

IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

MISC. LAND APPLICATION NO. 13 OF 2020

(Arising from Land Appeal No.39 of 2018 in the High Court of Tanzania – Mwanza, Originated from Land Case No. 54 of 2006 in the District Land and Housing Tribunal for Mara at Musoma)

**JOHN PETRO LUSAYA (Administrator of Estate
of the Late Suzana Peter Lusaya) APPLICANT**

VERSUS

ATHUMAN ALLY NYABANGE RESPONDENT

RULING

Last Order: 27.05.2020

Ruling Date: 29.05.2020

A.Z.MGEYEKWA, J

This is an application for extension of time to set aside the exparte judgment dated 03rd July and 5th December, 2018.

which is made under section 14 (1) of the Law of Limitation Act Cap. 89 [R.E 2019] which reads together with section 68 (e) and 95 of the Civil Procedure Code Cap.33[2019].

The applicant's application is supported by an affidavit deponed by John Petro Lusaya, applicant. The respondent filed a Counter Affidavit deponed by Athuman Ally Nyabange, respondent.

The hearing was conducted via audio teleconference, and Mr. Mashaka learned counsel represented the applicant whereas, Mr. Godfrey Martin, learned counsel represented the respondent, both were remotely present.

It was Mr. Mashaka who started to roll the ball, he prayed for this court to adopt the applicant's affidavit and form part of his submission. Mr. Mashaka submitted that the matter originated from Land Case No. 54 of 2006 which was before the District Land and Housing Tribunal for Mara at Musoma. He added that at the High Court the appeal was before Hon. Matupa,J. Mr. Mashaka went on to submit that the applicant seeks an extension of time to set aside the exparte judgment of this court. He cited the case of **Lyamuya Construction Company Limited v Board of Trustees of Young Women's Christian Association of Tanzania**, Civil Application No.2 of 2010 (unreported) which has set three principles that the applicant has to account days of delay. Secondly, the delay should not

be ordinate and thirdly, the applicant should show diligence, not negligence.

He continued to submit that the applicant has two main reasons for his delay to file the instant application; illegality and negligence. He referred this court to the Land Appeal No. 39 of 2018 which was before Hon. Matupa, J, and argued that parties agreed to argue their appeal by way of written submission but the applicant's Advocate failed to file his reply as per the order of this court thus the appeal was determined *ex parte* and the decision was in favour of the respondent. He continued to argue that he understand that negligence does not constitute good cause for extension of time but there are other circumstances Advocate negligence can be a good cause for extension of time. He referred this court to the case of **Erick Tumbo v Tanzania Telecommunication Company Ltd** (1997) TLR 57. He went on to state that in similar circumstances he invites this court to find that the applicant's Advocate failure to file a reply constituted negligence.

Mr. Mashaka further submitted that the issue of illegality is stated under paragraph 8 of the affidavit that the applicant was not served with the notice of delivery of the judgment. Mr. Mashaka fortified his submission by referring this court to the case of **Cosmas Construction Ltd v Arrow Garments Ltd** 1992 TLR 127. He lamented that the *ex parte* judgment was pronounced without informing the applicant, therefore the applicant failed to take necessary action within time. Mr. Mashaka invited this court to find

that such anomaly constituted illegality. He cited the case of **Principal Secretary, Ministry of Defence and National Service v Devram Valambhia** [1992] TLR 92 and **VIP Engineering Markets Ltd and 3 others v City Bank of Tanzania Ltd** Reference No. 7 and 8 of 2006.

In conclusion, the learned counsel urged this court to extent time under section 14 (1) of the Law of Limitation Act Cap.89 [R.E2019] and allow the applicant to set aside the *exrparte* judgment.

I reply thereto, the respondents' learned advocate started by praying for this court to adopt the counter affidavit and form part of his submission. Mr. Godfrey argued that the applicant has failed to account for the period of delay. He went on to submit that from 9th May, 2019 until 15th November, 2019 the applicant was pursuing another application before the District Land and Housing Tribunal for Musoma, thus counting days from 9th May, 2019 when he became aware to 26th February, 2020. He added that the judgment was delivered in December, 2018, and the instant application was filed in February, 2020 approximately 100 days has lapsed. Mr. Godfrey went on to submit he has failed to account the days of delay as required by the law. Mr. Godfrey fortified his submission by referring this court to the case of **Moto Matiko Mabanga v Ophir Energy PLC and 2 Others**, Civil Application No 463/01 of 2017, delivered on 17th April, 2019, The Court of Appeal quoted with approval the case of Bushir Hassani v Latifa Mashao, Civil Application No.3 of 2017 (unreported) whereas the Court of Appeal emphasized that delay even of a single day has to be

accounted for otherwise there would be no point of having rules describing period upon which certain stage has to be taken. He also cited the case of **MNZ RTC Trading Company Ltd v Export Trading Ltd**, Civil Application No.12 of 2016.

Mr. Godfrey continued to submit that there is no sufficient reason to move this court to extent time. He argued that the applicant had the service of Mr. Makowe, Advocate and he was aware about the court calendar that parties were ordered to argue their appeal by way of written submission, but he failed to file a reply within. He argued that failure to file a reply amounts to non-appearance. Mr. Godfrey argued that in the absence of an affidavit sworn by the learned counsel it is difficult to know if the negligence was upon the Advocate or attributed by the applicant's negligence.

The learned counsel for the respondent further argued that there is no any issue of illegality because the learned counsel for the applicant was in court and knew when the judgment was set to be delivered. He went on to state that if the date could have been fixed for future dates then the court shall inform the parties. He added that the appeal was argued by way of written submission and the date of judgment was set on the scheduling order. He insisted that the applicant's Advocate was aware as to when the order was issued, he was present. Mr. Godfrey distinguished the cited case of Construction Limited with the instant appeal because in the

latter case the matter proceeded ex parte and no order was given to parties.

Mr. Godfrey argued that the issue of illegality cannot stand because of the applicant's Advocate negligence. He went on to state that in the absence of an affidavit the issue of Advocate negligence cannot be a sufficient reason for extension of time. He valiantly argued that the illegality that the applicant was not notified when the judgment will be pronounced is not a point of law. To buttress his position he referred the case of *Lyamuya (supra)* that not all point of law is sufficient reason for extension of time. He went on to state that a point of the law might be of such significance to warrant the intention of the Court of Appeal. He also referred this court to the case of *Motto Matiko (supra)* that the illegality was clear on the face of the record. He distinguished the cited cases of *Principal Secretary (supra)* and *VIP Engineering* that in the cited cases the illegality was sufficient on the point of the face of the record while in the instant case; the grounds of negligence and illegality are not sufficient grounds for extension of time.

In conclusion, Mr. Godfrey argued that the application before this court lacks merit, he urged this court to dismiss it with costs.

In his brief rejoinder, the learned counsel for the applicant reiterated his submission in chief and added insisted that the applicant was not served with any notice of delivering of judgment thus the same is a

sufficient cause to enable the applicant to file an application to set aside the exparte judgment.

In conclusion, he prays this court to find that the applicant's application has merit and allow the applicant to file the said application.

Having heard the counsels' submissions for and against the application, I have to say that there is no gainsaying that the power to extend time is at the court's discretion. The issue for determination is whether this court can extend the time to file a notice of appeal before the Court of Appeal.

After carefully considering the competing arguments of the learned counsel of both parties, I figure out that the main issue calling for determination is whether or not the applicant has shown good cause for the delay in the circumstances of this case.

There is no gainsaying that a party seeking the court to extend time within which to do an act beyond the time by law has to show good cause for the delay. For this court to grant an extension of time, the applicant must state sufficient reasons for his delay and account for each day of delay. As it was held in the case of **FINCA (T) Ltd and another v Boniface Mwalukisa**, Civil Application No. 589/12 of 2018 Court of Appeal Iringa, (unreported) which was delivered in May, 2019.

Additionally, it should be known that the power to extend time is discretionary but such discretion must be exercised judicially, meaning the making of a logically sound decision based on rules of law which requires the attention of the court to all the relevant factors and materials surrounding any particular case. These factors include the length of the delay, the reason for the delay and whether or not there is an arguable case as stated in the case of **Nicholaus Mwaipyana v the Registered Trustees of the Little Sisters of Jesus of Tanzania**, Civil Application No.535/8 of 2019; [27th March, 2020 TANZLII] and **Lyamuya Construction Company** (supra).

In Lyamuya Construction Company Ltd (supra) the Court said that factors to be considered would normally include the following:-

- (i) That the applicant must account for all the period of delay.
- (ii) That, the delay should not be inordinate.
- (iii) That, the applicant must show diligence and not apathy negligence or sloppiness in the prosecution of action that he intends to take.
- (iv) That, 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.

After taking in consideration what has been stated in the affidavit filed by the applicants and the applicants' advocate submission I would like to make an observation that the applicants' grounds for seeking an extension

of time to set aside the *ex parte* judgment of this court have not based on reasons for the delay as to the submission of the learned counsel for the respondent have said. The applicant's delay to file his application for extension of time was based on two grounds; one is that the applicant's Advocate acted negligently after failing to adhere to the court schedule to file his reply on time. He stated that the fault of the Advocate was not attributed by the applicant. In my view, the applicant was also supposed to make a follow up to his application because two good years have lapsed from the date when the appeal was delivered by this court.

Nevertheless, the applicant's Advocate has submitted that there is a point of law that attracts this court. But to the contrary paragraph 8 of the applicant's affidavit does not contain a point of law. In my view had the applicant's Advocate covered that important aspect in the affidavit there would be a wide room for this court to weigh the issue of illegality. Unfortunately, it was not covered instead the applicant's Advocate brought the same during his submission that means it is an afterthought and a mere statement from the bar. Additionally, I am in accord with Mr. Godfrey that the appeal was determined by way of written submission and both parties knew when the judgment will be pronounced since the court calendar included the date of judgment and the date did not change I agree with the respondent's Advocate submission that not every point of law will necessarily carry weight in an application for extension of time. The point of law must be of such significance as to warrant the attention of the court of law as it was observed in the case of **Moto Matiko Mabanga v Ophir Energy** (supra). Also, I agree with the learned counsel for the

respondent that the cited cases of **Erick Tumbo** (supra) and **Cosmas Construction Limited** (supra) are distinguishable in the circumstances of the instant application.

For the aforesaid reasons, I conclude that the applicant has failed to convince this court that he has good reasons for extension of time to set aside the *ex parte* judgment of this court. Therefore I proceed to dismiss the application with costs.

Order accordingly.

DATED at Mwanza this 29th May, 2020.



A.Z.MGEYEKWA

JUDGE

29.05.2020

Ruling delivered on the 29th May, 2020i via audio teleconference, and both learned counsels were remotely present.

A.Z.MGEYEKWA

JUDGE

29.05.2020