

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS LAND APPLICATION NO. 453 OF 2022

SOPHIA MATHAYO SIMBA..... APPLICANT

VERSUS

EQUITY BANK(TANZANIA)LIMITED.....1st RESPONDENT

TEGRA TRADING CO. LIMITED.....2nd RESPONDENT

COPS AUCTION MART AND COURT BROKERS LTD.....3rd RESPONDENT

RULING

Date of last Order: 12/10/2023

Date of Ruling: 15/12/2023

K.D. MHINA, J.

The applicant, Sophia Mathayo Simba, by way of chamber summons, sought the indulgence of this Court through section 14 (1) of the Law of Limitation Act on the following orders;

- a. The Honourable Court be pleased to grant an extension of time within which to file an application for restoration of land application No. 79 of 2021 out of time.*
- b. Any other orders as the Court deem fit and just to grant.*

The chamber summons was supported by the applicant's sworn affidavit, which briefly advanced two grounds for the application. The grounds are;

- i. Illness of the applicant.
- ii. The applicant's previous advocate was employed by the Government.

To appreciate the merits or otherwise of the application, a tale on the background will be necessary.

The applicant filed in this Court, Land Case No. 79 of 2021, against the respondents. On 8 March 2022, this Court dismissed the suit for want of prosecution.

Aggrieved, while she was out of time, the applicant, on 5 August 2022, applied for an extension of time to restore Land Case No. 79 of 2021 vide Misc. Land Application No. 453 of 2022.

Again, on 13 December 2022, Misc. Land Application No. 453 of 2022 was dismissed for want of prosecution.

Relentless, the applicant again filed a Misc. Land Application No. 19 of 2023 sought to set aside the dismissal order and restore Misc. Land Application No. 453 of 2022. This Court, on 12 May 2023, restored Misc. Land Application No. 453 of 2022, in which the applicant is seeking an extension of time to apply for restoration of Land Case No. 79 of 2021.

In the instant application, the applicant was represented by Mr. A. Jamal, a learned advocate, whereas Mr. Andrew Maziku (Director) appeared for the 2nd respondent. The 1st and 3rd respondents failed to appear despite being duly served. The last service was by way of substituted service in Uhuru Newspaper, dated 6 September 2023; thus the application proceeded ex parte against them.

Supporting the application, Mr. Jamal submitted the delay was caused by the applicant's sickness, which restrained the applicant from attending as she was too weak to walk or make phone calls.

He argued sickness is one of the grounds for extension of time. To support his argument on sickness, he cited the cases of ***Kioo Limited vs. Felix Burchard Karunda***, Misc. Labour Application No. 12 of 2021

(HC-Labour) and ***Adinani Salehe and two Others vs. Valence Justine Tesha***, Land Case No. 36 of 2001 (HC-Moshi)

On the second ground, Mr. Jamal submitted that while the applicant believed that her advocate was pursuing the case, unfortunately, that advocate abandoned the case and was employed by the government, hence ceased to be a private practitioner.

He further argued that the delay was due to the negligence of the said advocate, which led to the dismissal of the case as the advocate was duty-bound to inform the applicant about her employment. To substantiate his submission, he cited the case of ***Alliance One Tobacco and two others vs. Mwajuma Hamisi***, Misc. Civil Application No. 803 of 2018 (HC- Dar es Salaam).

On his part, the 2nd respondent conceded the application.

Having considered the chamber summons and its supporting affidavit, the affidavits in reply, and the written submission made by the applicant and the 2nd respondent, the issue that has to be resolved is whether the applicants have shown a good cause for this Court to exercise its discretion in granting an extension of time to file a notice of appeal and to apply for leave to appeal.

It is important to note that though the application proceeded *ex parte* against the 1st and 3rd respondents and the 2nd respondent conceded to the application, it is still the duty of the applicant to show a good cause for this court to grant an extension of time.

In determining the ground of sickness, it is trite that sickness is a good ground in extension of time. See ***Hawa Issa Nchirya vs. Ramadhani Idd Nchirya and two others***, Civil Application No. 27/03 of 2021 (Tanzlii)

Further, the Court of Appeal in ***Emmanuel Maira vs. The District Executive Director Bunda District Council***, Civil Application No. 66 of 2010 (Tanzlii), where it was held that;

"... health matters, in most cases, are not the choice of human being, cannot be shelved and nor can anyone be held to blame when they strike..."

However, there must be a clear explanation as to how the said illness prevented the applicant from pursuing her case as it was held in ***Juto Ally v. Lucas Komba & Another***, Civil Application No. 484/17 of 2017 (Tanzlii), where the Court of Appeal held that: -

"Where the applicant's cause of delay is due to illness, must show that illness contributed to the delay as opposed to a general statement."

In her affidavit, the applicant submitted that her illness occasioned two major factors: one, she was unable to walk and hence could not attend Court sessions personally.

However, in paragraph 5 of the applicant's affidavit, the medical report is alleged to have been attached as annexure S-S 2 as a medical report. However, the annexure was the text by advocate Mapunda for Equity Bank without any content; therefore, it was not a medical report.

The only document connected to the applicant is the copy of her travelling passport as Annexure Sophia 4, which is not reflected in the affidavit.

From above, it is a legal requirement that he who alleges must prove. In this instant application, the applicant should have furnished proof of the illness in relation to the time of dismissal order. None has been placed before the Court, so that claim remains an assertion

incapable of persuading the Court to consider it in exercising its discretion to extend time.

Therefore, the ground of sickness/illness lacks merit.

Reverting to the second ground regarding the employment of her former advocate by the government. This should not detain me long.

This is because it is a trite that and the law is straight- forward that whenever another person is mentioned in an affidavit, unless that person swears his/her affidavit, the adduced evidence touching that person will be considered as hearsay evidence.

Therefore, failure to annex an affidavit of her former advocate allegedly employed by the government as a person material to the application, who could not attend the court sessions, that assertion remains hearsay.

On this, there is a plethora of authorities, such as the case of ***Benedict Kimwaga vs. Principal Secretary Ministry of Health***, Civil Application No. 31 of 2000, CAT (unreported), where it was held that;

"If an Affidavit mentions another person, that other person has to swear an affidavit. However, I would add that, it is so where information of that other person is material evidence because without the other Affidavit, it would be hearsay".

Therefore, there is no evidence that the advocate failed to attend the court sessions because of her employment with the government.

Flowing from above, it is the law that an extension of time is a matter of discretion of the Court, and the applicant must put material before the Court that will persuade it to exercise its discretion in favour of an extension of time. See ***Hans Paul Automechs Ltd v s. RSA Ltd*** Civil Application No. 126/02/ of 2018 (Tanzlii).

In the instant application, the applicant has failed to show good cause as to why this Court can extend the time to restore Land Case No. 79 of 2021, which was dismissed on 8 March 2022, while this application was filed on 5 August 2022.

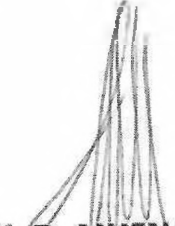
The applicant failed to account for a delay from 8 March 2022 to 5 August 2022, which is almost 160 days. On this, the Court of Appeal insisted that an applicant should account for each day of delay. In ***Hassan Bushiri v. Latifa Lukio Mashayo***, Civil Application No. 3 of 2007 (unreported), it held that;

*"Delay of even a single day has to be accounted for otherwise
There would be no point in having rules prescribing periods
Within which certain steps have to be taken."*

Having so stated, I find and hold the application lacks merit, and I dismiss it with costs.

It is so ordered.




K.D. MHINA
JUDGE
15/12/2023