

TANZANIA / JUDGMENT

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THE UNITED R EPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB - REGISTRY AT MBEYA LAND APPLICATION NO. 1554 OF 2024 (Originated from Land Case
No. 5 of 2015 in the High Court of Tanzania at Mbeya) LUWINZA
DALUSHI.....1ST APPLICANT SANDU LUCHEGA.....
2ND APPLICANT MALALE SHIMBAL.....3RD APPLICANT TOVE
MTEMI.....4TH APPLICANT MAKELEGE
KENGELE.....5TH APPLICANT SUSA LUHENDE.....
6TH APPLICANT JILAO SAMIKE.....7TH APPLICANT NGWISA
MTEMI.....8TH APPLICANT LAHA
MWANYENGE.....9TH APPLICANT MAKIJEGO
MISAFU.....10TH APPLICANT MAWAZO
MWAFU.....11TH APPLICANT ELIAS MWAFU.....
12ND APPLICANT TANGA LIGA.....13RD APPLICANT MAPAMBANO
JINANG'A.....14TH APPLICANT BUNDALA GAMBA.....15TH
APPLICANT FUBE LUGEDEJA.....16TH APPLICANT LUSANGIJA
GALUSHI.....17TH APPLICANT SHINJE JELA.....
18TH APPLICANT MASULUZU DALUSHI.....19TH APPLICANT JILAO
SAMIKE.....20TH APPLICANT 1 SANTU
LUCHEGA.....21ST APPLICANT VERSUS O.C INDUSTRIAL HOLDINGS
LTD.....RESPONDENT

RULING

Date: 10 September 2024 & 8 November 2024 SINDA, J.: This ruling is in respect of an application for extension of time within which to set aside an ex-parte judgment and decree of this court dated 30 September 2020 in Land Case No. 2015 against the applicants which was alleged to be procured illegally by the respondent. The application is brought under section 14 (1) of the Law of Limitation Act, Cap 89 R.E 2019 (the LLA) and supported by the applicant's affidavit. The respondent also filed a counter affidavit to oppose the application. At the hearing of application, the applicants were represented by Mr. Alfred Chapa, learned counsel. The respondent was represented by Mr. Samson Suwi, learned counsel. The application was argued by way of written submission. The applicants in their affidavit and submission advanced one reason that the judgement of this honorable court which was heard and 2 determined ex-parte was delivered in

their absence. That, the applicants were not served with the summons to appear on the judgement date for them to take initiative steps within time. This is fatal and actually occasioned the applicant's delay to set aside the impugned Judgment. He submitted that even if the matter proceeded ex parte, the applicants had a right of being informed through summons by the court on judgement date to enable them to act promptly and take any necessary steps. He referred the decision of Court of Appeal (the CAT) in the case of Stephen Ngalambe versus Onesmo Ezekia Chaula and Songea Municipal Council, Civil Appeal no. 27 of 2020 (CAT at Iringa), and the case of Mark-kim Chemicals Company Limited vs. Gadgetronix Net Limited where by at page 16 the trial judge borrowed the wisdom from the case of Langaël Sangito Marx vs. The Board of Trustees of Medical Stores Department, Civil Application NO.41 OF 2019 and the case of Shabani Khalfani Kondo vs Tajiri Abdi Barua, civil appeal no. 232 of 2021, CAT at DSM (Unreported) at page 6, where the court emphasize on the need of issuing summons when the case was heard ex-parte. It was Mr. Chapa view that the delay was not an inordinate delay but the same was caused by this honorable court for failure to issue summons of the judgement date as specified under paragraphs 3,6,7 3 and 8 of the affidavits. He prayed this honorable court to grant the application. In reply the respondent firstly submitted that the applicants failed to account for days of delay, from 05 August 2022 when the ruling of this Court in Misc. Land Application No. 128/2020 was pronounced rejecting the applicants' application of the same nature like the instant application. Secondly, the respondent stated that applicants are swearing falsehood, hence the affidavit supporting the applicants' application be expunged. He stated that the applicants averred that they became aware of existence of the ex-parte judgement in Land Case No. 05/2015 on 22 January 2024 when their fellow cows were attached in execution. That said date is a lie because they were aware of existence of the impugned ex parte judgement from 19 October 2020 and not from 22.01.2024. It is evident, as deponed under paragraphs 4 and 4 (d) of the respondent's Counter Affidavit, that, on 15 December 2020 the same applicants herein filed in this court Misc. Land Application No. 128 of 2020 applying among other orders, like herein again, for extension of time to set aside judgement in Land Case No. 5/2015. Under paragraph 11 of the affidavit in support of their chamber summons in the said Misc. Land Application 4 No. 128/2020 they deponed that they became aware of existence of ex parte judgement in Land Case No. 05/2015 on 19 October 2020. He referred the attached Chamber Summons and its supporting affidavit (Misc. Land Application No. 128/2020) annexed as Annexure "O - 2" at paragraph 4 (d) of the respondent's counter affidavit. As to whether the applicants have shown sufficient reason(s) for the delay, it was his view that they failed because the main reason for the delay relied upon by the applicants is only that they were not served with a summons to appear on the date of pronouncement of ex-parte judgement. Hence, they were not aware of that ex-parte judgement until on 22 January 2024 when their fellow cows were attached in execution. (See paragraph 5 of the applicants' counsel's affidavit). He further submitted that the case of Stephen Ngalambe (supra) is distinguishable. Mr. Suwi referred paragraph 4 (d) of the respondent's counter affidavit, from 05 August 2022 when the ruling of the court was pronounced dismissing applicants' Misc. Land Application No. 128/2020. He stated that the applicants disappeared until on 29 January 2024 when they appeared again by filing this instant application. Thus, the period from 05 August 2022 when their first application of this nature got struck out 5 to 29 January 2024 when they appeared

again by filing this instant application was to be accounted for. He stated that if they were unaware of the ex-parte judgement from 30 September 2019 to 22 January 2024 as alleged under paragraphs 3 and 5 of their counsel affidavits, then they could not have managed to file Misc. Land Application No. 128/2020 on 15 December 2020. He insisted that on deponing lies in an affidavit as submitted above, the law is clear that the consequence is the whole affidavit to be expunged, whose effect is that the chamber summons remains without a supporting affidavit. Thus, be struck out. He referred the decision of the CAT in the case of Bashir Ally vs. Anyegile Andendekisye Mwamaluka & 2 Others, Civil Appeal No. 49/2021 at Mbeya (TanzLii). He prayed this court to struck out the applicants' application with costs. In rejoinder the applicant reiterated his submission in chief I have considered the applicants application, affidavit, counter affidavit filed by applicant and submission by the parties. It is a settled principle of the law that extension of time is the discretion enjoyed by the court. The discretion is always exercised after the applicant has advanced sufficient cause or good reason for the delay. See, the cases of Tanga Cement Co. v. Jummanne Masangwa and Another Civil Application 6 No. 6 of 2001, Sospeter Lulenga v. Republic, Criminal Appeal No. 107 of 2006, Court of Appeal of Tanzania at Dodoma, Aidan Chale v. Republic, Criminal Appeal No. 130 of 2003, 3 Court of Appeal of Tanzania at Mbeya. The issue is whether the applicants advanced good/sufficient reason for delay. The applicant advanced one reason for delay that they were not served summons for the ex-parte judgment. In the case of Stephen Ngalambe versus Onesmo Ezekia Chaula and Songea Municipal Council (supra) the court stated that "We find that, under the circumstances of this case, where there were complaints that the appellant was not notified of the judgment date and where there was no any other evidence contradicting the claim that he became aware of the judgment given ex parte against him on 14.12.2018 through his relative, the appellant's affidavit to that effect, was sufficient and needed no further support by any other affidavit" I have gone through the hand-written proceedings of the trial court of 30 September 2019. I wish to reproduce the second and last paragraph from the last page. "MR. Nichombe We pray to close our case and we pray for judgment. 7 30/9/2019 Judgment later on at 3.00 pm" The above records do not show if there was an order for summons to be issued to the respondent for notification of the ex-parte judgment. Also, this fact was not contested by the respondent in his counter affidavit or on his submission. It is a position of law that regardless of whether or not a reasonable explanation has been given by the applicant to account for delay, a claim of illegality of the challenged decision constitutes a good cause for extension of time as propounded in case of Principal Secretary Ministry of Defense and National Service vs. Devran Valambia

(1999) TLR 189, the CAT stated that: "It is, therefore, settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under rule 8 regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay." Also, where illegality is raised as one of the grounds for extension of time, it must be satisfied that the claimed illegality really exists, in the case of Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of 8 Tanzania, Civil Application No. 02 of 2010 (unreported), the Court of Appeal of Tanzania stated that; "Since every party intending to

appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in Valambia's case, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one. The Court there emphasized that such point of law must be that of sufficient importance and, I would add that it must also be apparent on the face of record, such as the question of jurisdiction; not one that would be discovered by a long-drawn argument or process." In my view this reason advanced by the applicants falls under illegality because it is a requirement of law of issuing summons for notification of other party on ex-parte judgment before it was pronounced. The point raised by applicant meet all conditions on point of law to warrant extension of time because. I find the applicant advanced a good and sufficient reason for extension of time. I therefore grant the application. The applicant is given thirty

(30) days from the date of this ruling to lodge their application set aside the ex-parte judgement.
9 DATED at MBEYA on this 8 day of November 2024. A. A. SINDA JUDGE 10

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