

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND CASE APPLICATION NO. 438 OF 2021**

(Originating from the Misc. Land Appeal No. 86 of 2019 of the High Court of the  
United Republic of Tanzania (Land Division))

**LUSIA KILIAN .....APPLICANT**

**VERSUS**

**ANATHOLI SHAABANI HOMBWE..... RESPONDENT**

**RULING**

*22/03/2022 & 19/05/2022*

**Masoud J.**

The application beforehand has been made under Section 14 (1) of the Law of Limitation Act, Cap 89 R. E 2019 and it is supported by the affidavit of the applicant. The respondent has filed a counter-affidavit opposing the said application. The Applicant Lusiana Kiliani is seeking for the following orders; Extension of time to file an application to set aside the ex parte judgment of the high court of Tanzania in Misc. Land Appeal No. 86 of 2019 delivered on the 3<sup>rd</sup> May 2021 before hon. V. L. Makani, J., costs of this application and any other relief(s) this court may deem fit to grant.

With leave of the court the application was argued by way of written submissions. Mr. Paschal Kihamba, Advocate represented the

applicant, and respondent was represented by Mr. Frank Kilian, Advocate. The main reason for the delay as explained by Mr. Kihamba is illegality. He said the ex parte judgment is tainted with illegality based on respondent's failure to serve summons or any document to the applicant notifying her on the presence of the Misc. Land Appeal No. 86 of 2019.

He continued to submit that the records reveals that the summons relating to Land Appeal No. 86 of 2019 was served to the advocate who was never instructed by the applicant, and that there was no explanation by the court process server why service was made to an advocate and not to the Applicant herein. Mr. Kihamba continued to submit that, the applicant came to know about the ex parte judgment on the 30<sup>th</sup> July 2021 when she was served with the summons to appear before the District Land and Housing Tribunal for Morogoro (in execution No. 449 of 2021) to show cause why execution should not be granted in respect of the decision of the Kisemu Ward Tribunal Application No.1 of 2015.

To support his argument, he cited the case of **Mbogo Vs. Shah [1968] E.A 93** which laid down the conditions to be met before

granting an extension of time.

He prayed for the application to be granted as prayed in the chamber summons.

Replying, Mr. Kilian submitted that the applicant had engaged a new lawyer and alleges that he does not know one Mluge Karoli Fabian Advocate and that he was not aware of all what was done by advocate Mluge Karoli. He continued to submit that Advocate Mluge is the one who appeared on behalf of the applicant and he received all court proceedings relating to appeal starting with the memorandum of appeal, summons to appear in court for hearing, written submission in support of the appeal including summons to appear in court for judgment.

Mr. Kilian added that the applicant's main reasons for delay is unfounded because advocate Mluge is on the record to have represented the applicant on multiple applications starting from Land Appeal No. 101 of 2015 determined by Morogoro District Land and Housing Tribunal, Misc. Land Application No.600 of 2017 for an extension of time and Misc. Land Appeal No. 86 of 2019 before Hon. Makani.

Mr. Kilian continued to submit that extension of time is only granted when the applicant has sufficiently established that the delay was with sufficient cause. That the allegation by the applicant that he does not know Advocate Mluge who represented him is not sufficient cause because the reasons amount into the negligent between the advocate and its client in prosecuting the case. To support his argument, he cited the case of **Umoja Garage vs National Bank of Commerce [1997] TLR 109**, where the court held that, lack of diligence on the part of the counsel is not sufficient ground for extension of time. He added that the reasons advanced as the cause for delay is an afterthought, because what is apparent in this application is failure by the applicant and his advocate to obey court orders. He finalized his submission by praying the application be dismissed with cost.

It is now an established principle of law that the determination of an application for extension of time is purely on the discretion of the court.

However, that discretion has to be exercised judiciously by considering whether the applicant has given sufficient cause to account for the delay. This position was stated by the Court of Appeal of Tanzania in the case of **Yusuf Same & Another vs. Hadija Yusufu, Civil Appeal No. 1 of 2002) (CAT-DSM)** (unreported), where the Court stated:

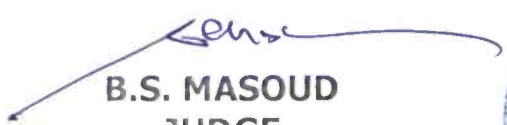
*"It is trite law that an application for extension of time is entirely in the discretion of the court to grant or refuse it. This discretion however has to be exercised judicially and the overriding consideration is that there must be sufficient cause for so doing. What amounts to "sufficient cause" has not been defined. From decided cases a number of factors have to be taken into account including whether or not the application has been brought promptly; the absence of any or valid explanation for the delay; lack of diligence on the part of the applicant".*

The applicant's only reason for delay is illegality in the proceedings and the judgment of the Tribunal. Illegality was discussed extensively in the case of **Moto Matiko Mabanga vs. Ophir Energy PLC & Others, Civil Application No.463/01 of 2017 (CAT-DSM)** (unreported). The Court of Appeal in this case stated that once it is established that illegality is clearly visible on the face of record, then it can be termed as a sufficient cause to warrant extension of time. In the present case illegality that has been raised by the applicant is apparent on the face of the record, as it is true that the applicant was never served with the summons to appear. Even Mr. Kilian conceded to the fact that they never served the applicant and instead they

served the advocate known as Mr. Mluge , who appeared for the applicant in various dates before the High court, and also was the one who represented the Applicant in the District Land and Housing Tribunal for Morogoro in Land Appeal No.110 of 2015. However, Mr. Kilian did not attach any evidence to prove his contention. One would have expected Mr. Kilian to attach the proceedings of the High court in Land Appeal No. 86 of 2019 to show that Mr. Mluge undeniably, appeared in court for the applicant. In the absence of such proof, I am therefore persuaded that, the alleged illegality in this application constitutes a good cause for the delay in filing the appeal.

In the upshot, I am satisfied that the applicant has raised a sufficient reason, to enable the court to exercise its discretion to extend the time within which to file an application to set aside ex parte judgment. This application is therefore meritorious, and it is granted, with costs. The applicant shall file the said application within thirty (30) days from the date of this ruling.

It is so ordered.

  
**B.S. MASOUD**  
**JUDGE**  
**19/05/2022**

