IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

MIC. LAND APPLICATION NO.44 OF 2021

(Arising from High Court of Tanzania at Shinyanga, in Land Appeal No.3 of 20220)

MHULU TABU .....APPLICANT

VERSUS

NDALALI MAZIKU .....RESPONDENT

RULING

31st July & 9th August 2023

F.H.MAHIMBALI, J,

Mhulu Tabu moved this Court for an order of extension of time within which to lodge an application for setting aside expert judgment of this Court (Mdemu, J) in Land appeal No.03 of 2020 dated on 27/11/2020. The application has been brought by way of Chamber Summons under Section 14 (1) of the Law of Limitation Act, Cap 89, R:E 2019 and is supported by an affidavit sworn by the applicant. The applicant pointed out reasons for the delay in paragraphs 3,6,7,8,9,10,11,13 of the affidavits, being technical delay, mistake of the advocate for his failure to

file written submission in Land appeal No.03 of 2020 as it was ordered by this court, and sickness.

The respondent herein through his counter affidavit resisted all grounds in support of the applicant's application and thus pressed for dismissal of the application for lack of merit.

This application was heard *inter partes* whereby the applicant was represented by Mr. Phares Malengo, Restuta Peter, and Veronica Chamu learned advocates while on the side of the respondent enjoyed legal service of Mr Bakari Chubwa Muheza, learned advocate.

Mr. Malengo on behalf of the applicant first prayed for the applicant's affidavit in support of the application be adopted and form part of the submission.

To start with, Mr. Malengo submitted that, the technical delay is one of good reasons for grant of such application. He referred this Court to the Case of ***Fortunatus Masha versus William Shija & Another (1997) TLR 154.*** He clarified; it is mow settled principle of the law that technical delay is one of good grounds for extension of time. He made reference to Section 21 (1) of the Law of Limitation Act in which the period the applicant has been prosecuting against the defendant found to be good cause of action, thus ought to be excluded in computing the same.

Thus, the period from 27th November 2020 to 26th June 2021 when Misc. Civil Application No. 77 of 2020 was struck out by Hon Mkwizu J. should be excluded in computation of time as that time was used prosecuting that application.

Further, Mr Malengo submitted that there is an issue of illegality as the applicant was condemned unheard on which the counsel for the respondent raised new ground and argued in which the applicant was unaware. He referred this court at page 4 of the impugned judgment of this court.

He contended that the right to be heard is very fundamental before adverse action is taken. He referred this court to the case of ***Mbeya Rukwa Auction and Transport Ltd versus Jestina George (2003) TLR 251.***

Mr. Malengo further submitted the other cause for the grant of this application is a mistake by an advocate who was prior engaged in prosecuting the Land Appeal Land Appeal No. 03 of 2020 which led to the experte judgment for his failure to file written submission on behalf of the applicant as it was ordered by the Court.

He cited the case of ***Zuberi Musa versus Shinyanga Town Council, Civil Application No.3 of 2007,*** (CAT) to the effects adding

that it is now settled law that parties should not be punished for advocate's mistake.

Lastly Mr. Malengo submitted that, the applicant fell sick. Since sickness contributed the applicant's failure to file the application within the time as funds used for treatment made him delay to file the application for setting aside experte judgement within the prescribed time

In opposing the applicant's application, Mr. Bakari for the respondent prayed for the respondent's counter affidavit to be adopted and form part of his submission.

Firstly, he contended that, failure of an advocate to file written submission was total negligence of the advocate in which no one is to be blamed.

On the ground of illegality, Mr. Bakari averred that the same has not featured in the affidavit and thus cannot be raised at this stage. However, Mr Bakari argued on the ground of financial problem encountered by the applicant, that the same does not feature into the applicant's affidavit. He also averred that the ground of financial problem has never been ground of for extension of time.

On sickness ground, Mr. Bakari submitted that it is true that sickness constitutes one of the good reasons for extension of time. However, in the matter at hand, there is nothing that proves sickness of the applicant. And there is no any explanation as to how sickness prevented the applicant from taking necessary legal steps. Therefore, the ground is insufficient in itself, as it has not even established in which hospital was he admitted/attended, the said medication and when he recovered.

Mr. Bakari was of the conclusion that, the applicant's application is devoid of any merit hence ought to be dismissed.

Mr Bakari also contended that the cited section 21 (1) of the Law of Limitation Act is misconceived in the context of this case. As it does not support technical delay as raised.

He added that, it is on record that the impugned judgement was delivered on 27/11/2020. And that the first Misc. Civil Application No.77 of 2020 was struck out on 28/6/2021. What then the applicant has been doing in between until on 8/10/2021 when he filed this application. It is his submission that the said time has not been accounted for.

Mr. Bakari further argued that, it is trite law that affidavit is self-proof evidence in leu of oral testimony. If the same has not been self-proof, he then pressed for dismissal of the application with costs.

In rejoinder, Mr. Malengo reiterated what submitted in chief. He contended that the ground of illegality that has featured out by its impugned judgment (Land Appeal No. 3 of 2020) being attached in affidavit accompanying the application.

On accounting of time between 28/11/2020 to 28/6/20221 when Misc. Land Application No.77 of 2020, was struck out, and the filing of the current application, Mr. Malengo just submitted that the instant application has been filed without delay.

On the ground of sickness, he clarified that the applicant's affidavit is clear as to when the applicant was sick, adding that the issue of control number self-explanatory in the affidavit. Mr. Malengo also added that Section 21 (1) of the Law of Limitation Act (supra) is relevant. It totality, he insisted that what has been prayed for in the application be granted as per his submission.

In evaluating the arguments made by both parties, the main point for consideration and determination is whether sufficient reasons have been given to warrant the grant of the application.

I have gone through the affidavit, counter affidavit and rival submissions by the parties in consideration of this application.

To start with the ground of technical delay, Mr Malengo submitted that much time spent by the applicant in prosecuting of Misc. Land Application No. 77 of 2020 which ultimately was struck out by Hon. Mkwizu J, on 28th day of June 2021 and thus it suffices with section 21 (1) of the Law of Limitation Act (supra) which exclude time for computation if the either party spent such time in prosecuting cases before the Court.

It is settled law principle that in computing time for limitation the period for which either party used in prosecuting cases be excluded. see Section 21 (1) of the Law of Limitation Act (supra). Meanwhile the law provides that, the time limit for application for setting aside experte judgement is 30 days. Now, Misc. Land Application was struck out on 28th June 2021 with the directives that the applicant should within 30 days to file his application.

The application at hand was filed on 8th October 2021, more than five months lapsed since Misc. Land Application No.77 of 2021 was struck out by this Court.

In my considered view, it would be proper for the applicant to have accounted for each day of delay from 28th June to 2021 to 8th October 2021 which is almost 103 days. The failure of which makes insufficient

ground of the application. This being the application for extension of time, the law is settled that the applicant has to show sufficient cause or good cause for delay as it was held in the case ***of Regional Manager, Tan roads Kagera versus Ruaha Concrete Company Ltd, Civil Application No. 96 of 2007, CAT (unreported) and Benedict Mumello v. Bank of Tanzania [2006] E.A 227***; that applicant is required to account for each day of delay and give sufficient reason for that delay. There is a litany of cases to that effect.

In the case of ***Attorney General versus Mkongo Building and Civil Works and another, Civil application No, 266/16 of 2019,*** the Court of Appeal formulated guidelines that may be considered in application for extension of time like the one at my hand. Criteria to be considered in application for extension of time as formulated by the Court of Appeal in Mkongo Building case, supra, are that:-

"(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 that he intends to take; and***

(d) if the court feels that there are other sufficient reasons, such as the existence of a point of law sufficient importance; such as the illegality of the decision sought to be challenged"

Therefore, the failure of the applicant to file his application for setting aside experte judgement was not caused by the grounds of technical delay, as he failed to act immediately soon after the delivery of the ruling by this Court dated 28th June 2021.

Further, Mr. Malengo submitted that, the application ought to be granted on the reasons that, the impugned judgement contains illegality. He referred this Court at page 4 of impugned judgement.

He averred that the applicant was not heard on the new ground raised by the counsel when submitting his grounds of appeal, and thus since the applicant was not heard, his right to be heard was infringed.

I have gone through impugned judgment to ascertain on the illegality mentioned by the applicant's advocate and I found none. I so hold because Mr. Melengo did not mention what ground was argued in during the hearing of the appeal of which the respondent was not aware with.

Entirely I agree with Mr. Bakari that, the applicant denied herself for his right to be heard. See the case of ***: Mussa Makweta Musa versus Faraja Credit Finance, Civil Appeal No.08 of 2021 on the effects of failure to file written submission.***

However in the case of ***Chunila Dahyabhai v. Dharamshi Nanji and Others, AIR 1969 Guj 213 (1969) GLR 734,*** which the court finds persuasive, the following paragraph was quoted from the decision of the Supreme Court of India in AIR 1953 SC 23:-

> *"„.the words illegallity' and 'materiall irregularity' do not cover either errors of fact or law. They do not refer to the decision arrived at but to the manner in which it is reached. The errors contemplated relate to material defects of procedure and not errors of either law or fact after the formalities which the law prescribes have been complied with"*

In the case of ***Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young Women's Christian Association of Tanzania, Misc. Civil Application No. 2 of 2010,*** the Court observed;-

> *"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in VALAMBIA'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" [Emphasis added]***

Guided by the principle laid down in **Lyamuya's case**, I find the applicant's advocate failed to identify and point out the illegality committed by the Court which needs rectification and of which can be ascertained on apparent face, therefore this ground is also dismissed.

Meanwhile, it was argued that the failure of the applicant's advocate to file written submission during the hearing of the Land Appeal No. 03 of 2020, was among of the factors transpired in this application. Mr. Malengo argued that the client should not be punished for the mistake of their advocates. He referred the case of Zuberi Musa(supra) to the effects.

It is true that the Land Appeal No 3 of 2020 was heard and determined expert for the failure of applicant (respondent) to file written submission.

It is established principle of the law that failure to file written submission as directed by the Court amounts to have denied himself/herself with the right to be heard. See the case of ***NIC of Tanzania and Consolidated Holding Corporation v. Shengana Ltd, Civil Application No. 20 of 2007*** (unreported), ***Abisai Damson Kidumba v. Anna N. Chamungu and 3 Others, Miscellaneous Land Application No. 43 of 2020, Godfrey Kimbe v. Peter Ngonyani, Civil Appeal No. 41 of 2014 .***

I therefore disagree with the argument of Mr. Malengo that failure to file written submission by the applicant's advocate amounts to the mistakes of the advocate retained. My firm view on this regard is that the act of applicant's advocate in Land Appeal No.3 of 2020 was gross negligence for his failure to discharge his duties and so the cited case is irrelevant as the same was about mistake committed in drafting's pleadings and not in this context. Therefore, this ground is also devoid of merit.

Further, it was argued that the applicant fell sick and thus since the sickness constitutes ground for extension then the applicant should be granted his application for extension of time. He also added that the

applicant used his financial resources for treatment and that led for his delay to file his application.

I agree with Mr Malengo that sickness has always good cause for extension of time, however the same should be strictly proved.

In the case of ***Seatus Laurian Ndihaye versus Mariam Kitoela, Miscellaneous Civil Application NO.6 of 2021,*** the court held that

> " *The applicant's only reason advanced is illness. I am well aware that as of late there are decisions which are to the effect that illness constitutes sufficient cause for extension of time. However,* ***such illness must be sufficiently proved.*** *Looking at the affidavit filed in support of the application, the applicant has attached to the affidavit a letter from the traditional healer indicating that he was admitted at his place where he was receiving treatment and was later discharged after he was well. That traditional healer further proved his professionalism by attaching a copy of his Certificate of incorporation No. A.91041 issued on 29/01/2019. The reason advanced by the applicant suffices to be sufficient cause upon which this court can exercise its discretion"*

In the instant application there is no any supportive evidence to prove that the applicant was sick and thus used his resources to encounter illness. In up short of the proof, this ground is also devoid of merit.

For the foregoing, I find that applicant has failed to provide sufficient cause of delay and further has failed to account for each day of delay. I therefore dismiss the application for want of merit.

DATED at SHINYANGA this 9th day of August, 2023.

F. H. MAHIMBALI

JUDGE