

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)
AT DAR ES SALAAM
MISC. CIVIL APPLICATION NO 78 OF 2021
(Originating from Civil Case No. 134 of 2013)

MUSULICHE LEBELWA.....APPLICANT

VERSUS

NATIONAL INSURANCE CORPORATION.....1ST RESPONDENT

BAM INSURANCE AGENCY.....2ND RESPONDENT

ALEXANDER A. MALLYA.....3RD RESPONDENT

IDDI OMARI.....4TH RESPONDENT

RULING

Date of Last Order: 13/06/2023

Date of Ruling: 30/06/2023

E.E. KAKOLAKI, J.

In this application this Court is called upon to grant extension of time within which to file a Notice of Appeal to appeal to the Court of Appeal of Tanzania, against the order of this Court dated 3rd day of February, 2017, dismissing applicant's suit in Civil Case No. 134 of 2013. Other reliefs sought are cost of the application and any other relief this Court may deem fit to grant.

The application is brought by way of chamber summons, under section 11 (1) of the Appellate Jurisdiction Act. Grounds in support of the application are two as found in the affidavit duly sworn by applicant's advocate one Godfrey Ukwonga. Firstly that, the applicant inadvertently proceeded to fight for his rights while believing the dismissal order sought to be challenged was that of striking out the suit and secondly that, the impugned ruling of this Court dated 3rd day of February, 2017 is tainted with illegality.

The background factual materials of this application as scanned from the affidavit are that, the applicant filed Civil Case No. 134 of 2013 before this court in which the same was dismissed on 3rd day of February 2017 for being time barred. Unhappy with the decision and inadvertently believing his suit was struck out, the applicant unsuccessfully filed Misc. Application No. 230 of 2017 before this Court seeking for extension of time to file a fresh suit as the same was struck out for want of jurisdiction of this Court to grant extension of time to suit since that power is vested to the Minister of Constitutional and Legal Affairs. Acting on that decision the applicant averred, he addressed the matter to the Minister of Constitutional and Legal affairs whereby the response was to the effect that, the case was not struck out but dismissed hence extension of time could not be granted. According

to the applicant, it is through the decision by the Minister when he realised his suit was dismissed and not struck out, hence application for extension of time to file the notice and appeal to challenge the said dismissal order is the only available remedy for him, as the mistaken belief that the order was for striking out the suit was arrived at inadvertently and not out of negligence. The applicant deposed that, the dismissal order has and constitutes an illegality of the decision as the applicant's suit was not heard and determined on merit, hence was supposed to be struck out as the matter before the Court at that time was an objection on time limitation of the filing of the case and not the merit of the case.

It was his further averment that, there is a need for that illegality to be addressed by the higher Court and be substituted with an order striking out the suit so as to pave a way for the applicant to seek for extension of time to re file his suit. It is for the reasons stated above that the applicant seeks this court's indulgence to enlarge him time for filing the Notice of appeal out of time to the Court of Appeal of Tanzania.

The application when served to the 1st respondent met her strong resistance exhibited in the counter affidavit sworn by Paul Shaidi, legal counsel for the 1st respondent in that, the advocate for the applicant was aware of the order

of the court dismissing the suit, therefore the fact that he believed the suit was struck out is baseless and is a clear manifestation of negligence on his part in prosecuting the matter. On the issue of illegality, it was countered that, there was no element of illegality as the suit was dismissed for being time barred.

When the matter was fixed for hearing which took the form of written submission, applicant was represented by Mr. Godfrey Ukwonga while 1st respondent had representation of Mr. Christopher Bulendu, both learned counsel whereas the 2nd, 3rd and 4th respondent did not enter appearance despite being served by way of substituted service in the Nipashe newspaper dated 17th of August, 2022, hence ex-parte hearing against them.

Submitting in support of the application Mr. Ukwonga sought leave of the Court to adopt the contents of affidavit and its annexure to form part of his submission. He then repeated the factual background of the matter as explained in the affidavit in support of the application and what bred the instant application. He submitted that, the applicant applied for extension of time this court in Misc. Civil Application No. 230 of 2017 (annexure C in the affidavit) on honest belief that, the suit was struck out whereby he would have the opportunity to seek for extension of time, but the same was struck

out by this court on the basis that, the power of the court under section 14(1) of the Law of Limitation Act was limited to institution of an appeal and applications and not extending time to file suit, thus the court advised that the only option is to face the Minister for Justice vide section 44 (1) of the Law of Limitation Act [Cap 89 R.E 2019]. He said the applicant took the court's option but was informed that the applicant's case was already determined by dismissing the said suit and that, that is when it came into their senses that the application was dismissed and not struck out, in which by then time for challenging the said decision to the Court of Appeal had lapsed, as dismissal connotes that the matter has been heard and determined while it was not the case in this matter.

Mr. Ukwonga had it that, the dismissal order amounts to illegality thus for the interest of justice this Court has to extend time for the applicant to appeal before the Court of Appeal, as to him, illegality in this matter is apparent on the face of record and the same is good cause for enlargement of time. To support his stance, he cited the case of **Tanga Cement Company Limited vs Jumanne D. Massanga and Amos A. Mwalwanda**, Civil Application No. 6 of 2021, and **VIP Engineering and Marketing Limited & 2others vs Citibank Tanzania Limited**.

Concerning what amount to good cause, Mr. Ukwonga cited the case of **The Attorney General Vs. Tanzania Ports Authority and Another**, Civil Application No. 87 of 2016 (Unreported), while winding up his submission that, the applicant has raised issues of illegality for determination by the court of Appeal on one, whether it was lawful to dismiss the suit and not have it struck out and second that, in his belief the applicant demonstrated due diligence in fighting for his rights and therefore demonstrated good cause for the grant of the sought extension of time.

In rebuttal, Mr. Bulendu countered on the raised two grounds by the applicant of his late awareness of the dismissal of his suit and illegality of the decision. He attacked the first ground and submitted that, the same shows gross negligence on part of the applicant in prosecuting his case, since negligence does not constitute good cause for extension of time as per the case of **Umoja Garage Vs National Bank of Commerce** [1997] TLR 109, since the impugned ruling was delivered in front Mr. Ukwonga as reflected in the drawn order, the same advocate who represents the applicant in this application. He contended that, it does not make sense for an advocate to decide to file an application of time (Misc. Civil application No. 230 of 2017) without reading and understanding the court order. In view of Mr. Bulendu

the applicant and his advocate unnecessarily caused delay when filed Misc. Civil Application No. 230 of 2017 which was struck out on 03/08/2018, despite the fact that, the court was not the proper forum for such application, as the application for extension of time to file the suit under section 44 (1) of the Law of Limitation Act, ought to have been made before the Minister for Constitutional and Legal Affairs something which they did later on and very late.

Concerning the issue of illegality, Mr. Bulendu contended that, the suit was dismissed on the ground that it was time barred under section 3 (1) of the Law of Limitation Act [Cap 89 R.E 2019], dictating that proceedings instituted after the period of limitation prescribed in the Act shall be dismissed. He therefore took the view that, the dismissal order by this Court was right as the action was based on tort, thus supposed to be instituted within a period of three years from the date when the cause of action arose. Referring at page 7 of the impugned ruling, Mr. Bulendu noted that, since the applicant had failed to comply with the requirements of the Law of Limitation the Court correctly dismissed the suit and for that matter there is no illegality in the decision as the order of striking out the suit was inappropriate. The applicant had to state the law or principle of law contravened to show that the decision

is tainted with illegality, but there is no such explanation neither in the affidavit nor in his submission, Mr. Bulendu contended.

He submitted further that, the applicant must have shown good cause for extension of time as provided for in the case of **Tanzania Coffee Board vs Rombo Miller Limited**, Civil Application Number 13 of 2015, but her totally failed to so do as the ground of illegality raised is unsubstantiated. While citing the case of **Tanzania Coffee Board vs Rombo Millers Limited** (supra) he argued that, in the matter at hand the applicant has failed to account for delayed period, as the decision he intends to challenge was delivered on 03/02/2017 and this application was filed on 19/02/2021 which is four (4) unaccounted years. He noted that, the last response from the Ministry of Constitutional and Legal affairs was made on 13/11/2019 but there is no explanation by the applicant either in the affidavit or submission as to what happened for the whole period of almost a year and three months, thus the applicant failed to account for each and every day of the delay warranting grant of extension of time by this Court. He finally implored the court to dismiss the application with cost for want of merit.

In a short rejoinder, Mr. Ukwonga reiterated his submission in chief while maintaining that, unheard matters are subjected to striking out order and

not dismissal, much as the law of limitation states that the matter be dismissed. Thus decision by the applicant to file Misc. Civil Application No. 230 of 2017, for extension of time to file a fresh suit should not be associated any negligence or lack of knowledge of the law on his part but rather be treated as a matter of practice. According to his belief application of section 3(2) of the Law of Limitation Act, in the manner it was done in this matter is outdated, for being applied on matter not heard on merit.

Regarding the issue of illegality, he maintained that it has become a matter of good practice that only matters heard to its finality and merit can be dismissed, and not matters not heard on merit like the present which are liable be be struck out. He argued that, this practice is available in all courts and the quasi-judicial bodies of this land as even in the Court of Appeal of Tanzania no matter can be dismissed without hearing.

On unaccounted delayed days he submitted that, that is not a requirement where illegality is pleaded. He was insistent that, the applicant demonstrated due diligence in fighting for his rights and therefore good cause warranting grant extension of time.

I have keenly examined and considered the affidavit, counter affidavit and the submissions in support and against the application. Again I have consulted the law referred by the both parties. The pertinent issue calling for determination by this court is whether *the applicant has advanced good cause for the grant of extension of time to file notice to appeal to the court of appeal?*

Notably, the powers of this Court to extend time within which to appeal to the Court of Appeal as provided under Section 11 of the Appellate Jurisdiction Act [Cap 141 R.E 2019] is discretionary exercised upon the applicant demonstrating to the satisfaction of this Court that the delay was occasioned by good cause. Conversely, it is well settled that the sufficient or good cause depends on deliberation of various factors, some of which revolve around the nature of actions taken by the applicant immediately before or after becoming aware that time for performing a certain function or action has lapsed. See the cases of **Regional Manager, Tanroads Kagera Vs. Ruaha concrete Company Ltd**, Civil Application No 96 of 2007 and **Tanzania Coffee Board Vs. Rombo Millers Ltd**, Civil Application No 13 of 2015 (both CAT-unreported).

Further, in assigning reasons, the applicant has to account for each and every day of delay as it was stated in the case of **Bushiri Hassan Vs. Latina Lukio, Mashayo**, Civil Application No. 3 of 2007 and **Sebastian Ndaula Vs. Grace Rwamafa**, Civil Application No. 4 of 2014 (both CAT-unreported).

In exercising this noble duty, applicant has advanced two reason. I wish to start with the first reason where the applicant and his advocate are contending that, inadvertently believed the suit was struck out and not dismissed until when they got response in respect of the request for extension of time to the Minister for Constitutional and Legal Affairs to file a fresh suit, and an implied technical delay caused by applicant's act of filling application for extension of time to file a fresh suit in Misc. Civil Application No. 230 of 2017. In my view and as rightly submitted by Mr. Bulendu, the applicant and his advocate's alleged beliefs and conducts thereafter cannot afford any other explanation than a sheer negligence and ignorance of law on their part. It is beyond any stretch of imagination for one to believe that, a very senior and experienced advocate for the applicant being in possession of the sought to be impugned ruling would have inadvertently mistaken the word dismissal and striking out of the suit. It is worth noting that, neither

ignorance of law nor negligence constitutes good cause for extension of time. This principle was pronounced in the case of **Omari R. Ibrahim v. Ndege Commercial Services LTD**, Civil Application No. 83/01 of 2020 (CAT-unreported), where the Court of Appeal observed that:

*"It should be stated once that, **neither ignorance of the law nor counsel's mistake constitutes good cause** in terms of Rule 10 of the Rules. (See **Bariki Israel v. The Republic**, Criminal Application No. 4 of 2011 and **Charles Salungi v. The Republic**, Criminal Application No. 3 of 2011 (both unreported)). In the case of **Umoja Garage v. National Bank of Commerce**, [1997] TLR 109, the Court stated that **lack of diligence on the part of the counsel is not sufficient ground for extension of time. In the current application, the record speaks loudly that the Applicant was negligent on the path he chose which culminated into inordinate delay which he failed to account for. For the foregoing and taking into consideration the circumstances pertaining in the current application, it is my view that no good cause has been shown by the Applicant to warrant extension of time sought. In the final result, this application is devoid of any merit and the same is dismissed with costs.**" (Emphasis supplied)*

It is also uncontroverted fact as gathered from the affidavit and Mr. Ukwonga's submission that, delayed days for more than four years are not

accounted for, more particularly when submitted and insisted that illegality when pleaded no need for accounting for delayed days. It is true and I embrace Mr. Ukwonga's view that, where illegality is successfully advanced as a ground, all other factors such as accounting for delay days are not measured. This settled position of the law was articulated in the case of **VIP Engineering and Marketing Limited and Three Others Vs. Citibank Tanzania Limited**, Consolidated Civil Reference No. 6, 7 and 8 of 2006 CA (Unreported) where the Court of Appeal patently stated that:

"It is, therefore, settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under rule 8 regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay."

Nevertheless, it also worth of note that, invocation of illegality as a ground is not automatic and without any condition precedent, as the settled position is that, the alleged illegality must be apparent on the face of record. If illegality is so unclear and would not be discovered without a long-drawn argument or process, the same fails the test or the threshold requisite for having it as a ground. This principle was adumbrated in the case of **Lyamuya Construction Company Ltd Vs. Board of Trustee of Young**

Women's Christian Association of Tanzania, Civil Application No. 2 of 2010 (CAT-unreported), where the Court of Appeal of Tanzania had the following to say:

*Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in Valambia's case, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one. The Court there emphasized that **such point of law must be that of sufficient importance and, I would add that it must also be apparent on the face of record, such as the question of jurisdiction; not one that would be discovered by a long-drawn argument or process.** [Emphasis supplied]*

In the matter at hand Mr. Ukwonga alleges that, illegality of the impugned ruling is apparent as the court dismissed applicant's suit, in lieu of striking it out, while Mr. Bulendu is of the contrary view that, the suit was rightly decided. Glancing at annexure "Ä" to paragraph 2 of the affidavit, and the rival submissions, the ruling in Civil case No. 134 of 2013 in which the applicant is seeking extension of time against, to file a notice of appeal to the Court of Appeal, was dismissed for being filed out of time, contrary to section 3(1) of the Law of Limitation Act. The section provides that;

3.-(1) Subject to the provisions of this Act, every proceeding described in the first column of the Schedule to this Act and which is instituted after the period of limitation prescribed therefore opposite thereto in the second column, shall be dismissed whether or not limitation has been set up as a defence.

The first column of the schedule to the above cited Act provides for suits in which the remedy when filed out of time is dismissal and not striking it out. See also the case of **John Cornel Vs. A. Grevo (T) Limited**, Civil Case No. 70 of 1998, where the Court observed that, the law of limitation on action knows no sympathy nor equity for suits preferred out of time as it is a merciless sword that cuts across and deep into those who get caught in its web. Applying the above principle to the facts of this Application with great caution of avoiding to act as appellate Court it is apparent to this Court that, the alleged illegality by the applicant cannot be said to be apparent on face of record as Mr. Ukwonga would like this Court to so believe.

In alternative argument Mr. Ukwonga impressed upon the Court that section 3(1) of the Law of Law of Limitation Act is behind time, thus its application by this Court in the sought to be impugned ruling is unfounded and misplaced, as the law is that a suit not heard on merit cannot be dismissed unless the law is changed. With due respect to the senior counsel I am not

prepared to purchase his proposition not supported by any provision of the law or case law as the law is settled as rightly submitted by Mr. Bulendu that, once suit is brought out of time prescribed under the law the same suffers the risk of being dismissed and not struck out even when it is not heard on merit as provided under section 3(1) of the Law of Limitation Act. I therefore find the argument by Mr. Ukwonga is misplaced.

As there is no any good cause shown by the applicant warranting this court to exercise its discretion in granting the prayers sought in the chamber summons this application is short of merit. In the upshot the same is hereby dismissed with costs.

It is so ordered.

Dated at Dar es Salaam this 30th June, 2023.



E. E. KAKOLAKI

JUDGE

30/06/2023.

The Ruling has been delivered at Dar es Salaam today 30th day of June, 2023 in the absence of both parties and in the presence of Mr. Oscar Msaki, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI
JUDGE
30/06/2023.

