

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MOROGORO DISTRICT REGISTRY)**

AT MOROGORO

MISC. LAND APPLICATION NO. 10 OF 2022

(Arising from the Land Appeal No. 145 of 2019, in the High Court of Tanzania at Dar Es Salaam (Land Division) Before Maghimbi, J.,)

DONATI KYEVECHOAPPLICANT

VERSUS

HUSSEIN MKUMBA RESPONDENT

R U L I N G

18th & 26th Oct, 2022

CHABA, J

This is an application for extension of time to set aside the exparte judgment dated 7th July, 2020 taken out under section 14 (1) of the Law of Limitation Act [Cap. 89 R. E, 2019]. The application is supported by an affidavit deposed by the applicant himself, Donati Kyevecho. The respondent didn't file counter affidavit, but he made his appearance in person, unrepresented during hearing of the application on 18th of October, 2022. The applicant also appeared in person.

As gathered from the applicant's affidavit, the applicant's averment is that he was not served with the summons and therefore he was not aware



of the existence of the suit, registered as Land Appeal No. 145 of 2019, filed in the High Court, Land Division at Dar es Salaam, nor was he aware of the delivery ex-parte judgment.

He deposed further that he came to be aware of the suit filed against him on the 9th day of February, 2022 after he had received a summon from hamlet Chairperson who informed him that the respondent herein was applying for execution of a decree stemmed from the court proceedings in respect of Land Appeal No. 145 of 2019.

During hearing of the application, done by way of oral submissions, the applicant started to kick the ball rolling by highlighting that, the respondent sued them before the District Land and Housing Tribunal at Ifakara in 2014 and the matter was concluded in their favour in 2019. He added that, he was surprised to see that the respondent filed a case which resulted to this application.

On the other hand, the respondent submits that, the appeal was filed before the High Court of Tanzania, at Dar es Salaam on 25/7/2019. He stated that he served the applicant and his fellows with the summons but all of them refused the services and further did not appear before the court. As the applicant and his fellows defaulted to appear before the High Court, then

the matter was heard ex-parte and the decision was in his favour because he won the appeal. He concluded by stating that since the present application has no merit, the same should be dismissed.

In rejoinder, Mr. Kyevecho prayed for an extension of time to set aside ex-parte judgment of this court delivered on the 7th day of September, 2020 and insisted that the summons was not served to him.

Having considered the parties oral submissions and perused the affidavit deposed by the applicant, the main issue for determination in this application is, whether the applicant has demonstrated sufficient reasons to warrant this court grant the prayers sought by him, that is extension of time to set aside ex-parte judgment issued by this court.

As gleaned from the applicant's affidavit, the main reason for delay advanced by the applicant was that he was not duly served with the summons and therefore he was not aware of the suit filed against him, nor was he aware of the ex-parte judgment delivered on 7/9/2020. On the other hand, the respondent alleged to have properly served the appellant and his fellow but for reasons better known by themselves they refused service of summons. The respondent attached a bundle of summons in his counter affidavit and during hearing of the application he tendered a number of

documents to substantiate his contention. His aim was to prove the court he made some efforts to notify the applicant and his fellows that he instituted a land matter against them. I had ample time to peruse these documents and noted that the first summons to the applicant was duly served to him on 2/9/2019, through the Ward Executive Officer's whose comments are here shown:

"Donati Kyovecho sijamuona, familia yake imesema yupo safarini" End of quoting.

The second summons was served on 11/3/2020, via the Ward Executive Officer, and upon complied with the relevant procedures, he assigned the following comments:

"Donati Kyovecho mkewe amesema amesafiri" End of quoting.

From the above records, it can be assumed that, the applicant was not physically served properly, yet in my view, he was served through his family members and his wife, and he cannot deny this fact. Nevertheless, even if, I can account for the time the applicant was unaware of the existence of the suit against him, yet the time from when he became aware of the existence of the ex-parte judgment, that is on 9th February, 2022 to the time of filing

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his application in this court that is, on the 9th March 2022 is still unaccounted for.

It should be noted that, the application before this court is for an extension of time to set aside the ex-parte judgment and not an application to set aside the ex-parte judgment. Thus, the applicant herein ought to have focused in establishing sufficient reasons for his delay. In my view, the applicant ought to have accounted for each day of delay which in this application are thirty (30) days of delay which ought to have been accounted for as alluded to above.

This position was correctly stressed in the case of **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young 7 Women's Christian Association of Tanzania**, Civil Application No. G2 of 2010 (Unreported-CAT) where it was stated 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.



d) If the court feel that there are other sufficient reasons, such as the existence of a point of law of sufficient importance, illegality of the decision sought to be challenged, it should be exhibited.

Considering the above legal requirements, this court is of the considered view that, the appellant ought to have given an account on each day of delays from the time he became aware of the ex-parte judgment to the time of filing this application before this court.

Moreover, with the delay of 30 days the applicant cannot be said to have acted expeditiously after his awareness of the existence of the decision to which he intends to set aside. Apparently, this will defeat the purpose of having the Law of Limitation Act which bars litigants from coming to courts whenever they wish and when they are out of the prescribed period of time. Indeed, the applicant had an obligation to demonstrate sufficient cause.


Finally, as regarding the principle governing extension of time, it is trite law that whether or not to grant extension of time to file a case out of time, is an exercise of discretion and just like any other discretion it must be exercised judiciously and on fixed principles and not private opinions, sentiments, or sympathy. It must be deservedly and not arbitrary. The court's discretion being judicial must therefore be exercised on the basis of

evidence and sound legal principles with the burden of disclosing the material facts falling squarely on the applicant. The judicial principle established by the law is that the applicant must satisfy the court that he or she had a good cause for delay. This good cause must go deep to the root cause of the delay. In this application, there is no good cause which have been established.

In the final event, this application is non-meritorious. Accordingly, it is hereby dismissed with costs. **It is so ordered.**

DATED at **MOROGORO** this 26th day of October, 2022.




M. J. Chaba

Judge

26/10/2022