IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

MISC. CIVIL APPLICATION NO. 178 OF 2019

Arising from Misc. Land Application No. 42 of 2017 emanating from Misc. Land Appeal No. 08 of 2015).

JOASH MASAI ..... APPLICANT

VERSUS

DALMAS MGAYA ..... RESPONDENT

RULING

21st May, & 28th July, 2020

ISMAIL, J.

The applicant in this matter has moved the Court to grant two prayers as follows:

1. *Extension of time within which to file an application for setting aside the Court's order that dismissed Misc. Land Application No. 42 of 2017;*
2. *Issuance of an order for setting aside the dismissal order dated 16th May, 2019 and restore Misc. Land Application No. 42 of 2017.*

The application is preferred under section 14 (1) of the Law of Limitation Act, Cap. 89 R.E. 2002 (now R.E. 2019); Order IX Rule 4; and section 95 of the Civil Procedure Code, Cap. 33 R.E. 2002 (now R.E. 2019). It is supported by an affidavit of Joash Masai, the applicant, and the applicant's supplementary affidavit in which grounds on which the extension is sought are setout. The ground for extension of time is found in paragraphs 8, 9 and 10 of the supporting affidavit and paragraphs 2 and 3 of the supplementary affidavit. The contention is that the applicant was indisposed, having fallen ill because of the distress that came with the prospect of losing his house that he has called his home for 33 years. As a result he developed high blood pressure and ulcers which necessitated undergoing treatment in Mwanza, before he left for Dodoma where he went for recuperation. Travel tickets and medical chits have been appended in support of the application.

The application has been strongly opposed by the respondent, through a counter-affidavit in which the respondent contended that dismissal of the matter and subsequent striking out of the application were all down to the applicant's lawyer's negligence. With respect to the applicant's alleged sickness, the respondent averred that the contention is baseless and the applicant was put to strict proof of the contention.

When the parties virtually attended the proceedings on 21st May, 2020, a schedule was drawn for the filing of written submissions which would dispose of the application. Credit to the counsel, the submissions were filed timeously and in conformity to the schedule.

Submitting in support of the application, the applicant highlighted what he stated in the affidavit. He contended that the matter which was dismissed by the Court was scheduled for hearing on 21st May, 2019, on which date he appeared in Court, only to be informed that the matter was called on 16th May, 2019 and dismissed for want of prosecution. This, he submitted, happened when neither he nor his counsel was informed of the change of the hearing date.

With respect to extension of time, the counsel for the applicant acknowledged the fact that extension of time is granted at the discretion of the Court and upon demonstration of sufficient cause. He stressed the fact that sufficient cause must be construed according to circumstances surrounding a particular case and that its interpretation should encompass all reasons and causes which are outside the applicant's power to control or influence resulting in delay in taking necessary step. To aid his cause, he cited the decisions of ***The Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia*** [1992] TLR 185 (CA); and

Bahati Musa Hamis Mtopa v. Salum Rashid, CAT-Civil Application No. 112/07 of 2018 (unreported). The learned counsel further contended that after dismissal of Misc. Land Case Application No. 42 of 2017 and striking out of Misc. Land Application No. 108 of 2019, the applicant's health deteriorated and that he had to travel to Dodoma where he took time to recuperate. In the process, he found himself late in filing the instant application by 70 days.

Stressing that sickness constitutes a sufficient ground for extension of time, the applicant's counsel cited the decision of ***John David Kashekya v. The Attorney General***, CAT-Civil Application No. 1 of 2012 (unreported) which was quoted with approval in ***Masoud Seieman Kikula v. Jaiuma General Supplies Limited***, HC-Commercial Application No. 171 of 2017 (unreported). He contended that his sickness was compounded by the setbacks he suffered in court when his applications fell through. In yet another contention, the applicant's counsel invoked the provisions of section 21 (2) of Cap. 89 to contend that, since the applicant tried to institute the struck out application in good faith, between 13th June and 6th August, 2019, then time spent in the pursuit should be excluded.

With respect to setting aside the dismissal order dated 16th May, 2019, the learned counsel contended that the dismissal occurred on a day that the parties never intended that the matter be called for orders. Absence of both parties served as the applicant's basis for the contention. He submitted that change of the date was genuinely the Court's mistake. He implored the Court to invoke inherent powers under section 95 of the CPC and investigate the applicant's claim that Misc. Land Application No. 42 of 2017 was initially set for hearing on 21st May, 2019 and that the cause list for 21st May, 2019 indicated as such.

Fortifying his contention, the applicant relied on the case of ***Sandru Mangalji v. Abdul Aziz Lalani & 2 Others***, HC-Misc. Commercial Application No. 126 of 2016 (Mwanza-unreported), in which it was held that conduct of a party prior to the non-appearance should be taken into consideration. In this case, the applicant and his late counsel were certain attendants of the matter prior thereto. He wound up by arguing that the respondent will not suffer anything if the application is granted. He prayed that the application be granted as prayed.

In his rebuttal submission, the respondent's counsel began by stating that the question that should guide this matter is whether the applicant has shown any good cause for absence on 16th May, 2019, when the matter

came up for the hearing. Contending that the matter was fixed for hearing in the presence of both parties, the Counsel contended that the applicant's argument on the dismissal are nothing but baseless and unjustified claims. Revisiting the manner in which the second application was struck out and time it took to file the instant application, the counsel for the respondent contended that, the period between 13th June, 2019 and 7th August, 2019, is generally accepted as falling within the technical delay. He contended, however, that the period between 7th August and 17th October, 2019, constitutes a real or actual delay of about 70 days which have not been explained out. Citing the decision of ***Tanzania Fish Processors Limited v. Eusto K. Ntagalinda***, CAT-Civil Application No. 41/08 of 2018 (Mwanza-unreported), the respondent's counsel held that days of delays have not been accounted for. On the sickness of the applicant, the respondent's counsel contended that the tickets and medical chits attached in support of the contention do not explain out the delay since they talk of earlier dates which are not relevant to the time of delay. In fact, the receipts were issued four months before the dates in question. The ticket was also contended to have been issued two days after the striking out of the application for restoration. The counsel submitted that the consequence of these variances is that the applicant has not acted

diligently and promptly, consistent with the holding in ***Interchick Company Limited v. Mwaitenda Ahobokiie Michael***, CAT-Civil Appeal 218 of 2016 (unreported) in which it was held that gauging good cause would also entail ascertaining if the applicant acted promptly. He contended that the applicant has failed to account for the delay. He, consequently, urged the Court to dismiss the application.

From these rival submissions, the Court's profound task is to pronounce itself on whether a case has been made out to warrant exercise of its discretion and grant an extension of time; and whether a justification has been given to allow setting aside of the dismissal order.

> The position is quite cemented with respect to extension of time. It is simply that an application for extension of time can only be granted upon satisfaction by the Court that the applicant thereof has presented a credible case, and he has acted in an equitable manner. This position takes into account the fact that extension of time is not granted as of right. Rather, it is an equitable remedy granted to a party who acts equitably. The elaborate position in respect thereof was laid down in the persuasive decision of the Supreme Court of Kenya in ***Nicholas Kiptoo Arap Korir***

Salat v. IEBC & 7 Others, Sup. Ct. Application 16 of 2014 wherein it was held:

> *"Extension of time being a creature of equity, one can only enjoy it if [one] acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that [one] was not at fault so as to let time lapse. Extension of time is not a right of a litigant against a Court, but a discretionary power of courts which litigants* ***have to lay a basis [for], where they seek [grant of it].***"

A similar view was expressed by the Court of Appeal of Tanzania in ***Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania***, CAT-Civil Application No. 2 of 2010 (unreported), wherein key conditions on the grant of an application for extension of time were restated. These are:

> *"(a) The applicant must account for all the period of delay.*
> *(b) The delay should not be inordinate.*
> *(c) The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action he intends to take.*
> *(d) If the Court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as illegality of the decision sought to be challenged."*

See also: ***Benedicto Mumello v. Bank of Tanzania*** [2006] 1 EA 227; ***Kalunga & Company Advocates v. National Bank of Commerce Ltd*** [2006] T.L.R. 235

In the instant application, both parties share the same fact. That in application for extension of time, the party's success is conditioned on demonstration of reasonable or sufficient cause from which the Court will gauge the applicant's action. The rationale for this is not hard to find. It is simply aimed at taming applications brought by parties who are at fault but are all out to benefit from their own inaction. The wisdom is consistent with the holding in ***KIG Bar Grocery & Restaurant Ltd v. Gabaraki & Another*** (1972) E.A. 503, in which it was held that ***"... no court will aid a man to drive from his own wrong."***

The term sufficient cause and what it entails has been judicially expounded and restated in many a decision of this Court and the apex Bench of our legal system. What is important, however, is that interpretation of sufficient cause has to take a broad approach which ensures that the applicant's journey in search of justice is not stifled. Thus, in ***Dephane Parry v. Murray Alexander Carson*** [1963] EA 546, the defunct East African Court of Appeal had this to say:

> *"Though the court should no doubt give a liberal interpretation to the words "sufficient cause", its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the*

appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant."

The applicant's reason for the delay in taking action is his ailment and the alleged subsequent travel to Dodoma where he underwent a recuperation. The question that follows is, is this good enough a reason to justify the extension? The current legal holdings are to the effect that illness of a party constitutes a good reason for extension of time (See: ***Christina Alphonce Tomas (as Administratrix of the late Didas Kasele) v. Saamoja Masinjiga***, CAT-Civil Application No. 1 of 2004; ***John David Kashekya v. The Attorney General*** (supra); and ***Richard Mlagala & 9 Others v. Aikael Minja & 3 Others***, CAT-Civil Application No. 160 of 2015 (both unreported)). In this case, the evidence adduced to support the contention is the medical chits and a travel ticket to Dodoma. A scrupulous review of these documents paints a gloomy picture which has also been raised by the respondent's counsel. They only serve to demonstrate a mismatch between the time that the applicant allegedly fell ill and the time within which he was supposed to take action. By any stretch of imagination, documents issued in April, 2019, would not and cannot be used to prove illness that is alleged to have occurred between August and October, 2019, the time within which action required of the applicant ought to have been taken. The same applies to a one way bus

ticket which would only exhibit the fact that he travelled on the date shown in the ticket and nothing else. In the absence of any medical certificate which would attest to the applicant's illness during the time and, assuming that the applicant was indeed indisposed, my expectation is that confirmation in respect thereof would come from a medical practitioner who attended him. This would be done by way of a supplementary affidavit, consistent with the holding in ***Isack Sebegele v. Tanzania Portland Cement***, CAT-Civil Reference No. 26 of 2004 (unreported). In the absence of any such evidence, the contention is lacking in veracity, and it will not be too much of an offence if I was to term it a mere afterthought which cannot be considered as the basis for the grant of extension.

The respondent has posed a potent question as to why no action was taken from the date Misc. Land Application No. 108 of 2019 was struck out to 17th October, 2019, when the instant application was instituted. This is a spell of 70 days out of which only a paltry have been accounted for. I need not say more that the requirement of accounting for each day of delay has been emphasized often times and the ***Interchick case*** (supra) serves as only one of the multitude of the decisions. In ***Bushiri Hassan v. Latina Lucia Masaya*** (Civil Application No. 3 of 2007 – unreported) it was held:

"...Delay, of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken."

See also: ***Karibu Textile Mills v. Commissioner General (TRA)***, CAT-Civil Application No. 192/20 of 2016 (unreported).

The spell of inaction from 7th August to 17th October, 2019, depicts nothing but sheer lack of diligence which is inconsistent with sufficient cause, and the Court will strip into the danger of being led by sympathy and, in the process, burying diligence and rewarding apathetic and procrastinating litigants.

The applicant wound up his submission by contending that granting of the application would not result in having the respondent suffer an irreparable loss, while he stands to suffer a perpetual loss. I do not subscribe to that reasoning. Loss or prejudice occurs in many forms and the never ending pursuit of matters, all at the instance of an indiligent party, constitutes one of prejudices.

Finally, the applicant has invited this Court to treat the delay as one fitting the exclusion spelt out in section 21 (2) of Cap. 89. With respect, this is a fallacious contention as far as this case is concerned. I say so because the bone of contention in this matter does not reside in the period during which the applicant was pursuing his applications. If that was the

case, the applicant's contention would have a semblance of a guarded credence. In this case, where the contention relates to the days that followed the striking out, the talk of exclusion under section 21 (2) is nothing but a ***"hit and hope affair"*** which is merely a wasted effort.

In the upshot, I hold that the application has failed the requisite test set for extension of time. Accordingly, I dismiss it with costs.

Order accordingly.

DATED at **MWANZA** this 28th day of July, 2020.

M.K. ISMAIL

JUDGE

Date: 28/07/2020

Coram: Hon. M. K. Ismail, J

Applicant: Scolastica Teffe, Advocate

Respondent: Mr. Erick Mutta, Advocate

B/C: B. France

Court:

Ruling delivered in chamber in the presence of Ms. Teffs and Mr. Mutta, Counsel for the Applicant and Respondent, respectively, and in the presence of Ms. Beatrice B/C, this 28th July, 2020.

M. K. Ismail

JUDGE

At Mwanza

28th July, 2020