

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

MISC. LAND APPLICATION NO. 28 OF 2023

(Arising from the Order of the High Court – Land Division at Dar es Salaam in Misc.
Land Application No. 469 of 2022, dated 18 November 2022)

RUAICHI P. MATEMBA.....APPLICANT

VERSUS

SETH G. MBUYA.....RESPONDENT

R U L I N G

Date of last Order: 26/05/2022

Date of Ruling: 21/06/2023

K. D. MHINA, J.

By a chamber summons taken under sections 93 and 95 of the Civil Procedure Code, Cap 33 R: E 2002 ("the CPC"), Section 2 (3) of the Judicature and Application of Laws Act, Cap 358 R: E 2019 ("the JALA") and 14 (1) of the Law of Limitation Act, Cap 89 R: E 2019 ("the LLA"), the applicant, **Ruaichi P. Matemba** instituted this application against the respondent, **Seth G. Mbuya**.

The applicant, *inter-alia*, is seeking the following orders: -

- i. That this Court be pleased to extend the time for the applicant to lodge an application for setting aside its dismissal order entered on 18 November 2022 in Misc. Land Application No. 469 of 2022, thereby restoring the application and setting aside a hearing date.*
- ii. Any other order(s) and relief(s) the Honourable Court may deem fit and just.*

The chamber summons is supported by the affidavit affirmed by Mr. Amin M. Mshana, the counsel for the applicant, which expounds the grounds for the application.

A brief background is significant to appreciate what prompted the filing of this application. It started in 2017 at Saranga Ward Tribunal ("the WT") as Application No. 21 of 2017, whereby the main issue was the complaint by the respondent that the applicant trespassed into his land by 1.5 meters and after that erected a fence wall, constructing a toilet and install the septic tank.

After the trial, the Ward Tribunal entered a judgment in favour of the respondent and declared the applicant a trespasser.

Undaunted, the applicant approached the District Land and Housing Tribunal ("the DLHT") of Kinondoni vide Misc. Land Appeal No. 47 of 2019. The DLHT overturned the WT decision and declared the applicant a lawful owner of the suit land.

This time it was the respondent who was aggrieved and decided to file an appeal to this Court vide Misc. Land Appeal No 47 of 2019. This Court, on 5 March 2021, after hearing the appeal, quashed the DLHT, set aside its orders, and reverted to the position in the decision of the WT. For better understanding, I wish to quote part of this Court's decision;

"The background of this dispute dates back to 2001. The appellant had bought a piece of land from one Joseph Kessy. The respondent also bought a piece of land from the same seller, Joseph Kessy in same year, 2001, therefore they became neighbours as their plots were adjacent to each other, but with known demarcation as stated by the one who sold the said plots to them.

.....The records of the trial tribunal are very clear that the seller gave his testimony and all of his testimony favored the appellant. Either the records further show that, the trial tribunal visited the locus in quo and the seller was present on the material date on showed the demarcations of the land he sold to both parties".

Dissatisfied, the applicant intended to appeal to the Court of Appeal, and she initiated the process by filing an application for leave to appeal vide 469 of 2022, which is subject to this application. On 18 November 2022, the application for leave was dismissed for want of prosecution as this Court held that;

"The applicant's counsel was last present in Court on 13.10.2022. He never appeared in Court 15.11.2022, and the Court issued a last adjournment. Again, today he did not show appearance. There is no anytime he had given reason to justify his absence in such circumstances I grant Mr. Tumaini Mfinanga, counsel for the respondent, to have this matter be dismissed for want of prosecution. This application is dismissed with costs for want of prosecution".

After that dismissal, the applicant was aggrieved and intended to set aside a dismissal order, but she found herself out of time hence this application.

The application proceeded by way of written submissions. The applicant was represented by Mr. Amin Mohamed Mshana, learned counsel, while the respondent was by Mr. Tumaini Mfinanga, also a learned counsel.

In support of the application, Mr. Mshana cited **Amos Manyama and 15 others vs. M/S Bio Sustain (T) Ltd**, Misc. Land Application No.

32 of 2020 (HC-Dodoma), where the grounds for extension of time to file an appeal or application have been well elucidated.

He further submitted the reasons for their absence at the Court on 15 and 18 November 2022 as follows;

On 15 November 2022, it was because of inadvertent or accidental lumping together of cases, making it difficult for him and his assistant Anitha Katema to attend to all cases simultaneously and on 18 November 2022, the reason was a lack of knowledge of the hearing being adjourned to that day.

Further, until 11 January 2023, his clerk was furnished with the dismissal order he obtained from the Court's front desk. Therefore, he submitted that the time from 18 November 2022 to 11 January 2023 should be excluded under sections 19 and 26 (c) of the LLA.

Mr. Mshana also submitted that when they read the dismissal order, they found no provision cited to move the court to enable them to take appropriate remedial steps. He narrated that the consequences of non-appearance under Order IX and Adjournments under Order XVII of Cap 33 R.E 2022 provide different scenarios. He cited Order IX, Rules 2, 3, 5 and 6

and submitted that the three distinct remedies under that provision are; **one**, applying to set aside the dismissal order, **two**, filing a new application/suit and **three**,reclusion from filing a new suit/application but only applying to set aside the dismissal order. Therefore, the provision under which a dismissal order was made was paramount to determining the appropriate and commensurate remedy.

Further, he submitted that the period from 11 January 2023 to 17 January 2023, when the document was signed, and the application was electronically filed, was just three days, excluding weekends. Therefore, there was no in-ordinate, and the delay was thus so explained. He bolsters his argument by citing **Damari Watson Bijinja vs. Innocent Sangano**, Misc. Civil Application No.30 of 2021 (HC-Kigoma) on page 10 where it was held:

From the foregoing, the underlying question is whether the 9 or even 10 days for the sake of argument are reasonable to prepare such an application and file. I am of the view that the said days are reasonable since they were spent preparing and filing the current application. This is in tandem with the decision of the single justice in Patrick Magologozo Mongella

(supra), where 12 days were found to be reasonable in preparation and filing of the application for extension of time upon receipt of the necessary documents in pursuit of intended revision."

Mr. Mshana also submitted on the conduct of the parties, the degree of prejudice and the need to balance the interest of the parties. He stated that he had been vigilantly attending without a hitch; there was no loss of interest from the applicant.

Further, the applicant would be more prejudiced than the Respondent because the applicant's house is the one sought to be demolished to create a road to the Respondent's empty plot situated in a gully (korongo), which is uninhabitable. The applicant's house is sought to be carved because of a purported boundary encroachment, and the respondent would suffer nothing.

In conclusion, he submitted that there are novel points of law which are sufficient for this Court to grant an extension of time. As indicated in paragraphs 16, 17, and 18 of the affidavit. He stated that the points require the keen eyes of the Court of Appeal to provide the final legal

position. The Applicant struggles to put her complaints before the Court of Appeal after a good and sound decision arrived after reading submissions and visiting the locus in quo was overturned and replaced by another that conflicts with the law.

Therefore, he raised a point of law that the judgment of this Court in appeal contravened section 34 (1) of Cap 216 Cap 2019, which allows the DLHT to take additional evidence.

In reply, Mr. Mfinanga resisted the application by submitting that it is trite law that an extension of time can only be granted if the Applicant displays "sufficient cause or good reasons" for the delay and must account for each day of delay. He cited **Anyes Charles Byampanju vs. William Chamwiru**, Misc Land Application No.57 of 2021, HC-Bukoba (Unreported), where the factors considered to be sufficient cause for an extension of time were pronounced.

He further submitted that the only reason advanced by the applicant was that he did not appear on 15 November 2022 when the matter was called on for a hearing. However, it is indisputable that he was aware of the hearing on the said date. Due to his absence, the matter was

adjourned to 18 November 2022 for a hearing, but he did not appear, and no reason was assigned for his non-appearance.

He concluded by submitting that the Counsel for the applicant did not take prompt action until 11 January 2023, when he started making follow-ups only to discover the matter had been dismissed. Further, the applicant failed to take steps within a reasonable time and has been unable to assign reasons for the delay for each day.

The applicant did not file a rejoinder.

Having considered the chamber summons, its supporting affidavit, and the written submission made by the 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 dismissal order.

The entry point is Column 4 of Part III to the schedule of the LLA, which sets a time limit for setting aside a dismissal order. It reads

"For an order under the Civil Procedure Code or the Magistrates' Court Act, to set aside a dismissal of a suit is 30 days".

After citing the above provision of law, also it should be noted that the essence of this application is to seek an extension of time to set aside the dismissal order dated 18 November 2022.

From the above, the position of law in applications for extension of time is stressed by the Court of Appeal in **Omari R. Ibrahim vs. Ndege Commercial Services Ltd**, Civil Application No. 83/01 of 2020 (Tanzlii), where it put succinctly that in an application for an extension of time, good cause to extend must be shown.

As to what may constitute a good case, again, the Court of Appeal in **Hamis Babu Ally vs. The Judicial Officers Ethics Committee and three others**, Civil Application No 130/01 of 2020 (TanZlii), pointed out the following factors: -

- i. To account for all period of delay*
- ii. The delay should not be inordinate;*
- iii. The applicant must show diligence and not apathy, negligence, or sloppiness in the prosecution of the action that he intends to take and*
- iv. The existence of a point of law of sufficient importance, such as the illegality of the decision sought to be appealed against.*

Apart from the above positions dealing with what constitutes a sufficient reason (s) and the necessity for accounting for each day of delay, but also in **Principal Secretary, Ministry of Defence and National Service Vs. Devram Valambia [1999] TLR 182**, the Court of Appeal, established that illegality is sufficient ground to grant an extension of time.

I cited those cases as benchmarks to consider and test if the applicant passes the test by showing a good or sufficient cause considering that the **decision in which extension of time is sought was delivered on 18 November 2022, and this application was filed on 19 January 2023.**

As alluded to earlier, the application for setting aside the dismissal order was supposed to be filed within 30 days from the date of dismissal of the application for leave to appeal. Therefore, from 18 November 2022, the application to set aside the dismissal order was supposed to be filed on or before 18 December 2022. By filing the application on 19 January 2023, the applicant is out of time for 31 days.

From above, it is then essential to look at the two key issues: *whether the applicant accounts for each day of delay and whether the*

applicant raised any point of illegality against the dismissal order dated 18 November 2022. The second key issue is critical as far as this application is concerned because, in the affidavit (paragraphs 16 and 17), Mr. Mshana raised the points of illegality against the decision of this Court in Misc. Land Appeal No. 47 of 2019. That is wrong because the issues of illegality that should be raised in this application for an extension of time to set aside dismissal order in Misc. Land Application No. 469 of 2022 should be confined to that dismissal order and proceedings led to the dismissal and not otherwise. Therefore, it was premature to raise the alleged illegalities against Misc. Land Appeal No. 47 of 2019 in an application for an extension of time to set aside a dismissal order because illegality could not be addressed in the application for setting aside a dismissal order. See **Ibrahim Twahi IKusundwa and another v. Epimaki Makoi and another**, Civil Appeal No. 437/17 of 2022 (TanZlii), where it was held;

"Illegality of the impugned decision is not a panacea for all applications for extension of time. It is only one in a situation where, if the extension sought is granted, that illegality will be addressed".

Therefore, the illegalities raised in paragraphs 16 and 17 of the affidavit are misconceived and misplaced as far as this application is

concerned because they cannot be addressed in the application of setting aside a dismissal order.

On accounting for each day of delay, Mr. Mshana submitted that the period from 18 November 2022, when the application was dismissed, to 11 January 2023, when they became aware that the application was dismissed, be excluded under section 19 and 26 (c) of the LLA. Further, from 11 January 2023 to 17 January 2023, the period during which they prepared the application was not inordinately delayed.

Having gone through the dismissal order dated 18 November 2022 and the affidavit, specifically at paragraphs 5, 6, 7 and 8, the applicant's counsel was aware that the matter was scheduled for a hearing on 15 November 2022. In the affidavit, he stated that he sent another advocate, Anitha Katema, who also could not appear because she attended another case on the very date. Therefore, they were unaware that the matter was adjourned to 18 November 2022.

From above, I have the following observation;

One, the counsel was aware that the matter was scheduled on 15 November 2022 but did not attend or notify the court of his failure to attend.

Two, the Counsel did not make any prompt efforts to follow up on the application after it was adjourned on 15 November 2023 and after it was dismissed on 18 November 2022 while he was the applicant in the matter. The applicants' side "woke up" on 11 January 2023, when the period to apply to set aside dismissal lapsed. Therefore, it is for the applicant's side to blame themselves for what happened.

Three, as indicated earlier, in paragraphs 5, 6, 7 and 8, Mr. Mshana counsel deponed that he sent another advocate, Anitha Katema, who also failed to appear because, on the very date, there was another case she attended. But the law is elementary that whenever another person is mentioned in an affidavit unless that person swears his own affidavit, the adduced evidence touching that person will be considered hearsay evidence see **NBC Ltd v. Superdoll Trailer Manufacturing Company Ltd**, Civil Application No. 13 of 2002 (CAT- unreported), the Court held that;

"... an affidavit which mentions another person is hearsay unless that other person swears as well."

And **Benedict Kimwaga vs. Principal Secretary Ministry of Health**, Civil Application No. 31 of 2000 (CAT-Unreported), it was observed that

"..if an affidavit mentioned another person, that other person must swear an affidavit, otherwise it will be hearsay".

Therefore, what was stated in paragraphs 6 and 5 regarding Anitha Katema remains hearsay for the lack of her affidavit.

Four, Mr. Mshana argued that period from 18 November 2022, when the application was dismissed, to 11 January 2023, when they became aware that the application was dismissed, be excluded under sections 19 and 26 (c) of the LLA, but in my opinion, neither of the cited sections are applicable in this matter. There was no evidence of any action that occurred within that period before any court of law regarding this matter which could trigger the exclusion of time under section 19 of the LLA. Further, no evidence of fraud or mistake could trigger the exclusion of time under section 26 (c) of the LLA.

Another issue raised in the affidavit was that the dismissal did not cite any law. Thus, it was difficult to determine the remedy available against that particular order. He explained that issue extensively in his submission. With respect to Mr. Mshana, I have the following;

One, that submission is unmeritorious because the provision of law, which he cited Order IX of the CPC, has the remedy. Order IX Rule 5 provides for dismissal when the plaintiff (in this matter, the applicant) is absent and the remedy is found under Rule 6 of the same Order, that the remedy is to set aside the dismissal order.

Two, the submission is misplaced in this application because this is an application seeking for extension of time and not to set aside a dismissal order.

Three, this is not an illegality at all. Therefore, this application failed to raise any issue of illegality against the dismissal order dated 18 November 2022 in Misc. Land Application no. 469 of 2022.

Flowing from above, it is, therefore, there is no sufficient and good cause advanced by the applicant as to why she failed to apply within time so that this can extend the time to set aside the dismissal. Instead of filing

on 18 December, she filed on 19 January 2023 and failed to account for each day of delay. In the case of **Hassan Bushiri v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported), it held that;

*"Delay of even a single day has to be accounted for otherwise
There would be no point in having rules prescribing periods
Within which certain steps have to be taken."*

For the reasons above, I find no merit in this application, and consequently, I dismiss it with costs.



It is so ordered


K.D. MHINA

JUDGE

21/06/2023