

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

**MISCELLANEOUS LAND APPLICATION NO. 522 OF 2023
(Originating from Land Case No. 69 of 2023)**

MTEMI NALUYAGA..... APPLICANT

VERSUS

MUSSA HUSSEIN KHAMIS.....RESPONDENT

RULING

Date of last Order: 26/02/2024

Date of Ruling: 14/3/2024

A. MSAFIRI, J.

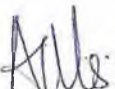
The applicant Mtemi Naluyaga has filed this Application seeking for the Court's order to set aside its ex-parte order issued on 16th August 2023 in Land Case No. 69 of 2023. The application is filed under Order VIII Rule 14(2) of the Civil Procedure Code Cap 33 R.E 2019 (the CPC). It is supported by an affidavit sworn by the applicant himself. The respondent also through his advocate Mr. Benitho Mandele filed a counter affidavit contesting the application.

The hearing of the application was conducted by way of written submissions. The submission in chief and rejoinder in support of the

Alle

application was drawn and filed by Mr Abraham Hamza Senguji, learned advocate for the applicant.

In his submission, Mr Senguji gave brief facts giving rise to the present application. That from the records, it appears that Land Case No. 69 of 2023 originates from Temeke District Land and Housing Tribunal Application No. 411 of 2018. That the applicant was represented by Mr Alex Balomi at the said Tribunal. That the Chairman of Temeke District Tribunal decided in favour of the applicant and appointed a court broker to evict the respondent and others in the suit land. That the respondent with 23 others instituted Revision No. 1 of 2019 before this Court whereby the Court upheld the decision of the District Tribunal except for the respondent. That the applicant was aggrieved by the decision of this Court and has sought a second bite in the Court of Appeal of Tanzania in Application No. 587/17 of 2023.

Mr Senguji submitted on the reason for this application that the respondent has served the summons through advocate Alex Balomi without taking into consideration that the applicant has decided to change advocates. That, advocate Balomi never informed the applicant that he was served the summons and was required to file written statement of defence. 

That the applicant discovered very late that advocate Balomi received the summons and failed to file written statement of defence as per the law. That after the court has issued ex-parte order, the applicant took prompt action to engage another advocate. **The counsel insisted that the applicant was not aware of the suit before the order to proceed ex-parte issued by this Court.** He added that from the aforesaid, it is clear that there was no good communication between advocate Balomi and the applicant and this is what caused the applicant to fail to file the written statement of defence within the time prescribed by the law.

Mr Senguji submitted that another reason for this court to set aside the ex-parte order is that the Land Case No. 69 of 2023 before this court is premature as there is a matter pending before the Court of Appeal which oust the jurisdiction of this Court. That the applicant cannot move this Court without filing his written statement of defence.

He prayed that the order to proceed ex-parte be set aside and the court allow the applicant to file written statement of defence.

The reply submission was drawn and filed by Mr. Benitho Mandele, advocate for the respondent. He started his submission by raising objection that the applicant is moving the court on omnibus prayers. That first, the applicant is praying to set aside ex-parte order issued by this

Alle

court and second that he is praying for an order allowing the applicant to file written statement of defence. He prayed that the application be struck out with costs on those applications.

Submitting on the application, Mr Mandele contended that the application contains no single reason to warrant this court to grant the application. He pointed that the entire submission by the counsel for the applicant is based on serious lies or misinformation which has effect of seriously misleading this court.

The counsel argued that at the time of service of summons, advocate Balomi was still under engagement of the applicant and that the applicant and Mr Balomi appeared together in Land Case No. 69 of 2023. That on 09/5/2023 the applicant appeared in this court and informed the court that his advocate Mr Balomi was appearing before the Court of Appeal and stated that they still have time to file the written statement of defence. That on 10/7/2023, the applicant appeared in court and informed the court that his advocate is indisposed. That on 27/7/2023, the advocate Mr. Ballomi and the applicant himself appeared in court and asked for extension of time to file written statement of defence but the prayers were rejected and dismissed for lack of merit.

Mr Mandele submitted further that inaction and negligence of the advocate and/ or of the applicant himself are not sufficient reasons to

warrant this court to exercise its discretion to allow the application. He concluded by praying for dismissal of the application with costs.

In rejoinder, the applicant contested the raised objection and contended that it is a settled law that objections cannot be raised in the submissions without prior Notice. He urged the court to disregard objection. He reiterated his submissions in chief.

Before I determine the application, I will first look into the objection raised by Mr. Mandele, advocate for the respondent on the alleged omnibus prayers by the applicant. I agree with the submission by Mr Senguji that there is a procedure for raising a preliminary objection and certainly not by raising it during the submissions. For that reason, I disregard that point of objection by Mr. Mandele as he ought to have raised it properly as per the procedure and not to catch the other party by surprise.

Back to determination of the application, the same is brought under Order VIII Rule 14(2) of the CPC. It provides thus;


*"14(2) Where before ex-parte judgment has been entered pursuant to sub-rule(1) the court may, **if the defendant assigns good cause**, set aside the order to proceed ex-parte, upon such terms as the court may direct as to costs or otherwise"(emphasis supplied).*

Alles.

The issue for determination hence is whether the applicant who was the defendant in the Land Case No 69 of 2023 has assigned good cause to move this court to set aside its ex-parte order which was entered against the applicant on 10/8/2023.

Upon going through the contents of the affidavit supporting the application and what was submitted in court by the counsel for the applicant in support of the application, I found serious contradictions between what was deposed in the affidavit as against what was submitted in court.

In the affidavit of the applicant, the advanced cause for setting aside the ex-parte order can be read at paragraphs 10, 11, 12, 13 and 14 of the affidavit. In the said paragraphs, the applicant admit to have been served with the summons by the respondent who is the plaintiff in Land Case No. 69 of 2023. He admit to have engaged advocate Balomi to prepare and file the written statement of defence but the said advocate did not do so and he never informed the applicant. That, the omission of preparing and filing written statement of defence was done by the advocate contrary to his instructions.

While in the submissions before the court, the advocate for the applicant Mr. Senguji submitted in contradiction of the affidavit. As already reproduced hereinabove, it was submitted that the applicant discovered 

very late that advocate Balomi received the summons and failed to file written statement of defence as per the law. That after the court has issued ex-parte order, the applicant took prompt action to engage another advocate. That, the applicant was not aware of the suit before the order to proceed ex-parte issued by this Court and that there was no good communication between advocate Balomi and the applicant and this is what caused the applicant to fail to file the written statement of defence within the time.

According to the proceedings in Land Case No. 69 of 2023, the applicant as 1st defendant appeared in court in person on 09/5/2023 and admitted to have received the Plaint. The case was set for mention on 29/5/2023 but the 1st defendant was absent without notice. Again on 19/6/2023, the 1st defendant was absent in court without any notice. By that time, the time for filing his written statement of defence has already lapsed considering that he was supposed to file the same within 21 days from the date of service. On 10/7/2023, the 1st defendant appeared in court and informed the court that his advocate is praying for extension of time and that the said advocate will state the reasons himself.

It should be noted that by that time, the purported advocate has never appeared in court and the 1st defendant has never told the court that he has engaged an advocate. On 27/7/2023, the advocate Mr Balomi

Allo-

entered appearance in court and prayed for extension of time admitting that initially the summons and plaint were initially sent to the 1st defendant.

In the ex-parte order, the court was of the view that according to Order VII Rule 1 of the CPC, it is the defendant who shall, within 21 days if he wishes so, file his written statement of defence. Not the defendant's advocate. According to the court records, it was the 1st defendant who entered appearance in court on 09/5/2023 and admitted to the court that he has already received the Plaint. In the instant application, the applicant has not told the court when he engaged the advocate Mr. Balomi. His affidavit is silent about that important fact. This is because even if we agree to shift the blame on the advocate Mr. Balomi, (which we should not), the important question is when the applicant did engaged the advocate? In the records it shows that the applicant appeared in person in 09/5/2023, admitted to have received the Plaint, never showed up on 29/5/2023 and on 19/6/2023 until on 10/7/2023 when he showed up and shifted the cause of delay to the advocate.

However, it my view that the applicant had a first obligation to ensure that his written statement of defence is filed on time as all this time he was aware of the case against him. Two months have passed since the applicant's admission to have received the plaint to the time he appeared

Alls

in court stating that his advocate was praying for extension of time. The applicant has not explained to the court what he was doing from 09/5/2023 when he appeared in court, disappeared and reappeared in court on 10/7/2023 seeking for extension of time. What he has done is blaming his advocate but the facts shows clear that there was gross negligence on his part as the defendant which cause the delay to file his defence on time. Therefore, including the serious contradictions of the facts between the contents of affidavit and the submissions in support of the application, I find that the reason of delay to file written statement of defence that it was caused by advocate to hold no water and I dismiss it.


The second reason which is being advanced by the applicant both in affidavit and in submissions touches on the jurisdiction of this Court. The applicant states that the Land Case No. 69 of 2023 before this Court is premature as there is a matter pending before the Court of Appeal which oust the jurisdiction of this Court. That the applicant cannot move this Court without filing his written statement of defence.

I have read the background of this dispute as presented in the affidavit deposed by the applicant where he stated that in the year 2006, Land Application No. 8 of 2006 was instituted before the District Land and Housing Tribunal of Temeke against him by the respondent and other people requesting the said Tribunal to declare them as the rightful owners

Alle

of a piece of land located at Magogoni area, Kigamboni District. (herein as suit land). The District Tribunal declared the applicant the lawful owner of the suit land. That the Tribunal appointed the Court Broker who evicted the trespassers including the respondent. That the respondent and other 23 trespassers instituted Revision No. 1 of 2019 before this Court whereby the Court upheld the decision of the District Tribunal except for the respondent. That the applicant was aggrieved by the decision of this Court and has sought a second bite in the Court of Appeal of Tanzania in Application No. 587/17 of 2023.

However, according to the respondent's submissions, in the year 2023, the High Court in Misc. Application No. 324 of 2022, reviewed its order in Revision No 1 of 2019 and proceeded to strike out the proceedings and order in Misc. Application No. 422 of 2018. That in the Court of Appeal, the applicant is challenging the decision of this court in Misc. Application No. 324 of 2022 and not Revision No 1 of 2019 as the applicant claims.

In this, I find that there have been multiple applications in this dispute which involves more parties than the applicant and the respondent. The applicant have not submitted clearly on how the Application which is pending in the Court of Appeal oust the jurisdiction. 

of this Court in entertaining the Land Case No. 69 of 2023. I also find this reason to hold no water and I dismiss it.

From the foregoing analysis, I find that the applicant have failed to show good cause upon which the court could have exercised its discretion and set aside its ex-parte order which was issued on 10/8/2023.

The application is hereby dismissed with costs.

It is so ordered.



A handwritten signature in black ink, appearing to read "A. Msafiri", is written over a horizontal dotted line.

A. MSAFIRI

JUDGE

14/3/2024