

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE SUB - REGISTRY OF DAR ES SALAAM**

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 654 OF 2021**

**ABISAI KILEO MKINDI**

**T/A PWEZA BEACH RESORT ..... APPLICANT**

***VERSUS***

**SICHANA MSANGI ..... RESPONDENT**

**(Arising from the decision of this Court (Rwizile, J.,)**

**in Civil Case No. 218 of 2018**

**RULING**

28<sup>th</sup> September and 21<sup>st</sup> October, 2022

**KISANYA, J.:**

The applicant is seeking the indulgence of this Court to allow him file out of time an application for restoration of Civil Case No.218 of 2018 which was dismissed for want of prosecution on 11<sup>th</sup> June, 2020. The application is by chamber summons made under section 14 of the Law of Limitation Act, Cap. 89, R.E. 2019. It is supported by an affidavit of Mohamed Majaliwa, learned advocate for the applicant.

In terms of the supporting affidavit, the application for restoration of the suit was not filed on time because the applicant's counsel, Mohamed Majaliwa was arrested and charged with unbailable offence before being

discharged on 23<sup>rd</sup> August, 2021. It was further deposed that the applicant's counsel was arrested at the time when he had not paid the filing fees for application for restoration filed vide online system on 19<sup>th</sup> June, 2020. In view of all this, the applicant's counsel deposed as follows in paragraph 5 of his affidavit:-

*"That, for the whole time I was in jail everything outside including my firm designed as Accurate Law Chambers was disorganized and fallen apart and until in December, 2021 when I started working as a firm after long journey of restoration and reorganizing of the office."*

The application was heard on 28<sup>th</sup> September, 2022 during which the applicant enjoyed the legal services of Mr. Majaliwa, learned counsel. It proceeded *ex-parte* due the respondent's failure to appear after being served by way of substituted service through publication.

The learned counsel commenced his submission by praying to adopt the supporting affidavit as part of his submission. In essence, he reiterated the reasons for failure to file the application for restoration of the suit on time as deposed in the supporting affidavit. When probed by the court whether the applicant was aware that his counsel had been detained in custody, Mr. Majaliwa's response was in affirmative. However, he

contended that there is nothing the applicant could do. Therefore, the learned counsel moved this Court to grant the application.

I have scanned the chamber summons and supporting affidavit and considered the submission made by the applicant's counsel. In terms of item 4, Part III of the Schedule to the LLA, the time within which to file application for an order to set aside the dismissal of suit is thirty days. Therefore, the application for restoration of the suit ought to have been filed on or before 11<sup>th</sup> June, 2020. That was not done. It was until 16<sup>th</sup> December, 2021 when the applicant filed the present application for extension of time.

The power of granting extension of time under section 14(1) of the LLA cited in the applicant's chamber summons is discretionary and thus, exercised judiciously in accordance with the circumstances of each case. That being the position, the issue that this Court is called upon to determine is whether the applicant has demonstrated sufficient or reasonable cause warranting extension of time.

The law does not define the words "reasonable or sufficient cause" referred in section 14(1) of the LLA. In its endeavour to outline some reasons or factors, case law has set out that reasonable, sufficient or good cause include the length of delay, whether the applicant was diligent and

the degree of prejudice to the respondent if time is extended to mention but a few. There is a list of authorities which advocate that position. See for instance, the case of the case **Lymuya Construction Company Ltd vs Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 CAT at Arusha, (unreported), where it was held that the factors include:

- (i) The applicant must account for all the period of delay*
- (ii) The delay should not be inordinate.*
- (iii) The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.*
- (iv) If the court feels that there other sufficient reasons such as the existence of point of law of sufficient importance, such as illegality of the decision sought to be challenge.*

Another principle on extension of time requires the applicant to account for each day of delay. If the delay is not explained, the applicant is taken to have exhibited negligence and apathy. I am fortified by the case of **Shelina Jahangir & Others vs Nyakutonya N.P.F. Company Limited**, Civil Application No.47/8 of 2020 (unreported) where it was held that:-

*"The failure to account for 16 months does not depict sense of diligence on the part of the applicants in pursuing their case as claimed by Mr. Kesaria. To say the least, the omission depicts sloppiness and negligence on their part. The Court has held time and again that negligence or lack of diligence constitutes no sufficient reason to warrant the grant of an extension of time".*

Applying the above principles, the record shows that the applicant delayed to take the necessary action against the dismissal order for almost one years and six months. Since the application for restoration of the suit dismissed for want of prosecution is filed within 30 days from the date of dismissal order, I am of the view that the length of delay is long.

As for the reason of delay and account for the delay, the ground advanced in the supporting affidavit is to the effect that, the applicant's counsel was arrested and charged with unbailable offence and released on 23<sup>rd</sup> August, 2021. However, the applicant did not file an affidavit to support the application. In the result, nothing to suggest that the arrest and detention of his counsel caused the delay. The fact that his counsel was arrested and detained in custody for unbailable offence is by itself not reasonable cause or sufficient cause. The applicant ought to have demonstrated who the said arrest and detention affected. Otherwise, he was duty bound to make follow up of his matter and take the necessary

measure and file an affidavit to such effect. This stance was taken by the Court of Appeal in case of **Lim Han Yun and Another vs Lucy Theseas Kristensen**, Civil Appeal No. 219 of 2019 where it was held that:-

*"The appellants cannot throw the whole blame on their advocates. We think that a party to a case who engages the services of an advocate, has a duty to closely follow up the progress and status of his case. A party who dumps his case to an advocate and does not make any follow ups of his case, cannot be heard complaining that he did not know and was not informed by his advocate the progress and status of his case. Such a party cannot raise such complaints as a ground for setting aside an ex parte judgment passed against him."*

In the light of the above position, the applicant's failure to show the measures taken in respect of his suit implies that he was sloppy or negligent.

Further to the foresaid, each day of delay was not accounted for in the supporting affidavit as shown hereunder.

**First**, the deponent did not state the exact date of his arrest and detention in jail for want of bail. Considering that the charge sheet appended to the affidavit shows that it was signed on 15<sup>th</sup> July, 2020, the applicant's counsel was required to indicate the date on which he was

arrested and charged in the court. In view of the said omission, it is not clear whether the arrest and detention in custody caused the delay.

**Second**, paragraph 4 shows that the applicant's counsel was released from jail on 23<sup>rd</sup> August, 2021. Yet, he did not find it necessary to produce the copy of judgment, ruling or order to support that statement. I am alive to the position that a fact may be proved by oral testimony. However, it is my considered view that the copy of judgment, ruling or order of the court where the applicant's counsel was charged was vital to prove the said fact.

For the reasons stated herein, I hold the view that the applicant has not advanced reasonable or sufficient cause for the delay and has not accounted for each day of delay for this court to extend time.

In the event, this application is devoid of merit. It is therefore, dismissed with no order to costs

**DATED at DAR ES SALAAM this 21<sup>st</sup> day of October, 2022.**



S.E. KISANYA  
**JUDGE**  
21/10/2022