IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

LAND APPEAL NO. 88 OF 2020

(Arising from Misc. Application No. 1033 of 2019 and Originating from Land Application No. 93 of 2017 in the District Land and Housing Tribunal for Mara at Musoma)

AMOSI N. MUGAYA ..... APPELLANT

VERSUS

MESURI WITARE ..... RESPONDENT

JUDGMENT

30th November, 2021 and 20th December, 2021

F. H. MAHIMBALI, J.:

This judgment traces its origin from the ruling of of the trial tribunal in Misc. Application No. 1033 of 2019 in which it refused to extend time to set aside the exparte judgment in Land Application no. 93 of 2017. Aggrieved by that ruling, the appellant has preferred this appeal. He has preferred two grounds of appeal namely:

1. That the trial tribunal erred in law to dismiss Miscellaneous Application No. 1033 of 2019 while the appellant has sufficient and good cause to warrant the trial tribunal to extend the time for the appellant to set aside exparte judgment

2. That the trial tribunal erred in law for failure to consider that there is illegality in the judgment of the trial tribunal, the judgment delivered on 23/10/2019.

During the hearing of appeal, the appellant was represented by Mr. Daudi Mahemba learned advocate whereas the respondent fended herself.

In his submission in support of the appeal, Mr. Mahemba argued in the first ground of appeal that it is the legal requirement under section 14 of the Law of Limitation Act, Cap 89 that if there are sufficient legal causes one is entitled with the extension of time. In this matter the appellant addressed sickness as reason for his delay to set aside the *exparte* judgment. The law is, sickness/illness is one of the sufficient causes warranting extension of time. As sickness was established, the appellant was entitled with the grant of extension of setting aside the *exparte* judgment. He then submitted that the trial tribunal erred in law in dismissing Miscellaneous Application No 1033 of 2019 while the appellant had sufficient legal cause to warrant the trial tribunal to extend time for the appellant to set aside *exparte* judgment.

Secondly, on the issue of illegality, he submitted that when *exparte* judgment is issued, there must be due notice to the opposite

party. In Land Application No 93 of 2017, the matter was heard *exparte* and its decision was equally delivered *exparte*. There was no legal notice to the appellant of knowing the matter which was heard *exparte* when is it going to be decided. This violation led to the appellant not to know anything transpired until when he had decided to make personal follow-up in court in which he was already out of time.

As right to be heard is a constitutional right, he submitted that this appeal be allowed for the interests of justice so that the appellant may be heard.

Considering it as disturbance, the respondent appeared to have been aggrieved the manner the appellant is pursuing this matter now and then. She then just stated that she had nothing to reply and left it for the Court to rule what is appropriate.

That was all about the hearing of the appeal. The central issue for determination is whether the appeal is meritorious. I have traversed the trial tribunal's records and get satisfied that there was exparte judgment in respect of Land Application no.93 of 2017 in which the appellant was the respondent thereof. In efforts of setting it aside out of time, the appellant filed Misc. Application no. 1033 of 2019 before the trial tribunal which application was dismissed with costs on 30th October,

2020 for want of sufficient explanations on accounting the delayed days. The appellant being aggrieved by the decision of the trial tribunal filed this appeal to this Court on 22nd December 2020 challenging the dismissal order stating that he had accounted the delayed days. Counting from 30th October 2020, I wonder if this appeal too is timely filed as per law.

Extension of time is upon judicial discretion and the applicant has to show "good and reasonable cause" (**See; Kalunga and Company Advocates v National Bank of Commerce Limited** [2006] TLR 235 at page 235).

It is settled that what amount to sufficient cause is not yet defined. See **TANGA CEMENT COMPANY LIMITED VS MASANGA AND AMOS A. MWALWANDA ,** Civil application No.6 of 2001 where it held;

> ***"What amounts to sufficient cause had 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 valid explanation for delay, lack of diligence on the part of the applicant."***

However, there are factors that are used to determine whether the

applicant has shown good and reasonable cause such as the length of the delay, whether or not the delay has been explained away, diligence on the part of the applicant and whether there is an illegality in the impugned decision. The above factors were also stated in **Lyamuya Construction Company Limited vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported). In addition, the applicant has to account for each day of delay.

In the instant case, the applicant reason for delay is sickness. The law is well established that sickness is a good cause because it beyond human control. This is per the case of **Emanuel R. Maira vs The District Executive Director of Bunda,** Civil Application No. 66 of 2010 (unreported) when the Court of Appeal held:

> *"Health matters in most cases are not the choice of a human being; cannot be shelved and nor can anyone be held to blame when they strike."*

Nevertheless, in order for sickness to be considered as a ground for extension of time, it must be proved by medical evidence. This court will be guided by what was decided in the case of **Pastory J. Bunonga v Pius Tofiri,** Miscellaneous Land Application No. 12 of 2019 (tanzlii), where Rumanyika, J. held: -

"Where it was on the balance of probabilities proved, sickness has been good and sufficient ground for extension of time yes. But with all fairness the fact cannot be founded on mere allegations. There always must be proof by the applicant that he fell sick and for the reason of sickness he was reasonably prevented from taking the necessary step within the prescribed time."

In the instant application, the applicant attached clinical notes dated 20/9/2019 where he attended Bumangi Dispensary for medication for tonsillitis which caused coughing, chest pain, fever and difficulty in breathing and other chest pains. From this it is evident that the applicant was sick by 20th September 2019 and was medically attended. However, the records establish that the appellant filed his application of setting aside exparte judgment out of time before the trial tribunal on 27th December 2019. Assuming that he was still in sickness after 29th September, 2019 (though there are no further proofs) it is not established as to when the appellant recovered from sickness for legal processing. A mere medical note that he was sick on that day, is legally insufficient excuse that he then had a prolonged sickness indefinitely. The medical explanation is insufficient to warrant such a lengthy delay without extra medical explanations. There must be proof that the sickness not only caught him, but prevented him from doing anything including appropriate legal action.

Furthermore, assuming that the appellant had been ill until 17th December, 2019 when he went to the Tribunal for collecting the said copy, yet he filed the said application on 27th December, 2019. Where was he and what was he doing between 17th December 2019 and 26th December, 2019? The law is clear that there must be accounting for each day of delay. A delay even of a single day has to be accounted for. In this case the accounting has not been done as per law. The available proof is insufficient in the eyes of the law to warrant the extension of time as appealed against.

On illegality issue, the learned counsel submitted that there was no notice issued as per law for the appellant to be informed of the exparte judgment date. Reading paragraph 5 and 6 of the appellant's affidavit at the trial tribunal, it is clear that the appellant was aware of the exparte judgment since 17th December, 2019 but filed his application on 27th December, 2019. There is no accounting reasons for such a delay. Moreover, the appellant has not established which law or provision of the law provides for there to be a notice prior to the issuance of the exparte judgment. this being a land matter, the governing law is LDCA. Under regulation 11(1)c and (2) of GN 174 of 2003 (The Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 provides that:

11(1)*c* *"Where the respondent is absent and was dully served with notice of hearing or was present when the hearing or was present when the hearing date was fixed and has not furnished the Tribunal with good cause for his absence, proceed* ***to hear and determine the matter exparte*** *by oral evidence*

11(2) *A party to an application may, where he is* ***dissatisfied with the decision of the Tribunal under sub-regulation (1),*** *within 30 days apply to have the orders set aside, and the Tribunal may set aside its orders if it thinks fit so to do and in case of refusal appeal to the High Court.*

This law in my observation does not give a notice requirement upon refusal or default of appearance. However, the Civil Procedure Code under order XX, Rule 1 on delivery of judgment provides:

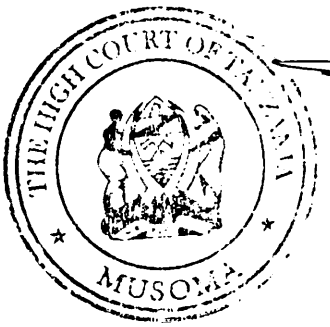
The court, after the case has been heard, shall pronounce judgment in open court, either at once or on some future day, of which ***due notice shall be given to the parties or their advocates.***

In my findings, though the notice requirement when delivering judgment is not provided under the LDCA but under the CPC, even if it is borrowed for its application in the proceedings under the LDCA, the same has not prejudiced the appellant (see section 45 of the DLCA). In the circumstances of this case, considering the fact that after the appellant had

become aware of it, he failed to act with due diligence but on negligence, sloppiness and merely apathy which is not the requirement of law.

That said, this appeal fails. The appellant has failed to account for each day of delay. The same is dismissed with costs.

DATED at MUSOMA this 20th day of December, 2021.



F.H. Mahimbali

Judge

20/12/2021

Court: Judgment delivered this 20th day of December, 2021 in the presence of the both parties and Mr. Gidion Mugoa – RMA.

Right of appeal is explained.

F.H. Mahimbali

Judge

20/12/2021