

**IN THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

MISC. CIVIL APPLICATION NO. 51 OF 2017
(Originating from Civil Case No. 50 of 2004)

MSAE INVESTMENT CO.LTD.....APPLICANT

VERSUS

THE NATIONAL INSURANCE CORPORATION (T).....1ST RESPONDENT

THE TREASURY REGISTRAR.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

Date of last Order, 22nd May 2018
Date of Ruling, 08th June, 2018

RULING

R. KEREFU SAMEJI, J.

The applicant herein seeks for orders of this Court to extend time within which to lodge an application to set aside the dismissal order dated 16th April 2015 which dismissed the applicant's suit for non-appearance of the parties. The applicant also is seeking orders of this Court to set aside the dismissal order dated 16th April 2015 for non-appearance of the parties. The Application is brought under section 14 (1) of the Law of Limitation

Act, Cap. 89 [R.E. 2002] and Order IX Rule 4 and Section 95 of the Civil Procedure Act, Cap. 33 [R.E.2002]. The Application is supported by an Affidavit deposed by one Godwin Muganyizi, the learned Counsel for the applicant.

On the other side the respondents have filed Counter Affidavit to challenge the Application. In addition the 2nd and 3rd Respondents have filed a preliminary objection to the effect that the Application is incompetent and untenable for:-

(a) *being time barred in law; and*

(b) *joining now existing parties without leave of the Court.*

On 6th July 2017 when the matter was called for hearing of the above points of objection, subject to the consent of both parties, the Court ordered the preliminary objection to be argued by way of written submissions. It was agreed that, the 2nd and 3rd respondents should file their submissions on or before 14th July, 2017, Reply on or before 21st July, 2017 and the rejoinder, if any, on or before 26th July, 2017 and the Ruling was to be delivered on 04th August 2017. However, on 4th August 2017

when the matter was called for the Ruling, it was submitted that the 2nd and 3rd respondents have not submitted their written submission as ordered by the Court due to negligence. As such, the points of preliminary objection were dismissed for want of prosecution and the Application was set for hearing on merit.

At the hearing of the Application the applicant enjoyed services of Mr. Muganyizi Godwin, the learned Counsel, while the 1st respondent was represented by Mr. Samson Mbamba, the learned Counsel and the 2nd and 3rd respondents were represented by Mr. Daniel Nyakiha, the learned State Attorney.

In his submission in support of the Application Mr. Muganyizi informed the Court that the applicant is praying for extension of time to file an application to set aside the dismissal order issued on 16th April 2015. He said, on 24th October 2014 the matter came before the Court and the matter was *adjourned sine die* following the consolidated Holdings having been rendered defunct. He said, the matter then came on 31st October 2014, but the file was nowhere to be found and it was called again on 16th April 2015 and the matter was dismissed for non-appearance of the

parties. Mr. Muganyizi submitted further that, after perusal of the file they noted that, there was an order of the Court to have parties be summoned, but the parties have never received any summons. He noted that, the same is a good reason for this Court to extend time as prayed in the Chamber Summons.

Mr. Muganyizi also argued that, in their Counter Affidavit, the 2nd and 3rd respondents are disputing that they were not parties to the original suit, without taking into account that after the consolidated Holdings the liabilities have been undertaken by the 2nd respondent and the 3rd respondent was joined as the legal adviser of the Government.

In response Mr. Mbamba started by praying the Court to adopt the Counter Affidavit and he argued that, the order issued by the Court on 16th April 2015 was given to the different parties and not for the current parties appearing in this Application. He said, in the Dismissal Order parties were *Msaе Investment Co. LTD (plaintiff), the National Insurance Corporation (T) LTD (the 1st Defendant), Yudika Mremi t/a Dar Express (2nd Defendant) and The Presidential Parastatal Sector Reform Commission, (3rd Defendant)*. Mbamba said for this Application the parties are *Msaе*

Investment Co LTD (the applicant) V the National Insurance Corporation (T) LTD (the 1st Respondent), The Treasury Registrar (the 2nd Respondent) and The Attorney General (the 3rd Respondent). Mr. Mbamba argued that, there is nowhere indicated that, leave of the Court was sought to bring and include the 2nd and 3rd defendants in this matter. He said, the applicant was required to seek leave of the Court before including these new parties to this Application. To buttress his position Mr. Mbamba referred to the decision of the Court of Appeal in the case of **NIC of (T) and Consolidated Holding Corporation V Shengena Limited**, Civil Application No. 20 of 2007 where the Court of Appeal observed at page 2 that:-

“...the 2nd applicant is not the original applicant as such. The original 2nd applicant was PSRC which has been extinguished by operation of law. Consolidated Holding Corporation has assumed PSRC’s position by virtue of Act. No. 26 of 2007; The National Bank of Commerce (Reorganization and vesting of Assets and Liabilities)(Amendment Act No. 2). The present 2nd applicant was substituted with leave of the Court.” [Emphasis added].

In addition Mr. Mbamba cited another decision of the Court of Appeal in the case of **Dunia Worldwide Trading Company Limited V Consolidated Holding Corporation**, Civil Application No. 61 of 2008 and then spiritedly argued that, since there is no leave of the Court to include the 2nd and 3rd respondents herein the Application should not be granted.

Mr. Mbamba also challenged paragraph 5 of the Affidavit in support of the Application together with the verification clause that, it is on the hearsay and is not supported by an affidavit of the Court officer who gave the said information. He said, the deponent is not the Court officer or even a custodian of Courts' files to have the personal knowledge that the Court's file was misplaced. Mr. Mbamba also referred to paragraphs 6 and 7 of the Affidavit that, the deponent also has indicated that, he perused the Court's file but there is no evidence or even exchequer receipt to verify that fact.

Mr. Mbamba referred to the case of **Unyangala Enterprises LTD & 5 Others V Stanbic Bank (T) LTD**, Civil Application No. 56 of 2004 and strenuously argued that, there is no enough evidence and proof in the Affidavit to enable the Court to exercise its discretion. He said, the Court cannot exercise its discretion in a vacuum.

Mr. Mbamba also argued that the dismissal order was issued on 16th April 2015 and the current Application was filed on 14th February 2017, after a period of almost two years, but the applicant has not accounted for the delay of each day as required by the law. He cited the decision Court of Appeal in **Tanzania Coffee Board v Rombo Millers LTD**, Civil Application No. 13 of 2015 and thus prayed the Application to be dismissed with costs.

In his part Mr. Nyakiha started by challenging the claim by Mr. Muganyizi that the matter was dismissed by the Court without summoning the parties. Mr. Nyakiha said, if one reads the Dismissal Order will observe that the same was issued under Order IX Rule 3 of the Civil Procedure Code, which do not provides for the said summons to be issued to either party.

Mr. Nyakiha then challenged the Affidavit in support of the Application that, the applicant has not accounted for each day of the delay (i.e from 16th April 2015 – 04th February 2017). He said, what is stated in the said Affidavit is the issue of summons, which he said, is not sufficient reasons to enable this Court to grant prayers sought in the Chamber Summons.

Mr. Nyakiha said, for the Court to grant applications of this nature, issues such as, *sufficient reasons for the delay, the length of the delay* and *whether the applicant has accounted for each day of delay* should be considered. It was therefore the view of Mr. Nyakiha that the applicant herein has not managed to adduce sufficient reasons or even to account for the delay of two years. Mr. Nyakiha argued further that, being a plaintiff in the original suit, the applicant was required to make a follow-up on the progress of her case. He thus prayed the Court to dismiss the Application with costs.

In rejoinder submission, Mr. Muganyizi, on the issue of follow-up on the case he said, the case was adjourned pending further directives of the Court, he thus said the applicant has not made any follow-up, as she was waiting for the directives of the Court. It was the view of Mr. Muganyizi that, it was the duty of the Court to summon the parties and that the applicant should not suffer inaction from the Court. He thus said, the issue of negligence cannot be raised on the part of the applicant, because parties were told to wait by the Court. However, *Mr. Muganyizi promised to*

submit authority of the Court of Appeal on this matter, but none was submitted until the time of crafting of this Ruling.

On the claim by Mr. Mbamba that, the deponent Affidavit contains hearsay information and there is no Affidavit from the Court Clerk or any other officer from the Court, Mr. Muganyizi said, he himself had personal knowledge that the court's file was missing and there was no need to get further information or even an affidavit from a Court Clerk or any other officer of the Court. As on who perused the Court's file, Muganyizi said, he is the one and that the exchequer receipt to that effect is in the record of the case. On the length for the delay Mr. Muganyizi argued that, when the order of the Court was made, there was no any party before the Court. So he said, it is not proper for Mr. Mbamba and Mr. Nyakiha to count from the date of the order. He said, parties were still waiting to be called by the Court for further directives. He said, until today the Court has not yet called the parties for those directives. It was therefore the view of Mr. Muganyizi that, there is no reference point where one can count the length of the delay. On the issue of leave to join the 2nd and 3rd respondents in the suit, Mr. Muganyizi said, it was not possible for the applicant to file a

case with defunct parties. He said the case was filed against the person given liabilities by the Court and according to him there was no need of the said leave. Finally Mr. Muganyizi reiterated what he submitted in chief and prayed the Court to grant the Application.

Having perused the record of the matter and given a deserving weight to the submissions by the Counsel for the parties, I wish to start by pointing out that, it is well settled that in considering an application for an extension of time, the main issue to be considered by this Court is *whether the applicant has submitted sufficient reasons, which contributed to the delay and whether the applicant has managed to account for the delay of each day.*

In other words, the applicant must show with concrete evidence that, the delay was not caused by his/her *dilatory conducts, inaction, negligence, or compliance*. The applicant must convince the Court that, *he acted diligently and reasonably in pursuing this matter*. This position was discussed in the case of **Yusufu Same and Another Vs Hadija Yusuf**, Civil Appeal No. 1 of 2002 and **Braiton Sospeter @ Mzee and 2 Others v. R.**, Criminal Appeal No. 358 of 2009, both decisions of the Court of Appeal

(unreported). In the case of **Yusufu Same**, (supra) the Court of Appeal categorically stated, at page 5 that:-

*"It is trite law that **an application for extension of time is entirely in the discretion of the court to grant or refuse it.** This discretion however has to be exercised judicially and the overriding consideration is that **there must be sufficient cause** for so doing. What amount to "sufficient cause," has not been defined. From decided cases a number of factors have to be taken into account, including, **whether or not the application has been brought promptly; the absence of any or valid explanation for the delay; lack of diligence on the part of the applicant**". [Emphasis supplied].*

Therefore, extension of time is entirely in the discretion of the court to grant or refuse it and the same may be granted only where "*good cause*" or "*sufficient reasons*" for the delay has been established. This position was also discussed in the cases of **Sospeter Lulenga v. the Republic**, Criminal Appeal No. 107 of 2006, Court of Appeal of Tanzania at Dodoma (unreported); **Aidan Chale v. the Republic**, Criminal Appeal No. 130 of

2003, Court of appeal of Tanzania at Mbeya, (Unreported) and **Shanti v. Hindoche & Others** [1973] EA 207.

It is also a trite law that, the applicant is required to account for each day of the delay. In the case of **Al Imran Investment Ltd V Printpack Tanzania and another Misc. Civil Cause No 128 of 1997** in determining a similar application the following observation was underscored by Hon. H. Nsekela J, as he then was at page 2, that:-

*"In order for the applicant to have the benefit of Section 14(1) of the Law of Limitation, **applicant ought to explain the delay of every day that passes beyond the prescribed period of limitation**" [Emphasis added].*

In all these cases cited above courts, while considering applications for extension of time, they, among other factors, considered special circumstances and sufficient reasons showing why the applicant should be allowed to lodge his application out of time. I entirely agree with these authorities and I will adopt them entirely in this Application. I should also emphasize that, application of this nature cannot be granted if reasons

adduced by the applicant were contributed by **indolent, inaction and lack of vigilance on the part of the applicant.**

A cursory and close scrutiny of the record of the case reveals that, the dismissal order, which the applicant is seeking to challenge, was issued on 16th April 2015. It is also on record that, the said order was pronounced in the absence of the parties in accordance with Order IX Rule 3 of the Civil Procedure Code, as clearly explained by Mr. Nyakiha. It is also on record that, since that date (i.e to 04th February 2017, when this Application was lodged (***about two (2) years or 730 days, which definitely is inordinate delay***) the applicant has not taken any step or made any follow –up on the progress of her case claiming that she was waiting for the further directives of the Court. It was the submission of Mr. Muganyizi that, it was the duty of the Court to summon the parties and that the applicant should not suffer inaction from the Court. With due respect to Mr. Muganyizi, the applicant herein is the one who instituted that case and as such, she was required to make a follow-up on the status of her case.

I have since perused the record of the case and the proceedings thereto and it is clear that prior to the Dismissal Order was issued on 14th April

2015, the applicant had disappeared for about five (5) months, i.e 150 days, as the record indicates that, on 24th October 2014 when the matter was called for hearing the plaintiff was represented by Nyangi Wambura, the learned Counsel and Ms. Aziz held brief for Mr. Mbamba, the learned Counsel for the 1st Defendant and the 2nd and 3rd Defendants were absent. On that date both Counsel who were present prayed for an adjournment and the Court noted that, since the 3rd defendant, (PSRC) is absent and its mandates and functions are under Consolidated Holdings awaiting directives from the Attorney General, the matter was referred to the Registrar for further action. From that date, the matter was called again on 31st March 2015, after expiry of almost five (5) months.

In my considered view the failure by the applicant to make follow-up on the progress of her case *depicts outright negligence, lack of diligence and seriousness and by any means this cannot constitute sufficient reason and the same cannot bail out the applicant as per the established principles.*

See the case of **Mwananchi Engineering and Constructing Corporation v. Manna Investimates (PTY) Limited and Holtan Investments Company Limited**, Civil Application No. 5 of 2006, CAT,

Dar es Salaam Registry (unreported); **Chesco Muhyinga V. Sietco** Misc. Civil Application No. 50 of 2005, High Court Dodoma and **Hamza Aziz Vs Millicom International & Another**, Civil Case No. 94 of 1995 (both unreported) where the court refused to bless the negligence of the applicant. Similarly, in this case, the applicant's negligence herein cannot be blessed by this Court. Let me also reminds the learned Counsel Mr. Muganyizi that, the *Court is not a place where clients are at liberty to stay aloof at will and on the day when they do feel to appear the court just winds up the clock!!!*. No!!!!.

It is also on record and as eloquently submitted by Mr. Mbamba that, though Mr. Muganyizi is claiming that at some point the Court's file was missing the same is not supported by the court's record (proceedings) and there are no concrete evidence on the same. It is a fact that Mr. Muganyizi is not a custodian of the Court's file and has not submitted an affidavit from the custodian of those files (Court Clerk or any other Court officer) to prove his allegations. See the decision of the Court of Appeal in **Christopher Mtikila v Jacob Nkomola and 3 Others**, Civil Case No. 278 of 1997.

Furthermore, it is also a fact that the applicant herein has not accounted for each day of the delay. I agree with Mr. Mbamba and Mr. Nyakiha that the applicant was required under the law to account for each day of the delay. In the case of **Sebastian Ndaula Vs Grace Rwamafa**, Civil Application No. 4 of 2014, (unreported), the Court of Appeal of Tanzania at Bukoba at page 8 and 9 held that:-

*"The position of this Court has consistently been to the effect that **in an application for extension of time, the applicant has to account for every day of delay**; See Bariki Israel Vs the Republic, Criminal Application No. 4 of 2011, (Unreported). **The need to account each of the days of delays becomes even more important where matters subject of appeal like the present one is, was decided eighteen years ago on 6/02/1997...Application has failed to advance good cause to justify an extension of time, the Application was dismissed**".[Emphasis added].*

The above decision of the superior court of the land is binding on this Court. Therefore, before extending the time herein, this Court must satisfy itself that, there are sufficient reasons and the applicant has accounted for each day of delay. In the case before me, the applicant has completely failed to perform that duty.

Let me say it straight that, there is nothing in the submission of Mr. Muganyizi capable to constitute sufficient reason to justify this Court to grant the prayers sought in the Chamber Summons. The application has not made out a case to justify the exercise of the court's discretion.

Before penning of let me also point out that, as submitted by Mr. Mbamba and indicated above the original parties for the matter are different from the current parties in this Application. The applicant has included these new parties (2nd and 3rd Respondents) without first obtaining the leave of this Court. Therefore, this Court is in agreement with the submission of Mr. Mbamba and Mr. Nyakiha on the issue of the leave, that, before joining the 2nd and 3rd Respondents in this case, the Applicant was required to first seek the leave of the Court as per the requirement of the law. I thus associate myself with the authorities cited by Mr. Mbamba and Mr. Nyakiha

on this matter. With due respect, I wish to remind Mr. Muganyizi that, the issue of parties to the case is a legal issue which is very crucial and central in all court proceedings. The issue of parties is the foundation of each case and goes to the very root of the matter. See the case of **Mbeya Rukwa Autoparks and Transport Ltd V Vestina George Mwakyoma** 2003 TLR 251.

Therefore, since in the original case parties were different from the parties herein, then the applicant was supposed to seek leave of this Court. It was wrong for the applicant to change the parties to the case without the leave of the Court as ably argued by Mr. Mbamba and Mr. Nyakiha. The act done by the applicant is illegal and unacceptable and it *again depicts negligence and ignorance of the law and procedure on the part of the applicant*, the thing which cannot be accepted. As such, this Application is legally un-maintainable.

In upshot and taking into account the above points, it is my respectful view that, the applicant has failed to show sufficient reasons for his inordinate delay.

Therefore the *Misc. Civil Application No. 51 of 2017*, is hereby dismissed with costs.

It is so ordered.

DATED at **DAR ES SALAAM**, this 08th day of June 2018.




R. K. Sameji

JUDGE

08/06/2018

COURT- The Ruling delivered in Court Chambers in the presence of Mr. Kenneth Lyimo, the learned Counsel who was holding brief for Mr. Godwin Muganyizi, the learned Counsel for the applicant, Mr. Samson Mbamba, the learned Counsel, who appeared for the 1st Respondent and Mr. Daniel Nyakiha, the learned State Attorney, who appeared for the 2nd and 3rd Respondents.

A right of Appeal explained.



R. K. Sameji

JUDGE

08/06/2018