

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

**MISC. LAND APPLICATION NO. 776 OF 2022**

**SIMFOROSA CASMIRY TEMBA (Administratrix of the  
Estate of the Late Ferdinand Donald Temba). .....APPLICANT**

**VERSUS**

**DONALD CHRISTIAN TEMBA.....1<sup>ST</sup> RESPONDENT  
KULWA GODFREY KYOVECHO.....2<sup>ND</sup> RESPONDENT**

**RULING**

*Date of Last Order: 27.10.2023*

*Date of Ruling: 17.11.2023*

**MWAIPOPO, J**

The applicant in this matter has moved the Court to grant four prayers as follows;

1. Enlargement of time within which to file an application for setting aside abatement against the 1<sup>st</sup> defendant in the Consolidated Land Case No.122 & 286 of 2016
2. Enlargement of time to file an application to be joined as the legal representative of the deceased 1<sup>st</sup> defendant in the Consolidated Land Case No.122 & 286 of 2016.
3. Cost of the Application abide the results of this application

4. Any other reliefs/orders this Honourable Court may deem fit and just to grant

The application is preferred under section 14(1) of the Law of Limitation Act Cap 89 R.E 2019 and section 95 of the Civil Procedure Code Cap 33 R.E 2019. It is supported by the amended affidavits of Simforosa Casmiry Temba, the applicant and the learned Advocate Eric Rweyemamu, in which grounds upon which the extension of time is sought are set out. The learned Counsel Rweyemamu represented the deceased 1<sup>st</sup> defendant in Consolidated Land Case No.122 & 286 of 2016.

In opposing the application, the respondents filed Counter affidavit sworn by Nazario Michael Buxay, an Advocate who represented the respondents in Consolidated Land Case No.122 & 286 of 2016.

At the commencement of the hearing on 6<sup>th</sup> November 2023, Mr. Deogratus Sawere learned Advocate represented the Applicant, while the respondents enjoyed the services of learned Advocate Nazario Michael Buxay. The hearing of the Application was conducted by way of oral submissions.

Submitting in support of the application, the Counsel for the applicant prayed for this Court to adopt the contents of the amended affidavit of the applicant, Simforosa Casmir Temba and Advocate Rweyemamu so as to form part of his submissions. He went on to submit that the basis

of the Application is set out under paragraphs 5,6,7 and 8 of the affidavit and the main reason for filing this application is due to the death of the 1<sup>st</sup> defendant, Donalt Ferdinand Temba who was a party in consolidated cases no. 122 and 286 of 2016 and lack of a person to step in his shoes. He submitted that despite the fact that the Respondents in their Counter affidavit have stated that there was an advertisement in the newspaper in respect of the exparte judgment between the parties, the applicant could not file this application since she did not have an authority to sue because her appointment to the administration of the estate of the late Donalt Ferdinand Temba was objected in the Court of Appeal of Tanzania by one Christina Massawe who claimed to be the deceased wife and four others in Civil Appeal case no 45 of 2023. Therefore the Applicant had to wait until 6<sup>th</sup> of July 2023, when the Court of Appeal had disposed of the said case. He referred the Court to Annexed withdrawal order of the case. The Application for extension of time is within the mandate of the Court. He submitted that, the position has been articulated in a number of cases. In the **case of KCB Bank Sarah Joel Mahanyu, Misc. Land Application No. 30 of 2021, the High Court** decided that;

**Delay is not the only factor to be considered in applications for extension of time, as no particular grounds or reasons have been set out as good cause....**

The Counsel referred the Court to page 14 para 2 of the same.

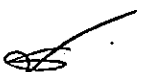
He further submitted that the applicant, as the legal wife of the deceased person was not aware of the consolidated cases, which were on going in Court and determined in the absence of the deceased legal representative. It was until 21<sup>st</sup> November 2022 when she was served with the notice to show cause in Execution Application no. 116/2023, whereby she then started following up the matter by filing her application on 30<sup>th</sup> November 2022. In this regard, the Counsel for the Applicant thus disputed the averments stated in the Respondents Counter Affidavit that the deceased and the second respondent have been enjoying the services of the learned Advocate Rweyemamu and on several occasions the deceased and his wife Christina C. Massawe continued to attend Court sessions, even after the demise of the said Ferdinand Donalt Temba.

The Counsel for the applicant prayed for this Court to take into consideration the reasons advanced by the applicant in the application for setting aside abatement that it was not the result of the negligence of the applicant but lack of information on her part, since she was not involved in the matter that was being prosecuted by the deceased husband. It was until when the applicant got the mandate as an administratrix of the estate of the deceased on 6<sup>th</sup> June 2023 and informed about the case, she knew about the matter. He wound up his submissions by praying that the application be granted as prayed.

In his rebuttal submissions, the counsel for the respondents began by praying to the Court to adopt the Respondents Counter affidavit to form part of his submissions in Court. He further argued that the application is not proper before the Court and falls short of legal requirements for the following reasons;

Firstly, he argued that the submissions made by the Counsel for the applicant were made out of context based on his arguments made in respect of this application. The Application contains four prayers; the first is for the enlargement of time to set aside abatement order, the second prayer is for extension of time to file an application to be joined as a legal representative of the deceased (1<sup>st</sup> defendant), third prayer is for costs and fourth for reliefs. He submitted that the submissions made by the applicant are meant to set aside the ex parte judgment instead of setting aside abatement. He contended that setting aside abatement is different from setting aside ex parte judgment therefore this application should be dismissed.

Secondly, he made an observation in respect of the Affidavit of Advocate Erick Rweyemamu. The Counsel asserted that the said Affidavit has been signed by the deponent and attested, however, when one looks at the affidavit of Advocate Eric Rweyemamu, specifically on his signature, will find that; it is a photocopy. Therefore, his observation revealed that the deponent and the attestor were not together at the time of attestation. The Counsel further added that; throughout the prosecution of the Land Case No.122 and 286 of



2016, the 1<sup>st</sup> defendant was represented by the advocate and appeared in Court with the lady called Christina Massawe until he met his death and afterwards the said lady filed caveat proceedings against the Applicant in the application for administration of the estate. He referred the Court to Paragraphs 3 and 4 of the Affidavit of Advocate Eric Rweyemamu. The counsel further highlighted that; when the deceased died, the Respondents cases had already been closed (Case no 122 and 286/2016)

He further amplified that, according to our laws, if the administrator has not been appointed within 90 days of the death, the case would abate. In this scenario, the case abated against the deceased in March or April 2022, as there was no any person appointed as the legal representative or an administrator and that the notice of the exparte judgment was advertised in the newspaper on the 11<sup>th</sup> of April 2022 page 25 and the judgment was delivered on 3<sup>rd</sup> June 2022. He emphasized that; by the time the Judgement was delivered, the Applicant had already been appointed as an administrator of the estate. The counsel further argued that, he understands that; the application of this nature is granted based on the discretion of the court but the discretion must be based on sufficient reasons. The Court of Appeal has already ruled on grounds for issuing an extension of time as follows;

- i) Lack of negligence on the part of the applicant.
- ii) The application must be brought without undue delay
- iii) The applicant must account for the delay.



iv) The applicant must show good cause for the delay in taking action.

He alluded further that; the Applicant in his application has not complied with the grounds for extension of time stated above. That she only raised two grounds that she was not aware of the case and that she had no powers /mandate since the appointment to the administration of the estate was contested. It was his submission that whether she had power or not, that was not amplified by the applicant on how the appointment to the administration of the estate was a limitation. Since she was not aware of the case, it is an indication of negligence as this case was in this Court since 2016 and the date of judgment was announced in the newspaper, which serves as a general notice to the public. Similarly he contended that the Applicant also failed to account for each day of delay and nothing has been accounted on illegality. The Counsel implored the Court to dismiss the application for lack of merit. In rejoinder, the counsel for the applicant reiterated his submissions in chief and went on to reply on the raised issues by the counsel for the respondents as follows;

With regard to the issue of making his submissions out of context, he clarified that probably it was the issue of language which was used but his focus was on setting aside abatement as it appears on the prayers in the chamber summons. He prayed for this Court to consider his submissions and prayers made in the Chamber summons for this court to extend time to set aside abatement orders and other prayers which are consequential and



related. He stated that the 1<sup>st</sup> prayer goes together with the second prayer of the applicant being joined as the legal representative of the deceased estate. He clarified further that, there was no any undue delay or negligence on this case as the applicant became aware of the matter when she was served with the notice to show cause in the Application for Execution and immediately within 10 days, she filed the present application. He amplified further that; the fact that the real wife of the deceased was not aware of the consolidated cases and the application for execution, is a strong reason for granting extension of time. He submitted that, that is why the said woman i.e. Christina Massawe could not apply for letters of administration upon the death of the applicant's husband.

With regard to her appointment as an administrator, the counsel submitted that upon realising that there was a pending matter before this court she requested for perusal of the court file. She was made aware of the case when she was served with a notice to show cause whereby she immediately reacted by filing the present application within 10 days of being served with the Notice to show cause. Those days included also consultations with the advocate, Court perusal and filing of the instant matter. The Counsel equally reiterated on the delays caused by the caveat proceedings, until when they were withdrawn.





With regard to the Affidavit of Advocate Erick Rweyemamu, he submitted that, the said cannot render the application incompetent, he found the Affidavit to be competent. As for the status of Christina Massawe, the woman who used to appear with the deceased in court, the Counsel submitted that appearing with a woman in court is not a criteria for concluding that the said woman is a real wife of a particular person. He argued that, surprisingly, the Notice of ex parte judgement was never served to the said woman who was appearing in Court with the deceased person but was published in a Newspaper. He thus prayed for the court to grant all the prayers in the application as they are related.

Having considered the rival submissions of the learned advocates, the question before this court is whether the applicant has demonstrated sufficient cause to warrant this court to grant extension of time to enable her to file an application to set aside abatement against the 1<sup>st</sup> defendant in the consolidated land cases no 122 and 286 of 2016 and to be joined as a legal representative in the said cases.

Before I venture into the issue of extension of time, I would like to first deal with the issue raised by the Counsel for 1<sup>st</sup> Respondent that the Counsel for the Applicant has made his submissions out of context, that is instead of arguing about setting aside abatement he focused his arguments on setting aside ex parte decision which for him was not appropriate. In his Rejoinder the counsel for the Applicant clarified that perhaps it could be the issue of

expression or language but what he meant were reasons for setting aside abatement and be joined as the legal representative as they appear in the Chamber Summons and Affidavit. He thus invited the Court to consider all the prayers made in the Chamber Summons.

With regard to this issue, I disagree with the Counsel for the 1<sup>st</sup> Respondent that the Counsel for the Applicant made his submissions out of context, based on the record of proceedings the Counsel began his submissions by adopting the contents of the Chamber Application and throughout his submissions he referred the Court to the issue of the death of the Applicant's husband, the decision made in consolidated land cases cited above when the Applicant's husband had already died and reasons for extension of time to file applications for setting aside abatement and the Applicant to be joined as the legal representative. That is how the record of the Court indicates and the Counsel in his rejoinder, made clarifications to the effect that what he meant were reasons for extension of time to file an application to set aside abatement and be joined as a legal representative as stated above. Therefore this issue will not detain me for a long time.

I now move to the issue of extension of time. The position is quite cemented with respect to extension of time. In the case of Joash **Masai vs Dalmas Mgaya, Misc. Civ Application No. 178 of 2019, HC Mwanza**, Ismail J as he then was, when discussing this concept stated that;



**It is simply that an application for extension of time can only be granted upon satisfaction by the Court that the applicant thereof has presented a credible case and he has acted in an equitable manner. This position takes into account the fact that extension of time is not granted as of right. Rather it is an equitable remedy granted to a party who acts equitably.**

The Honourable Judge, while citing the persuasive decision of the Supreme Court of Kenya in **Nicholaus Kiptoo Arap Korir Salat vs IEBC & 7 Others, Sup. Ct Application no. 16 of 2014** went on to state as follows;

**Extension of time being a creature of equity, one can only enjoy it if (one) acts equitably; he who seeks equity must do equity. Hence, one has to lay a basis that (one) was not at fault so as to let time lapse. Extension of time is not a right of a litigant against the court but a discretionary power of courts which litigants have to lay a basis (for), where they seek or grant it”.**

A similar view was expressed by the Court of Appeal in **Lyamuya Construction Company Ltd Vs. Board of Registered Trustees of Young Women’s Association of Tanzania, CAT Civil Application No. 2 of 2010** (unreported) wherein key conditions on the grant of an application for extension of time were restated. These are;

- (a) The Applicant must account for all the 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 he intends to take.**

**(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 illegality of the decision sought to be challenged.**

See also the case of **Benedict Mumello Vs Bank of India (2006) 1 EA 227, Kalunga & Company Advocates Vs. National Bank of Commerce Ltd TLR 235.**


With regard to the term sufficient cause and what it entails, the case of Joash (Supra) stated that;

**What is important however is that interpretation of sufficient cause has to take a broad approach which ensures that the applicant's journey in search of justice is not stifled.**

**See also the decision of Katiti J in the case of Peter William Matoke versus Abdalla Champion Civil Appeal no. 56 of 1994 HCT, DSM.**

I am also further guided by the decision in **Tanga Cement Company Limited vs. Jumanne D Masangwa and Amosi A Mwalwanda** Civil Application No.6 of 2001 (unreported) wherein Nsekela JA had this to say;

**"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”**

In the instant case, the counsel for the applicant has submitted before the court that the main reason for extension of time to file an application to set aside abatement as well as to be joined as the legal representative is the fact that the applicant was not aware of the consolidated Land Cases No.122 & 286 which were being prosecuted by his deceased husband along with one Christina Massawe, without her knowledge. The deceased was the first defendant in the said cases. That she became aware of the said cases on 21<sup>st</sup> November 2022 when she was served with the notice to show cause in Execution Case No.116 of 2022. Immediately thereafter she conducted perusal of the said case file and learnt on the recusal of advocate Eric Rweyemamu in the matter who had been all along representing the deceased in the case who was appearing with one Christina Massawe. Then on 30<sup>th</sup> November 2022, upon consultations with her advocate she filed the instant application within ten days of being served with a notice to show cause (Refer to the Applicant's Affidavit).

The Counsel also submitted on the delays made due to objections (caveats) made to the Applicant 's application for administration of the deceased's estate, by one Christina Massawe and 4 others until the same were finally disposed by the Court.



From the facts above this Court finds that in the circumstances of this matter, the applicant's reason that she was not aware of the Consolidated Land Case No.122 and 286 of 2016 until when she was served with the notice to show cause on 21<sup>st</sup> November 2016 is a sufficient cause for enlargement of time for her to file an application to set aside abatement and an application to be joined as a legal representative, see para 5 of the Applicant's Affidavit. This Court has verified through the affidavit of the Applicant and that of the Advocate Eric Rweyemamu and satisfied itself that deceased was attending in Court with another woman, one Christina Massawe who claimed to be his legal wife while in fact she was not, see para 4 and 7 of the Applicant's Affidavi and Para 3 of the Affidavit of Advocate Rweyemamu. Similarly, Para 7 of the Counter Affidavit of the Counsel for the 1<sup>st</sup> Respondent also affirms this fact where it states;

**Throughout the deceased Ferdinand Donalt Temba together with the 2<sup>nd</sup> Respondent have been enjoying the service of Advocate Eric Rweyemamu and on several occasions the deceased and his wife Christina C. Massawe attended Court sessions and the said Cristina Massawe continued to attend the Court sessions even after the demise of the said Ferdinand Donalt Temba.**

It my firm position that, under such circumstances the applicant being the wife of the Deceased was prevented from knowing the truth of the matter and be able to act within the time stipulated by the law. The fact that the notice

for exparte decision and Judgement were advertised in the newspaper of wide circulation by the 1<sup>st</sup> Respondent i.e. Mwananchi News paper, or as contended by the Counsel for the 1<sup>st</sup> Respondent can not serve any purpose in the mist of lack of knowledge or information on the part of the applicant regarding the existence of the said consolidated land cases no 122 and 286 of 2016 which were prosecuted by the deceased and the woman by the name of Christina Massawe.

With regard to the arguments by the 1<sup>st</sup> Respondent that the Applicant ought to have known about the case since it was advertised in the newspaper, it is my position further that, the fact that the notice of exparte judgement and the judgement in respect of consolidated applications were advertised in Mwananchi Newspapers, does not serve any purpose since the applicant was completely un -aware of the case and could not have even comprehended it since she was not the one who was originally impleaded but the deceased. Secondly, I agree with the arguments by the Counsel for Applicant that if Applicant knew about the matter why did the Respondents advertise it in the Newspaper? Why couldn't they have served Christina Massawe with the Notice?. The argument by the Counsel for the Respondent that, the deceased Advocate also knew about the matter, is a non starter in this case, since he was also prosecuting the matter on behalf of the deceased and in the absence of the knowledge of the Applicant as the real wife of the deceased as stated in his affidavit in support of the Applicant' Application. See para 3 of Advocate

Rweyemamu's Affidavit and para 4 where he states that their Law firm had to recuse from representing the deceased following lack of cooperation from Christina Massawe who was not willing to meet the Applicant as the administrator of the estate.

With regard to the issue of counting days for delay and indicating reasons for delay, the Applicant has stated that apart from not knowing the existence of the deceased case, following his death at Rabininsia Hospital in October 2020, she was appointed as the administrator of the deceased estate on 08/12/2021 by Hon Mugeta J as he then was, however the said appointment was contested by Christina Massawe who claimed to be the deceased wife and four others in Civil Appeal no. 45 of 2023 which was later withdrawn by the Appellants on the 6<sup>th</sup> day of July 2023, see para 4 of her Affidavit and the attached Order by G. H. Herbert, Deputy Registrar –Court of Appeal.

Further at that time, she was also still not aware of the matter until November 2023 when she was served with the Notice to show cause in Execution No. 116 of 2023 and immediately she conducted perusal and filed the instant matter within ten days. Therefore the issue of her not accounting for each day of delay lacks merits too because she took efforts in pursuing the matter immediately after she became aware of the consolidated land cases upon being served with notice to show cause in the Application for execution no116/2023. See para 4, 5 and 6 of the Affidavit of the Applicant and the decision by Mugeta J. **in the matter of the estate of the late Ferdinand**





**Donalt Temba and in the Matter of an Application for letters of Administration by Simforosa Casmiry Temba and Christina S. Massage and others, Probate and Administration Cause No. 12/2021, DSM.**

Based on this information, It suffices to state that the explanations given by the Applicant and supported by the Affidavit of Advocate Rweyemamu are sufficient to show that the Applicant's delay was not caused by negligence and that she was not sloppy in prosecuting the matter. Immediately when she became aware of the case she conducted a file perusal to find out that there was recusal by an Advocate who was representing the deceased (1<sup>st</sup> Defendant) for the reason of lack of cooperation from Christina Massawe who alleged to be his wife while in fact she was the only deceased legal wife, See Para 6 of the Applicant's Affidavit, a copy of the Marriage Certificate attached as annex E. and the Judgement by Mugeta J in the matter of the estate of the late Ferdinand Donalt Temba (supra) which affirmed her marriage to the deceased.

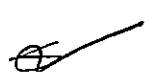
Therefore the efforts taken by the Applicant have met the test set in the case of **Lyamuya Construction Company Ltd Vs. Board of Registered Trustees of Young Women's Association of Tanzania, CAT Civil Application No. 2 of 2010** (unreported). That is she has been able to account for all the period of delay, the delay has not been inordinate from the date she knew about the land cases she immediately conducted perusal and



filed this Application within ten days, i.e. from 21<sup>st</sup> of November 2023 to 30<sup>th</sup> Day of November 2023, upon consultations with her Advocate. Furthermore all these efforts indicate that the Applicant has shown diligence and not apathy, negligence or sloppiness in the prosecution of the action she has taken. In the similar vein I agree with the position cited by the Applicant in the **case of KCB Bank Sarah Joel Mahanyu, Misc. Land Application No. 30 of 2021, the HCT Arusha** that the reasons advanced by the Applicant constitute good reasons.

Lastly, the Counsel for the Respondent raised an issue that the Affidavit of Advocate Rweyemamu is incompetent for containing a photocopy of the signature. The Counsel for the Applicant maintained that the same is competent. With regard to these assertions, the Counsel for the 1<sup>st</sup> Respondent could not adduce any proof to show that the said signature is a photocopy hence his submissions fell short of requirements stated under section 110,11 and 112 of the Tanzania Evidence Act Cap 6. He did not place any material before me to prove that indeed the said signature was a photocopy. Hence I found the said Affidavit to be competent.

Having said so, this court holds that the applicant has adduced sufficient reasons to warrant extension of time for her to file both applications for setting aside abatement and be joined as the legal representative.



In the upshot I proceed to grant both prayers. The applicant should proceed to file an application to set aside abatement as well as an application to be joined as the legal representative within 14 days from the date of this ruling.

Each party shall bear its own costs.

It is so ordered.



*S.D. Mwaipo*  
**S.D. MWAIPOPO,  
JUDGE,  
17/11/2023**

The Ruling delivered this 17<sup>th</sup> day of November, 2023 in the presence of Learned Advocate Josepha Tewa for the Respondents who also held brief for the learned Advocate Deogratius Mwarabu for the Applicant, is hereby certified as a true copy of the original.



*S.D. Mwaipo*  
**S.D. MWAIPOPO  
JUDGE  
17/11/2023**