

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

**[LAND DIVISION]
AT ARUSHA**

MISC. LAND APPLICATION NO. 6 OF 2020

(C/F the High Court of the United Republic of Tanzania, Land Appeal No. 7 of 2008, Originating from the District Land and Housing Tribunal for Manyara Region in Land Application No. 74 of 2007)

MARIAM MUSSA SHABANI APPLICANT

Versus

MAPINDA NSABI RESPONDENT

RULING

29th July & 3rd September, 2021

Masara, J.

The Applicant has preferred this application under section 68(e), 95 and Order IX Rule 12(1) and 13(1) of the Civil Procedure Code, Cap. 33 [R.E 2002] as amended by Government Notice No. 381 published on 10/5/2019, moving the Court to set aside its ex-parte judgment and decree delivered on 12/12/2012. The Application is supported by the affidavit of Mr. Gwakisa Sambo, learned Advocate for the Applicant. The Respondent contested the application and filed a counter affidavit deponed by the Respondent himself. Mr. Jubilate Ngoiva, learned advocate appeared for the Respondent. The application was argued through filing of written submissions.

Brief facts culminating to this application as per the affidavits and annexes go as follows: The late Shaban Mussa, owned a registered piece of land located at Plot No. 198, Majengo area within Babati Town (the suit land). He died on 4/12/1986. Swalehe S. Tandu was appointed as the administrator of the deceased's estate because the deceased's son Salum Mussa was a minor. When Salum Mussa attained the age of majority, the suit land was transferred to him on 18/3/1997. Unfortunately, in March 2003, Salum Mussa also died. Ramadhan Mussa was appointed as the administrator of the estate of the late Salum Mussa

by Babati Primary Court vide Probate and Administration Cause No. 38 of 2003. Ramadhan Mussa and Amina Mussa sold the suit land to the Respondent herein on 19/8/2003. The Applicant herein claiming to be among the heirs of the estate of the late Salum Mussa, petitioned to be appointed as the administratrix of the estate of the late Salum Mussa. On 5/3/2004, she was appointed by Babati Primary Court as the administratrix of the estate of the late Salum Mussa, whose administration was previously granted to Ramadhan Mussa.

Having been appointed as the administratrix of the estate of the late Salum Mussa, the Applicant sued the Respondent in the District Land and Housing Tribunal for Manyara (the district tribunal), vide Application No. 74 of 2007, seeking to be declared lawful owner of the suit land. She also sought a declaration that the Respondent be ordered to demolish his building erected on the suit land. After hearing the parties, the district tribunal declared the Applicant the lawful administratrix of the suit land. The sale of the suit land by Ramadhan Mussa to the Respondent was declared null and void. The Respondent was aggrieved. He appealed to this Court vide Land Appeal No. 7 of 2008. The appeal was heard ex-parte due to the Applicant's failure to enter appearance in Court. This Court (Massengi, J. as she then was), allowed the appeal reversing the decision of the district tribunal and thereby declaring the Respondent the lawful owner of the suit land. Consequently, the Respondent filed Application No. 145 of 2017 in the district tribunal seeking to execute the decree of this Court in Land Appeal No. 7 of 2008. It is against that ex-parte judgment and decree that the Applicant seeks to set aside in this application.

Submitting in support of the application, Mr. Sambo rightly highlighted that in order for the Court to set aside its ex-parte judgment, the Applicant has to adduce sufficient cause for failure to enter appearance in Court. He made reference to Order IX Rules 12 and 13 of the Civil Procedure Code, Cap. 33 [R.E

2019] (the CPC). Mr. Sambo referred to paragraph 14 of his affidavit stating that there are illegalities in the decision sought to be set aside. He explained the alleged illegalities as follows: First, this Court had no jurisdiction to entertain the appeal because it was filed out of time. He fortified that the decision of the district tribunal in Land Application No. 74 of 2007 was delivered on 9/11/2007, and Land Appeal No. 7 of 2008 was filed on 21/2/2008 outside 45 days allowable in filing appeals to this Court.

The other illegality referred to by Mr. Sambo is that Land Appeal No. 7 of 2008 was defective because the judgment and the decree in Land Application No. 74 of 2007 do not tally. The judgment is dated 9/11/2017 while the decree has no date at all. This, in Mr. Sambo's view, contravenes Order XX Rule 7 of the CPC. Mr. Sambo cited the case *of Mariam Abdallah Farid Vs. Kassim Abdallah Farsi* [1991] TLR 196 to substantiate his argument. Further, the advocate for the Applicant faults the impugned judgment because the Respondent herein who was the Appellant in Land Appeal No. 7 of 2008, pursued two matters at the same time. That the Respondent filed Misc. Land Application No. 7 of 2008 and Land Appeal No. 7 of 2008 both of which were filed on 21/2/2008. Mr. Sambo submitted that the Respondent rode two horses at the same time, which is prohibited in law. He made reference to decisions in *Heeter Sequira Vs. Serengeti Breweries Ltd*, Civil Appeal No. 395/18 of 2019 and *Delima Leba/ Elizabeth Lesso Vs. Khamis R. Milili*, Misc. Land Application No. 348 of 2017 (both unreported) to buttress his argument.

The last illegality pointed out by Mr. Sambo is that the Applicant was denied her basic right to be heard in Land Appeal No. 7 of 2008, contrary to Article 13(6)(a) of the Constitution. He asserted that the Respondent knew the physical address of the Applicant. He maintained that the Applicant was not served with any summons as there is no affidavit of any person showing that the Applicant

was dully served and she refused service. To support his contention, the learned advocate made reference to the decisions in ***Ramadhan Amiri Vs. Yusuph Rajabu*** [1995 [TLR] 26 and ***Melkiory Herbet Assey Vs. Faustine Mchuo***, Misc. Land Application No. 70 of 2020 (unreported).

Mr. Sambo also faulted the counter affidavit of the Respondent for containing general denials, without explaining his side of the story. To support his argument, he cited the case ***of East African Cables (T) Ltd Vs. Spencon Services Ltd***, Misc. Application No. 61 of 2016 (unreported). He maintained that paragraph 14 of his affidavit was thus admitted by the Respondent for failure to state his side of the story. Mr. Sambo concluded by urging the Court to allow the application, set aside the decision in Land Appeal No. 7 of 2008 and allow the same to be heard interparty.

On his part, Mr. Ngoiva vehemently contested the application. He precluded his submission by raising a legal point relating to the status of the Applicant. In his view, the Applicant had no *locus standi* to sue both in the district tribunal and in this application. To substantiate the point, he stated that the Applicant was illegally appointed as the administratrix of the estate of the late Salum Mussa because administration of the deceased's estate was previously vested on Shaban Mussa vide Probate and Administration Cause No. '38 of 2003. He asserted that since the former administrator was not revoked, the subsequent appointment of the Applicant was contrary to law, which he termed as res judicata.

The learned counsel further said that the Applicant is not recognized as one of the beneficiaries of the estate of the late Salum Mussa. He cited the case of ***Masudi Ally Vs. Chiku Masudi*** which held that a person who is neither a child nor a relative of the deceased is a stranger to the deceased and stranger to his

estate. According to Mr. Ngoiva, the Applicant sued in her own capacity and not as the administratrix of the deceased's estate. Lastly, that the Applicant had no any interest in the suit land. To support his contention, the learned advocate referred to the decision of this Court in ***Mary Tutaye Vs. Grace Mwambenja***, Land Appeal No. 42 of 2019. He concluded that the Applicant had no *locus standi* to pursue the suit. To support his argument on the importance of showing *locus standi* prior to suing a party, Mr. Ngoiva relied on the decisions in ***Lujuna Shubi Ballonzi Senior Vs. Registered Trustees of Chama cha Mapinduzi*** [1996] TLR 203 and ***Chama cha Wafanyakazi Mahoteli na Migahawa Zanzibar Vs. Kaimu Mrajisi wa Vyama vya Wafanyakazi na Waajiri Zanzibar***, Civil Appeal No. 300 (unreported). He called upon this Court to nullify the proceedings of both this Court and the district tribunal for lack of *locus standi*.

Regarding the illegalities pointed out by Mr. Sambo, Mr. Ngoiva submitted that the Respondent, knowing that he was out of time due to sickness, he applied for extension of time vide Misc. Land Application No. 7 of 2008, but he admitted that the same is not in the Court record. In so far as the Respondent's counter affidavit is concerned, it was Mr. Ngoiva's submission that paragraph 5 thereof specifically states that all the necessary efforts were employed to locate the Applicant's whereabouts but she could not be traced. He referred to a letter written by Bagara Ward Executive Officer dated 23/3/2009 showing that the Applicant's relatives refused to receive summons. Mr. Ngoiva maintained that substituted summons by publication in Mwananchi of 18/11/2011 was properly made in accordance with the law.

Mr. Ngoiva faulted the Applicant for taking five years to file the instant application stating that the Applicant did not act promptly. He implored the Court to uphold the principle that litigation must come to an end. In this respect,

the learned advocate referred to **Lakhamshi Brothers Ltd Vs. R. Raja and Sons** [1966] 1 EA 313. He maintained that the Respondent did not admit the contents of the affidavit in support of this application. He reiterated his prayer that this Court nullifies the proceedings and decisions of both this Court and those of the district tribunal.

In his rejoinder submissions, Mr. Sambo submitted that the issue whether the Applicant has *locus standi* is a new ground which is not pleaded in the counter affidavit or is it an issue for determination before this Court. That what this Court is enjoined to determine is whether the Applicant has adduced sufficient reasons for the Court to exercise its discretion and set aside its judgment. He insisted that it is undisputed that the Applicant was appointed as the administratrix vide Probate Cause No. 55 of 2003; therefore, she had *locus standi* to sue. According to Mr. Sambo, the fact that the Applicant did not indicate in the title that she was suing as administratrix is not fatal. To support this averment, he cited the case of **Suzana S. Waryoba Vs. Shija Dalawa**, Civil Appeal No. 44 of 2017 (unreported).

Mr. Sambo also faulted the Respondent's submission for containing a letter of the WEO of Bagara Ward stating that written submissions do not contain annexures save decisions of the Court in line with the decision in **TUICCO Vs. Mbeya Cement Company Ltd and Another** [2005] TLR 41

I have given deserving weight to the affidavits and the written submissions by both advocates. The issue calling for this Court's determination is whether the Applicant has advanced sufficient cause that will move the Court to exercise its discretion to set aside its decision in Land Appeal No. 7 of 2008.

It is noted that Mr. Sambo cited Order IX Rules 12 and 13 of the CPC as the provisions he premised this application. The provisions are incorrect. The application ought to have been premised under Order IX Rule 9 of the CPC. The relevant provision provides:

*"9. In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that he was prevented by any **sufficient cause** from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit."* (Emphasis added)

In the application under scrutiny, it is therefore upon the Applicant to show sufficient cause for her non-appearance when the appeal was set up for hearing. This was also the holding of the Court of Appeal in the case of ***Pangea Minerals Ltd Vs. Petrofuel (T) Limited and 2 Others***, Civil Appeal No. 96 of 2015 (unreported), the Court of Appeal held:

*"On the basis of the above provision and authorities, it is settled that where a defendant against whom an ex-parte judgment was passed, intends to set aside that judgment on the ground that he had **sufficient cause for his absence**, the appropriate remedy for him is to file an application to that effect in the court which entered the judgment."*(Emphasis added)

In determining whether to set aside the impugned decision as the above authorities show, sufficient cause for non-appearance is the only ground that is taken into account by the Court. The Court is not asked to review its decision. It is asked to depart from the decision rendered ex parte on the basis of sufficient grounds that precluded the applicant from entering an appearance before it. That is to say, the litany of alleged illegalities pointed out by Mr. Sambo under paragraph 14 of the affidavit and elaborated in his written submissions cannot move the Court to set aside the ex-parte judgment and decree in Land Appeal No. 7 of 2008. They are, to say the least, irrelevant and immaterial as far as the application is concerned. The illegality in the impugned

decision would have been relevant were this application about the extension of time to appeal to the Court of Appeal or against the trial tribunal decision. Having so said, I will not deal with the substance of the alleged illegalities. The only issue that calls for my determination is whether sufficient cause for non-appearance in Court has been established by the Applicant.

In this application, the reason for the Applicant's non-appearance is stated under paragraphs 7 and 8 of the affidavit in support of the application. In paragraph 7, the advocate for the Applicant deponed that the Applicant was never served with summons to appear and defend that appeal. Paragraph 8 thereof states that the Respondent intentionally avoided to serve the Applicant while he was aware of her physical address and working place.

I have revisited the record of this Court in Land Appeal No. 7 of 2008. The appeal was first scheduled on 14/5/2008. It dragged in Court until it was determined on 09/02/2012. Throughout that period, the Applicant did not enter appearance. It is on record that the Applicant's whereabouts could not be traced. Under the circumstances, the Respondent, who was the Appellant therein, prayed for substituted service by publication on 25/08/2011. An order of service by publication was made on that day, and the Applicant was served by publication in Mwananchi newspaper dated 18/11/2011.

The counsel for the Respondent seems to admit that there is no documentary proof that the Applicant was served and that she could not be traced. The summons annexed in the affidavit and counter affidavit DN-1, show that they were attached with affidavits which were not filled in. Such affidavits ought to be filled in so as to indicate that the Applicant could not be found. However, in the reply submissions, the learned counsel makes reference to a letter dated 23/03/2009 written by the Ward Executive Officer of Bagara ward. The

Advocate for the Applicant challenged this assertion and sought this Court to ignore any such evidence. The Advocate for the Respondent did not attach the said letter in his submissions, therefore what is purported by Mr. Sambo is not supported by the records. A perusal of the Court File with respect to Appeal No. 7 of 2008 contains the said letter. I would have expected Mr. Sambo, who alleges to have made a Court record perusal, to have come across the said letter. Further, there is a summons dated 23rd February, 2009 addressed to the Applicant which has an endorsement of the Ward Executive Officer of Bagara to the effect that the Applicant could not be traced. I believe these are the evidences that made the judge in conduct of the appeal to authorise substituted services.

It is therefore not true to state that there was no proof of failure of service. It is common knowledge that a party seeking to resort to service by publication has to satisfy the Court that service by all other means has failed. The Court of Appeal in *Ally M. Tarimo Vs. Julius Gogadi*, Civil Appeal No. 26 of 2011 (unreported) stated the following on the importance of proof of service:

*"When the matter was called on for hearing neither the appellant/plaintiff nor the respondent/defendant was present in court. **There was also no proof of service to the parties.** The order dismissing the suit did not indicate that the parties were served."*(Emphasis added)

From the above, the order of substituted service was properly made considering that other modes of service failed. Furthermore, once a party is summoned by way of publication, the assumption is that she will attend as the publication is expected to reach her wherever she is. The fact that the publication was done in Mwananchi newspaper, which is a widely read newspaper in Tanzania, the Applicant's non-appearance cannot be justified. I need not also say that it would not be appropriate for this Court to fault the discretion exercised by the judge when she ordered service through publication. This Court is functus officio on that aspect.

In the assertion by Mr. Ngoiva that the Applicant had no *locus standi* to sue, I resist from making such determination. That submission would have been appropriate if this Court was dealing with the merits or demerits of the appeal/suit. On the issue of not indicating at what capacity she was suing, again this is a matter that need not detain me. I should however state that such omission may not be fatal in fit cases. In this aspect, I am guided by the Court of Appeal decision in the case of ***Suzana S. Waryoba Vs. Shija Dalawa***, Civil Appeal No. 44 of 2017 where it held:

"Before we pen off, we wish to address one little disquieting aspect. This is that the appellant sued as an administratrix of the estate of the late Stanslaus Waryoba. However, that aspect did not reflect in the title of the case. We are of the considered view that the fact that Suzana Waryoba was suing in her capacity as an administratrix of the estate of the late Stanslaus Waryoba should have been reflected in the title of the case. However, we hasten the remark that the omission is not fatal given that it was clear throughout that she was, suing in that capacity and the judgment of the Primary Court which appointed her as such, was tendered in evidence at the very outset. We only wish to accentuate that when a litigant sues as an administrator or administratrix of estate, it is desirable that the same should be reflected in the title." (Emphasis added)

I should also point out that the time taken by the Applicant to file this application makes this Court believe that the Applicant's delay was inordinate. Having been appointed as the administratrix of the estate, rightly or wrongly, the Applicant was not expected to disappear for close to 12 years without attending matters of the estate. There is no proof that she ever managed the estate by filing an inventory or final accounts. It also took her close to 8 years from the time the Judgment in land Appeal No. 7 of 2008 was delivered to the time she filed this Application. Her only excuse is that she was not served! As rightly submitted by the counsel for the Respondent, it is in the interest of justice that there must be an end to litigation. The Applicant, exercising common diligence, was supposed to realise that the Respondent was not going to forfeit his

purchase money. She made no efforts to avert the possibilities of an appeal. She cannot be excused for such a long and unexplainable delay.

In the upshot, this application is bound to fail. The Applicant has failed to adduce sufficient cause for the delay to have the judgment in Land Appeal No. 7 of 2008 set aside and the appeal heard interpartes. The application is accordingly dismissed with costs.

Order accordingly.




Y. B. Masara
JUDGE

3rd September, 2021