

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

MISC. LAND APPLICATION NO. 136 OF 2023

(Arising from the Ex parte Judgment and Decree of the High Court – Land Division at Dar es Salaam in Land Appeal No. 184 of 2016 Hon S.A.N Wambura)

YASIN KINONDO MDEE

(As Attorney of TULIBAKO TABU KYOMA)APPLICANT

VERSUS

NGULO MTIGA (As legal personal representative

of ABUBAKAR SAID MTIGA.....RESPONDENT

R U L I N G

Date of last Order:12/06/2023

Date of Ruling: 25/07/2023

K. D. MHINA, J.

Before me is an application in which the applicant, **Yasin Kinondo Mdee** (As Attorney of Tulibako Tabu Kyoma), moves this Court to extend the time within which to lodge an application for setting aside ex parte judgment against the decision of this Court (S.A.N Wambura. J) delivered on 10 August 2018 in Land Case No 184 of 2018.

The application has been brought by way of chamber summons, made under sections 14 (1) and 20 of the Law of Limitation Act, Cap 89 R: E 2019 ("the LLA").

The grounds in support of the application are contained in the affidavit duly sworn by the applicant.

The background to this matter briefly, as can be gleaned from the records, is as follows, the dispute was the allegations of encroachment by the applicant into the respondent's surveyed plot No. 329 Block "A" with Title number 21778 located at Mikocheni area.

The wrangle above put the parties at issue, and the respondent approached this Court and filed Land Case No. 40 of 2012. That Land Case was struck out for being time-barred on 18 September 2015.

The respondent requested an extension of time under Section 44 (1) of the Law of Limitation Act, and on 29 March 2016, the Minister for Constitutional and Legal Affairs granted him the extension of time to institute the proceedings against the applicant.

On 14 June 2016, the respondent instituted Land Case No. 184 of 2016, the subject of this application. After failing to secure the applicant's attendance by way of "normal" summons on 27 October 2016, this Court ordered a substituted service by way of publication. The publication was done on 8 November 2016 and 23 February 2018 through Mwananchi

Newspaper. After all those efforts proved futile, the Court proceeded to hear the suit *ex parte* and delivered an *ex parte* judgment in favour of the respondent.

The application was argued by way of oral submission. The applicant was represented by Mr. Gabriel Munishi, learned advocate, while the respondent was represented by Ms. Apis Maigwa, also learned advocate.

In moving this court to exercise its discretion to grant an extension of time, Mr. Munishi submitted that the main reason for the application was that when Land Case no. 184/2016 was filed, the applicant was out of the country and was not served with the summons to appear and file the written statement of defence.

Despite the publication through substituted service but the publication did not come to the knowledge of that publication because there was no circulation of Mwananchi Newspaper in the United States of America.

He further stated that he understood that extension of time is a discretion of the court, but the discretion is guided by the principles which were formulated in **Lyamuya Construction vs. The Board of Registered Trustees**, Civil Application No. 2 of 2010 (Tanzlil)

Further, in the affidavit, it is indicated that she was out of the country where she left for the USA in 2013, therefore unaware of the suit; hence she is entitled to the exclusion of the days.

Further, there is no inordinate delay because once she knew the existence of the ex parte judgment, she appointed the attorney through a special power of attorney on 15 November 2022. The document was filed for registration on 1 December 2022. After that appointment, the applicant was looking for an advocate, and there was ongoing communication between her and the attorney until the filing on 16 March 2023. Therefore, the delay is not inordinate.

He concluded by submitting that there was no negligence on the part of the applicant, and the intention was to challenge the ex parte judgment, which condemned the applicant unheard.

In response, Ms. Maigwa strongly opposed the application and submitted that Plot no. 332, located at Mikocheni, pleaded in the affidavit, has never been involved in Land case no 184/2016. The plot involved was Plot No. 320. Therefore, the applicant's application was misconceived

She further stated that the applicant did not travel during the institution of Land Case No. 184/2016, as no document was attached to prove that she had been in Washington, DC, since 2013. Attached is an identification Card indicating its validity from 3 April 2021 and will expire in 2027.

As per the cited case of **Lyamuya Construction** (Supra), Ms Maigwa stated that the applicant failed to account for each day of delay in this application.

Further, she stated that the respondent became aware that one Hussein Muccadam purchased Plot No. 322 from the applicant during the execution and objection proceedings which were dismissed.

That buyer (Muccadam) filed many cases concerning his Plot No. 322, while in Land Case No. 184 of 2016, the claim was the encroachment into Plot No. 320, not ownership of Plot No. 322.

Therefore, the applicant was supposed to be aware of the matter. Hence fact to account for the period of delay.

She concluded by submitting that the delay was inordinate and the applicant was negligent because she was aware of the case, but he did not take action.

In a brief rejoinder, Mr. Munishi submitted that the purpose of the identification card was to indicate that applicant was living in the USA and did not intend to show when she travelled to the USA.

Having considered the chamber summons and its supporting affidavit, the affidavit in reply, and the oral submission made by both learned counsel for the applicant and the respondent, 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 *ex parte* judgment.

As to what may constitute a good case, the Court of Appeal in the cited case of **Lyamuya Construction Co. Ltd (Supra)** and also 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: -

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

In this application at hand, the applicant has raised two grounds for seeking an extension; one, that Tulibako Tabu Kyoma had no knowledge of the existence of Land Case no. 184/2016 since she travelled to the USA in 2013 and; two, she became aware of the existence of exparte in November 2022 and filed this application on 16 March 2023; hence there was no inordinate delay.

On the first ground, apart from the oral submission, the applicant attached the Identification Card of Tulibako Burton Kyoma to substantiate his ground. That ID Card No. 46410271, issued by the State of Texas in the USA, indicates its validity is from 4 March 2021 to 28 March 2027.

Flowing from above, I have the following;

One, the Identification Card is insufficient to prove whether, prior to 4 March 2021, Tulibako Kyoma was in the USA or not. It had no other information on her whereabouts before 4 March 2021.

Two, the ID Card does not prove whether a person has travelled. For international travel (Travelling outside the country), the document which is relevant as proof is a Passport, defined under section 3 of the Immigration

Act, Cap 54 and issued by the Immigration Department. In this matter, the applicant side failed to submit a copy of the passport to prove that fact.

Therefore, there is no proof that Tulibako Kyoma was not in Tanzania when Land Case No. 184/2016 was filed, mainly when the substituted service by way of publication was effected on 8 November 2016 and 23 February 2018 through Mwananchi Newspaper.

In such circumstances, the applicant has failed to account for a delay from 10 August 2018, when the ex parte judgment was delivered, up to November 2022, when she became aware.

On the second ground, she became aware of the existence of an exparte in November 2022 and filed this application on 16 March 2023; hence there was no inordinate delay, this should not detain me long.

The submission revealed that after Tulibako became aware of the decision, she appointed the applicant as her attorney through a special power of attorney on 15 November 2022. The document was filed for registration on 1 December 2022. Then the applicant was looking for an advocate until the filing on 16 March 2023. Therefore, it took about **five months** from when he became aware until the application was filed.

From the above facts, the question is whether that period can be considered an inordinate delay or not.

And this is not a new phenomenon in our jurisdiction, as the Court of Appeal in **Emmanuel Rurihafi and another vs. Janas Mrema**, Civil Appeal No. 314 of 2019 (Tanzlii), has already held that;

"The test to determine promptness is the question of fact which has to be decided on a case-by-case basis."

In that decision, the Court of Appeal found that 22 days was a reasonable time to collect copies of the ruling and drawn order in the struck-out appeal and prepare a meaningful application for an extension.

In Emmanuel Rurihafi's case (Supra) case, the Court of Appeal quoted its other decisions with a similar issue. Those cases are;

One, **Samwell Mussa Ng'omango (as a legal representative of the Estate of the late Masumbuko Mussa) vs. A.I.C (T) Ufundi**, Civil Appeal No.26 of 2015 (unreported), where a single justice of appeal considered the circumstances of the case and observed that the applicant acted promptly for filing an application in less than 20 days after obtaining the certificate.

Two, **Hamis Mohamed (as the Administrator of the Estate of the late Risasi Ngwale) vs. Mtumwa Moshi (as the Administrator of the Estate of the late Risasi Ngwale)**, Civil Application No. 407/17 of 2019, where also a single justice of appeal observed that a period of less than 30 days is a reasonable time.

In the above-cited cases, a maximum of 30 days was considered reasonable.

Coming to this application, where the applicant's side took about five months to apply for an extension, I think the period is unreasonable; they did not act promptly. Therefore, there is an inordinate delay.

Flowing from the discussion above, the applicant fails to advance good and sufficient ground to warrant this court to exercise its discretion in granting an extension of time.

In the upshot, I decline to grant this application, which is consequently dismissed with costs.

It is so ordered.




K. D. MHINA
JUDGE
25/07/2023