

TANZANIA / JUDGMENT

final ruling HAI DISTRICT COUNCIL TANZLII

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IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA THE SUB-REGISTRY OF MOSHI AT
MOSHI MISC. LAND APPLICATION NO. 31069 OF 2024 (Arising from the Land Case no. 25260 of
2024 between the parties herein) HAI DISTRICT COUNCIL..... 1ST
APPLICANT ATTORNEY GENERAL.....2ND APPLICANT VERSUS
KILEMPU KINOKA LAIZER.....RESPONDENT

RULING

30th & 31st December, 2024. A.P. KILIMI, J.: By way of chamber summons supported with their joint affidavit duly affirmed by Ms. Hadija Matewele learned State Attorney, the applicants herein have brought this application under order VIII rule 3 and order XLIII rule 2 of the Civil Procedure Code Act Cap. 33 R.E. 2019 hereinafter “the CPC” praying for extension of time to file Written Statement of defence ‘WSD’ in Land case no. 25260 of 2024 and any other orders this court may deem fit to grant. Before embarking on this application on merit, I deem obliged to narrate, albeit briefly, the background of the matter as discerned from party’s affidavits. 1 The applicants alleges that on 11th November, 2024 received a summons in Land Case No.25260 of 2024 requiring to file a written statement of defense. In the course of preparation of the same, they learnt that the Respondent previously instituted a suit of similar nature in this court vide Land Case No. 21 of 2014 which was later subjected to appeal at the Court of Appeal at Arusha vide Civil appeal No. 110 of

2018. In order to ground proper defence, the 2nd applicant demanded facts and the outcome of the said case from the 1st applicant but because the 1st applicant was preoccupied with official duties could not get required information on time. Upon receiving the same the applicants realized that the previous suit filed by the respondent bears the same subject matter which raises a point of law on the tenability of the Land Case No. 25260 of 2024 in this court. In his party the respondent vehemently disputed the above reasons advanced by the applicants and further avers that the suit in the Land Case Number 21 of 2014 and Civil Appeal No. 110 of 2018 are totally different with Land Case No. 25260 of 2024. He added that the said Land Case No. 21 of 2014 was never determined in merit, however when it was appealed at the Court of Appeal of Tanzania, the same was nullified in all proceedings, judgment and decree because the 2 boundaries of the disputed land were not properly

described. Further the respondent proceeded to aver that there are neither any point of law raised by the applicants nor any valid and justifiable reason advanced for delay or for the applicants being unable to file their Written Statement of Defense in time. When this matter was placed before me for hearing Mr. Yohana Marco learned State Attorney appeared representing both applicants whereas Mr. Lengai S. Loitha assisted by Mr. Joshua Mambo both learned Advocates appeared for the respondent. Mr. Marco commenced by informing this court that applicants have complied with the points for extension of time as enumerated in *Lyamuya Construction Company vs Board of Registered trustee of Young Womens Christian Association of Tanzania* Civil Application no. 2 of 2010 which are; first, the applicant must account for all the period of delay; Second, the delay should not be inordinate; Third, the applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take; and fourth, If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged. 3

Arguing in support of the first point above, Mr. Yohana Marco expounded what detailed in applicants' affidavit as discerned above and further said that since applicants received the plaint on 11/ 11/ 2024 then 21 days to file their WSD expired on 2/12/2024. He further said that the additional time to file their WSD started to be counted from 3/12/2024 and ended on 9/12/2024 which was a public holiday. Therefore, since the application was filed on 10/12/2024 the applicants complied with order VIII rule 3 of the CPC. In respect to seeking information from the 1st applicant, Mr. Marco submitted that by the time the said previous case was instituted up to the Court of Appeal, the office of Attorney General was not established, then second applicant had no information of what transpired in that case. He then as paragraph 3 of applicants' affidavit depicts wrote to the first applicant in order to be availed with information in what happen in order to prepare defence, but due to elections for local government leaders they were late to get them hence time expired before filing the same. Arguing in the above listed second and third point jointly, Mr. Marco contended that the above delay is not inordinate, he reasoned 4 that after the said 21 days expired, and within 7 days as required by the law applicants filed this application. In regard to diligence the learned State Attorney said that this was their first application of this nature a land case No. 25260 of 2024. therefore, no any negligence caused by the applicant to file WSD.

Addressing on the issue of illegality, Mr. Marco argued that as reflected on paragraph 4 of the applicants' affidavit there is a case bearing the same subject matter which is Land Case no.21 of 2014 which raises a point of law on tenability of land case 25260 of 2024. He candidly further referred to paragraph 5 and 6 of the counter affidavits and said that, impliedly the respondent admitted the said illegality by saying that applicants could have filed their WSD and prayed for amendment. Then the learned State Attorney commented that the duty of this court is to determine whether there is illegality and not to resolve the dispute of that illegality, only is required to satisfy that there is alleged illegality on the face of the record. He then concluded on the issue whether the subject in the previous case is the same with new case filed or not and whether the previous case was not concluded will be answered in this land case No. 25260 of 2024, and he further added that since the

respondent has not denied the existence of Land case No 5 21 of 2014 thus, it is apparent that the illegality is on the face of the record. To bolster his arguments Mr. Marco relied on the case of Lyamuya Construction Company (supra) and MT.80510 Peter Mashaka Selemani @ Lunyombe vs. The Permanent Secretary of Ministry of Defence and National Service and Another (Miscellaneous Civil Application No.14328 of 2024) [2024] TZHC 10148 (TANZLII) at page 10. In his rebuttal address, Mr. Loitha contended that, it was not true that the applicants received the summons of the main case No. 25260 of 2024 on the alleged date, instead he said the applicants were served on 11/10/2024 and acknowledged, therefore days for filing WSD ended on 2/11 /2024 and not on 2/ 12/2024 as said. In that regard the counsel averred that when the applicants filed this application, they were in delay of more than 40 days which they were not accounted for. Mr. Loitha refuted the defence of local leaders' government election and said that it was neither justified by stating the timeline of its tenure nor evidence to show that all the lawyers for the applicants participated in the said election. He further argued that there was no any evidence of a letter written by the Solicitor General requesting the first applicant the said 6 documents proving previous case thus, such assertions were just a mere word from the bar. He then insisted that a delay of 40 days was inordinate and cannot easily be ignored. Therefore, he concluded that applicants' failure to account of those days shows that they were not diligent but they were negligent. The counsel supported his assertion by referring the case of Lyamuya Construction Company (supra). Still protesting why the petitioner should not be granted this application, Mr. Loitha contended on issue of alleged illegality that the said land case no. 21 of 2014 parties were different, also the subject matter was different, the counsel referred to paragraph 3 of respondent counter affidavit and said that the said previous case was never determined on merit even at the court of appeal of Tanzania vide Civil Appeal no 110 of 2018 wherein respondent were 16, the Court nullified all proceedings judgment and decree because the boundaries was not properly described. The counsel added that in the current case filed respondent has sued for trespass and unlawful dealing with respondent's land. He then concluded that these are two distinct cases, therefore no illegality can rise therefrom to make this case to extend time for this application. 7 Regarding retrial, Mr. Loitha contended that the said land case no 21 of 2014 was in this court before Hon. Judge Simfukwe, and decision was delivered on 17/8/2023 striking out the case for non-joinder of Attorney General, that is why respondent has filed another case. The counsel for the respondent then concluded that there were no illegalities because parties are different, he then prayed for this application to be dismissed with costs. In his brief rejoinder, Mr. Marco reiterated submission in chief and further responded that what the respondent have averred at his counter affidavit at paragraph 3 did not deny date of service, thus the issue that applicants were served on 11/10/2024 is the fact from the bar which is not supported by counter affidavit. He insisted further that Land case No. 25260 of 2024 were filed in this court on 10/10/2024 and service in their part was delayed which was done on 11/11 /2024, therefore he urged this court to see this application has been brought within time limit as per order VIII rule 3. In respect to failure for account of days for delay, Mr. Marco contended that according to para 2 and 3 the applicants diligently observed the

competence of the matter filed, and by the time they got a 8 report, the time to file WS were already expired. He further said this is because government cases are highly regulated and bureaucratic. Distinguishing on respondent submission on the illegality, Mr. Marco insisted on issue whether parties were the same or subject matter was the same, it was the question to be asked by this court in later stage in order to avoid mockery of justice. The learned state Attorney further raised new issues which was not submitted in chief that since this court struck out a retrial case on 17/08/2023, it is apparent on the record that to bring another case, is subject to the law of limitation. He further added that illegality in the face of record essentially presupposes the right to be heard which also will not prejudice the other party. However, I will not deal with the above new raised issues because despite of not being raised during submission in chief, they were also not pleaded. Having heard the learned counsel arguments for and against the application at hand, the issue for determination is whether the applicants have established good cause for this court to grant this application. And before I dwell in the merit issue, I wish to reproduce the provision of order VIII rule (1)(3) of CPC which embed the kernel of this application. 9 “(3) The court may, on application by the defendant before the expiry of the period provided for filing a written statement of defence or within seven (7) days after expiry of that period and upon the defendant showing good cause for failure to file such written statement of defence, extend time within which the defence has to be filed for another ten days and the ruling to that effect shall be delivered within 21 days.

(4) The extended ten days under sub-rule

(3) shall be counted from the date of the order of the court for extension of time.” Emphasis supplied. From the wording of the above provision the leading requirement is that the applicant must establish good cause as envisaged on the issue above, what constitutes good cause cannot be laid down by any hard and fast rules. The term "good causes" is a relative one and is dependent upon the party seeking extension of time to provide the relevant material in order to move the court to exercise its discretion. (See *Oswald Masatu Mwaizarubi vs Tanzania Fish Processing Ltd*, Civil Application No.13 of 2010; *Tanga Cement Company 10 Limited vs Jumanne D. Masangwa and Amos A. Mwalwanda*, Civil Application No. 6 of 2001 (both unreported) and *Hassan Abdulhamid vs Erasto Eliphase* (Civil Application 402 of 2019)

[2020] TZCA 49 (TANZLII) to mention few. Having given the rival submissions due consideration and carefully examined the affidavits both for and against the application. I have grasped there is a contention on what exactly the day the applicants were served with the main suit, however in my view of the parties' affidavits, I am satisfied the applicants are right on the day they were served. This is because as per paragraph 2 said they were served on 11/11/2024 and in paragraph 3 averred that the time to file WSD expired on 2nd December, 2024. These assertions are supported by the respondent himself when he acknowledged at paragraph 7 of his affidavit, and for ease of reference he averred as follows; “7. That, the Respondent humbly state that, the prayer sought in the chamber summons have not been

counted for each day of delay. The Application was brought on 10th December 2024 which Eight (8) days the time to file WSD have elapsed. And there is no reason for such 11 delay stated in the Affidavit by Khadija Matewele.” [Emphasis added] According to the above assertion arithmetically if the application was 8 days delayed on 10th December 2024 that is correctly means the days to file WSD expired on 2nd December, 2024 which also direct me the same was served 21 days back which is 11/11/2024 as rightly averred by the applicants in their joint affidavit. Therefore, in that endeavor, I am in all fours with Mr. Marco when he contended that Mr. Loitha submissions that the applicants were served on 11/10/2024 are the facts from the bar which is contrary to paragraph 7 of respondent counter affidavit as quoted above. I wish to bolster the above observations that, it is a trite law submission are not evidence and they cannot be used to substitute the contents of the affidavit. (See Tanzania Union of Industries and Commercial Workers (TUICO) at Mbeya Cement Company Ltd vs. Mbeya Cement Company Ltd and Another [2005] T.L.R. 41 at page 48); Bruno Wenceslaus Nyalifa vs. Permanent Secretary, Ministry of Home Affairs and the Attorney General, Civil Appeal No. 82 of 2017 (unreported) and Jongo Mwikola vs. Geita Gold Mining Limited, Civil Appeal No. 344 12 of 2020 [2024] TZCA 125 (TANZLII). In Bruno Wenceslaus Nyalifa (supra) the court held that: “Submissions are not evidence submissions are generally meant to reflect the general features of a party's case. They are elaborations on evidence already tendered. They are expected to contain arguments and the applicable law. They are not intended to be a substitute for evidence.” Now back to the law that moved this court, the law as highlighted above provides the Defendant can apply for extension of time before the expiry of the period provided for filing a written statement of defence or “within seven (7) days after expiry of that period” and upon the defendant showing good cause the same should be granted. Thus, if the 21 days expired on 2nd December, 2024, then 7 days goes up to 9th December 2024 which was public holiday as rightly said by Mr. Marco, therefore applicants filing this application on 10/12/2024 was consequential and not by default. In the circumstances I am of the considered view the applicants did not offend the provision of order VIII rule (1) (3) of the CPC. In respect to good cause, I have considered the joint affidavit by the applicants, I have noted that applicants have different offices, by 13 virtue of law the second applicant has to lead the defence and also prepare defence, therefore communications were required in order to retrieve information from the first applicant as rightly averred. Now the issue is whether 8 days delay for the sake of arguments above is inordinate. I am of the view that the said days are reasonable since they were spent on the said transactions. In the premises I am settled that delay of 8 days is not inordinate in the circumstance. For the foregoing reasons, I find the applicants have accounted for the delay which as alluded above was not inordinate. Another point argued in this application is illegality, it is a trite law that where there is such claim of an illegality courts of law should not wring their hands in desperation but must give themselves an opportunity to look into the alleged illegality by extending time within which appeals or application can be filed. (See Losindilo Zuberi Vs Ally Hamis, Civil Application No. 5 of 1999, Principal Secretary, Ministry of Defence and National Service Vs Devran Valambhial 992 TLR 185 and VIP

Engineering and Marketing Limited and 2 Others Vs Citibank Tanzania Limited Consolidated Civil References No. 6, 7 and 8 of 2006). 14 I have considered opposing submissions which was sourced from paragraph 4 of the joint applicants' affidavit that, presence of the earlier suit brought by the Respondent herein, bearing the same subject matter, raises a point of law on the tenability of the Land Case No. 25260 of 2024, on which Mr. Marco insisted is the issue of jurisdiction and is apparent. Whereas Mr. Loitha maintained that the two cases are different as the said land case no. 21 of 2014 parties were different, and the subject matter is different, he also said the same were never determined on merit even when it reached the court of appeal of Tanzania vide Civil Appeal no 110 of 2018. The Court nullified all proceedings judgment and decree; therefore, he was of the view no illegality can rise therefrom. As authorities above state, opportunity should be provided in order to look into the alleged illegality which is apparent. In my view of the record the existence of previous case alleged to have same subject matter with the current case filed is apparent on the face of record. Therefore, in my view it is not convenient now to deal with the findings that the said subject matter affects the current case filed or the previous case had different parties or was quashed and nullified. This is because doing so will be taking on board substantive issues to be dealt on future 15 application or objections which in fact will be pre-emptying the merits or demerits of the intended application. Therefore, at this time the applicants are not required to prove the alleged illegality as Mr. Loitha endeavored to disprove it, in my opinion a mere raising it on the face of record suffice for the court to grant extension of time. In lieu of the above observation I am constrained to seek the guidance of the court which dealt with similar scenario in the case of Victoria Real Estate Development limited vs. Tanzania Investment Bank and 3 Others, Civil Application No. 225 of 2014 (unreported) when the court was dealing with an application for extension of time, declined to tackle the issue whether or not the illegality was well found because that issue border closer to going into the merits of the intended application for revision. (See also Regional Manager-TANROADS Lindi vs. D.B Shapriya and Company Limited, Civil Application No. 29 of 2012 (Unreported) and Grand Regency Hotel Limited v. Pazi Ally and 5 Others, Civil Application No. 100/01 of 2017 (Both unreported). For the foregoing, I am of settled view the applicants have prompted this court on the alleged illegality but also accounted for days delayed which in fact will not prejudiced the respondent if this 16 application is granted. In the premise, I find that there is good cause established by the applicants to be granted the application as prayed and which I hereby do forthwith. I hereby order WSD by the applicants should be filed within ten days from the date of this ruling. In the circumstance no order as to costs granted. It is so ordered DATED at MOSHI this 31th day of December, 2024. X JUDGE Signed by: A. P. KILIMI Court: Ruling delivered this 31st day of December, 2024 in presence of Mr. Yohana Marco, learned State Attorney (appearing virtually) assisted by Ms. Sylvia Shayo, learned State Attorney (appearing in person) all for the applicants and in presence of Mr. Joshua Mambo, learned Advocate for the respondent appearing virtually. K. C. MSHOMBA DEPUTY REGISTRAR 31/12/2024 17

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