

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MWANZA SUB-REGISTRY

AT MWANZA

MISC. CIVIL APPLICATION NO. 110 OF 2022

THE BOARD OF TRUSTEES OF THE NATIONAL

SOCIAL SECURITY FUND..... APPLICANT

VERSUS

NAKARA HOTELS LIMITED..... RESPONDENT

RULING

Last order: 22.05.2023

Judgment date: 07.06.2023

M. MNYUKWA, J.

Before me is an application for extension of time within which the applicant can file an application to set aside ex-parte judgment delivered on 28th June, 2017 by this Court.

Briefly it goes that; the applicant instituted Land Case No 05 of 2012 against the respondent claiming among other things payments of outstanding rent and electricity bills to the tune of USD 850,000/- and Tshs. 2,724.759.93/- respectively. After being served, with the leave of the Court the respondent filed amended written statement of defense



which incorporated a counterclaim. In between, the respondent also filed Misc. Land Application No 139 of 2013 sought for an order allowing the respondent to prove its counterclaim ex-parte against the applicant with respect to Land Case No 05 of 2012. The applicant duly filed the counter claim opposing the application. On 20/10/2015 when the Land Case No 05/2012 came for mention, the applicant was absent and the respondent sought two orders. First, service to be done to the applicant informing him the hearing date of the Land Case No 05 of 2012. Second, an order of ex-parte proof to the counterclaim. In response to the above prayers, this Court dismissed Land Case No 05 of 2012 for non-appearance of the applicant and proceeded to order the counter claim to be heard ex-parte as prayed.

On the same date, that is 20/10/2015, the Misc. Land Application No. 139 of 2013 was called where the respondent informed the Court that the applicant was aware of the hearing date and defaulted appearance. He then asked the Court to grant his prayer to prove a counterclaim ex-parte to be granted. In its order dated 20/10/2015, this Court granted the respondent prayer for the reason that, the applicant was duly served with an amended written statement of defense but



failed to file his written statement of defense as per the requirement of Order VII Rule 13 of the Civil Procedure Code.

After hearing the respondent's counterclaim, this Court issued an ex-parte judgment on 28/06/2017. Dissatisfied, the applicant attempted to set aside the dismissal order entered on Land Case No 05 of 2012 vide Misc, Land Application No 188 of 2015. Before the application was heard on merit, the respondent filed a preliminary objection that the application is time barred, the Court sustained it in this Court and the matter was dismissed with costs for being time barred.

The records also revealed that, there were several court battles between the parties. In his way of finding justice, the applicant filed the present application claiming illegality in the impugned judgement as deposed under paragraph 13 of his affidavit that, the Court did not satisfy itself on whether the applicant was notified on the hearing of Misc. Land Application No 139 of 2013, the applicant was not afforded a right to be heard and the Court did not consider the requirements for relying on secondary evidence.



In his application the applicant moved this Court by an affidavit sworn in by Randolph Shaaban Shimbo, the senior state attorney of the applicant. The respondent strongly opposed the application by the affidavit sworn in by Dr. Rugemeleza Albert Kamuhabwa Nshalla, the learned counsel. The application was argued orally.

At the hearing of the application, the applicant was represented by Lukelo Samwel, Frank Mgeta and Charles Mtae, the learned state attorneys while Dr. Rugemeleza Albert Kamuhabwa Nshalla, appeared for the respondent.

Submitting first, the applicant's learned state attorney prayed to adopt the chamber summons and the affidavit filed in by the applicant's senior state attorney to form part of his submissions. He averred that; this Court has the discretion to extend time. However, that discretion should be exercised judiciously depending on the circumstances of each and every case.

He quickly pointed out that, the Proceedings in Land Case No 05 of 2012 and the Order in Misc. Land Application No 139 of 2013 attached as Annexure NSSF 2 and 3 respectively are tainted with illegalities.



Pointing out the illegalities he submitted that, at page 25 of Annexure NSSF 2, it shows that on 5/11/2013 both parties were present in Court and the matter was adjourned and scheduled for Mention on 12/12/2013 where both parties did not enter appearance and the matter was again scheduled for mention on 13/03/2014.

He went on that, from that date the proceedings are silent and the next appearance was on 20/10/2015 in which the matter was for mention before Hon. Gwae, J. On that date, it was only the respondent who entered appearance and made the two prayers as highlighted above. The counsel for the applicant argued that, the dismissal Order issued by the Court in respect to Land Case No. 05 of 2012 was done *suo moto* as the respondent did not pray for it.

Further to that, the applicant challenged Annexure NSSF 3 which is the Court Order in Misc. Land Application No 139 of 2013. He averred that, the Court wrongly agreed with the respondent submissions and granted prayer to prove the counter claim ex-parte. He contested that, the respondent's submissions of 20/10/2015 are contradictory in the sense that, on the same time, that is 20/10/2015 he prayed the Court to



notify the applicant on the hearing date on Land Case No 05 of 2012 and on the same date he stated that, the applicant was aware of the hearing and defaulted appearance in respect to Land Case No 139 of 2013. He added that, nothing was submitted to show that the applicant was aware with the hearing date as the Court did not satisfy itself if the applicant was served.

Supporting his assertion on the right to be heard, the applicant's learned state attorney submitted that, there are number of authorities which emphasized on the right to be heard. He gave an example of **Dishon John Mtaita v The Director of Public Prosecutions**, Criminal Appeal No 132 of 2004. He added that, it was wrong for the Court to dismiss the applicant's claim while the matter was set for Mention which is contrary to the law as it was stated in the case of **Mr. Lembrice Israel Kivuyo v M/S DHL World Wide Express DHL Tanzania Limited**, Civil Appeal No 83 of 2008.

The learned state attorney retired his submissions by averring that, there is serious illegality on the Proceedings and Order of the Court and that, the claim of illegality is a good ground for extension of time as it



was held in the case of **Juto Ally v Lucas Komba and Another**, Civil Application No 484/17 of 2019, He prayed the application be allowed.

Opposing the application, the respondent's counsel started with the issue of jurisdiction of this Court to entertain the application at hand. He submitted that, this Court had no power to entertain an application for extension of time to set aside a judgment or ruling of a very same Court, as soon after pronouncement the Court became functus officio. He added that, illegality can only be investigated by the superior court to the High Court. He amplified that, if this Court entertains the present application will be exercising an appellate power which does not possess. He cited the case of **Lyamuya Construction Company Limited v Board of Trustees of Registered Young Womens Christian Association of Tanzania**, Civil Application No 2 of 2010.

He further submitted that illegality should be on the face of record and nothing illegal has been shown by the applicant in his affidavit to support the application. He averred that, the submission does not show what is wrong with the judgement dated 28/07/2017 and that the application has nothing to do with what took place on 20/10/2015.



He further attacked the applicant's submissions by averring that, the Ruling of the Court in Misc. Land Application No 139 of 2013 has never been challenged. He added that, the applicant was served and filed counter affidavit and he opted not to enter appearance on the day of hearing.

On the point of illegality he submitted that, illegality must be apparent on the face of the record as it was stated in the case of **Ngao Godwin Lusero v Julius Mwarabu**, Civil Application No 10 of 2015 and **Tumsifu Kimaro v Mohamed Mshindo**, Civil Application No 28/17/2017, He elaborated more by stating that nothing illegal has been pointed out since the summons was served to the applicant to file defence to the counter claim in Land Case No 05 of 2012, while in Misc. Land Application No 139 of 2013, the applicant filed counter affidavit. He insisted that service to applicant was done and therefore prayed the application to be dismissed with costs because it is an abuse of court processes.

Rejoining, the applicant's learned state attorney submitted that, this Court has jurisdiction to entertain the present application and the case



of Lyamuya Construction Company Limited v Board of Trustees of Registered Young Womens Christian Association of Tanzania, (supra) is distinguishable with our case at hand since in that case the Court of Appeal entertained the application as a second bite. The learned state attorney reiterates what he had submitted in chief and prayed the Court to allow the application. That marked the end of submissions on both parties and the matter was scheduled for judgment. However, before the date of judgment, the counsel for the respondent wrote a letter asking the Court to summon parties to address the Court on the import of the Ruling of this Court in Misc. Land Application No 188 of 2015.

As requested, parties were summoned and it was the respondent's counsel who started to address the Court. He briefly stated that, parties did not submit on Annexure NSSF 5 which the Misc. Land Application No 188/2015 seeking to set aside dismissal order of the main suit. He said that, the main reasons advanced by the applicant was that the matter was dismissed on a Mention date. And unfortunately, the matter was dismissed for being time barred. He opined that, the applicant had



already exercised his right to set aside dismissal order and therefore the matter is now res-judicata.

Responding, the applicant learned state attorney submitted that the respondent's counsel misconceived the matter because their application and submissions does not relate with the Misc. Land Application No 188 of 2015 and that their submissions centered on paragraph 13 of the applicant's affidavit which focused on the counter claim and not the main suit. He therefore prayed the Court to consider the application.

In a brief rejoinder the respondent's counsel submitted that, applicant's submissions did not base on Misc. Land Application No 139 of 2013 and that their submissions focused on the main suit. He insisted the application should not be granted.

After the submissions of both parties and after going through the available record, the main issue for consideration and determination before me is whether this application is merited.

To start with, it is worthy to note that, as per the chamber summons application, the applicant's prayer is for this Court to extend time within which to set aside ex-parte Judgment delivered by this Court



on 28/06/2017. As indicated above in brief facts, the ex-parte judgment was a result of the applicant's failure to file defense on a counter claim filed by the respondent when served with the applicant's plaint in Land Case No 05 of 2012. The ex-parte proof of the counter claim which resulted into the ex-parte judgment was also ordered by this Court when granting the respondent's application in Misc. Land Application No 139 of 2013. That is to say, there were two orders which blessed the ex-parte proof. The Order issued on Land Case No 05 of 2012 and the Misc. Land Application No. 139 of 2013 of which both of them were issued on 20/10/2015.

Before I proceed to determine the application on merit, I have to comment on the issue of whether this Court had the jurisdiction to hear and determine the present application. This is because jurisdiction is fundamental in any matter and it is unsafe for a Court to hear and determine the matter without possessing a requisite jurisdiction. It is settled that any decision made by a Court without having a jurisdiction is null and void.



It is the complaint of the respondent's counsel that, this Court does not have requisite jurisdiction to determine the application at hand because it is the same Court which gave an Order of ex-parte proof of the counterclaim which resultant into the ex-parte judgment. And therefore, cannot overturn its own decision. Again, this Court does not have jurisdiction to entertain the present application because it is res judicata as the matter was finally decided when the applicant filed Misc. Land Application No 188 of 2015.

As alluded above, it was the applicant who initiated a suit against the respondent when he filed a Land Case No. 05 of 2012. And when served, the respondent filed a written statement of defence which incorporated a counter claim. If things might have gone well, the main suit and the cross suit could have been determined by this Court. Unfortunately, the main suit filed by the applicant was dismissed for want of appearance and an attempt to set it aside dismissal order vide Misc. Land Application No. 188 of 2015 became abortive after the application being dismissed for being time barred.



Therefore, in respect of the applicant's claim in a main suit in Land Case No 05 of 2012 as submitted, this Court does not have jurisdiction to entertain it because the matter was finally heard by this Court. That is to say, all the applicant's submissions in relation to the complaint of the dismissal of his suit on the date of mention for want of appearance will not be taken on board since this Court lacks jurisdiction.

Now, since the complaint of the applicant was also based on the Ex-parte proof of the respondent's case in a counter claim against the applicant as evidenced on paragraph 13 of his affidavit, this Court had power to entertain it. It is a trite law that a party aggrieved by the decision which is passed ex-parte, the remedy is to make an application to the very court to set it aside its ex-parte order if a party's complaint is on the right to be heard as stated in **Dangote Industries Ltd Tanzania v Wanercom (T) Limited**, Civil Appeal No 13 of 2021.

For that background, since the applicant's complaint as per paragraph 13 of his affidavit is on the right to be heard, this Court had the requisite jurisdiction to entertain the application for extension of time so as to enable the applicant to set aside an ex-parte judgment.



Therefore, it is my firm view that, this Court has jurisdiction to entertain the present application.

Coming now to the merit of the application, the applicant's main reason for this Court to exercise its discretionary power to extend time is on illegality. In his affidavit as deposed on paragraph 13, the applicant pointed out three points of illegality on the decision sought to be challenged. The first two points of illegality centered on the denial of the right to be heard for allegation that, this Court did not satisfy itself if the applicant was served with the notice of hearing in respect to Misc. Land Application No 139 of 2013 and the other illegality is that, this Court did not consider the requirements for relying on secondary evidence.

With due respect to the applicant's learned state attorney, it is my conviction that, failure by this Court to consider the requirements for relying on secondary evidence, is not a point of illegality worth to be determined by this Court in a present application since, it is more of the ground of appeal and does not met threshold of illegality as stated in the case of **Lyamuya Construction Company Limited v Board of Trustees of Registered Young Women Christian Association of**



Tanzania (supra). For that reason, the points of illegality that will be determined in this application is only in respect the right to be heard.

As it stands in the records, the applicant's main point of illegality aroused in Misc. Land Application No. 139 of 2013 which in turn resulted to the Ex-parte judgment. The appellant's affidavit specifically on paragraph 13 clearly pointed out the points of illegality which are;

13. That the material illegalities contained in the impugned judgement are as follows: -

- i. The court did not satisfy itself on whether the Applicant was notified on the hearing of Miscellaneous Land Application No 139 of 2013*
- ii. The applicant was not afforded a right to be heard.*

In his submissions, the appellant argued that the above points of illegality are observed apparent on the face of the record. He attacked the Court Order issued on 20/10/2015 in Misc. Land Application No. 139 of 2013, which granted the respondent's prayer of ex-parte proof of the counter claim without satisfying itself if, the applicant was served with the notice of hearing. He further argued that, the same respondent on the same date prayed service to be issued to the applicant informing



him on the hearing date. The applicant was of the view that, the statements of the respondent was contradicting each other in respect of the applicant's awareness on the date of hearing.

Going into the records, it is clear that the above applicant's complaint is unfounded. I say so because records are very clear. As reflected on page 25 and 26 of Annexure NSSF 2, which is the Proceedings in Land Case No 05 of 2012, the respondent prayed service to be issued to the applicant notifying him of a hearing date. The hearing that was meant in Land Case No 05 of 2012 was the hearing of the applicant's main suit that was dismissed.

On the other side, in respect to Misc. Land Application No 139 of 2013, the records shows that, the respondent informed the court that the applicant had defaulted appearance while aware of the date fixed for hearing, and the Court proceeded to grant the respondent prayer of ex-parte proof on the counter claim. To that end, there was no any contradiction as these were two separate matter and the respondent's prayer in Land Case No. 02 of 2012 of notifying the applicant on the hearing date of his main suit, cannot be equated with the prayer to



grant ex parte proof of the counter claim on Misc. Land Application No 139 of 2013 to which the respondent informed the Court that, the applicant was aware of the hearing date of that application but defaulted appearance.

Having in mind that, the main reason advanced by the applicant to seek this Court to grant extension of time is on illegality which based on the right to be heard, I am now in a better place to determine if the point of illegality claimed by the applicant is sufficient to warrant this Court to exercise its discretionary power to grant extension of time.

In discussing illegality as a ground for extension of time, in **Ngao Godwin Losero v Julius Mwarabu**, Civil Application No 10 of 2015, the Court of Appeal observed that:

"In our view when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record straight."

Nevertheless, for the illegality to stand as a ground for extension of time, the applicant must successfully demonstrate the existence of



the said illegality on the face of the record and the same should not be discovered through a long drawn process. In **Lyamuya Construction Company Limited v Board of Trustee of Young Womens Christian Association of Tanzania**, Civil Application No. 2 of 2010, it was held that:

*"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 demonstrate that his intended appeal raises points of law should, as of right be granted extension of time 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 will be discovered by a long drawn argument or process."*

Going to the records, it is clear that the affidavit of the applicant is silent if he was not notified on the date of hearing of the Misc. Land Application No 139 of 2013. The records depicts that, the applicant was well aware with the above application that's why he was able to file the counter affidavit to oppose the application. It is wondering now why the



applicant's affidavit is silent on what transpired after filing a counter affidavit. Does the silence means that the matter was not fixed at all for hearing, or the application was adjourned when the matter was scheduled in the first hearing, or he just served with the summons to file counter affidavit without being informed on the hearing date. How can this Court know that the applicant was not served with the date of hearing of Misc. Land Application if the affidavit is silent? It is my view that, as the applicant alleges that he was not notified on the hearing date, it is upon him to prove his assertion.

To my opinion, the silence of the affidavit is defeated with the respondent's submissions as he expressly informed the Court that the applicant was aware of the hearing date and defaulted appearance. It is settled that illegality must be apparent on the face of the record. My reading of the applicant's affidavit and the impugned decision sought to be challenged, the point of illegality claimed by the applicant is not apparent on the face of the record and it is the one which will be discovered by a long drawn argument or process and therefore does not meet the settled threshold in **Lyamuya Construction Company Limited v Board of Trustee of Young Womens Christian**



Association of Tanzania (supra). I say so because, I had time to go through the impugned Order in Misc. Land Application No. 139 of 2013 in which the respondent's counsel informed the Court that the applicant was aware with the hearing of the application and defaulted appearance, as the Court believed the averments of the respondent, this Court cannot go through a long drawn process to see if the applicant was served or not while he had a chance to state so.

At any rate, this Court is not allowed to undergo a long drawn process to find a point of illegality since the point of illegality. Therefore, I find it justified not to exercise my discretionary power to grant the extension of time on point of illegality.

All said and considered, it is my finding that the applicant failed to demonstrate the points of illegality for this Court to exercise its discretionary power, to grant the extension of time to file an application to set aside ex-parte judgement out of time. Consequently, the application is hereby dismissed with costs.

It is so ordered.




M.MNYUKWA

JUDGE

07/06/2023

Court: Ruling delivered at Dar es Salaam on 07th June 2023 in the presence of the counsels for respondent and in the absence of the applicant.



M.MNYUKWA

JUDGE

07/06/2023