

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND CASE APPLICATION NO. 461 OF 2021**

*(Arising from Land Case No. 124 of 2016 and Misc. Land Application No. 688 of 2020)*

**ELIZABETH SALEHE SAID ..... APPLICANT**

**VERSUS**

**ENTREPRENEURS FINANCIAL CENTER ..... 1<sup>ST</sup> RESPONDENT**

**AHMAD ABDULRAHIM MABWE ..... 2<sup>ND</sup> RESPONDENT**

**MEM AUCTIONEERS AND GENERAL BROKERS LTD ..... 3<sup>RD</sup> RESPONDENT**

**HADIJA ALI MWALIMU ..... 4<sup>TH</sup> RESPONDENT**

**CRECENSIA WASAMA MWITA ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

Date of last Order: 08.12.2021

Date of Ruling: 14.12.2021

**A.Z. MGEYEKWA, J**

This application was lodged by the applicant on 6<sup>th</sup> September, 2021 seeking leave for an extension of time to file an application to set aside an

*ex parte* Decree dated 5<sup>th</sup> August, 2021. The application was made under section 14 (1) of the law of Limitation Act, Cap 89 [R.E. 2019], Section 95 of the Civil procedure Code, Cap 33 [R.E. 2019], Order IX Rule 13 of the Civil Procedure Code, Cap 33 [R.E. 2019] together with any other enabling provisions of the law.

When the matter was called for hearing on 8<sup>th</sup> December, 2021, the applicant enjoyed the legal service of Mr. Stanslaus, learned counsel, and the 1<sup>st</sup> respondent had the legal service of MrCleoplace James, learned counsel. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup>, respondents did not enter appearance, even though they were served through substitution of service. Therefore, following the prayer by the appellant's Advocate to proceed *ex-parte* succeeding the absence of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup>, respondents, this court granted the appellant's Advocate prayers. The matter proceeded *ex parte* against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup>, respondents.

The learned counsel for the applicant urged this court to adopt the affidavit to form part of his submission. He stated that the applicant is seeking leave for extension of time to apply to set aside the *ex parte* Decree as stated in paragraphs 3-5 of the applicant's affidavit in which Misc. Land Application No.688 was heard *ex parte* against the applicant.

Mr. Stanslaus contended that the reason for the absence was because Mr. Geoffrey, the learned Advocate for the applicant fall sick. To support his submission he referred this court to a medical chic dated 3<sup>rd</sup> August, 2021.

He went on to submit that Mr. Stanslaus made an arrangement for Ms. Agness Mtunguja, learned Advocate to hold a brief on his behalf, unfortunately, when she was on her way to court her motor vehicle breakdown in which both the Applicant and the Advocate delayed for some time. The learned counsel for the applicant more contended that after they reached the court premises, they were informed that their matter had been heard *ex parte* 30 minutes earlier.

The learned counsel for the applicant went on to submit that the applicant was supposed to file the application to set aside the an *ex parte* Decree on 5<sup>th</sup> September, 2021, but that Mr. Geoffrey who was representing the applicant fall sick, that is why the application was not filed within time. For the interest of justice, Mr. Stanslaus urged this court to apply its discretionary power to extend the time and set aside the *ex parte* Decree as per section 99 of the Civil Procedure Code, Cap 33 [R.E. 2019]. Fortifying his submission he cited the cases of **Leopard Tours Ltd v Silver Justin**, Misc. Labour Application of 2020 and **Mrange Chacha v Elias Nyirabi**, Civil Application No 24 of 1967 HCD. He insisted that the Advocate's

sickness is a sufficient reason to set aside the *ex parte* Decree. Supporting his stance he cited the case of **Abdallah Safari v Mohamed Omary** (1969) HCD 150.

In response, Mr. Cleoplace, learned Advocate for the 1<sup>st</sup> respondent contended that the application emanates from Misc. Land Application No. 688 of 2020 which was dismissed on 20<sup>th</sup> August, 2021 after the learned counsel for the respondent raised an objection that the application was hopeless time-barred. He went on to submit that when the matter was called for hearing, neither the applicant nor his Advocate did enter appearance. Hence that the Tribunal proceeded with hearing the preliminary objection *ex parte* against the applicant and the objection was upheld. The learned counsel for the 1<sup>st</sup> respondent contended that there is no sufficient cause for the applicant's delay basing on the sickness of the Applicants Advocate. He contended that the attached medical chit was issued to one Geoffrey Saidi while the affidavit in court was deponed by Geoffrey Naftali Saidi.

The learned counsel went on to submit that the medical chit shows that Mr. Geofrey was treated for 4 days, which means he recovered on 7<sup>th</sup> August, 2021. He went on to state that the affidavit is silent when the learned counsel recovered from his illness and the medical chit does not

show the kind of illness that prevented the learned counsel to appear in court. It was his stance that the learned counsel for the applicant has not stated sufficient reason to move this court to grant his application. Stressing, Mr. Cleophace argued that the applicant's Advocate failed to account for each day of delay from 5<sup>th</sup> August, 2021 to 6<sup>th</sup> September, 2021.

The learned counsel for the 1<sup>st</sup> respondent further contended that it is settled law that the court has discretionary power to extend time, but that such discretion must be exercised judiciously. To fortify his submission he cited the case of **Wambele Mtumwa Shamhame v Mohamed Hamis**, Civil Reference No. 08 of 2016.

He further contended that failure for Ms. Mtunguja to appear in court is not a good excuse. He contended that Ms. Mtunguja was informed that the case had been heard *ex parte* against the applicant 30 minutes earlier without mentioning the name of the person who told her and she did not tender any affidavit to support her allegations.

He went on to argue that there is no proof that there was a breakdown of the vehicle nor traffic report to prove the same. He valiantly contended that the delay was due to negligence.

On the strength of the above submission, the learned counsel urged this court to disregard the applicant's omnibus application.

In rejoinder, the learned counsel for the applicant reiterated his submission in chief and added that the reason for Ms. Mtunguja not to appear in court is genuine, though did not appear on time but was she was not negligent.

After a careful consideration of the sworn affidavit of the parties together with the submissions thereto. It would appear that it is settled that Misc. Land Application No.688 of 2020 was heard *ex parte* in absence of the applicant and her Advocate. It is trite law that *ex parte* order or decree can be restored upon giving good cause as to the failure to appear as provided **under Order IX Rule 9 of the Civil Procedure Code, Cap 33 [R.E. 2019].**

*"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:*

*Provided that, where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also.”*

It is unfortunate that the applicant has cited the wrong section of the law to support his application by citing Order IX Rule 13 which does not exist, while the proper citation is Order IX Rule 9 of the Civil Procedure Code Cap.33 [R.E. 2019]. However, under the oxygen principle, I will disregard such an omission and consider it reparable as far as this application is concerned.

This is an omnibus application therefore before I proceed to determine it on merit, I have to find out whether the combination of the applicant's prayers can be entertained by this court. In determining an omnibus application, Hon. Mapigano (as he then was) in case of **Tanzania Knitwear Ltd v Shamshu Esmail** (1989) TLR 48, Mapigano, J (as he then was) held that:-

*“ In my opinion, the combination of the two applications is not bad in law. I know of no law that forbids such a course. Courts of the law abhor multiplicity of proceedings. Courts of law encourage the opposite.”*

Applying the above authority I find that the three prayers are properly before this court as they are not diametrically opposed to each other, but

one easily follows the other. Once extension of time is granted then an application to set aside an *ex parte* Decree follows. Therefore, I proceed to determine all three prayers and find out if the applicant has adduced sufficient evidence to move this court to grant what she is sought.

In addressing the first prayer, the central issue for consideration and determination is whether sufficient reasons have been advanced to warrant the extension of time to file an application to set aside an *ex parte* Decree. time sought by the applicant. It is settled law that a party who seeks an extension of time must disclose sufficient cause for the delay. The decisions are equally relevant for the requirement to account for each day of delay and failure to do so the Court cannot exercise its discretion in his favour. That position is reflected in several decisions of the Court of Appeal in applications for extension of time, and I have no doubt the principle applies to this court too. It is equally not in dispute, and indeed it is settled law that such discretion must be exercised judiciously on the basis of material placed before the court for its consideration.

The requirement of accounting for every day of delay has been emphasized by the Court of Appeal in numerous decisions; examples are such as the recent case of **FINCA (T) Ltd and another v Boniface Mwalukisa**, Civil Application No. 589/12 of 2018 Court of Appeal Iringa,



(unreported) delivered in May, 2019 and the case of **Karibu Textile Millss v Commissioner General (TRA)**, Civil Application No. 192/20 of 2016, **Tanzania Coffee Board v Rombo Millers Ltd**, AR CAT Civil Application No 13 of 2015 (unreported) the Court reiterated its decision in **Bushiri Hassan v Latifa Lukio Mashayo**, Civil Application No 3 of 2007 (unreported) which had held that:-

*“Dismissal of an application is the consequence befalling an applicant seeking extension of time who fails to account for every day of delay.”*

After taking into consideration what has been stated in the affidavit filed by the applicant and the applicants' advocate submission, from the outset that the reasons for the application raised by the applicant as for me are not sufficient good cause suitable for this court to grant the application because the “prescription form” dated 3<sup>rd</sup> August, 2021 from Burhani Charitable Hospital which reads *“attended & treated, ED – four (4) days”*. In my view the Hospital chic does not show whether the learned Advocate was admitted to the hospital for 4 days and whether he was discharged on the 3<sup>rd</sup> August, 2021 which was the fourth day or it was the first day when he was admitted. In general, the Hospital chic is not clear as to when Mr. Godfrey was admitted to the hospital or he was attending the medical treatment for four days from home.

Again, the words; attended & treated do not necessarily mean that the Advocate was admitted to the hospital. Therefore, the hospital chic does not prove that the learned counsel for the applicant was admitted to the hospital. I fully subscribe to the learned counsel for the applicant's submission that sickness can be a good ground for extension of time. However, the same must be supported by a shred of cogent evidence to move the court to believe that the applicant's Advocate was sick on the day of the hearing of the case.

As rightly stated by the learned counsel for the respondent that Ms. Agnes excuse for not appearing in court is a mere statement. She was supposed to adduce cogent evidence for example disclosing the name of the court officer who informed her that the application proceed *ex parte* against the applicant 30 minutes earlier. She did not file an affidavit to prove the same, nor reported the saga to the registrar on the same date. The same position was discussed by the Court of Appeal of Tanzania in the case of **Phares Wambura and 15 others v Tanzania Electric Supply Company Limited**, Civil Application No. 22 of 2016 at page 10 last paragraph, it held that:-

*“ .. a mere fact that applicants and their Advocate were in court premises on the hearing date does not amount to appearance.”*

Applying the above authority, it is my respectful opinion that there was no proof that the said motor vehicle breakdown hence this court cannot rely on mere words.

In the upshot, I find that the applicant has failed to state sufficient cause of his failure to appear in court when Misc. Land Application No.688 of 2021 was called for hearing on 05<sup>th</sup> August, 2021. Consequently, I hereby dismiss this application without costs.

Order accordingly.

Dated at Dar es Salaam this date 14<sup>th</sup> December, 2021.



  
A.Z.MGEYEKWA  
**JUDGE**  
14.12.2021

Ruling delivered on 14<sup>th</sup> December, 2021 in the presence of Mr. Stanislaus, learned counsel holding brief for Mr. Geoffrey Naftali, learned counsel for the applicant, and in the absence of the respondents.



  
A.Z.MGEYEKWA  
**JUDGE**  
14.12.2021