

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA**

MISC. LAND APPLICATION NO 63 OF 2021

(C/f Land Case No. 76 of 2016 and Misc. Land Application No. 96/2020)

ARUSHA CITY COUNCIL.....1ST APPLICANT

THE ARUSHA CITY COUNCIL DIRECTOR.....2ND APPLICANT

VERSUS

JACKSON JAPHET MTEMA.....1ST RESPONDENT

COLMAN FABAN MSELE.....2ND RESPONDENT

GABRIEL SHIRIMA 3RD RESPONDENT

CHRISTINA KASSIM JUMANNE4TH RESPONDENT

HADIJA ISSA ABDALLAH5TH RESPONDENT

RULING

27/06/2022 & 01/08/2022

KAMUZORA, J.

The Applicants preferred this application seeking for extension of time to file an application to set aside an ex-parte judgment to this court against the decision issued by this court on November 13th 2020 in Land Case No. 76 of 2016. The application was brought under the provision of 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 and supported by an

affidavit sworn by Sifael Tuiwene Kulanga, the State Attorney. The application is strongly opposed through the counter affidavit deposed by the Jacob V. Malick the advocate for the Respondents.

Hearing of the application was by written submission and Mr. Iddi A. Ndabhona learned State Attorney submitted for the Applicant while the submission by the Respondent was drawn and filed by Mr. Jacob V. Malick, learned advocate.

The brief background of this matter is that, the Respondents sued the Applicants for the claim of land. The matter proceeded ex parte against the Applicant and the judgment was entered in favour of the Respondents herein. The Applicants intend to lodge an application to set aside the ex-parte judgement as they are out of time hence preferred this application seeking an order of this court enlarging time within which the Applicant can file an application to set aside the ex-parte judgment. The main issue calling for the determination by this court is whether the Applicants has demonstrated sufficient reasons for the delay.

Submitting in support of application the counsel for the Applicant's counsel adopted the affidavit in support of application and argued that, after the ex-parte judgment was delivered, they were supposed to file

an application to set aside the judgment within 30 days but they delayed for almost 4 days. That, the reasons for the delay were that, after they obtained the copy of judgment, they started administrative procedures of measuring the suit land which was awarded to the Respondents.

The counsel for the Applicant submitted further that, apart from administrative procedures, they conducted intensive research and discovered that the judgement was tainted with material irregularity and illegality as no proper service was done to the Applicant's and also discovered that, the court had no jurisdiction to entertain the matter whose subject matter was time barred. He was of the view that, if those illegalities are left uncured it will prejudice public interest and result into a bad precedent.

The counsel for the Applicant added that, the provision of section 3 and item I part 1 of the schedules of the Law of Limitation Act Cap 89 provides the limit for the claim of compensation over land to be one year. He was of the view that, Land Case No. 76 of 2016 which was based on the claim for compensation was filed on 21st June 2016 with almost 10 years delay and no evidence was presented to prove ownership. The counsel for the Applicant also added that, the Respondents were supposed to describe the land in dispute under order

VII Rule 3 of the Civil Procedure Code Cap 33 RE 2019 but they failed to do so.

The counsel for the Applicant urged this court to consider the cardinal principle that once the point in issue is illegality of the decision of the trial court then time be extended. To cement his arguemnt, he cited the case of **Principle Secretary Ministry of Defence and National Service Vs. Duram P Valambhia** [1992] CAT at page 387, **Mary Rwabizi T/A Amuga Enterprises Vs. National microfinance Bank**, Civil Application No 378/01 of 2019.

Opposing the application, the counsel for the Respondents submitted that, the Applicant admitted for the delay of 4 days and in light of the case of **Registered Trusees of Shadhily Vs. Muhfudh Salimomary Bin Zagari (Administrator of the estate of the late Salim Omary)**, Civil Application No 512/01 of 2018 CAT at Dar es Salaam, the Applicant was required to demonstrate in the affidavit, the reason and length of delay. The Respondent's counsel was of the view that, the reason that the Applicant took administrative procedures and meetings is unjustified as the time used for administrative issues and meetings was not stated. He referred the decision of the Court of Appeal of Tanzania at Dar es Salaam in the case of **The Registered Trustees**

of the Archdiocese of Dar es Salaam vs. Chairman Bunju Village Government and 4 others, Civil Appeal No. 147/2006 (Unreported) where the court held that at any rate a political solution out of court does not constitute an explanation for failing to appeal.

Regarding the issue that there was no proper service the counsel for the Respondent submitted that, the issue required proof hence not a good ground for extension of time but may be a good ground for appeal. He argued that, illegality must be visible on the face of record referring the case of **Ramadhani Kipanga, Sugu Kipanga vs. Peter junior, Mwinyihija Ayubu Tembe**, Civil Application No 172/17 of 2019 CAT at Dar es Salaam (Unreported).

The counsel for the Respondents went on and submitted that, there is a position that once the illegality is mentioned one had to be granted extension. He however in referring the case of **Ramadhani Kipanga(Supra)** submitted that, not every illegality suffices the extension of time. That, the said illegality must be of sufficient importance and must also be apparent on the face of record. The counsel for the Respondent was of the view that, the illegality mentioned by the Applicants that the suit was time barred is not reflected in the pleadings and not apparent on the face of record as

required in the case of **Finca(T) Limited and another Vs Boniface Mwalukisa**, Civil Application No 589/12 of 2018. He added that, the intended application has no overwhelm chance of success since the Applicant had previously brought the application unsuccessful.

In a brief rejoinder the counsel for the Applicant reiterated the submission in chief and added that, the issue of time limitation is addressed in the Applicant's affidavit as among the grounds of illegality. That, it is also a requirement of law that the plaint should describe the property in dispute. He was of the view that, the claim by the Respondent that the illegality is not on the face of record is a misleading. He maintained that, since the issues of illegality has been raised, the court ought to grant the application. He cemented his submission with the case of **Eqbal Ebrahim Vs. Alexander K. Wahyungu**, CAT at Dar es Salaam, Civil Application No 235/17 of 2020, **Mariam Khalifan Mtoro Vs. Shirika la Umeme Tanzania (Tanesco)**, Civil Application No 301/18 of 2020 CAT at Dar es Salaam. The counsel for the Applicant finalised by insisting that, the application has an overwhelm chance of success given the illegality found in the said judgment.

The pertinent issue in this application is whether the Applicant has adduced sufficient reasons for extension of time. The grant of extension of time is a matter of discretion of the court, the discretion which however must be exercised judiciously. In **Mbogo Vs. Shah [1968] EA 93**, certain factors were highlighted to assist the court in deciding to either grant or refuse to grant extension of time. It was held that: -

"All relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reason for the delay/ whether there is an arguable case on the appeal and the degree of prejudice to the defendant if time is extended".

The Court of Appeal of Tanzania also formulated the guidelines to be considered in granting the extension of time in the case of **Lyamuya Construction Company Limited Vs. Board of Registered Trustees of Young women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (Unreported). The court held that: -

"On the authorities however, the following guidelines may be formulated:

- a) The Applicant must account for all the period of delay;*
- b) The delay should not be inordinate;*

c) The Applicant must show diligence, 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 reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged."

It was contended by the counsel for the Respondent that the application to set aside ex-parte judgment have no chances of success as it was prior dismissed by this court. This application is for extension of time to file an application to set aside ex-parte judgment that was issued by this court in Land case No. 76 of 2016. The Applicant agreed that there was Misc. Land Application No. 107 of 2016 that was filed but dismissed by this court. He however argued that, the said application is different from the present application as the same intended to set aside an ex-parte order for the suit to be heard inter-paties while present application intend to set aside the ex-parte judgment.

I understand that, in this application, this court is only inclined to look into the reasons laid down by the Applicant if it surfaces the grant of extension of time. Thus, the question as to whether the Applicant is likely to succeed is not necessarily a reason that may trigger the

extension of time. The reasons are well set in the case of **Lyamuya Construction** (supra) cited above.

In the case at hand the Applicants' reasons for the extension of time can be depicted under paragraph 4, 5 and 6 of the Applicant's affidavit in support of the application. The delay is based on administrative issues and the claim that there are illegalities and irregularities in the judgment of court which was issued to a matter which was time barred and, on the pleadings not describing the suit property.

Starting with administrative issues, it is my settled mind that the Applicant did not make good explanation on how the administrative issue and, or, meetings resulted into their delay in filing the application in question. If the Applicant allege that they had meetings or they were conducting survey to verify if the disputed land belonged to the Respondent, it is upon the Applicant to state with evidence the date those meetings were conducted and if the same influenced their delay in taking legal actions. As the Applicants admitted the delay for 4 days, they are bound to state with evidence what was the reason for such a delay. Failure to do so makes this court conclude that the Applicants failed to account for each day of delay as so required.

On the issue of illegality as the reason for extension of time, this court had looked upon the pointed illegality. The illegalities pointed out is centred on the pleadings before this court. It was alleged that, the suit that was heard ex-parte was filed out of time and the plaintiff failed to properly describe the suit land in the plaint. The plaint is question was appended to the affidavit in support of application and this argument was not countered by the Respondents.

I agree with the submission by the counsel for the Respondents which was based on the case of **Ramadhani Kipanga**, (supra) that, illegality must be visible on the face of record and maintain that, the court had to see if what is alleged is well reflected in records. In my view, it is enough where a part pleads illegality and point out the illegality referred to and, in this matter, the Applicant was able to plead and point out the alleged illegalities. Since this court is currently dealing with an application for extension of time, it need not go further to discuss the validity of the said illegality as doing so will amount to discussing the merit of intended application.

Based on the above argument, it is my settled view that the Applicant demonstrated good reason warranting this court to exercise its discretionary powers in extending time to file the application to set aside

the ex-parte judgment. In considering the decision in the case of **Benedict Shayo Vs. Consolidated Holdings Corporation as Official Receiver of Tanzania Film Company Limited**, Civil Application No. 366/01/2017, I do not see how the Respondents will be prejudiced by the grant of extension of time to the Applicant.

I therefore grant the application and allow the Applicants to file their application within thirty (30) days from the date of this ruling. No order for costs is issued.

DATED at ARUSHA this 1st day of August, 2022




D.C. KAMUZORA

JUDGE

