

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF MWANZA)**

AT MWANZA

MISC. CIVIL APPLICATION NO. 21 OF 2021

(Arising from Miscellaneous Civil Application No. 138 of 2019)

ACCACIA GOLDMINE APPLICANT

VERSUS

AUGUSTINO NESTORY SASI RESPONDENT

RULING

15th July, & 9th September, 2021

ISMAIL, J.

This Court is called upon to grant an extension of time within which to institute an application for setting aside a dismissal order dated 13th November, 2020. The said order dismissed Miscellaneous Civil Application No. 138 of 2019 for want of prosecution. This followed non-appearance of the parties when the matter was called for orders, before Hon. Manyanda, J.

The application is supported by the affidavit of Waziri Mchome, the applicant's counsel. The affidavit sets out grounds on which the application is based. The main contention by the deponent is that the applicant was not

notified of the date of the hearing on the date the matter was dismissed. This means, in the deponent's contention, that he was not aware of the dismissal of the matter.

The application has been valiantly opposed by the respondent. He avers that the applicant ought to have known that the matter would come for orders exactly six months from the date it was adjourned. Moreover, the respondent argued, it was the applicant's duty to make a follow up of the matter, adding that notification of the hearing date was done telephonically and he believes that the applicant was also notified through an advocate who handled the matter before.

When the matter came up for hearing, the applicant enjoyed the services of Mr. Waziri Mchome, learned counsel, while the respondent enlisted the services of Mr. Chiwalo Nchai Samwel, learned advocate. Hearing of the application took the form of written submissions, drawn and filed in conformity with the Court's schedule.

Submitting in support of the application, Mr. Mchome referred to the averments made in the supporting affidavit. He argued that no specific date was set for parties to appear in court and that the last order did not direct the parties to make a follow up of the next date. He argued that when the Court ordered on 20th October, 2020, the parties would be notified. the



parties had the right to be notified of the next date. In this case, the counsel argued, there was no notice issued to notify the parties of the next hearing date.

He took the view that, since no evidence is available that service was effected on the applicant, it was erroneous for the Court to order a dismissal of the matter. Mr. Mchome argued that even where the notice was issued, and a party failed to enter appearance, the worst that such party would suffer is to have his matter heard *ex-parte*, but he would still be entitled to be notified of the date of delivery of the decision. On this he relied on the case of **Cosmas Construction Co. Limited v. Arrow Garments Ltd** [1992] TLR 127 in which it was held:

"A party who fails to enter appearance disables himself from participating when proceedings are consequently ex parte, but that is the farthest extent he suffers. Although the matter is therefore considered without any input from him, he is entitled to know the final outcome. He has to be told when judgment is delivered so that, he may, if he so wishes, attend to take it as certain consequences may follow..... in the present matter, the applicant was not present and there is no proof that he was served with a copy of notice of judgment dated 7th October 1991."

It was the counsel's view that the delay in applying for an order to set aside the dismissal was due to the applicant's unawareness of the day's hearing, and that after the dismissal, the applicant was kept oblivious to it as no summons was served, inviting the applicant to the matter. The applicant considered this to be a sufficient cause for granting an extension of time.

Submitting in rebuttal, Ms. Nchai Samwel, was fiercely opposed to the application. He appointed an accusing finger at the applicant for not following up the matter, subsequent to the dismissal. This saw the applicant sit idle for ten months without any action. The learned counsel argued that the applicant's counsel has not cited any provision of the law to indicate that following up the matter was a sin, considering the fact that the adjournment order by Hon. Madeha, J. was specific in that the same would last between 15th April and 15th October, 2020.

Underscoring the need for accounting for each day of delay, Mr. Nchai Samwel cited the decisions in ***Mussa S. Msangi & Another v. Peter Mkomea***, CAT-Civil Application No. 188 of 2017; and ***Elfazi Nyatenga & 3 Others v. Caspian Mining Ltd***, CAT-Civil Application No. 44/08 of 2017 (both unreported). In the counsel's view, a delay of four months was quite inordinate and that the applicant failed to account for each day of delay.



The counsel further contended that the counsel who represented the applicant ought to have backed up the contention on non-service of the summons with an affidavit of Messrs Galati Law Chambers who handled the matter prior to the new instruction. On this, the counsel cited the Court's decisions in ***Tabu Majebele v. Hela Tangambaga***, HC-Misc. Civil Application No. 20 of 2012; and ***Asia Abdu v. Juma Abdallah Nassoro***, HC-Misc. Civil Application No. 380 (both unreported). The counsel argued that the notification was done via a mobile phone and he believed that the applicant was also notified through the same channel.

Mr. Nchai Samwel further argued that the extension sought in the application is of no useful purpose, since there is a pending application in the Court of Appeal for striking out a notice of appeal. This means that, the counsel argued, restoration of Misc. Civil Application No. 138 of 2019 will be an exercise in futility because absence of the notice of appeal means that no appeal would be filed to the Court of Appeal. He urged the Court to dismiss the application.

The applicant's rejoinder was mainly an elaboration of what was stated in chief. With respect to the service of the notice of hearing, the argument is that the contention by the respondent's counsel is unjustified. This is why the respondent's counsel failed to disclose the name of the person who

allegedly served him, and that no affidavit was sworn to that effect. The counsel poured cold water on his counterpart's contention and termed it as a mere statement from the bar which carries no weight. The counsel took the view that proof of service of a summons or notice of hearing remains a requirement under the law.

The counsel wound up by arguing that the fate of the impending appeal to the Court of Appeal will be considered at the hearing stage of the application for restoration of the matter. He urged the Court to grant the application.

From these rival and elaborate submissions, the singular question for determination is whether the application carries any weight that justifies the grant of extension of time.

As stated earlier on, the parties' contentions revolve around the decision of the Court (Hon. Manyanda, J) Misc. Civil Application No. 138 of 2019, that was dismissed on 13th November, 2020. The contention by the applicant is that dismissal of the matter without letting the parties know of its hearing denied the applicant the opportunity to take necessary steps which would not only include appearance on the date it was dismissed, but also taking necessary steps early enough, subsequent to the dismissal. In the eyes of the applicant, such failure is the sole reason for the delay in

challenging the dismissal. The respondent reads negligence as the dismissal would be learnt through follow up of the matter.

Let me begin the disposal journey by restating the position that the Courts have stated many a time. It is to the effect that Courts enjoy powers to grant or refuse an extension of time within which to take some judicial steps. Such powers are discretionary and are exercised judicially. The discretion entails the Court making decisions which are logically sound, tracing their basis from the rules of law. 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, gave an invaluable guidance when it 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]."

Back home, this position was underscored in the decision of the Court of Appeal of Tanzania in ***Nicholaus Mwaipyana v. The Registered***



Trustees of Little Sisters of Jesus of Tanzania, CAT-Civil Application

No. 535/8 of 2019 (unreported). The superior Court guided as follows:

"The power to extend time given under this provision is discretionary, but such discretion must be exercised judicially, meaning the making of a logically sound decision based on rules of the law. That requires the attention of the court to all the relevant factors and materials surrounding any particular case. These factors include the length of the delay, the reason for the delay, and whether or not there is an arguable case, among others."

Significantly, the upper Bench's reasoning in the ***Nicholaus Mwaipyana*** (supra) is a leaf which was borrowed from its predecessor Court, the defunct East African Court of Appeal, in ***Mbogo v. Shah*** [1968] EA 93 in which it was propounded as follows:

"All relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reason for the delay, whether there is an arguable case on the appeal and the degree of prejudice to the defendant if time is extended."

Deducing from the cited decisions, what comes out clearly is the fact that adduction of sufficient cause constitutes the condition precedent for triggering the Court's discretion to grant the enlargement of time. What



constitutes sufficient cause is a subject that has been traversed quite extensively and authorities to that effect are plenty. These include the landmark decision of the Court of Appeal in ***Lyamuya Construction Company Limited v. Board of Trustees of YWCA***, CAT-Civil Application No. 2 of 2010 (unreported). Following in the footsteps of the ***Lyamuya Construction Company Limited*** (supra) is another of the Supreme Court of Kenya's decision in ***Aviation & Allied Workers Union of Kenya v. Kenya Airways Ltd, Minister for Transport, Minister for Labour & Human Resource Development, Attorney General***, Application No. 50 of 2014. In this decision, several conditions were set as an imperative guide in considering whether to grant or refuse an extension of time. It was held:

"... We derive the following as the underlying principles that a court should consider in exercise of such discretion"

- 1. extension of time is not a right of a party; it is an equitable remedy that is only available to a deserving party at the discretion of the court;*
- 2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;*
- 3. whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;*
- 4. where there is [good] reason for the delay, the delay should be explained to the satisfaction of the Court;*



5. *whether there will be any prejudice suffered by the respondents if extension is granted;*
6. *whether the application has been brought without undue delay; and*
7. *whether in certain cases, like election petitions, the public interest should be a consideration for extension."*

In the instant matter, the applicant's prayer for extension of time is predicated on the Court's failure to issue a notice of hearing on the date of the dismissal, and the subsequent inability by the applicant to get to know of the last order from which the days for taking action, including applying for restoration, would be reckoned. The question is whether this reason is good enough to constitute a sufficient cause. My unflustered answer to this question is in the affirmative. The application ticks most of the boxes, putting it in the mould of applications for which the prayer for extension of time is legitimate. In my considered view, the applicant has explained the reason for the delay, and I take the view that the explanation is satisfactory. It is also my conviction that the respondent will not suffer any prejudice if extension of time is granted as the worst that he will suffer is to have the matter restored, should the impending quest for restoration be acceded to.

I am also convinced that the filing of the application has not been procrastinated, meaning that it has been brought quite timely, in the



circumstances of this case. I hold that the respondent's submission which places the blemishes on the applicant's shoulders is erroneously premised on the assumption that the party's duty to keep track of the matter which is pending in court takes away the court's duty to ensure that parties are kept posted of the position of the matter, especially when the matter in which the parties are interested faces a long spell of adjournment.

In the upshot, it is my conclusion that the applicant has demonstrated sufficient cause that justifies exercise of the Court's discretion to grant the craved extension of time. In consequence, this application succeeds and it is hereby granted. The applicant is given fourteen (14) days within which to file an application for setting aside the dismissal order in Miscellaneous Civil Application No. 138 of 2019. Costs to be in the cause.

It is so ordered.

DATED at **MWANZA** this 9th day of September, 2021.



M.K. ISMAIL

JUDGE

Date: 09/09/2021

Coram: Hon. M. K. Ismail, J

Applicant: Mr. Waziri Mchome, Advocate

Respondent: Mr. Nchai Samwel, Advocate

B/C: P. Alphonse

Court:

Ruling delivered in chamber, in the presence of Mr. Waziri Mchome, Counsel for the applicant and Mr. Nchai Samwel, Counsel for the respondent, this 09th day of September, 2021.



M. K. Ismail

JUDGE

At Mwanza

09th September, 2021

