

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

**IN THE DISTRICT REGISTRY OF SUMBAWANGA**

**AT SUMBAWANGA**

**MISC. LAND APPLICATION NO. 05 OF 2023**

(Originating from Misc. Land Application No. 9 of 2022)

**EFREM THOPHILO NDUKA .....APPELLANT**

**VERSUS**

**ALBENTO JUMA KANOLO .....RESPONDENT**

07/11/2023, 08/12/2023

**RULING**

**MWENEMPAZI, J.:**

The applicant has filed this application under the provisions of section 14(1) of the Law of Limitation Act, [Cap 89 R.E 2019] and any other enabling provision seeking for orders that: -

1. This Honourable court be pleased to extend time within which the Applicant herein may file an application to set aside a dismissal order dated 11/08/2022 of the Miscellaneous Land Application No. 9 of 2022.
2. That any other and further relief this Honourable court may deem just and fit to grant.
3. Costs be provided for.

The application is supported with an affidavit sworn by EFREM THOPHILO NDUKA in it he has deposed that in 2019 he filed a case in the Ward Tribunal of Inyonga against the respondent herein above and it was registered as Shauri No. 7 of 2019. On the 6<sup>th</sup> May, 2019 a decision was delivered in his favour. The Respondent appealed to the District Land and Housing Tribunal for Katavi at Mpanda. It was registered as Land Appeal No. 25 of 2019. A judgment was delivered on 20/11/2019 in favour of the Respondent. The applicant was aggrieved, however he could not appeal on time. He filed Misc. Application No. 9 of 2022 praying for extension of time an appeal.

The said application was before Hon. Nkwabi Judge. The application and summons were served to the Respondent on the 16<sup>th</sup> May 2022, and an affidavit of service was sworn by process server Angelina Michael to prove the service.

On the 26<sup>th</sup> June 2022, the applicant travelled for treatment at Tumbi Regional Hospital where he had a regular schedule of physiotherapy Clinic. Unfortunately, he was hospitalized/admitted on 8/6/2022 to 8<sup>th</sup> April, 2023.

As a matter of arrangement, the applicant has averred he was being represented by Mr. James Lubusi, Advocate who could not inform the

applicant anything. After his discharge, the applicant has averred that he instructed Mac Law Attorneys based at Kibaha who after follow up informed the applicant that they application was dismissed for want of prosecution on 11/8/2022. The application was dismissed on the presence of his advocate he prays for the interest of justice that the dismissal order be set aside.

At the hearing parties applied for leave to submit the application by way of written submission. The Applicant was unrepresented and the Respondent was under the representation of Mr. Mathias Budodi, learned advocate.

In his written submission the applicant prayed his affidavit to be adopted. The applicant in the submission reiterated the contents of an affidavit. He insisted that he was admitted at the hospital that is why he did not personally follow up Misc. Application No. 9 of 2022. He was discharged on the 8<sup>th</sup> April, 2023 and immediately started to work to follow up for his case. The application it was on 17/04/2023 when he knew that Misc. Application No. 9 of 2022 was dismissed on 11/08/2022.

In this application the applicant has raised two reasons which have caused his delay in follow up of the case. One, is sickness which is something beyond his control. The second reason is the fact that he has instructed

advocate James Lubusi who abandoned his case leading to its dismissal for want of prosecution. The advocate did not inform his client, the applicant and the advocate blocked communication with the applicant. As the applicant was sick, he could not make follow up of his case. He has cited the case of **Alasai Josiah (suing by his Attorney Oscar Sawuka) Versus Lotus Valley Ltd**, Civil Application No. 499/12 of 2019 (unreported) where in it was held: -

*"Sickness is beyond human control and therefore nobody will fault the applicant for being sick".*

The application has argued that despite him being sick he instructed an advocate to represent him, that advocate is Mr. James Lubusi. However, the advocate blocked communication with him and also he did not handle the matter as agreed. He did not even inform him that he has decided to withdraw himself nor that the matter was dismissed for want of prosecution.

The applicant cited the case of **Lyamuya Construction Company Limited Versus Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010

(unreported) for issues to be considered when granting extension of time, that: -

*"The applicant must account for all the period of delay, the delay should not be inordinate, the applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of action that he intends to take, and 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".*

He argued in the present matter the applicant has adduced reasons which are a good causes for this honourable court to extend time to file an application for setting aside dismissal order as it has been articulated in paragraph 9, 10, 11 and 12 of the applicant's affidavit in support of the chamber summons.

In reply to the submission by the applicant, the counsel for the respondent has submitted that the applicant has failed to show a good cause to justify

his application and prays that this court dismisses the application with costs for lack merit.

In the submission the counsel prayed to adopt the respondent's counter affidavit. However, the record shows it was filed out of the prescribed time. This court also allowed the respondent to argue only on points of law. Thus the prayer to adopt content of a counter affidavits is denied.

The counsel has submitted that the basis of this matter is dismissal order which basically was caused by negligence of the applicant herein for his failure to serve summons to the respondent; and thus the matter was dismissed for want of prosecution. The applicant failed to justify his negligence, inordinate of failure to serve summons to the respondent for several times when he was not sick. The dismissal order by J.F. Nkwabi, Judge states that: -

*"I ordered that this would be a last adjournment. To date the applicant has not filed any proof of service. As such I refuse to adjourn the matter. Thus, I dismiss the application for want of prosecution".*

It has been argued by the counsel for the respondent that the applicants failed to justify his negligence of failure to serve summons to the respondent.

The counsel for the respondent has submitted that the applicant has not accounted for every day of delay. That is on the 10<sup>th</sup> day of April, 2023 to the 18<sup>th</sup> day of April, 2023. Paragraph 16 of the affidavit revealed that on the 17<sup>th</sup> April, 2023 the applicant was informed that the Miscellaneous Land Application No. 9/2022 was dismissed. However, he did not show cause for his failure to lodge an application on the 17/04/2023 as well on the 18<sup>th</sup> April, 2023, he failed to account even a single day of delay.

The applicant has submitted that the second cause for delay to file application for restoration in time was triggered by an advocate who was engaged to prosecute the case. The counsel has submitted that irrespective of the cause of delay that might be advanced by the applicant for the application of extension of time, the applicant must show, diligence and not apathy, negligence or ineptness in the prosecution. The counsel cited the case of **Mtengeti Mohamed Versus Blandina Macha**, Civil Application No. 344/17 of 2022, Court of Appeal of Tanzania at Dar es Salaam (unreported) where the court observed that:

*"And if I may add, the position set by our previous decisions is that irrespective of the nature of the grounds advanced by the applicant in support of an application for extension of time, he must as well show diligence, and not apathy, negligence or ineptness in the prosecution of the action that he intends to take".*

According to the evidence annexed to the affidavit the applicant acted negligently and failed to exercise due diligence to take necessary steps or issue instruction to another advocate. It is clear in annexure EF4 that the applicant had a regular visit to hospital on a monthly cycle. Though sickness may be a good reasons but it cannot be founded on mere allegations it must be proved. He has cited the case of **Pastory J. Bunonga Versus Pius Tofiri**, Miscellaneous land Application No. 12 of 2019, Court of Appeal of Tanzania at Mwanza.

It has been argued by the counsel for the applicant that each case has its own peculiar facts and the case of **Abdallah Juma Kambale Versus Noradi Tiliko Mongelwa**, Civil Appeal No. 231 of 2018, Court of Appeal of Tanzania at Tabora is distinguishable to the present situation. In the case

of **Abdallah Juma Kambale Vesrus Noradi Tiliko Mongelwa** (supra) in the latter case, the appellant was not aware of the existence of the Land Appeal No. 3 of 2015 which he then filed an application for extension of time to restore upon being dismissed for want of prosecution. In this case the applicant was aware of the existence of Miscellaneous Land Application No. 9 of 2022 and therefore he had a reciprocal duty to closely follow up the progress and status of his case. In the cited case of **Abdallah Juma Kambale Vesrus Noradi Tiliko Mongelwa** (supra) the court observed: -

*"On the other hand, as alluded above the party to a case who engaged the services of an advocate has a reciprocal duty to closely follow up the progress and status of his case".*

The counsel has argued that what the applicant did in this case is a continuation of the negligence and an abuse of court process. He has therefore prayed that the application be dismissed with costs.

In rejoinder the applicant has reiterated the contents of his submission in chief in an emphatic way. This case is a peculiar one where the applicant delayed to appeal, filed an application for orders to enlarge time, did not

serve the respondent, the application was dismissed for want of prosecution and again he delayed to apply for restoration of the application. He is now applying for extension of time to apply for restoration of the application for extension of time to file an application to set aside a dismissal order dated 11/08/2022.

The applicant in his explanation he has advanced two reasons. One that he was sick as a partial stroke patient. He went to be treated for physiotherapy at Tumbi Region Referral Hospital. He has attached a copy of the medical evidence which shows he was attending on monthly basis. The other reason is lack of information from his advocate, James Lubisi. The medical certificate record for 08/06/2022 shows the applicant has been referred from Mkoani. I take note of the fact that starting from Katavi, Rukwa, Mbeya we have referral hospitals. The document has missing information to make the story more appealing and or convincing as to allow this court exercise its reliance for applying discretion to enlarge time.

History of the matter makes it necessary to check the flow of the reasons of delay. The applicant has cited the case of **Lyamuya Construction Compnay Ltd Versus Board of Registered Trustees of Young**

**Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) with the quoted holding, the same bites against what he wants to convince, this court that it is a situation for consideration so as the time is enlarged I agree to the position that sickness is beyond natural control of the person but if not strictly scrutinized courts of law may be used to endorse ill motives of parties based on what apparently looks to be good reasons and sufficient cause. Looking at the medical evidence shown, the doctor in all instances of hospital visit commented "doing well". It cannot be said that the applicant failed even to notify the court through a relative that he was sick or a simple letter or call.

Applying the factors for consideration in the case of **Lyamuya Construction Compnay Ltd Versus Board of Registered Trustees of Young Women's Christian Association of Tanzania**, (supra) the applicant has failed to account for each day of delay and the delay was so inordinate as to move this court to exercise its discretion by extending time. That is a cumulative delay as argued by the counsel for the respondent, which at first led to the dismissal of the first application. Though not so obvious, the applicant lacks that diligence to be accorded an attention for the prayer he has made to be granted.

Under the circumstances the applicant has not been able to show sufficient reason for delay. The application is dismissed with costs.

It is ordered accordingly.

Dated and signed at **Sumbawanga** this 08<sup>th</sup> day of December, 2023.



  
**T.M. MWENEMPAZI**  
**JUDGE**