

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 8 OF 2019

**(Original from Misc. Civil Application No. 135 of 2015 and Commercial Case
No. 53 of 2015)**

INTEGRATED PROPERTY

INVESTMENT (T) LIMITED..... 1ST APPLICANT

OMARI ABDI ALI2ND APPLICANT

SULEIMAN ABDI DUALEH3RD APPLICANT

VERSUS

THE COMPANY FOR HABITAT AND

HOUSING IN AFRICARESPONDENT

RULING

B.K. PHILLIP, J

Before me is an application made under the provisions of section 14(1) of the Law of Limitation Act, Cap 89 for the following orders;

- i. This honourable Court may be pleased to make an order granting the Applicants herein an extension of time within which to file an application for an order setting aside the dismissal of the Application for leave to appear and defend the suit and the consequent summary judgment entered against the Applicants on the 6th day of July, 2015 in Miscellaneous Civil Application No. 135 of 2015 and Commercial Case No. 53 of 2015 respectively.

- ii. Costs of this application be provided for.
- iii. Any other order(s) that the Honourable court may deem fit.

This application is supported by an affidavit affirmed by the 3rd applicant, Suleimani Abdi Dualeh. The respondent has filed an affidavit sworn by the learned advocate Gasper Nyika in opposition to the application.

The learned Advocates Mary Masumbuko and Gasper Nyika appeared for the applicants and respondent respectively.

A brief back ground to this application is that in August 2015 the respondent herein filed a summary suit against the applicants. The applicants herein lodged an application for leave to defend the suit and the same was fixed for hearing on 6/7/2015. When the said application was called for hearing on 6/7/2015, the advocate for the applicants did not enter appearance, Advocate Madina Chenge who was present in court for the respondent informed the court that there was a point of preliminary objection and she prayed for a short adjournment due to the absence of the applicants, however, the presiding judge, dismissed the applicants' application for leave to defend the suit for non appearance of the applicants and entered a judgment , for the respondent herein.

The applicants appealed against the said judgment to the court of Appeal of Tanzania vide Civil Appeal No. 107 of 2015 challenging the court's judgment on grounds of illegality and inappropriate procedure in the decision reached by the court.

The said Civil Appeal was finally determined on 20th December, 2018, whereby the Court of Appeal dismissed it with costs. The court order in respect of the said appeal was extracted on 24th December, 2018. On 28th January, 2019, the applicants lodged this application. The affidavit in support of this application and the counter affidavit in opposition of this application has narrated the background to this application though with different tests and emphasis favourable to each party's position. It is my settled view that, this being an application for extension of time, the task of this court at this juncture is to determine whether the applicants have adduced sufficient reasons for the delay.

Submitting for the application Ms. Mary Lamwai submitted that the applicants did not sit on their rights, after the dismissal of their application for leave to defend the suit they lodged an appeal at the Court of Appeal of Tanzania, so they have spent almost two years awaiting for the determination of their appeal. Ms. Lamwai submitted further that, the order for extension of time is within the court's discretion. She referred me to the case of **Omary Chabani Nyambu vrs Dodoma Water and Sewerage Authority, civil Application No. 146 of 2016** (unreported), in which the Court of Appeal pointed out that court's discretion in deciding whether or not to extend time must be exercised judiciously, not arbitral or capriciously, nor should it be exercised on basis of sentiments or sympathy.

In addition to the above, Ms. Lamwai told this court that, she is aware of the legal requirement that each day of delay has to be accounted for, she

insisted that the delay in filing this application is due to the fact that the applicants were pursuing their appeal at the Court of Appeal. She referred me to the case of **Sebastian Ndaule vrs Grace Rwamafa, Civil application No. 4 of 2014** (unreported) to buttress her arguments. She contended that each case has to be decided on its own merits, to cement her arguments she referred me to the case of **Tanga Cement cCompany Ltd vrs Jumanne D. Mesangwa & another, TAG Civil application No. 6 of 2001**(unreported).

On the other side, the learned advocate Nyika submitted that no sufficient reasons for the delay in filing this application have been adduced by the applicants and that the applicants have failed to account for each day of delay. Mr. Nyika contended that all of the allegations stated in the affidavit in support of this application were dealt with by the Court of Appeal, therefore they cannot be re-opened here again. Mr. Nyika argued strongly that the fact that the applicant's spent time at the Court of Appeal is not sufficient reason since the applicants opted to appeal to the Court of Appeal instead of applying to set aside the decision of this court. Mr. Nyika submitted that, the judgment of the Court of Appeal was delivered on 20th December, 2018 and this application was filed on 28/1/2019, almost a month after the dismissal of the applicants' appeal at the Court of Appeal.

Mr. Nyika argued further that, no evidence has been shown to prove that the applicant's officer was away and the affidavit in support of this application shows that it was affirmed on 17/1/2019, therefore there are 11 days of delay in lodging the application in court which have not been

accounted for. Mr. Nyika was of the view that the delay of 39 days from 20th December, 2018 to 28th January, 2019 when the application was filed has not been accounted for. Mr. Nyika insisted that, not all days of delay have been accounted for. He referred this court to the case of **Sebastian Ndaula** (supra) in which the Court of Appeal of Tanzania, quoted with approval the decision of the court in the case of **Royal Insurance Tanzania Ltd vrs Kiwengwa Strand Hotel Limited Civil Application No. 116 of 2008** (unreported) that;

"it is trite law that an applicant before the court must satisfy the court that since becoming aware of the fact that he is out of time, acted very expeditiously and that the application has been brought in good faith".

Mr. Nyika also referred this court to the case of **Paul Martin vrs Bertha Anderson, Ar Civil application No. 7 of 2005** (unreported) in which the court held that

"..Negligence, as no doubt Messes Mkongwa and Stolla, learned counsel for both parties are aware, does not constitute sufficient reason to warrant the court's exercise of its discretion to grant extension of time".

In her rejoinder Ms. Lamwai submitted that, the applicants appealed to the Court of Appeal in bonafide belief that was the proper remedy. As regards the delay in filing the application in court Ms. Lamwai submitted that the application could not be filed earlier because of the court's vacation and

that the advocate who was handling the case was away. She prayed that this court should be guided by the provisions of section 21 of the Law of Limitation Act Cap 89, R.E. 2002.

It is a common ground that, for an application for extension of time like the instant application, the applicant has to account for each day of delay by giving sufficient reason for the same [see the case of **Benedict Mumello vrs Bank of Tanzania, Civil appeal No. 12 of 2002** (unreported)].

The position of the law is that there are no hard and fast rules on what constitutes to sufficient cause [see the case of **International Airline of the United Arab Emirates vrs Nassor Nassoro Civil Application No. 263 of 2016** (unreported)] However, the courts have been taking into consideration a number of factors in ascertaining whether sufficient causes have been adduced such as the magnitude of the delay, and the applicants' diligence in pursuing the matter. I am alive that, the discretionary powers vested in this court in applications of this nature have to be exercised judicially.

In this application there is no dispute that the applicant's appeal at the Court of Appeal was dismissed on 20th December, 2018 and this application was filed on 28th January, 2019. As correctly submitted by Mr. Nyika, the applicants have to accounted for each day of delay in filing this application. I am not convinced with the reasons adduced by Ms. Lamwai in accounting for the aforesaid delay of 39 days. As pointed out earlier in

this ruling Ms. Lamwai alleged that the court was on vacation that is why this application could not be filed earlier or soon after the dismissal of the appeal at the Court of Appeal. What I know is that during Court's vacation the registry offices at the High Court are not closed. If the applicants were diligently pursuing this matter, they could have filed the application soon after the dismissal of their appeal at the Court of Appeal. In addition to the above, the courts vacation ended in February, 2019, now if the applicants managed to file this application on 28th January 2019 during the court's vacation why it didn't they file it earlier? To me that connotes lack of diligence on part of the applicants, not only that the affidavit in support of this application was affirmed on 17th January 2019, it took the applicants' advocate more than ten (10) days to lodge the application in court. No sufficient reasons have been adduced for the aforesaid delay too. Ms. Lamwai in her endeavour to rescue this application told this court that the advocate who was handling this case was also away, so she contended, that contributed to the delay in filing the application. I am inclined to agree with Mr. Nyika that this second alternative reason is not sufficient cause, since no evidence has been adduced to show that the advocate who was handling this matter was away, in fact, this reason is not reflected in the affidavit in support of the application the same applies to the allegation that the court was on vacation.

I have also taken into consideration the provisions of section 21 of the law of Limitation Act, Cap 89, R.E. 2002 that was referred to this court by Ms. Lamwai. My finding is that section 21 of the Law of Limitation Act, Cap 89, R.E. 2002 cannot be applicable in this application, since the period

under consideration is not the one during the prosecution of the appeal at the Court of Appeal. The period of delay that the applicant was supposed to account for is the one after the dismissal of the appeal at the Court of Appeal and that is the period which has been considered by this court in this ruling.

For the foregoing reasons the applicants have failed to advance sufficient reasons to move this court to grant the extension of time sought. This application is dismissed with costs.

Dated at Dar es Salaam this 5th day of April, 2019.




B.K. PHILLIP
JUDGE