IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DODOMA DISTRICT REGISTRY

AT DODOMA

MISCELLANEOUS LAND APPLICATION NO. 104 OF 2022

(Arising from Miscellaneous. Land Application No. 06 of 2022 of the District Land and Housing Tribunal for Kondoa at Kondoa.)

PIUS DAMIAN.....APPLICANT

Versus

STELLA MARTINI.....RESPONDENT

RULING

Date of Last Order: 30th October 2023.
Date of Ruling: 24th November 2023.

MASABO, J:-

By a chamber summons filed in this court under section 14(1) of the Law of Limitation Act Cap. 89, R.E 2019 and section 41 (2) of the Land Disputes Courts Act Cap. 216 R.E 2019, a leave for an extension of time is sought to enable the applicant to file an appeal out of time to this court against the decision of the District Land and Housing Tribunal (DLHT) for Kondoa in Miscellaneous Land Application No. 06 of 2022. Supporting the application is an affidavit sworn by the applicant, Pius Damian. In the affidavit, it is deposed that the applicant was the applicant in Miscellaneous Land Application No. 6 of 2021 by which he was praying that the exparte judgment entered against him in Land Application No. 28 of 2017 be set aside. The application was decided in his disfavour on 29th July 2022. Disgruntled further he intends to appeal to this court but the time within which to file

the appeal lapsed when he was nursing her mother. Hence, this application. The application was contested by the respondent.

Hearing of appeal proceeded by way of written submissions. The applicant was represented by Ms. Joanitha Paul learned Advocate, whereas the respondent appeared in person. Only the applicant filed his submission. The respondent did not and when the application came for mention on 19/9/2023 to ascertain if the submissions are in order he defaulted appearance. Consequently, I have only the submission of the applicant at my disposal.

It is a settled principle of law in our jurisdiction that hearing by way of written submission is equivalent to a v*iva voce* hearing and the failure to file written submission when ordered, is considered to be tantamount to failure to enter appearance on the date of hearing which renders the application, suit or appeal the best candidate for dismissal if the defaulting part is the applicant or plaintiff or for an ex parte hearing if the defaulting part is the defendant or respondent. There is a plenty of authorities on this. In the case of **Fredrick Mutafungwa vs CRDB 1996 Ltd and Others,** Land Case No. 146 of 2004 (unreported) the Court of Appeal held that:

> Times and out of numbers, this Court has held that the practice of filing written submissions is tantamount to a hearing and therefore failure to file submission has been linked to a non- appearance for want of prosecution.

Cementing this position in the case of **National Insurance Cooperation (T) Ltd and Another vs. Shengena Limited** Civil Application No. 20 of 2007 [2020] TZCA 261 TanzLII, the Court of Appeal held that:

> Failure by a party to lodge written submissions after a court has ordered hearing by written submissions is tantamount to being absent without notice on the date of hearing.

Borrowing this wisdom, this court in **Muratweza Mutwe vs. Konde Shomary**, Civil Appeal NO. 1 of 2008, [2010] TZHC 164 TanzLII held that, filing submission is tantamount to a hearing and the failure to file respective written submission implies that the defaulting party has waived his rights to present their case. On the strength of these authorities, the respondent's failure to file his reply in the present application is taken to be a waiver of her right to submit in support of his counter affidavit.

Reverting to the applicant's submissions, while submitting is support of the application Ms. Paul narrated the background of the application that, the applicant is the owner of the disputed land measuring 17 1/4 acres which he personally acquired by clearing a virgin land in 1990, built a house into it and has since then been residing there. She submitted that the conflict arose in 2009 after the death of the respondent's father who was a neighbour to the applicant's land. The respondent instituted a case against him in the ward tribunal where it was held that she had no *locus standi*. Still determined to deprive the applicant of his ownership of the suit land, she filed another case before the District Land and Housing Tribunal for Kondoa at Kondoa. Her application, Land Application No. 28 of 2019 proceeded *ex parte.* Disgruntled by the exparte order, the applicant moved the tribunal to set aside the ex parte order but his application was dismissed erroneously. He

now intends to challenge the dismissal order in this court but the time has already lapsed.

On the merit of the application, Ms. Paul submitted that the delay in filing the application was not due to the applicant's negligence. Cementing the reason for delay she argued that the record demonstrates clearly that the applicant was not negligent. At no time has he sat on his right. She has been consistently fighting for her rights. When the land application was decided exparte, he filed an appeal in this court and the same was admitted as Land Appeal No.17 of 2020 and was assigned before Hon. G.V. Dudu PRM with extended jurisdiction who struck it out and advised him to file an application to set aside the exparte order. Hence, she was technically delayed in filing the application to set aside the exparte order. Thus, his delay was excusable as stated in **Betam Communications Limited vs. China International Telecommunication Limited Construction Corporation and CITCC Tanzania Limited**, Misc. Civil Application No. 511 of 2019 [2020] TZHC 1291 TanzLII.

Ms. Paul proceeded to submit that the applicant delayed to file the application as he was nursing his mother who was ailing. Because of that, he found himself under economic hardship as he was neither producing not earning an income. The farm he was depending on for production was the one under conflict and he was stopped from using it. Consequently, he depended on legal aid for the preparation of documents to be filed in court which is a good cause for extension of time as held in the case of **Constantine Victor John vs. Muhimbili National Hospital,** Civil

Application No. 214/18 of 2020 and **Shanti vs. Hindocha & Others** [1973] E.A 207.

Further, it was submitted and argued that there are material irregularities in the ex parte judgment as the opinion of one of the assessors was not recorded contrary to section 24 of the Land Disputes Courts Act Cap. 216 and the decision of this court in **Hosea Andrea Mushongi(Administrator of the late Hosea Mushongi) vs. Charles Gabagambi,** Land Case Appeal No. 66 of 2021 [2021] TZHC 7325 TanzLII. In conclusion, Ms. Paul invited this court to extend the time so that the applicant can be heard and the case be determined on merit inter parties.

It is a settled law that in applications for a leave for an extension of time such as the one at hand, the court will invariably invoke its discretionary powers. Such powers being judicial must be judiciously exercised upon a good cause for delay being demonstrated. Whereas there are no hard and fast rules as to what amounts to a good cause, it is an elementary rule that a good cause is a relative term and it is dependent upon the peculiar facts of each case. In the case of **Tanga Cement Company Ltd vs. Jumanne D. Masangwa and Amos. Mwalwanda**, Civil Application No. 6 of 2001 [2004] TZCA 4, TANZLII the Court of Appeal while dealing with an application for extension of time held that:-

> It is trite law that an application for extension of time is entirely in the discretion of the Court to grant or refuse it. This unfettered discretion however has to be exercised judicially, and the overriding consideration is that there must be sufficient cause for doing so. What amounts to

> sufficient cause has not been defined. From the decided cases a number of factors have to be taken into account, including whether or not the application was brought promptly; the absence of any valid explanation for the delay; lack of diligence on the part of the applicant.

And, in the case of **Lyamuya Construction Company Ltd Versus Board of Registered Trustee of Young Women's Christian Association of Tanzania** Civil Application No. 02 of 2010 [2011] TZCA 4 TanzLII, the Court of Appeal held that a good cause is established by looking at such factors as the duration of delay, that is, whether the delay is not inordinate; whether the applicant has sufficiently accounted for the delay; whether the applicant has demonstrated diligence and not apathy, negligence or sloppiness in the prosecution of the action he intends to take; or whether there exists a point of law of sufficient importance such as the illegality of the decision sought to be challenged.

It is also elementary that the applicant's duty to demonstrate a good cause for the delay is mandatory and not waived by such things as the respondent's inadvertent or deliberate failure to file a counter affidavit or written submissions thereof. Thus, even in the present case where the respondent defaulted filing of written submission, the applicant's duty to demonstrate a good cause remained intact. Therefore, the central question for determination in this application as it is the case in the other applications of this nature is whether a good cause has been demonstrated. Starting with the duration of delay, the decision sought to be challenged if the present application passes was delivered by the DLHT on 29th July 2022. As per

section 41 (2) of the Land Disputes Courts Act, the appeal to this court ought to have been filed within forty-five days from this date. Thus, it was to be filed by 13th September 2022. The present application was filed on 31st October 2022 which was approximately eighteen days after the impugned decision. In my firm view, the delay is not inordinate and is excusable if it is fully accounted for.

In his affidavit in support of his application the applicant has advanced one reason in support of his application. The same is deponed under paragraph 3 of his affidavit where he stated that he delayed because he was nursing his mother who was ailing. Indeed, sickness is a good ground for an extension of time if it is established and proved as to justify the delay. This was stated by the Court of Appeal in **Tiluhuma Pima vs. Malagoi Muhoyi**, Civil Application No. 418/08 of 2022[2022] TZCA 807 TanzLII where it held that:-

> On the second ground which is about sickness, indeed the law is settled that once sickness is established and proved as to justify the delay, it constitutes sufficient cause for extension of time.

I need not emphasize that as per this authority, for sickness to suffice as a good cause it must be established. It is not sufficient to just state that sickness prevented the applicant from taking the necessary legal steps. Proof must be rendered to show that he was indeed sick and that the sickness prevented him from filing the application. Going back to the affidavit and the submission, the applicant has stated that he was not the one ailing but his mother was the one ailing. Much as this earns him sympathy, it does not

suffice as a good ground for an extension of time because not only was he the one not ailing but no support was rendered to support his assertion about the ailment of his mother. Further intriguing is his omission to even mention the name of his mother and the name of the hospital at which she was treated. Not only that, no medical certificates were attached to the affidavit to support the assertion.

It is also unknown when the applicant's mother became ill. This court is therefore not in a position to know where to start counting the days of delay. The omission has left the days of delay unaccounted for. Since it is a trite law that an applicant seeking for extension of time must fully account for each day of delay even if it is just for a single day as held in **Bushiri Hassan vs. Latifa Lukiko Mashayo**, Civil Application No. 03 of 2007 (unreported), the omission is fatal to the application.

Furthermore, it is a general rule that when an affidavit mentions another person is hearsay unless that other person swears an affidavit in support of what has been stated about him (see the case of **Sabena Technics Dar Limited vs. Michael J. Luwuza**, Civil Application No. 451/18 of 2020 [2021] TZCA 108 TanzLII. Therefore, since the affidavit mentions the applicant's mother it was incumbent for her to swear an affidavit in substantiation that she was indeed sick. Since this was not done, the assertion that the applicant was nursing his ailing mother remains hearsay and devoid of weight.

In my further reading of the submission by the applicant's counsel, I have observed that she has improvised two new grounds, namely the applicant's difficult financial position and the illegality of the decision intended to be challenged. None of these was deponed in the 5 paragraphs of the affidavit. Much as I am alive that the illegality of the decision constitutes a good cause for an extension of time, the point of illegality was irregularly raised from the bar contrary to the law and practice as it is a mere submission from the bar hence devoid of weight (see **Benjamini Ndesario t/a Harambee Bus Service/UB 40 Bus Service VS M/S Rahisi General Merchant Ltd and Another**, Civil Application No. 265/05 of 2020 [2023] TZCA 17431 TanzLII). Second, the illegality alleged is not of the decision of the DLHT in Misc. Land Application No. 6 of 2022 which is intended to be challenged if the leave for extension of time is granted. Rather, it is of the ex parte judgment.

For the above reasons, the application miserably fails for want of a good cause and it is consequently dismissed. As the respondent defaulted filling of written submissions, there are no costs.

DATED at **DODOMA** this 24th day of November, 2023.

J.L. MASABO

JUDGE