

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 358 OF 2020

MWANAHAWA HARUNA.....APPLICANT

VERSUS

FATUMA BAKARI MAGAMBILWA.....1st RESPONDENT

ALLY SANGALI.....2nd RESPONDENT

RULING

7th June & 15th July 2021

Rwizile, J

By chamber summons supported by an affidavit of Mwanahawa Haruna this application was filed. It was preferred under section 14(1) of the Law of Limitation Act, [Cap 89 R.E 2019]. The applicant is seeking for orders that;

- 1. This honourable court be pleased to extend time within which the applicant herein to file an application to set aside a dismissal order*
- 2. Cost of this application be provided for*
- 3. Any other relief this honourable court may deem fit and just to grant in the circumstances of this application.*

In the affidavit affirmed by the applicant, she averred that, after dismissal of Misc. Civil Application No. 619 of 2018 for want of prosecution, the applicant filed another application No. 499 of 2019.

The applicant averred further that her advocate mistakenly cited a wrong provision of the law on extension of time, instead of provisions for restoration of the case, which in, essence was her intention.

At the hearing, the applicant was represented by Ms Mariam Hussein learned advocate. The respondents appeared in person. However, their submissions were crafted by Jane Kapufi of the Centre for Widows and Children Assistance (CWCA).

Supporting the application, the learned advocate adopted the applicant's affidavit. He argued, after the dismissal order on 15th August 2019, she filed another application No. 499 of 2019 for its restoration. Mistakenly, it was submitted, he cited provisions for extension of time. She added that, the same was dismissed on 19th June 2020, hence this application. She referred this court to paragraph 4-10 of the affidavit.

She argued that, since there is no definition of sufficient/good cause, according to her, the same is the question of fact depending on the prevailing circumstances of each case. She stated that, when the applicant was aggrieved by the decision of Kinyerezi District Court, and as soon as she was supplied with copies of the same, she immediately applied for extension of time to appeal out of time. She added, despite the same being dismissed but she promptly dealt with the same. She relied on the cases of **Mwanza Director M/S New Refrigeration Co. Ltd Vs Mwanza Regional Manager of Tanesco Ltd and Another** [2006] TLR 329, and **Yusuph Same and Another Vs Hadija Yusuph**, Civil Appeal No. 1 of 2002.

It was her assertion further that, her intention was to restore Misc. Civil Application No. 619 of 2019, but mistakenly cited a wrong provision.

However, it was argued that, soon after the dismissal of application No. 499 of 2019 she filed this application. Her view was, she has shown due diligence. She then said, considering the overall circumstances surrounding the case, it was her opinion also that, extension of time may be granted even where there is some element of negligence of the advocate. To support her assertion, she cited the cases of **Felix Tumbo Kisima vs TTC Limited and Another, Civil Application No.1 of 1997 and Tanzania Uniforms & Clothing Corporation vs Charles Moses**, Civil Reference No.10 of 1993.

It was argued further that, grating or refusing to extend time is the discretionary power of the court, which has to be exercised judiciously. It was her opinion that, she had shown a good cause for the delay, as was stated in the case of **Tanga Cement Company Limited vs Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No.6 of 2001. So, she prayed for this court to grant this application.

Disputing the application, the learned advocate adopted the counter affidavit and argued that, the reason given by the applicant about her advocate's mistakes in citing provision of the law holds no water. According to her the same intends to waste time of this court. Her opinion was that, the said reason does not fit to the principles stated in the case of **Joel Silomba vs R**, Criminal Application No. 5 of 2012.

It was her argument further that, no sufficient cause was shown by the applicant. She added that, citation of wrong provision of the law does not amount to sufficient cause. She submitted, an advocate is duty bound to move the court by citing proper laws.

She said, the applicant intends to sympathised with this court, which according to her is not the duty of the court to act on sympathy. She relied on the case of **Arusha City Council vs NMK Project Service**, Misc. Commercial Application No. 9 of 2019.

Moreover, she submitted that applicant failed to account to each day of delay and did not act diligently in following up of her case. The learned advocate held, despite the absence of the definition of what amounts to sufficient cause, according to her, resort is taken in the caselaw, as in the **Tanga Cement Company Limited (supra) and Lyamuya Construction Company Ltd vs Board of Registered Trustee of Young Women Christian Association of Tanzania, Civil Application No. 2 of 2010.**

It was submitted that, the applicant did not account for 732 days of delay, which shows lack of diligence and seriousness. It was the learned advocate's prayer that, this application be dismissed with costs.

When re-joining, Mariam for the applicant reiterated what was submitted in chief, that the delay was caused by mistakes of the advocate which caused the delay due to wrong citation, the application was dismissed hence this application. She added that, the applicant did not delay for two years.

She stated that, sufficient cause should be interpreted to encompasses all reasons which are beyond the applicant's power to control, as stated in the case of **Yusufu Same and Another (supra)** which she cited to support her argument. She reiterates her prayer that, this court grant her extension of time to set aside dismissal order.

Having considered the rival submission of the parties, it has to be noted that, in rejoinder the applicant introduced a new ground of illegality which was not stated in the submission in chief. As the matter of law, the same should not be considered by this court, since the other party was unable to argue on the same.

Coming to the merit of this application, the law of Limitation Act, [Cap 89 R.E 2019] under the provision of Part III Item 4 provides for 30 days to apply for an order to set aside the dismissal order. However, under section 14(1) of the same Law, [Cap 89 R.E 2019], it provides for extension of time upon sufficient cause. For ease reference the same states;

14.-(1) Notwithstanding the provisions of this Act, the court may, for any reasonable or sufficient cause, extend the period of limitation for the institution of an appeal or an application, other than an application for the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application.

It is trite that, granting or refusing to grant extension of time is in absolute discretion of the court. Though, for the same to be granted, one must show sufficient cause and account for each day of delay. The same is stated in the case of **Benedict Mumello vs Bank of Tanzania**, Civil Application No. 12 of 2012, where the Court of Appeal of Tanzania held inter alia that:

"...It is trite law that an application for extension of time is entirely in the discretion of court to grant or refuse,

extension of time may only be granted where it has sufficiently established that the delay was with sufficient cause...”

I am also fortified by the case of **Wambura N. J Waryuba vs The Principal Secretary Ministry for Finance and Another**, Civil Application No.320/01 of 2020 when the Court of Appeal held that;

“...It is essential to reiterate here that the Court's power for extending time under Rule 10 of the Rules is both wide-ranging and discretionary but it is exercisable judiciously upon good cause being shown...”

The question to be determined is whether the applicant has shown sufficient cause for delay. The answer is in the principles stated in the case of **Lyamuya Construction Company Limited (supra)** and see also the case of **Wambura N. J Waryuba (supra)** at page 7. The Court of Appeal in Lyamuya held that;

- i. The delay should not be inordinate;*
- ii. The Applicant should show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take;*
- iii. If the Court feels that there are other sufficient reasons such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged*

From the foregoing, it has been stated that, the decision to be appealed against was delivered on 27.08.2012. In 2018 the applicant filed an application for extension of time to appeal out of time.

It was dismissed by this court on 15.8.2019. This application was then filed on 21.7.2020, after expiry of 11 months. The reason for delay was that, the learned advocate for the applicant wrongly moved this court in Misc. Civil Application No.499 of 2019. A wrong provision of the law was cited leading to dismissal of the same on 19.6.2020. The application was intending to seek for an order to set aside the dismissal order.

For the foregoing, the question would be do the mistakes done by advocate amount to sufficient cause. It is my considered view that, the answer to this question would be in the negative. Since as officers of the court advocates are bound to know the law and procedure. With all due respect, it is my view that, any mistake as to the provisions of the law shows negligence and lack of due diligence. The Court of Appeal in the case of **Bahati Musa Hamis Mtopa vs Salum Rashid**, Civil Application No.112/07 of 2018 at page 7 held that;

We are firm that, application for extension of time, generally speaking an error made by an advocate through negligence or lack of diligence is not a sufficient cause.

Even assuming that the error committed fall under exception to the general rule as stated, still this application cannot be granted. The reason is that, even after the applicant and her advocate realised that they wrongly moved the court in Civil Application No.499 of 2019, they did not file the application sooner after the dismissal. They waited until 30 days passed.

Yet they, failed to account for each day of those 30 days of delay. While it is on record that the application was dismissed on 19.6.2020, this application was filed on 21.7.2020. This shows how sloppy the applicant was. For the foregoing reasons, I find no merit in this application, it is hereby dismissed without costs.

AK. Rwizile
JUDGE
15.07.2021



Recoverable Signature

X

A handwritten signature in blue ink, consisting of a stylized 'A' followed by a series of horizontal strokes.

Signed by: A.K.RWIZILE

