

IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA
MISC. CIVIL APPLICATION NO.94 OF 2020
(RM Civil Case No. 02 of 2020)

ERICK NGWEGWE @ ERICK CYRILO NGWEGWE APPLICANT

VERSUS

NEW HABARI (2006) LIMITED & 4 OTHERS.....RESPONDENTS

RULING

Last Order: 12.02.2021

Ruling Date: 15.02.2021

A.Z.MGEYEKWA, J

The applicant has instituted an application which is brought under section 14 (1) and 21 (2) of the Law of Limitation Act, Cap. 89 [R.E 2019]. The Order sought is for an extension of time to file a notice of appeal to the Court of Appeal of Tanzania. The application is supported by an affidavit deposed by Robert Lawrence Mosi, learned counsel for the applicant. The respondent

resisted the application and has demonstrated his resistance by a joint counter-affidavit deposed by Denis Hussein Dendela, the learned counsel for the respondents.

In prosecuting this application, the applicant enjoyed the legal service of Mr. Malik Hamza, learned counsel while the respondents enjoyed the legal service of Mr. Stephen Kaswahili, learned counsel.

It was Mr. Malik, learned counsel for the applicant who kicked the ball rolling. In addressing the Court, Mr. Malik sought to adopt the affidavit in support of the application as part of his oral submission. He submitted that the applicant is seeking extension of time to file an application for revision. Mr. Malik stated that the applicant filed a Civil Case No.02 of 2002 at the Resident Magistrate Court claiming for general damages in a tune of Tshs. 200,000,000/=.

The learned counsel for the applicant further submitted that on 11th March, 2020 the applicant was served with a joint defence and on 22nd January 2020 the applicant appeared before the court, and again he appeared on 10th February, 2020. He went on to submit that on 28th February, 2020, 22th, 12th, 18th, and 19th March the matter was called for mention in their absence.

Mr. Malik continued to submit that on 19th March, 2020 the trial court dismissed the case for want of prosecution. He lamented that the Magistrate dismissed the case when it was called for mention and not hearing.

Mr. Malik, did not end there he added that the pleadings were complete on 11th March, 2020, therefore, the trial Magistrate was required to order for a first pre-trial conference, mediation, issues for determination and hearing. He added that the dismissal order did not state the provision of law which moved the court to dismiss the application. It was his view that the applicant has stated good reason because the order of dismissal is tainted with illegalities since the applicant was not given any available remedy. To support his argumentation he cited the case of **Losindilo Buberi v Ally Hamis**, Civil Application No.5 of 1999.

Mr. Malik went on to submit that after the dismissal order the applicant filed a Civil Case No. 21 of 2020 and on 16th June, 2020 it was dismissed for being *res judicata* to Civil Case No. 02 of 2020. He added that the trial Magistrate in Civil Case No. 21 of 2020 misdirected himself for stating that the proper remedy was to set aside the dismissal order instead of filing a new suit. He lamented that due to the circumstances of the case in Civil Case No.02 of

2020 there were procedural errors. Mr. Malik went on to submit that at all material time the applicant was prosecuting and pursue with due diligence to file Civil Case No. 02 of 2020.

On the strength of the above submission, Ms. Malik beckoned this court to allow the applicant's application.

Opposing the application, Mr. Kaswahili, learned counsel representing the respondent argued that the applicant has not accounted for each day of delay to warrant this court to grant the application for extension of time. He argued that it is a cardinal principle that no application of this nature be granted without stating sufficient reasons. Mr. Kaswahili fortified his submission by referring this court to the case of **Dar es Salaam City Council v S. Group Security Company Ltd**, Civil Application No. 234 of 2015. Mr. Kaswahili went on to submit that Civil Case No 02 of 2020 was dismissed on 19th March, 2020 and the applicant filed a Civil Case No. 21 of 2020 after 11 days from the date when the dismissal order was issued on 30th March, 2020. He went on to submit that the Civil Case No. 21 Of 2020 was dismissed on 16th June, 2020 and the applicant filed the instant application on 10th August, 2020 whereas in total 35 days lapsed.

It was Mr. Kaswahili further submission that the applicant's claims that the Resident Magistrate did not cite any provision which moved him to dismiss the case is baseless. He went on to state that the Magistrate has revisional powers as per section 95 of the Civil Procedure Code Cap.16 [R.E 2019] to make his decision. He valiantly argued that the court on 11th March, 2020 and 19th March, 2020 had set the matter for mention and the court issued a last adjournment thus it was right to dismiss the case for non-appearance of the parties. He added that it is not necessary for the court to dismiss the case at mediation or first pre-trial conference stages but at any stage, a matter can be dismissed.

On the strength of the above submission, Mr. Kaswahili beckoned this court to dismiss the application with costs.

Rejoining, Mr. Malik reiterated his submission in chief and added that the court has inherent power in accordance with section 95 of the Civil Procedure Code to give an order for both parties. He added that in accordance with section 2 of the Judicature and Application of Laws Act, it is the High Court only which has inherent powers therefore he urged this court to disregard this ground. He insisted that a court is supposed to cite a provision of law when dismissing a case at a preliminary stage.

Mr. Malik distinguished the cited case of Dar es Salaam City Council (supra) from the cited case of Losindilo (supra) for the reason that Losindilo case is related to illegality and the dismissal order contains an issue of illegality. He went on to argue that after Civil Case No. 02 of 2020, the applicant has accounted for each day of delay that the applicant was in court corridors pursuing his case. He added that after the Civil Case No. 21 of 2020 was dismissed the applicant was in confusion and the applicant was in court corridors for some days processing the filing of the instant application

In conclusion, he urged this court to grant the applicant's application to allow the applicant to pursue his legal rights after the dismissal order.

When I was composing this ruling, I noted a point of law that was not well addressed by both learned counsels, therefore I called the parties to address the court on whether the application is proper before this court.

On his side, Mr. Dendera, learned counsel for the respondent stated that the application was not proper before this court. He went on to submit that the applicant was required to follow proper procedure by applying to set aside the dismissal order before filing the instant application for revision.

On his part, the learned counsel for the applicant stated that it was a proper approach. He referred this court to the order which was issued by the Resident Magistrate Court in respect to Civil Case No. 02 of 2020. He stated that the case was dismissed while it was on the stage of mention and the Magistrate dismissed the case without citing a provision that moved him to dismiss the said suit. Therefore, it was his view that the applicant had no any provision to rely upon in applying to set aside the dismissal order. He insisted that the only remedy is revision.

Having heard the contending submissions of the parties, it now behooves the Court to determine whether this is a fitting occasion to condone the delay involved and proceed to enlarge time to lodge the intended application for revision against the dismissal order dated 19th March, 2020 in Civil Case No. 02 of 2020 to satisfy itself of its correctness, legality, and propriety.

To begin with, I wish to restate that the court's power for extending time is both wide-ranging and discretionary but it is exercisable judiciously based on material placed before the court for its consideration. One of such materials is, as I understand the law, is 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. There are a plethora of legal authorities in this respect. As it was decided in numerous decisions of the Court of Appeal of Tanzania, in the case of **M.B Business Limited v Amos David Kassanda & 2 others**, Civil Application No.48/17/2018 and the case of **Benedict Mumelo v Bank of Tanzania** [2006] 1 EA 227 the Court of Appeal of Tanzania decisively held:-

"It is trite law that an application for extension of time is entirely in the discretion of the Court to grant or refuse it, and that extension of time may only be granted where it has been sufficiently established that the delay was with sufficient cause."

Similarly, the Court of Appeal of Tanzania in the cases of **FINCA (T) Ltd and Another v Boniface Mwalukisa**, Civil Application No. 589/12 of 2018 (unreported) which was delivered in May, 2019 and the case of **Bushiri Hassan v Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported), it 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."

Applying, the above authority, the applicant is required to account for each day of delay. In the instant application, the respondent's Advocate objection is based on two aspects that the applicant's Advocate has not stated reasons for the delay and the ground of illegality cannot stand because the court can dismiss the suit at any stage taking to account that the applicant and respondents were absent for severally days. In my considered view, I am in accord with Mr. Kaswahili that the illegality raised by the learned counsel for the applicant does not amount to illegality. The Court of Appeal of Tanzania in various cases has decided that the illegality must be on the face of the record.

I am aware that the court can consider the question of the illegality of the impugned decision as a conceivable reason for an extension of time. It relied on the decision of **Lyamuya Construction Company Ltd v Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, whereas the Court of Appeal held that:-

"... a point of law must be sufficient importance and apparent on the face of the record to compel the court to allow for an extension."

Based on the above authority and the question of illegality raised by the applicant, I am on my considered view that the alleged illegality is not apparent on the face of the record. In the instant application, the applicant's Advocate stated that the Resident Magistrate faulted himself to dismiss the application because the matter was called for mention. With due respect this is not a point of law first of all mention is not featured in the law.

Besides, the court can dismiss a suit at any stage as long as it has satisfied itself that there are good reasons to dismiss the suit for non-appearance. The cited case of **Losindilo Buberi** (supra) by the learned counsel for the applicant is distinguishable from this application for the reason that in the instant application there is no any point of law which is sufficient importance and apparent on the face of the record to compel the court to allow extension of time. Therefore this ground is demrit.

The applicant's Advocate also stated that the applicant has accounted for each day of delay while the learned counsel for the respondent argued that the applicant did not account for each day of delay. I have perused the applicant's affidavit and specifically paragraph 10 and 11 and in my considered view, I have found that the applicant's advocate has accounted for each day of delay starting from 19th March, 2020 when the Civil Case No.

02 of 2020 was dismissed for want of prosecution to 30th March, 2020 when the applicant filed the Civil Case No. 21 of 2020 before the Resident Magistrate Court at Mwanza. Therefore, I am in accord with the learned counsel for the applicant that the applicant was in court premises trying to pursue his rights. However, the applicant's Advocate did not account for each day of delay starting from 16th June, 2020 when the Resident Magistrate dismissed Civil Case No. 21 of 2020 to the date when the applicant lodged this application for extension of time to file a revision on 10th August, 2020.

Conversely, even if the applicant could have exhausted the remedy to set aside the dismissal order in respect to Civil Case No. 02 of 2020, this instant application for extension of time to file a revision could not stand. I am saying so because the applicant and his Advocate were supposed to account for each day of delay starting from 10th June, 2020 when Civil Case No. 21 of 2020 was dismissed to 10th August, 2020 when the applicant filed the instant application before this court. Saying that the applicant was confused because he did not know which step to take after finding that his application was dismissed is not a sufficient reason at all.

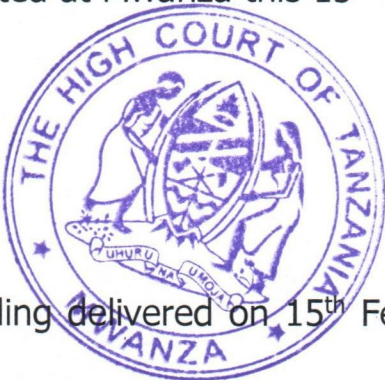
Having failed to surmount that hurdle, the Court cannot exercise its discretion by granting the applicant's application. I am satisfied that the

applicant has not disclosed sufficient reasons to move this court to grant his application.

In the upshot, this application is dismissed without costs.

Order accordingly.

Dated at Mwanza this 15th February, 2021.




A.Z.MGEYEKWA

JUDGE

15.02.2021

Ruling delivered on 15th February, 2021 via audio teleconference whereas both parties were remotely present.


A.Z.MGEYEKWA

JUDGE

15.02.2021