IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION No 587 of 2023

(Arising from Land Case No. 17 of 2019, Dr. Zainabu Diwa Mango, Judge)

ALI MOHAMED ALI..... 1st APPLICANT

SOPHIA SOMO OMAR.....2nd APPLICANT

MAMY ABUBAKAR FADHILI.....3RD APPLICANT

VERSUS

LILIAN STEPHEN KIMARO ..... RESPONDENT

RULING

Date of Last Order: -24/10/2023

Date of Ruling: - 08/11/2023

MWAIPOPO, J.

This is an application for extension of time to set aside an *exparte* judgment entered by this court in Land Case No.17 of 2019 dated March 29, 2021. The Application has been premised under Section 14 (1) of the Law of Limitation Act Cap. 89 RE 2019 by way of a Chamber summons supported by a Joint affidavit of Mr. Ali Mohamed Ali, Ms Sophia Somo Omar and Ms Mamy Aboubakar Fadhil, herein applicants, who are praying that this court be pleased to extend time for them to set aside the said *exparte* judgment. Ancillary thereto is a prayer that any other relief this court deems just and fit be granted in their favour. Upon being served with the said Chamber summons and affidavit, Ms. Lilian Stephen Kimaro, herein Respondent, filed a counter affidavit to contest the application.

Before embarking on the determination of this application on its merits, I find it apt to narrate the material background facts leading to this application as may be deciphered from the record.

On May 30, 2014, the 1st applicant requested a loan of Tshs. 50,000,000/= to be paid on July 31, 2014 from the Respondent, a money lender who holds a business license no. 1769776 admitted as P1. The request was granted and a loan agreement, admitted as P4, was duly signed by the parties. As security for the loan, the 1st applicant mortgaged his house situated at Kigamboni with residential license no. VJB/MKJ591. In compliance with Section 114(1) of the Land Act Cap. 113 RE 2019 which requires a mortgagor to obtain spousal consent before mortgaging his matrimonial property, his wives i.e. the 2nd and 3rd applicants, duly granted their consent. Unfortunately, the 1st applicant failed to honor his obligations to repay the loan hence on the 5th of December 2014, the Respondent wrote him a demand letter as per Section 127 (1) & (2) of the Land Act Cap. 113 RE 2019 directing him to pay within 60 days and the same was admitted as P5. Thereafter, the Respondent Instituted Land Case No.17 of 2019 in this court. She sued the applicants for recovery of a loan amounting to Tshs Sixty Million (Tshs60,000,000/=).

The 1st applicant allegedly refused service of court summons as per affidavits of the court server dated 3rd of July, 2019 and 24th March, 2020. Consequently, on 27th of March, 2020 the trial judge ordered the matter to proceed *exparte*. The Respondent, thus, proceeded to prove its case *exparte*. She was the only witness. Only two days later i.e. On 29th of March, 2021 the Judge entered judgment in her favour and ordered, among other things,

sale of the mortgaged property. On August 23rd of 2023, the 1st Applicant was served with 14 days' notice by a local government leader after being notified by Court Broker Sensitive Auction Mart & Court Brokers of the existence of an execution order. On the same day, the applicants engaged an advocate, Mr. Faraji Mangula, to establish whether it was true that a suit had been instituted against them which resulted in an *exparte* judgment. Having so established, the applicants instituted this instant application.

When the application was called on for hearing, the applicants enjoyed the services of Mr. Faraji Mangula aforementioned while the respondent enlisted the services of Mr. Aidan Kitare, both learned counsels. The court acceded to the parties' proposal to have the matter disposed of by way of written submissions not exceeding five pages each. Pursuant thereto, a schedule for filling the said written submissions was set by this court. The said schedule was, subsequently, duly complied with by both parties.

In their submissions in support of the application, having adopted the Chamber summons and affidavit, the applicants via their counsel, Mr. Mangula, stated that they knocked the doors of this court vide Section 14(1) of the Law of Limitation Act Cap 89 RE 2019 seeking extension of time within which to apply for setting aside the *exparte* judgment of this Court. He contended that the *exparte* judgment is tainted with serious irregularities apparent on the face of the record. In elaboration, he stated that the applicants were not aware of the existence of Land Case No. 17 of 2019, between the parties. They only became aware of it on 23rd August, 2023 when they were served with a 14 days' notice in compliance with the order of this court in Application for Execution No. 95 of 2022 which was heard and delivered Exparte by a Judgement dated 29/3/2021 where the

Applicants were not aware and time to set aside Exparte Judgment lapsed hence this Application. He submitted that as parties in the case have a right to appear and defend their case as can be seen in the submission there are matters which are not in dispute such as existence of loan facility between them therefore denying the chance to exercise their right to be heard has led to execution of a decree by application of execution to attach and sale the alleged mortgaged house. Whereas the parties may resolve at the earliest stage of the case during mediation and obtain Consent Judgment if the Applicants were given chance to respond to the claims.

He contended that they were never summoned by this court and, consequently, they were denied their right to be heard as per article 13 of the Constitution of Tanzania, 1977 and Order V rule 1 of the Civil Procedure Code RE 2019 which directs that a case must be heard when both parties are present. He went further to state that some of the summons were defective as they were not witnessed by a Commissioner for Oath, for instance the one dated February 7, 2019. He also complained that substituted service under Order V rule 16 of the CPC RE 2019 was wrongly not preferred.

Furthermore, he faulted the trial judge for failure to comply with Order XX rule 1 of the CPC RE 2019 which provides that after a case is heard *exparte* and before a judgment is pronounced, due notice must be given to both parties. To buttress his argument, he cited **Ms Casco Technologies Co. Ltd v Kal Holdings Co. Ltd, Misc. Civil Application No 8 of 2021 (Unreported)** citing the case of **Awardh Idd Kajass v Mayfair Investment Ltd, Civil Application No 281 of 2017** (Unreported) CAT

and **Stephen Ngalambe v Onesmo Chaula and another, Civil Application No 5 of 2022 (Unreported) CAT.**

He rounded off his submissions by praying that the application be granted in favor of the applicants.

Submitting in opposing the application, the Respondent, through her counsel, Mr. Kitare, raised a preliminary objection to the effect that the application is incurably defective for failure to cite Section 52 (2) of the Land Disputes Courts Act Cap 216 RE 2009 before citing Section 14(1) of the Law of Limitation Act Cap 89 RE 2019 which, according to him, is not applied directly to land applications. He cited the case of **Othuman M. Othuman and Another Vs Tanzania Investment Oil and Transport Co. Ltd, Civil Appeal No. 134 of 2004** to cement his view.

Regarding the substantive matter, he contended that the applicants were not denied their right to be heard as they avoided summons sent to them by a court process server and also contended that substituted service was not required as the applicants were duly served via the ordinary mode of service i.e. physically. He further stated that the reasons for delay given did not amount to good cause. To cement his view, he cited the case of **Elias Mwakilinga v Domina Kagaruki & Others**, Civil Application No. 120 of 2018 (CAT). He concluded by asking the court to dismiss the application with costs.

In his rejoinder, Mr. Mangula, reiterated his position in his submissions in chief. He asked this court to overrule the PO stating that it was unlawful for a party to rise a preliminary objection when making submissions as that is

tantamount to surprising the other party. He cited the case of **Yara Tanzania Ltd vs Charles Msemwa and others**, Commercial Case No. 5 of 2013 (Unreported).

Having carefully considered the records of this court and the submissions made for and against the application by the trained legal minds, this court is now called upon to determine this matter. However, before considering the merits or otherwise of this application, I am inclined, as is the norm, to first deal with, and to dispose of, the preliminary objection raised by the Respondent. This is in compliance with various decisions of this court; see, for instance, the recent case of Keith **George Maginga VS Stanbck Tanzania Limited**, Commercial application No. 120 of 2023 (Unreported). This court stated:

> ***"As a matter of law and practice, whenever there is a preliminary objection, the same must be disposed of before dwelling into the merits or otherwise of the main matter".***

As stated earlier on, this court has been called upon to determine a preliminary objection raised by the Respondent when tendering in court his written submissions to the effect that the applicants' application is incurably defective for failure to cite Section 52 (2) of the Land Disputes Courts Act Cap 216 RE 2009 before citing Section 14(1) of the Law of Limitation Act Cap 89 RE 2019 which, according to him, is not applied directly to land applications. Mr. Mangula, in his rejoinder submissions, contended that it was unlawful to raise a preliminary objection at that stage. However, I do not subscribe to that view. I am of the view that a preliminary objection may be raised at any time as correctly stated by this court in **Pyrethrum**

Company of Tanzania vs Rehema Chioko, Labour Revision No.6 of 2019 (HC) (Unreported):

> ***"...Courts of law are enjoined to decide matters before them according to the law. A court of law cannot thus, close eyes to a PO based on point of law, merely because the PO has not been brought according to the practice. a PO has no time limitation in law. It can be raised at any time....."***

Consequently, I now proceed to determine the merits or otherwise of the said preliminary objection. For the reasons which will be apparent shortly, I wish to state from the outset that the Respondent's objection is without merit and I overrule it. The case of **Othuman M. Othuman and Another Vs Tanzania Investment Oil and Transport Co. Ltd** (supra) cited by the Respondent is distinguishable from the instant application. In that case, the applicant had not cited the provision of the law under which the court was moved and thus the Court of Appeal stated that it was fatal:

> ***"An applicant has to cite the provision of the law under which the court is moved. Failure to do so will result in an application being struck out for incompetence. Similar consequences will follow if the specific correct provision of the law is not cited".***

In the instant application, the applicants cited a provision under which the Court is moved i.e. Section 14(1) of the Law of Limitation Act Cap 89 RE 2019.The said Section provides as follows:

> ***"Notwithstanding the provisions of this Act, the court may, for any reasonable or sufficient cause, extend the***

period of limitation for the institution of an appeal or an application, other than an application for the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal".

There is no doubt in my mind that this is the correct specific provision required to be cited, in the circumstances of this matter, as per the CAT in **Othuman M. Othuman and Another Vs Tanzania Investment Oil and Transport Co. Ltd** (Supra). In my view, Section 52(2) of the Land Disputes Court Act Cap 216 RE 2009 is not the correct specific provision, it is a general one. It provides:

"The Law of Limitation Act shall apply to proceedings in the District and Housing Tribunal and the High Court in the exercise of their respective original jurisdiction".

Furthermore, Section14(1) cited above is the enabling provision in the circumstances of this matter. In this regard, in the case of **Amin Mcharo Vs Tanesco,** Civil Application No. 196 of 2019 (HC), the court stated:

"The question is; What is an enabling provision? It is a provision of law that gives someone legal authority to do something. It is that which allows the applicant to make an application"

Guided by the above principle, Section 14(1) of the Law of Limitation Act Cap 89 RE 2019, in my view, is the enabling provision in the circumstances of this matter. There is a considerable body of case law in our jurisdiction in this respect. See, for instance, the case of **Amanda Lipawaga v Dora**

Mwakayai, Civil Application No. 5 of 2023 (HC) (Unreported), **Halima Kidanga v Nasibu Mwanjaku**, Land Appeal No.58 of 2022 (Unreported) HC and **Hafidhi Selemani and another v Salima Selemani**, Civil Application No 738 of 2016 (Unreported) HC. In all these cases, it is only Section 14 (1) of the Law of Limitation Act Cap 89 RE 2019 which was cited. Section 52(2) quoted above was not cited in any of these cases. Consequently, I am of the view that it is not proper to contend that Section 14(1) cited above could not be resorted to for anchoring the applicants' application on the ground that it is a wrong provision as the Respondent has contended.

Admittedly, it would be more appropriate to cite both provisions but failure to cite Section 52(2) is a minor error which is not fatal. In this respect, I invoke the principle of overriding objectives to disregard the error as it is a minor error, relying on the decision of the CAT in **Yusuph Nyabunya Nyatururya Vs Megaspeed Liner and Another (Supra).** Furthermore, the Respondent has not been prejudiced by the anomaly see **Yusuph Nyabunya Nyatururya v. MEGA Speed Liner Ltd and Another** (Supra). On the other hand, Mr. Mangula, in his rejoinder submissions filed on 30th October 2023, challenged the validity of the Respondent's Written Submissions filed on 27th October 2023 for contravening the order of this Court issued on 24th October 2023. In elaboration, he stated that this Court had ordered that this Application be disposed of by way of written submissions that do not exceed 5 pages. This was also agreed to by both parties. Mr. Mangula stated that in contravention of the said order, Mr. Kitare submitted a document containing a 9-page Written submission.

Consequently, Mr. Mangula has requested this court to disregard the entire written submissions filed by Mr. Kitare.

It is incumbent upon me confirm that indeed, this court, on 24th October 2023, ordered that this matter be disposed of by way of written submissions which should not exceed 5 pages. This being a court order, it was supposed to be strictly adhered to by both parties. There is a considerable body of case law to the effect that court orders must be duly complied with; see, for example the case of **Athumani Kungubaya and Another VS PSRC & TTCL**, Misc. Civil Appeal No.9 of 2001 (Unreported) HC. In these circumstances therefore, what is the way forward? Should I disregard Mr. Kitare's entire Written submissions as Mr. Mangula has requested? After having thoroughly considered this matter, I have decided to disregard only the exceeding pages ie Pg. 6-9 and will proceed to only consider the pages within the prescribed limit i.e. Pg. 1-5. I am fortified in my view by the persuasive decision of the High Court (Kairo, J, as she then was) in the case of **Intertrade Commercial Services LTD VS NMB and Another**, Misc. Civil Application No. 304 of 2018 (Unreported) who took the same route when faced with an akin situation).

Furthermore, this court has noted that Mr. Kitare submitted a "*Rejoinder to the Applicant's Reply Submissions on Preliminary Objections*" which was essentially a rejoinder as per the Order dated 30th and it was titled as a rejoinder. To be clearer, he filed a rejoinder on top of a rejoinder which was ordered by the Court. This, in my view, was also in contravention of the court order issued on 24th October 2023. This was not compatible with a sound policy to avoid endless litigations. It is a settled principle that litigations must come to an end; see, for example, the case of **John Barnaba Machera VS**

North Mara Gold Mine, Civil Appeal No. 204 of 2019 (Unreported –CAT). When Mr. Mangula filed his rejoinder submissions on 30th October 2023, the schedule for submissions was complete as per the order of the court. Consequently, Mr. Kitare ought to have obtained leave of this court to file the same. Failure to do so means that the said document is improperly before this Court and the attendant consequence is that the same is accordingly expunged from the court's record.

Having decided on the preliminary objection raised by Mr. Kitare and the complaint made by Mr. Mangula, I now move to the merits or otherwise of the instant application. The question this court is invited to determine is whether this court should exercise its powers and proceed to grant the applicants' application for extension of time within which to apply for setting aside the judgment given exparte against them.

I wish to start the determination by appreciating the law on the point. This application is entirely in the discretion of this court which must, however, be exercised judiciously. There is an avalanche of cases to that effect, see, for instance, **Tanga cement company Ltd v Jumanne Masangwa and another**, Civil Appeal No.6 of 2001 (unreported) which is a true and reliable guiding star. The CAT stated:

> ***"An application for extension of time is entirely in the discretion of the court to grant or refuse it. This unfettered discretion of the court however has to be exercised judiciously and the overriding consideration is that there must be sufficient cause for doing so"***

What amounts to sufficient/good cause has not been defined but the Court of Appeal provided guidance in the case of **Lyamuya construction company Ltd v the Registered Trustees of the Young Women's Christian Association of Tanzania,** Civil Application No. 2 of 2010 (unreported) by mentioning factors to be considered. These are **One,** to account for all the period of delay, **two,** the delay should not be inordinate, the applicant must show diligence and not apathy, negligence or sloppiness in prosecution of the action he intends to take and **three,** the existence of a point of law of sufficient importance such as the illegality of the decision sought to be challenged.

Furthermore, the CAT stated in the case of **VIP Engineering and Marketing Ltd and others v Citibank Tanzania Ltd,** Civil Reference No.6, 7 and 8 of 2006 (unreported).

"It is settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time...".

Moreover, for the ground of illegality to stand, it must be apparent on the face of the record and should never require a long-drawn process to be marked. The CAT has so stated, times without number. See, for instance, the case of **Elias Nyang'oro and 2 others v Mwananchi Insurance company Ltd,** Civil Application No. 552 of 2019 (unreported).

Lastly, I wish to cite the case of **Access bank Tanzania LTD VS Joseph Magesa Chilawe,** Civil Appeal No. 4 of 2021 (Unreported –HC):

"There are some irregularities which amount to illegality".

Reverting to the present application, the main reason advanced by the applicants seeking this court to exercise its discretion to set aside the *exparte*

judgment is on illegality which is based on the right to be heard. The applicants have forcefully contended that the judgment is tainted with serious irregularities which are apparent on the record. They have submitted that they were not duly served hence they were denied their right to be heard in contravention of article 13 of the Constitution of the United Republic of Tanzania, 1977 and Order V rule 1 of the CPC RE 2019 which, in essence, directs that a case must be heard when both parties are present. He contended that the trial judge misdirected herself when she ordered *exparte* hearing instead of service by publication after being informed that the applicants were avoiding summons.

Mr. Kitare, on the other hand, has contended that the applicants were not denied the right to be heard and that the trial judge did not misdirect herself when she ordered *exparte* hearing instead of service by publication after being informed that the applicants were avoiding summonses. He was of the view that the applicants are to blame.

It is an old principle of natural justice, perhaps the foundation of the very justice this court is constitutionally charged to administer that no person shall be adjudged without being heard. Accordingly, in response thereto, rules of civil procedure and litigation at large require that one must be put to notice of a claim against him and be allowed to present his defence. Elaborate procedure on this is given by the rules of Civil procedure particularly on service of summons.

On this point, it was stated by this court in **Charles Ndesi v Juma Wambura**, Land Appeal No.77 of 2020 (unreported) that:

"The Law clearly provides the modes of serving the respondent. The modes are found under Rule 5 and 9 of the Land Disputes Courts (The Land and Housing Tribunal) Rules GN 174/ 2003. Rule 5(3) requires the service to be effected upon the party himself, his spouse, any member of the household above 18, his advocate or any other person authorized to receive the summons. The law further provides the mode of service if the respondent cannot be served in the mode provided under rule 5, he may be served as provided under Rule 9. Rule 9 provides that where it is not possible to effect personal service, service may be by affixing the notice on conspicuous place on or as near as possible on the land in dispute, by registered mail and by publishing a copy in one or more newspapers circulating locally.

..... If personal service cannot be affected, all the above modes must be applied to effect service". (Emphasis mine).

In the same vein, I wish to borrow the words of Honourable, Mruma J, who emphasized in Dave **Impex Ltd v Hellman Worldwide Logistics,** Civil Appeal No. 320 of 2021 (Unreported):

"It should be known that service by publication should be the last resort where the appellant is nowhere to be found".

Furthermore, in determining whether or not a court should exercise its discretionary powers, it is important to consider if the applicant was prompt and diligent after becoming aware of the existence of an *exparte* judgment. This guidance was provided by our Apex court in the case of **Magnet Construction Ltd v Bruce Wallace Jones**, Civil Appeal No.459 of 2020 (Unreported):

> ***"For the court to exercise its discretion, the applicant must satisfy it that since being aware of the facts of delay that he is out of time, his conduct must display that he acted expeditiously and diligently in lodging the application for extension of time".***

This is akin to what the CAT also stated in **Stephen Ngalambe v Onesmo Chaula,** Civil Appeal No.27 of 2020 (Unreported) whose facts are on all fours with the instant application:

> ***"It is our finding that the appellant was prompt and diligent in pursuing his goal to have the judgment made exparte against him set aside. Just after being informed of the existence of the judgment on 14.12.2018, he wrote a letter to the Registrar of the HC requesting to be supplied with the copies of the relevant documents. Upon being supplied with the copies on 19.12.2018, he had to look for an advocate who on the same day was able to peruse the relevant case file and on 4.1.2019 Misc. Application No.1 of 2019 for extension of time within which to set aside the judgment was filed".***

Applying the above principle to the instant application, I am of the settled view that the applicants were prompt and diligent as they acted expeditiously after becoming aware of the *exparte* judgment. The applicants became aware of it on August 23, 2023 after the execution process commenced. On the same day they engaged their advocate who immediately on the same day perused the relevant case file and subsequently filed this application. I am inclined to share the views expressed by Mr. Mangula that his clients were denied their right to be heard. This was wrong as it is a cornerstone of our legal system that no one should be condemned unheard. I wish to borrow a leaf from the CAT's decision in **Clody Shikonyi v Estom Baraka & 4 others,** (2019) 1 TLR 192 that:

> ***"It is now a settled law that no decision must be made by any court of justice, body or authority entrusted with the power to determine rights and duties so as to adversely affect the interests of any person without first giving him a hearing according to the principle of natural justice".***

Consequently, I am of the settled view that the applicants have assigned good cause that prevented them to enter appearance. In other words, there is an arguable defence which justifies this court to exercise its discretionary powers to grant this application to set aside the exparte judgment as stated by the CAT in ***Hashy Energy (T) vs Khamis Maganga***, Civil Appeal No. 181 of 2016 (Unreported).

> ***"...The presence of an arguable defence on the merit may justify the High Court to exercise its discretion to set aside default judgment even if other factors are unsatisfactory in the whole or in part".***

In the premises, the application is meritorious and consequently it is hereby granted. The applicants are given 14 days from the date of delivery of this ruling to file their application to set aside the *exparte* judgment. Costs to follow the event. It is so ordered.

DATED at DAR ES SALAAM This 8th day OF NOVEMBER, 2023.

S.D. MWAIPOPO

JUDGE

08/11/2023

The ruling delivered this 8th day of November, 2023 in the presence of Advocate Francis Kajiru holding brief for Advocate Faraja Mangula for the Applicants and in the absence of Advocate Aidan Kitare, for the Respondent, is hereby certified as a true copy of the original.

S.D. MWAIPOPO

JUDGE

08/11/2023