

IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

MISC. CIVIL APPLICATION NO.99 OF 2019

(Arising from the Civil Appeal No. 21/2017 and Originated from Civil Appeal No.55 of 2013 at the Resident Magistrate's Court of Mwanza at Mwanza)

M/S MONARCH INVESTMENT APPLICANT

VERSUS

FAUSTINE JOSEPH KAMUABWA RESPONDENT

RULING

Last Order: 18.02.2020

Ruling Date: 20.02.2020

A.Z.MGEYEKWA, J

The applicant has instituted an application which is brought under Section 93 of the Civil Procedure Code Cap. 33. The order sought is an extension of time to file the appeal out of time. The application is supported by an affidavit deposed by Oswald Masatu Mwizarubi, the

Executive Director of the applicant. The respondent filed a counter-affidavit sworn by Dennis Kahangwa, learned counsel for the respondent.

In prosecuting this application, the applicant enjoyed the service of Mr. Remigius Mainde, learned counsel and the respondent enjoyed the service of Mr. Dennis Kahangwa, learned counsel.

Commencing his submission, Mr. Remigius submitted that the application before this court is for extension of time brought under section 93 of the Civil Procedure Code Cap.33. He submitted that the applicant was aggrieved by the decision of the Resident Magistrate Court thus he appealed before the High Court and the appeal was dismissed instead of striking it out. The applicant applied for review and this court changed the order of the court to read struck out instead of dismissed. Mr. Remigius argued that all the time when the application was dismissed the applicant was in court to fight for his right thus has not delayed the court process. He stated that the applicant applied for extension of time on 25th day of July 2019. The applicant's Advocate went on to submit that section 21 of the Law of Limitation Act, Cap.89 provides a chance that when a party was in court process the time be excluded whether he was in a right forum or

not. He concluded by stating that for the interest of Justice their prayer be granted.

On the part of the learned counsel for the Respondent, Mr. Kahangwa started by praying for this court to adopt his counter-affidavit and form part of his submission. Mr. Kahangwa narrated that the suit started in 2017. In Misc. Application No. 153 of 2016 the court issued 30 days to the applicant to file his appeal, they filed their appeal in respect to High Court Civil Appeal No.21 of 2017 but it was defective and the same was dismissed. He argued further that the applicant filed a Misc. Application No.69 of 2017 before Makaramba, J the same was defective again in 2019 the applicant filed a Misc. Application No. 52 of 2019 before Mgeyekwa, J this court changed the order of the court to read struck out. He lamented that the learned counsel for the applicant cannot shift the blame to court while he was required to file a proper appeal.

Mr. Kahangwa continued to argue that the applicant has not given sufficient reasons for there is no good reasons form where the case started to when the decision was made as the same was attributed by the applicant's failure to file a proper application. He acted negligently as

failure to abide by the law is not a good ground for extension of time. To support his submission Mr. Kahangwa cited the case of **Calico Textile Industries Ltd v Pyaraliesmail Premji** 1983 TLR 28 and the case of **Ngao Godwin Losero v Julius Mwarabu** Misc. Civil Application No. 179 of 2015. He disputed the citation of section 21 of the Law of Limitation Act that the same applies to suit not an application. Mr. Kahangwa continued to dispute that after the deliverance of the ruling in July 2019 the applicant did not act promptly to file another application as he was late for 14 days and they did not account for each day of delay from 20.04.2019 when the appeal was dismissed to 16.05.2017 when he filed his application for review. He insisted that the law requires that every single day be accounted for but the applicant's delay is extraordinary thus he prays this court not to grant the application since the case was dragging in court for a long time thus justice must come to an end.

In his brief rejoinder, Mr. Remigius said that in case this court had issued a proper order of striking out the application then the applicant could not have scrambled to rectify the mistake instead he could have filed his appeal in time. He disputed the cited authority by stating that the

Miscellaneous Amendment No.3 of 2018 was amended to introduce overriding principle to restrict technicalities. He concluded by stating that the requirement of account each day of delay is of no importance he prays this court to grant their application.

I have given careful consideration to the arguments for and against the application herein advanced by the learned counsels for the applicant and the respondent; there is no gainsaying that the power to extend time is at the court's discretion. In the instant application, it is clear that the applicant lodged several applications and the same were struck out for being defective and one order was rectified by this court. It is in the court record that the applicant was not idle; instead, he made efforts to fight for his right. However, the defence counsel has pointed out that the applicant did not account for every day of delay. It settled law that an applicant must not only demonstrate reasons for the delay but also he must account for each day of delay in taking a particular step in the proceedings. The Court of Appeal has emphasized the requirement of accounting for every day of delay in a 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 **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 an extension of time who fails to account for every day of delay."

Guided by the above authority accounting for each day of delay is among the good cause of delay. I am aware that there is an authority of the Court of Appeal which expanded the grounds for good cause apart from accounting every day of delay, illegality is also among the good cause for extension of time. Unfortunately, the issue of illegality is not stated in the applicant's affidavit. In the case of **VIP Engineering and Marketing Ltd and Three Others v Citibank Tanzania Ltd**, consolidated Civil Reference No.6, 7 and 8 of 2006 CA (unreported) it was stated that:

" We have already accepted it as established law in the country that where the point of law at issue is the illegality or otherwise of the decision being challenged that by itself constitutes "sufficient reasons" within the meaning of Rule 8 of the Rules for extending time."

Having failed to surmount that hurdle, the Court cannot exercise its discretion by enlarging time pursuant to section 91(1) of the Civil Procedure Code, Cap.33. I am satisfied that the Applicant has not disclosed sufficient cause for his application to appeal out of time. Therefore, his application is accordingly dismissed without costs.

Order accordingly.

Dated at Mwanza this 20th day of February 2020.


A.Z.MGEYEKWA

JUDGE

20.02.2020

Ruling delivered on 20th day of February 2020 in the presence of Mr. Kiboga, learned counsel for the applicant and Mr. Dennis Kahangwa, learned counsel for the respondents.


A.Z.MGEYEKWA

JUDGE

20.02.2020