

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

MISC. LAND APPLICATION No. 285 OF 2023

*(Application for Extension of Time to file an Application for setting aside Ex-parte
Judgement and Decree of this Court by Hon. Msafiri.J dated 7th March 2023 in Land Case
No.60 of 2022)*

GRACE MPONJI1ST APPLICANT

QUEEN MBANDO.....2ND APPLICANT

AMANI JOHN KIMARO.....3RD APPLICANT

VERSUS

MUSTAFA SEIF NGANE (suing as the Administration of the Estate of the late
SEIF NGANE.....**RESPONDENT**

RULING

10th & 30th October, 2023

A.MSAFIRI.J

This Application is brought under Section 14 (1) of the Law of Limitation Act [Cap 89 R.E 2019], Order IX Rule 9 and Section 95 of the Civil Procedure Code [Cap 33 R:E 2019](herein the CPC), supported by the affidavits of Grace Mponji, Amani John Kimario, and Queen Mbando.

The applicants herein prayed for the following orders;-

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- a) That this Honourable Court be pleased to extend time for the applicants to set aside the ex- parte Judgement and decree of this Court by Honourable Msafiri. J dated on 7th March 2023 in Land Case No.60 of 2022.*
- b) Subject to prayer (a) being granted, this Honourable Court be pleased to set aside the ex-parte Judgement and Decree of this Court by Honourable Msafiri J dated on 7th March 2023 in Land Case No. 60 of 2022.*
- c) Costs of this Application.*
- d) Any other relief (s) as the Honourable Court may deem just and equitable to grant.*

Upon being served with the Application, the respondent herein filed a counter affidavit which was deposed by Mustafa Seif Ngane.

The hearing of this Application was by way of written submissions, whereby Mr Odhiambo Kobas, learned Advocate, appeared on behalf of the applicants, and Mr Denice S. Tumaini, learned Advocate, appeared for the respondent. Both parties adhered to the schedule as per court order.

Upon taking the stage to argue the Application, Mr. Kobas prayed to adopt the supporting affidavits, supplementary affidavits and reply to the counter affidavit, all of the applicants, to form part of his submissions.

In the submissions in support of the Application, the learned counsel

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narrates the chronological account of what transpired in this matter. He also argued that the applicants have good cause for granting this Application. In the submission, the counsel for the applicants submitted that the grounds for extension of time deposed in paragraphs 14 (i) to (vi) for the first applicant, paragraphs 14 (i) to (v) for the second applicant and paragraphs 14 (i) to (v) for the third applicant are sufficient to warrant this Court to grant the sought orders.

The counsel for the applicants submitted that the applicants herein were the 4th, 5th and 2nd defendants in Land Case No. 60 of 2022 which was instituted by the respondent who was the plaintiff. That it was heard ex-parte and ex-parte judgment was entered on 7th March 2022 in favour of the respondent declaring him the lawful owner of the suit land which is the 1st applicant's land. That the 1st applicant had bought the suit land from the 2nd applicant who also bought the same from the 3rd applicant.

That the 1st applicant have developed her land in March 2022 by constructing a fence wall and placed a watchman to take care of the suit land by the name of Twalib Mbaya Mohamed who has been caring for the suit land since June 2022 up to date. That it was not until 23rd April 2023 when the 1st applicant learnt of the existence of Land Case No.60.

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of 2022 through her said watchman and she took necessary actions of engaging an advocate to inquire into the matter and informed the 2nd and 3rd respondents.

The applicants are praying for two interrelated orders, first; for an extension of time for the applicants to set aside the ex-parte judgment and decree of this Court, and second; subject to the first prayer being granted, that the Court be pleased to set aside an ex-parte Judgement and decree of this Court by Hon. Msafiri, J in Land Case No. 60 of 2022.

Therefore in that chronology, I shall start determining the prayer for the extension of time and if this Court finds the merit in the prayer, then I shall also determine the second prayer for setting aside ex-parte judgement.

Mr Kobas submitted on the prayer for extension of time that the applicants have advanced sufficient reasons for this Court to grant the extension of time. He said that according to the affidavit of the 1st applicant, she came to know of existence of ex-parte judgment later on 23rd April 2023 and that she was not served with any process or summons to appear and defend the suit.

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He said that the 1st applicant inquired from the office of Mwenyekiti Serikali ya Mtaa, Tegeta 'A' (The Office of Street Local Government), but that there was no proof of service to the applicants through the said Mwenyekiti wa Serikali ya Mtaa.

He contended further that the 1st applicant came to know the existence of the judgement on 23rd April 2023, engaged a lawyer who did perusal on the court file on 24th May 2023, informed the 2nd and 3rd applicants on 5th May 2023, then prepared the pleadings and lodged in court on 12th May 2023.

He further stated that the applicants were not served through the court process and the substituted service was done through the publication in the newspaper which is a small one and unpopular and not widely circulated. He said that there was no proof that the ordinary means of service were effected and failed so as to justify for the order of substituted service.

He contended that the substituted service is a means of service of last resort, thus this service applies when all efforts have proved unsuccessful. To support his argument he cited the Court's decision in **Abutwalib Musa Msuya & 2 Others vs Capital Breweries Ltd & 2**

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others, Civil Revision No.2 of 2012 and Order V rule 16 (1) of the CPC, as thus there were no any sufficient reasons to warrant the court to grant service by way of publication.

Another ground which was submitted by the counsel for the applicants was that the impugned ex-parte decree was tainted with illegality. As regards to illegality which is a sufficient cause of extension of time, he fortified his argument with the decision of the Court of Appeal of Tanzania in the case of **VIP Engineering and Marketing Ltd and 2 Others vs Citibank Tanzania Ltd**, Civil Reference No.6,7 and 8 of 2006 (Unreported). He argued that the denial of the right of the party to be heard constitutes illegality.

He added that there was no proper service carried out in accordance with the law which by itself constitutes illegality which is a sufficient cause for extension of time.

He prayed that the prayers for extension of time be granted.

On his part, in opposition to the Application, the counsel for the respondent Mr. Tumaini, vehemently denied the applicants' claims and submitted that after the suit was admitted, the proceedings thereof commenced and the respondent (plaintiff in Land Case No 60 of 2022)

was issued with the summonses to serve the applicants and other defendants. However the respondent's attempts to look for the defendants was in vain for reason that, except for the 1st defendant, the remaining defendants including the applicants were untraceable. There was no permanent address of other defendants except 1st defendant, thus the Court ordered service to be conducted by way of publication. That even the 1st defendant entered appearance for a couple of time then abandoned the case.

The counsel for the respondent submitted further that the applicants must demonstrate a reasonable and sufficient causes to warrant the court to grant the Application, the applicants must account for delay, demonstrate illegality and show chances of success if the application is granted.

That, it was stated in the affidavit of the 1st applicant in support of the Application that it was Mr Twalib Mbaya Mohamed who broke the news of the presence of exparte judgment as the watchman who works for 1st applicant. There is also an affidavit of the said watchman Twalib Mbaya Mohamed which was attached in the Application. The counsel contended that, the 1st applicant and the said watchman failed to prove

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their relationship as no salary slip or contract of employment, or any letter of confirmation from the ten cell leader to confirm that he is working for 1st applicant were attached in the Application.

He argued that there is no proof when the watchman met the respondent, and that the applicant failed to prove existence of the facts as all facts alleged by the said watchman must be proved as per Section 110 of the Evidence Act [Cap 6 R:E 2019]. He added that it is not clear as to when the applicants became aware of the proceedings in Land Case No. 60 of 2022.

On account of illegality, Mr Tumaini argued that the applicants have not pleaded any point that this Court may dwell upon to investigate and found out the purported illegality.

Having gone through the rival submissions made by the parties, my duty is to deliberate on whether the applicant has demonstrated good cause to warrant this Court to grant extension of time for the applicants to set aside the ex-parte judgement and decree of this Court.

Section 14 (1) of the Law of Limitation Act (supra) provides thus;

*"14- (1) Notwithstanding the provisions of this Act, the court may, **for any reasonable or sufficient cause,*** 

extend the period of limitation for the institution of an appeal or an application, other than an application for the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application.” (emphasis added).

The aforesaid provision does not specifically provide for the factors to be considered by the Court in determining whether or not to extend time. However, in the case laws, courts have developed guidance in assessing whether or not good or sufficient cause have been established by the applicant. In the case of **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No.2 of 2010, (2011) TZCA 4**, the Court of Appeal set out the following guiding factors;

- a) The applicant must account for all the period for 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*

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d) If the Court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance such as the illegality of the decision sought to be challenged.

In the present case, the applicants have to account from 7th March 2023 up to 12th May 2023, when they filed this Application. See the case of **Sebastian Ndaula vs Grace Rwamafa, Civil Application No 4 of 2014**, where it was held that failure to account for each day of delay amounts to a failure to advance "good cause" to justify the extension of time.

I have gone through the affidavit deponed by the 1st applicant Grace Mponji, in support of the Application. She stated that she came to know the existence of ex-parte judgment against her on 23rd April 2023 after being informed by her watchman Mr. Twalib Mbaya Mohamed as in paragraphs 7 of her affidavit: -

7. That to my surprise on or about the 23rd April 2023, I learnt through my watchman Mr Twalib Mbaya Mohamed that there was a person who was bragging around the area that he has a Judgement against me which declared him the lawful owner of the land. On the further enquiry he came know that the person was Mustafa Seif Ngane. Immediately after being informed,

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I instructed Kobas O.J. Attorneys to find out what was going on in court. A copy of an affidavit from my watchman Mr Twalib Mbaya Mohamed is annexed herewith and marked GM-5 to form part of affidavit.

Through their affidavits, the 2nd and 3rd applicants were informed by the 1st applicant on 5th May 2023 on the existence of the exparte judgment against them in relation to Land Case No. 60 of 2022, as stated in paragraphs 7 of the affidavits of Queen Mbando and Amani John Kimario. According to the affidavits of the applicants, the source of information is Mr. Twalib Mbaya Mohamed, the purported watchman.

I agree with the submissions by the counsel for the respondent that, there is no proof of the relationship between the 1st applicant and Mr Twalib Mbaya Mohamed, there is no letter from the Ten Cell leader of the area identifying Mr Twalib Mbaya Mohamed as watchman of the alleged property, and no detail when the said watchman started to work for the 1st applicant. In the absence of reasonable explanation from the parties who alleges, it raise doubt on the probability of the truth of claims of the applicants which are based on mere words.

On the allegations by the applicants that there were no proof that they were served through the Serikali ya Mtaa, in the counter affidavit

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of the respondent at paragraph 14 it shows that the service was done through the Street Executive Officer Tegeta "A" and the summonses were served under the leadership of Mossi Dimoso and Aziza Idd Mchana.

On the claim that the service by publication was effected in an uncirculated, unpopular Newspaper of Habari Leo on 26th May 2022, it is my belief that Habari Leo is a newspaper owned by the Government and it is a leading newspaper which is popular and has a large number of readers across the country.

I have taken time to revisit the attached copy of judgement attached as GM-7 in the affidavit of Grace Mponji, at page 3 of the exparte judgement reads;-

"... This suit was instituted in this court on 23/3/2022 by the applicant against the seven (7) defendants. It is only the 1st defendant Enock Elikana Massam who has ever entered appearance in court despite the service being duly conducted to all defendants. The 1st defendant was represented by Mr Dua Said, learned advocate and filed his written statement of defence. The first defendant entered appearance through his advocate but later abandoned his case 2nd -7th defendants never entered appearance and Alle-

were served through substituted service by publication in a local newspaper named Habari Leo on 26/5/2022....."

The above quoted part of the judgement is evidence that the applicants were served but they failed to enter an appearance in Court despite being served, only the 1st defendant in Land Case No. 60 of 2022 entered an appearance, this reflected that the service was duly effected.

Thereafter, the Court opted to order publication after other means of service failed as it was observed in the case cited by the applicant, the case of **Abutwalib Musa Msuya & 2 Others vs Capital Breweries Ltd & 2 Others**, Civil Revision No.2 of 2012.

On the ground of illegality, it is trite law that illegality must be apparent on the face of the record, and it is settled that where illegality is on issues in relation to the decision being challenged, then the Court has duty to extend time so as the matter can be looked into, this is popular decision of the Court of Appeal of Tanzania in the case of **Principal Secretary, Ministry of defence & National Service vs Devram Valambhia** [1992] T.L.R 185. In the case of **Lyamuya Construction Company (supra)**, the Court of Appeal had this to say on the issue: *Alles*

"Since every party intending to appeal seeks to challenge the decision either on points of law or facts, it cannot in my view, be said that in Valambhia's case, the court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one. 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 long drawn argument or process"

In the premises, I am not persuaded that the alleged illegalities (right to be heard) are errors apparent on the face of the impugned decision, as it is, it will require a long process to discern the said assertions. I am of the view that the applicants have failed to demonstrate good cause for the delay to warrant the grant of extension of time as sought.

The 1st applicant got information on 23rd April 2023, on 24th April 2023 informed her lawyer who perused the court file on 27th April 2023, on 3rd May 2023 she inquired from the village chairman of Tegeta "A" where the disputed land is located, on 5th May 2023, she informed 2nd and 3rd applicants. The record is silent on the period from 5th May 2023

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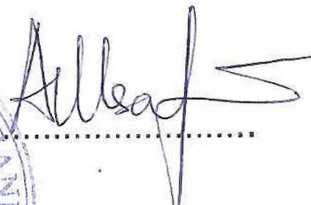
up to 12th May 2023 when the current Application was filed. This period has to be accounted for, as it was held in the case of **Bushiri Hassan vs Latifa Mashayo**, Civil Application No. 3 of 2007, where it was stated that:-

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

From the foregoing reasons, I find that the applicants have failed to account for each day of delays. The applicants also have failed to advance the good and sufficient reasons warranting this Court to grant them the extension of time as prayed.

The Application thus lacks merit and it is hereby dismissed with costs.

It is so ordered


A. MSAFIRI
JUDGE

31/10/2023