support the application. The argument was whether the affidavits of the third and fourth respondent, who was the applicants' principal officer, could

be considered as having been sworn by the first and second applicants as well.

That was the issue the Court of Appeal answered negatively and held, as I cited above.

Therefore, the facts and scenario of the cited case above are distinguishable from our application. The reason is that in our application, the person who swore the affidavit is an advocate who was duly instructed to represent the applicants. In contrast, in the cited case, the fourth applicant was neither the advocate nor there was no evidence that he was representing the other applicants.

Further, in my opinion, once the advocate is instructed, he/she may swear an affidavit on behalf of the client within the perimeters enunciated in **LaLago Cotton Ginneryand Oil Mills Company Ltd** (Supra).

In conclusion, the preliminary objection lacks merit, I dismiss the same and proceed with the application on merits.

On merits, Mr. Augustino submitted that it is an established principle of law that for the extension of time to be granted, an applicant should adduce sufficient cause.

Further, he submitted that in the impugned exparte judgment, this court decided the matter, which was time-barred. Therefore, the principle is that once the issue of jurisdiction arises, the court has the duty to extend the time so that the alleged illegality can be looked at and corrected. To bolster his argument, he cited **Principal Secretary, Ministry of Defence and National Service Vs. Devram Valambia [1999] TLR 182,** where it was held that once illegality arises, the Court has the duty to extend time.

He narrated that the cause of action arose in 1987, but the matter was filed in 2008, and the exparte judgment was entered in 2015. Several efforts to set aside were made, but there has yet to be a substantive decision ever made addressing the limitation of time as indicated in paragraphs 5 to 10 of the affidavit. The Court of Appeal made the last order on 10 August 2022.

He further submitted that they come again to this court because of the principles laid down in **Hashi Energy (T) Ltd v. Khamis Maganga**, Civil Appeal No. 181 of 2016 (TanZlii), where it was held that the parties must exhaust remedies available under the law before they could appeal.

He argued that the available remedy is to request this court to extend the time to set aside exparte.

In his further submission, he stated that the issues of time-barred claims were discussed in **IGA v. Makerere University, 1972 (EALR) 65**, where it was held that;

> *"The plaint barred by limitation is barred with the law and it must be rejected and such plaint should be rejected even though the judgment has been entered".*

Therefore, the plaint which initiated the suit was supposed to be rejected.

In reply, Ms. Kulwa submitted that in applications of this nature, there are some principles, such as;

i. A party must account for each day of delay
ii. The impugned judgment must contain illegality

To start with the first principle, she submitted that the applicants had failed to account for each day of delay. The Court of Appeal struck out the applicant's matter on 10 August 2022, and this application was filed on 20 August 2022; therefore, they failed to account for the delay of ten (10) days. That failure contravenes the principle enunciated in **Muse Zongari Kisere v. Richard Kisaka Mugendi**, Civil Application No. 244/01 of 2019.

On the issue of illegality, she submitted that it was not clearly vetted and indicated in the affidavit; therefore, it was an afterthought.

Further, she argued that since the applicants claimed that the court of appeal struck out their appeal, the remedy was for them to seek for extension of time to file a notice of appeal.

In the cited case of **Hash Energy** (Supra), on exhaustion of available remedies, she submitted that the applicants had previously attempted to set aside an exparte order, but the application was dismissed.

She concluded by submitting that the application lacks merit and allowing the same means allowing endless litigations.

In rejoinder, Mr. Augustino responded that the delay of ten days was not inordinate. However, the reason for seeking an extension of time is based on illegality.

In the cited case of **Muse Zongori Kisere,** he submitted that though the Court of appeal found a delay, it granted an extension since the issue of illegality was raised.

He further submitted paragraphs 12 and 13, in which the annexed plaint indicated that the suit was time-barred.

Further, he submitted that what was dismissed previously was the application for setting aside to proceed with an exparte hearing and not to set aside exparte judgment.

He concluded by submitting that the appeal at the court of appeal was struck out because there was no initial attempt to set aside exparte judgment.

Having considered the chamber summons and its supporting affidavit, the affidavits in reply, and the oral submission made by the learned counsel for the parties, the issue that has to be resolved is whether the applicant has shown a good cause for this Court to exercise

its discretion in granting an extension of time to set aside exparte judgment.

In this application, as submitted by Mr. Augustino, they raised only one ground, i.e., illegality, in seeking an extension of time.

In considering illegality, I will be guided by the settled position of law established by the Court of Appeal on illegality and the parameters of how illegality should be.

One, the case of **Principal Secretary, Ministry of Defence and National Service Vs. Devram Valambia [1999] TLR 182** held that illegality is sufficient ground to grant an extension of time.

Two, the case of **Lyamuya Construction Co. Ltd Vs. Board of Registered Trustees of Young Women's Association of Tanzania**, Civil Application No. 147 of 2006 (Unreported), it was held that;

> *"The Court there emphasized that such point of law must be that of sufficient importance, and I would add that it must also be apparent on the face of the record, such as the question of Jurisdiction, not one that would be discovered by a drawn argument or process."*

Therefore, though illegality is sufficient ground to grant an extension of time, one of the parameters of what the illegality should be, it should not require a drawn argument or process to be discovered.

Three, in the case of **Ibrahim Twahil Kusundwa and another v. Epimaki Makoi and another,** Civil ~~Appeal~~ Application No. 437/17 of 2022 (TanZlii), it was held that;

> *" ...an illegality of the impugned decision will not be used to extend time in this case, for, no room will be available to rectify it in the application for stay of execution intended to be filed. The illegality of the impugned decision is not a panacea for all applications for extension of time.* ***It is only one in situation where, if the extension sought is granted, that illegality will be addressed".*** (Emphasis provided)

I cited those cases as a "litmus paper" to test whether the ground raised for an extension of time to set aside as advanced by applicants could pass the test.

As I indicated earlier, the applicants have raised the ground of illegality in seeking extension time, and that illegality is that the suit was time-barred.

On this, having gone through the records, I am not persuaded by the illegality raised by the applicants. The reason being that this is an application for an extension of time to set aside exparte and not to file a notice of appeal. The illegality raised cannot be cured in the application to set aside exparte judgment.

The provision of law which governs setting aside exparte judgments, which is Order 9 Rule 9 of the CPC, reads;

> *"In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside; and* ***if he satisfies the court that he was prevented by any sufficient cause from appearing when the suit was called on for hearing,*** *the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit: Provided that, where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also."* **(Emphasis provided)**

Flowing from above, the principle established in the cited case is applicable in this matter. This is because the applicant is raising the

issue of illegality in the application for an extension of time to set aside exparte judgment, whereby the illegality in the impugned decision will not be addressed in that application as per Order 9 Rule 9 of the application.

Therefore, the application failed to pass the test put forward in **Ibrahim Twahil Kusundwa** (Supra) because illegality is not a treatment for all kinds of extension of time; it depends on the action the person intends to do after the extension is granted.

From the above, the applicants have failed to show good cause so that this court can extend the time to set aside exparte judgment.

For the reasons above, and since the applicants raised only one ground, i.e., of illegality, I find no merit in this application, and consequently, I dismiss it.

Each party is to bear his/her costs because, in a preliminary objection, I overrule the objections raised by the respondent, therefore deciding in favour of the applicants. At the same time, in the main application, I dismiss the applicants' application and decide in favour of the respondent.

It is so ordered.

K. D. MHINA

JUDGE

14/12/2022