

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

MISC. CIVIL APPLICATION NO.48 8 OF 2023

***(From Misc. Cause No. 647/2019 High Court of Tanzania at Dar es Salaam
and an Order of this Court Dated 31 July 2023)***

**SHAIDU ADAM KIBILA *(An Administrator of the Estate of the Late ADAM
SADICK NSHOLO)*APPLICANT**

AND

GENERAL BUSINESS & EQUIPMENT SUPPLIES CO. LTD.....RESPONDENT

RULING

Date of Last Order: 27/10/2023

Date of Ruling: 03/11/2023

MWAKAPEJE, J.:

This application under certificate of urgency accompanied by a Chamber Summons and supported by an Affidavit is brought under section 14(1), Paragraph 4 of Part III of the Law of Limitation Act, Cap 89 [R.E. 2019] and sections 68(e) and 95 of the Civil Procedure Code (CPC), Cap. 33 [R.E. 2019] is brought by one Amos Yona Sura, Advocate for the Applicant. In this application, the applicant prays that he be granted an extension of time within which to apply for setting aside a dismissal order in Misc. Civil Cause No. 647/2019.

In summary, the history regarding this application started in 2019, when the Applicant filed a Misc. Civil Cause No. 647 of 2019 against the Respondent in this Court. The said suit was dismissed on 01 October 2020 for want of prosecution. The Applicant filed an Application to set aside the dismissal Order through Misc. Civil Application No. 573 of 2020 which was granted by this Court on 19 November 2020. On 01 June 2023, the same was dismissed by this Court for want of prosecution under Order IX Rule 5 of the CPC.

Following the dismissal of the same, the applicant filed an application for setting aside the dismissal order which was granted. However, on 31 July 2023, the applicant prayed to withdraw his application Misc. Civil Application No. 309 of 2023, in which prayer was granted. The Court, however, ordered that the applicant was at liberty to re-file by the law. The applicant did not re-file his application to set aside the dismissal order of 01 June 2023, hence this application.

When the matter was scheduled for hearing, the Applicant was represented by Mr Amos Sura and on the other hand, the Respondent was under the care of Mr Mohamed Tibanyendera, learned Advocates respectively. Since the application was made through Chamber Summons supported by Affidavit on the one hand, and Counter Affidavit on the other

hand, during their submissions, both Counsels adopted them and prayed
form part of their respective submissions.

In his submission, Mr. Amos, learned Counsel for the Applicant had the following issues to substantiate his application for an extension of time. One is that there is a serious determination of a matter of law by the court especially the fate of 45% shares left by the late Adam Sadick Nsholo in the Respondent, i.e. Company. Since he was a Director, the Administrator and his other fellow heirs are to enjoy the benefits of the said shares of their late father, hence his estate has to be administered accordingly.

Since the late Adam Sadick Nsholo had a considerable number of shares in the Respondent, an application of extension of time should be granted that the heirs be heard as they have no other forum to pursue their rights apart from this. He remarked that, since inheritance is a matter of law, administration of the same is a matter of law. He therefore referred to the case of **Kalunga and Co. Advocates vs NBC Ltd (2006) TLR 235** to rely on his point, where it was stated that:

*"When there are serious legal points involved, then that
is sufficient reason to grant an extension of time. In the*

present case, there is a serious legal issue that requires a determination of the court”

Mr. Tibanyendera on the other hand, refuted this point as raised by the Applicant’s Advocate that if this application is not granted heirs would seriously suffer loss of 45% shares of their late father. He was of the view that this was a misconception and misleading on the part of the Applicant. According to him Paragraphs 8-11 of the applicant’s Affidavit have not been proved and Misc. Application 647 of 2019 sought to be restored has nothing to do with the present application. He stated that deceased estate found in the company can only be presented to the heirs through the judicial process governing the administration of estates where any entitlements are presented to the judiciary account and not through the court process in commercial disputes. Hence this application is not tenable.

Secondly, Mr. Amos, advocate for the Applicant stated that extension of time is the court’s discretionary power which has to be exercised judiciously. In dealing with matters of application of extension of time, he supported his submission with the case of **Felix Mtumbo Kisima vs. TCC Limited and another, Misc. Civil Appeal No. 1 of**

1997 quoted in the case of **Bahati Matimba vs Jaglo Enterprises Ltd, misc. Application No. 01 of 2020** that:

"it should be observed that sufficient cause should not be interpreted narrowly, but should be given a wider interpretation to encompass all reasons or causes which are outside the applicant's power to control or influence resulting in a delay in taking any necessary steps"

He therefore called this Court to subscribe to what has been stated since the degree of lateness in the application at hand is not inordinate. In addition, he contended that the delay was caused by looking and making a follow-up of the court's order of the withdrawn application Misc. Civil Application No. 309 of 2023.

He further stated that immediately after the Withdrawal Order, he wrote a letter to the Court that he should be supplied with a copy of the Order. According to him, it takes time for our courts to supply copies of orders and decisions. This shows how vigilant the Applicant was to make sure that he refiles the same in Court. He therefore concluded by stating that even the Counter Affidavit by the Respondent in all its 33 Paragraphs does not dispute their Application. It is from this aspect he prayed that

the time within which to apply to set aside the dismissal order be extended.

Regarding this point, Mr. Tibanyendera was of the opinion that according to paragraphs 30-33 of the Counter Affidavit he has opposed the Application as the same is filed to abuse the Court Process, as it is based on lies, misrepresentation of facts and personal attacks as shown in Paragraphs 4 and 13 of the same. He also stated that this application originates from Misc. Application No. 647 of 2019. The same has been dismissed for want of prosecution twice i.e. on 01 October and 01 June 2023 for the reasons that the Applicants were not ready to proceed and non-appearance on dates scheduled for the hearing, respectively.

Further, he stated that it was the Applicant who prayed for the withdrawal of Misc. Civil Application No. 309 of 2023. The court ordered that the Applicant was at liberty to refile the same according to law but the said Applicant failed to do so. As he agrees with Mr. Amos Advocate for the Applicant, that the application for extension of time is a matter of law, Mr. Tibanyendera concludes that restoration of the same subject to the legal test.

Mr. Tibanyendera further on the issue of delay submitted that the Applicant has not accounted for the same. He relied on his submission on

the case of **Lyamuya Construction Co. Ltd v. Board of Trustees of Young Women's Christian Association of Tanzania, Civ. Appeal no. 2 of 2010**, where guidelines to account for each day of delay were set. i.e:

- "i. the applicant must account for the period delayed;*
- 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 are other sufficient points of law i.e. illegality of the decision ought to be challenged.*

He further stated the present application is not supported with good cause for the same to be condoned by the Court. He cemented his argument by referring to the case of **Exim Bank (T) Limited v. Jacqueline Kweka, Civil Appeal No. 348 of 2018** where the Court could not condone the failure of an advocate to act within the detect of law as good cause to enlarge of time. Other cases that he referred to cement his submission on this point were that of **Ratnam vs. Cumarasamy and Another (1964) Vol. III All ER at page 933** which was referred to by the Court of Appeal of Tanzania in the case of **Karibu**

Textile Mills Ltd v. Commission General (TRA), Civil Appeal No.

192 of 2016. In the said case the Privy Council held that:

"the rules of the court must prima facie be obeyed and to justify a court in extending the time during which some steps in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise any part in breach, would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a timetable of the conduct of litigation."

In the present Application, according to Mr Tibanyendera, the degree of lateness in this application is inordinate i.e. 97 days. The same were not were not accounted for. According to him, there was no diligence shown in the action taken by the applicant to extend time. To him, allowed sufficient reasons may include points of law of sufficient importance and the same should be on the illegality of the decision sought to be challenged. He then prayed for the application to be dismissed with cost.

In his rejoinder, Mr. Amos reiterated what he stated in his submission in chief that his application was per the law until the same was withdrawn by the order of the court. He insisted that when orders of court are given they have to be prepared. On 02 August, 2023 he

requested to be supplied with copies of the ruling hence he did not do the best he could to refile the same on time. He also refuted to abuse court process concerning the dismissal of 01 October 2020 and 01 June 2023. He therefore prayed that his application be granted with costs.

This Court is therefore called upon to determine the application at hand. Plus all the lengthy and enriching submissions by the learned advocates, in this ruling I will confine myself on whether there are sufficient reasons to warrant an extension of time within which the applicant is to apply to set aside the dismissal Order in Misc. Civil Cause No. 647/2019 of 01 June 2023.

As a general principle of law and as established in case law, it is crucial to note that while extensions of time are typically granted for legitimate and justifiable reasons, they should not be used to unduly delay the legal process or to abuse the legal process. Courts therefore, may deny applications for extensions that are made in bad faith or where there is a lack of good cause. This guide has been set in various cases including the cases of **Paradise Holiday Resort Limited vs Theodore N. Lyimo, Civil Application No.435/01 of 2018** and the case of **Lyamuya Construction Company Ltd (*Supra*)**. The general principles set and which are to be adhered to by courts in extending time are the:

- "i. the length of the delay;*
- ii. the reasons for the delay;*
- iii. whether the Applicant was diligent;*
- iv. the degree of prejudice the Respondent stands to suffer if time is extended;*
- v. whether there is a point of law of sufficient importance such as the illegality of the decision sought to be challenged"*

I will test the above guides with the present application before I conclude. As stated by both counsels for the Applicant and Respondent respectively, this application traces its origin in Misc. Civil Application No. 647 of 2019. This application was dismissed twice for want of prosecution. The first dismissal was that of 01 October 2023 while the second was that of 01 June 2023. In the restoration of the same vide application No. 309 of 2023, the Applicant on 31 July 2023 prayed to withdraw the same, which order was granted by the Court with liberty to refile according to the law. On 06 September 2023 lodges an application for an extension of time within which to apply to set aside the dismissal order of Misc. Civil Application No. 647 of 2019. Now the question is when did time start running against the Respondent? Since Misc. Application No. 309 of 2023 was withdrawn by the Applicant, it implies that it never existed in court

as the same was to be re-filed at the Applicant's want. Therefore, it is crystal clear that time started running when the dismissal order was issued on 01 June 2023. I agree with Mr. Tibanyendera that the Applicant was delayed for 97 days.

Among the reasons stated by the Applicant for his delay in Paragraph 12 of his affidavit was that he requested the Registrar to be supplied with a withdrawal order, which the applicant himself applied for and obtained, for arrangements to re-file the same. To me, this does not hold water because it has nothing to do with the new application, for it to be used in prospective applications. Moreover, this delay was to be accounted for by the applicant. In the case of **Bushiri Hassan v. Latifa Lukio Mashayo, Civil Application No. 3 of 2007 (unreported)**, the Court of Appeal emphasized the need to account for each day of delay within which certain steps could be taken. In this case, it was stated that:

"Delay, of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken."

This was not the case in this application. The Applicant wants to shift the burden to the court for his failure to comply with legal provisions and what was ordered by this Court on 31 July 2023 in Misc. Application

No.309 of 2023. On this factor, I find it obligated to advise parties especially those knocking on the doors of the court to take personal responsibility for adhering to court rules, procedures, and deadlines. Blaming the court for issues that could have been prevented or corrected by their diligent and responsible conduct, undermines the integrity of the legal process which this Court enviously protects. Therefore this reason as advanced by the Applicant is unacceptable.

In extension of time, the applicant must be diligent and not apathy, negligent or sloppiness in the prosecution of the action that he intends to take (see, **Lyamuya's Construction Company Ltd, (*Supra*)**). The facts of this application speak for themselves. This matter has been in this Court since 2019 vide Misc. Cause No. 647 of 2019. The same was dismissed twice for want of prosecution as indicated above. The third time it was filed but later, the Counsel for the Applicant withdrew it because it was wanting. The same has been dealt with recklessly and negligently from the beginning. I agree with the Counsel for the Respondent that the applicant decided to sleep over the same. Hence no one to blame but himself.

Looking at this application, there is no dispute that the same was filed in 2019. The matter has been filed and dismissed in this Court for

want of prosecution in more than one circumstance. The first dismissal for want of prosecution was on 01 October 2020. The applicant applied to set aside the dismissal order which was granted on 19 November 2021 through Misc. Application No. 573 of 2020. Secondly, because the advocate for the Respondent was absent on the date allocated for the hearing, the matter (Misc. Civil Application No. 647 of 2023) was again dismissed for the same reason on 01 June 2023.

The third time, the applicant, through Misc. Application No. 309 of 2023 lodged his application to set aside the dismissal order made on 01 June 2023, but he on 31 July 2023 prayed to withdraw the same. He on 6th September, 2023 once again, knocked on the doors of this Court for the fourth time praying to be granted an extension of time to apply to set aside the dismissal order of Misc. Civil Application No. 647 of 2019. This is evidenced in what is stated in the Affidavit and Counter Affidavit of both the Applicant and the defendant respectively. The reason for the delay supplied by the applicant in Paragraph 12 of his affidavit was that he was not supplied with the withdrawal order for him to refile his application on time. But in his Affidavit, he does not disclose the date on which the said documents were supplied to him by the court.

The degree of prejudice the Respondent stands to suffer if time is extended is yet another test in matters of extension of time. This application has been pending in this court for quite some time. It has been dismissed and restored without progress. There has been laxity on the part of the Applicant to progress with the same hence affecting the respondent. Today he comes with a certificate of urgency as if the matter has just erupted, while the same has been in court for the past 4 years.

The last point in the test is whether there is a point of law of sufficient importance such as the illegality of the decision sought to be challenged. This is the contention by the advocate for the Applicant, that in this application there is a serious determination of a matter of law that 45% of the shares of the late Adam Sadick Nshole will be lost if this application is not granted. To my opinion, this is not what this test is there for. To the contrary it applies to cases where a decision was made, especially by a lower court and the same was illegal, hence a higher court extends time and takes appropriate measures to put the matter and record straight. See the case of **Principle Secretary Ministry of Defence V. Davian Vhalambhia (1992) TLR 182**. In the application at hand, therefore, there is no decision made that is sought to be challenged for the court to rectify. This point also fails.

In the end, as rightly put by the Counsel for the Applicant the *extension of time* is the court's discretionary power and the same is to be exercised judiciously as pointed out in the case of **Felix Mtumbo Kisima** (*supra*). In the application at hand, the Court has considered all the factors necessary to grant an extension. However, there was nothing that was outside the power of the Applicant to control or influence that resulted in a delay in taking necessary steps on time.

In the circumstances, it is the finding of this Court that the applicant failed to advance good cause for his delay. Therefore, this application is devoid of any merit and the same is dismissed with costs.

It is so ordered



V. MWAKAPEJE
JUDGE
03/11/2023

Court: Ruling delivered this 03rd November, 2023 in the presence of Mr. Amos Yona Sura Advocate for the Applicant and the respondent.



G.V. MWAKAPEJE
JUDGE
03/11/2023

I CERTIFY THIS IS A TRUE COPY OF THE ORIGINAL