

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
[COMMERCIAL DIVISION]
AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 18 OF 2020

MICAH ELIFURAHA MRINDOKO

t/a NEW BP KILWA ROAD SERVICE STATION APPLICANT

VERSUS

BANK OF AFRICA TANZANIA LIMITED RESPONDENT

(Arising from the decision of this Court in Commercial Case No. 75 of 2015)

RULING

23rd and 27th September, 2021

KISANYA, J.:

This application was made under rule 43(2) of the High Court (Commercial Division) Procedure Rules, 2012 read to together with its amendments of 2019 (hereinafter referred as "the Commercial Court Rules"), Order IX Rule 13(1) of the Civil Procedure Code [Cap. 33, R.E. 2002] and section 14(1) of the Law of Limitation Act [Cap. 89, R.E. 2002]. The applicant, Micah Elifuraha Mrindoko t/a New BP Kilwa Road Service Station seeks for the following orders:

- (i) That the Honourable Court be pleased to grant an order for extension of time for the applicant to make an application for setting aside Ex parte judgment in commercial Case No. 75 of 2015 which was entered on 29th day of May 2018 before*

Saleh J on ground that on the hearing date of the sole witness who is defendant was not present to the Court.

(ii) That the Honourable Court be pleased to grant an order to set aside Ex parte judgment in commercial Case No. 75 of 2015 which was entered on 29th day of May 2018 before Saleh J on the ground that on the hearing date of the sole witness who is defendant was not present to the court.

(iii) That the Honourable Court be pleased to make such any other orders as it may deem fit and just to grant.

Pursuant to the affidavit in the affidavit in support of the application, the applicant was the defendant in Commercial Case No. 75 of 2015. When the aforementioned case was called for defence hearing on the 25th day of April, 2018, the applicant and his advocate failed to appear on time due to traffic jam. Upon reaching Court's corridors, they found an *ex-parte* order entered against the applicant; and the matter had already been fixed for judgment, on the 29th day of May, 2018.

Trusting his advocate's advice, the applicant lodged the notice of appeal to challenge the *ex-parte* judgment dated the 29th day of May, 2018. When served with the copies of the proceedings for purposes of appeal, his newly engaged advocate informed him that the proper recourse that had to be taken was to apply for setting-aside the *ex-parte* judgment. Consequently, the applicant lodged Miscellaneous Commercial Application No. 41 of 2019 seeking for the indulgence of this Court to extend time within which to apply to set aside the *ex-parte* judgment. He also asked the Court to set aside the *ex-parte*

judgment. Things did not go well for him. His application was struck out for being incompetent, as the notice of appeal against the *ex-parte* judgment was pending at the Court of Appeal.

In that regard, the applicant applied to withdraw the notice of appeal. The withdrawal order was issued by the Court of Appeal on the 11th day of October, 2019, whereby the applicant was informed through letter dated the 15th day of October, 2019.

Eager to challenge the *ex-parte* judgment, the applicant approached the Court seeking for the aforementioned orders. Upon being served, the respondent, Bank of Africa Tanzania Limited filed a counter affidavit sworn by her advocate, Mr. Godwin Mganyizi, opposing the application.

When this matter was called for hearing, on the 23rd day of September, 2021, the applicant was represented by Ms. Jedness Jasson, learned Advocate while Mr. Godwin Mganyizi, learned advocate, represented the respondent.

Ms. Jasson commenced her submission by praying to adopt the supporting affidavit and skeleton submission filed under rule 64 of the Commercial Court Rules to form part of her submission.

Submitting in support of the first prayer, Ms. Jasson contended that the delay to lodge an application within time was caused by the applicant's counsel who advised him to appeal against the *ex-parte* judgment instead of applying

to set aside the same. She was of the view that, in an event that the applicant will be considered to have failed to account for every day of delay, the Court may consider other factors and grant the extension of time. The learned counsel supported her argument by citing the case of **Bank of Africa Tanzania Limited vs Rose Miyago Assea**, Commercial Case No. 228 of 2018 (unreported).

She went on to submit that, the Court is required to decide the rights of the parties and not to punish them for their mistakes done in the conduct of the case. Her argument was premised on the decision of this Court in the case of **National Housing Corporation vs Etienes Hotel**, Civil Application No. 10 of 2015. Also, making reference to the case of **Ghania J. Kimambi vs Shedrack Ruben Ng'ambi**, Misc. Application No. 692 of 2018, Ms. Jasson argued that the applicant should not be punished for the mistakes committed by his advocates.

Further, the learned counsel urged the Court to consider that the applicant is entitled to a right to be heard. She referred me to the case of **Dishon John Mataita vs the Director of Public Prosecutions**, Criminal Appeal No 134 of 2000, cited in approval in **Abbas Sherally and Another vs Abdul S.H.M Faza Iboy**, Civil Application No. 33 of 2002 (unreported).

On the second prayer, Ms. Jasson contended that the applicant and his former counsel failed to appear on time due to traffic jam. She cited the cases

of **Beatus Malima vs Dr. Emmanuel Malangalila and Another**, Misc. Land Application No. 578 of 2019 (unreported) and **DRTC Trading Company Limited vs Happy Sambega and Another**, Civil Appeal No. 267 of 2018 where this Court considered traffic jam to be a sufficient ground for setting aside *ex-parte* judgment.

In response, Mr. Mganyizi opposed the application. Starting with the second prayer, he argued that the cases of **Beatus Malima** and **DRTC Trading Company Limited** (supra) were distinguishable, when compared to the circumstances of the case at hand. His argument was based on the fact that, the counsels for the respective applicants in the said cases appeared before the judge on the date of issuance of *ex-parte* order, while the applicant in the case at hand did not appear before the trial judge.

Reverting back to the first prayer on extension of time within which to file an application to set aside the *ex-parte* judgment, the learned counsel argued that the applicant had not advanced a good cause for the delay. He was of the view that the applicant and his counsel were negligent by failure to take the necessary actions. Mr. Mganyizi went on to argue that the applicant had not accounted for every day of delay. He pointed out that, the delay from the 3rd day of September, 2019 when the first application for extension of time to set aside the *ex-parte* judgment was struck out for being incompetent, to the 4th day of October, 2019 when he applied to withdraw the notice of appeal

against the decision subject to this application, was not accounted for. He also contended that the applicant had not accounted for the delay from the 15th day of October, 2019 when the order for withdrawal of the notice of appeal was communicated to him, to the 3rd day of February, 2020 when he lodged the present application. That being said, the learned counsel implored me to dismiss this application for want of merit.

In a brief rejoinder, Ms. Jasson argued that the cases of **Beatus Malima** and **DRTC Trading Company Limited** (*supra*) cited in support of the second prayer were not distinguishable. Referring to paragraph 3 of the affidavit, she contended that the applicant and his former counsel entered the Court's corridor and found the *ex-parte* order had already been entered against the applicant. However, she conceded that they did not enter into the judge's chambers for further ado. As to the first prayer, Ms. Jasson reiterated that the mistakes by the party's counsel is a good cause for extension of time. She also asked the Court to consider other factors for extension of time.

Having considered the application and the submissions advanced by the counsels for the parties herein, it is common ground that the facts which led to the matter in consideration are generally not disputed.

In a bid to determine the merit of this application, I prefer to start with the first prayer, a request for this Court to extend time within which the applicant can apply to set aside the *ex-parte* judgment. Pursuant to rule 43 (2)

of the Commercial Court Rules, an application to set aside an *ex-parte* judgment has to be lodged within 14 days from the date of judgment or order. However, the said Rules doesn't stipulate the factors to be considered in determining whether to extend the time within which to apply to set aside *ex-parte* judgment or otherwise. Therefore, in terms of the provisions of section 14(1) of the Law of Limitation Act (*supra*), the general consideration is whether there is reasonable or sufficient cause or otherwise.

What constitutes to reasonable or sufficient cause is not defined or provided for in the said legislations. Case based law suggests that, the same is determined basing on the circumstances of each case. Some of the factors that are taken into account include; the length of the delay, whether the applicant have accounted for all the period of delay and demonstrated diligence and not laziness, negligence or sloppiness in taking the required steps, and whether the Court finds other reasonable ground like the existence of a point of law of sufficient importance in the decision sought to be challenged. This position was well stated by the Court of Appeal of Tanzania in the case of **Lyamuya Construction Company Ltd v. Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

It is also a settled law that, each day of delay must be accounted for by the applicant. The rationale behind being to ensure that the objective of having the provisions on time limitation is met. See the decisions of the Court of Appeal

in **Bushiri Hassan versus Latifa Lukio Mashayo**, Civil Application No.3 of 2007 and **Karibu Textile Mills versus Commissioner (TRA)**, Civil Application No. 192 of 2016 (both unreported). In the former case, the Court of Appeal held and I quote:

"...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."

In the instant case, the *ex-parte* judgment was delivered on the 29th day of May, 2018. As rightly observed by Mr. Mganyizi, the application before me was filed on the 3rd of February, 2020. Then, it is obvious that this application is outside the period of time limitation under rule 43(2) of the Commercial Court Rules, for about one (1) year and eight (8) months. Now, the question to be determined is whether or not the applicant has been able to establish sufficient reason to justify the delay.

As already demonstrated, the reason crafted in the supporting affidavit is that of mistakes by the former counsel for the applicant. That he lodged the notice of appeal to challenge the *ex-parte* judgment instead of applying to set aside the *ex-parte* judgment. Indeed, it is on record that the said notice of appeal was lodged by the counsel who was representing the applicant during the trial.

It was Ms. Jasson's argument that the applicant should not be punished for the mistake of his counsel. Luckily, the issue on the mistakes committed by

the party's advocate has already been addressed by case law. In the case of **Kambona Charles (Administrator of the Estate of the late Charles Pangani vs Elizabeth Charles**, Civil Application No. 529/17 of 2019 (unreported), the Court of Appeal had this say on the issue under consideration:-

*"It is settled that a mistake made by a party's advocate through negligence or lack of diligence cannot constitute a ground for condonation of delay but a minor lapse committed in good faith can be ignored. The decision of the Court in **Yusufu Same and Another v. Hadija Yusufu**, Civil Appeal No. 1 of 2002 (unreported) is an apt illustration of the principle. It was held in that case that:*

*"Generally speaking, an error made by an advocate through negligence or lack of diligence is not sufficient cause for extension of time. This has been held in numerous decisions of the Court and other similar jurisdictions.... But there are times, depending on the circumstances surrounding the case, where extension of time may be granted even where there is some element of negligence by the applicant's advocate as was held by a single Judge of the Court (Mfalila, JA, as he then was) in **Felix Tumbo Kisima v. TTC Limited and Another - CAT Civil Application No. 1 of 1997 (unreported).**"*

In view of the above position, the mistakes caused by the negligence or lack of due diligence by the advocate for the party to the case is not by itself a ground for an extension of time. However, the court can be enjoined to consider

the circumstances of the case and ignore minor lapse of time committed in good faith. Prompt action and good faith in filing the application may persuade the court to extend the time limitation. See the case of **Royal Insurance Tanzania Limited vs Kiwengwa Strand Hotel Limited**, Civil Application No. 116 of 2008 (unreported) in which the Court of Appeal held as follows: -

"It is trite law that an applicant before the Court must satisfy the Court that since becoming aware of the fact that he is out time, act very expeditiously and that the application has been brought in good faith."

Upon thorough reading of the supporting affidavit, I am of the view that the lapse of time in the case at hand is not minor for this Court to ignore the same. I am also at one with Mr. Mganyizi that the applicant and his advocates were not prompt or vigilant to take the proper recourse due to the following reasons:-

One, the applicant deposed in paragraph 3 of the supporting affidavit that he was informed by the newly engaged advocate that the proper action against the *ex-parte* judgment was to lodge the application to set aside the *ex-parte* judgment. Although he stated that the information was conveyed to him after receiving the copies of the proceedings, the evidence as to when the copies were supplied to him was not stated. In other words, he did not account as to when he became aware of the proper recourse to be taken in order for this Court to consider as to whether he was prompt to take the required action.

As if that was not enough, the affidavit of the newly engaged advocate was not filed to support the applicant's contention. Therefore, the narrative suggested by the applicant is not substantiated and therefore unfounded.

Two, it is apparent that the newly engaged advocate was not aware of the proper procedure to be explored. He lodged an application for extension of time to set aside the *ex-parte* judgment, while the notice of appeal was pending in the Court of Appeal. The route taken by the said counsel inclined this Court to strike out the said application for being incompetent before it.

Three, the application for extension of time to set aside *ex-parte* judgment was struck out on the 3rd day of September, 2019 because the notice of appeal against the *ex-parte* judgment was pending at the Court of Appeal. It was on the 4th day of October, 2019 when the applicant applied to withdraw the notice of appeal. This was delay of thirty (30) days and was not accounted for by the applicant. Since by that time the applicant was aware of the fact that he was to lodge an application for extension of time to set aside the *ex-parte* judgment, he ought to act expeditiously.

Four, the applicant did not plead as to when the order for withdraw of notice of appeal was dispatched to him. If it is taken that he was made aware of that the said order on the 15th day of October, 2019 appearing in Annexure EA 4 appended to the affidavit, then, it took him and his counsel more than 100

days to lodge the present application. Yet, nothing was brought to the attention of this Court in so far as the justification of the said delay is concerned.

The learned counsel for the applicant urged this Court to consider other factors in an event that an account for each day of a delay will fall short. She referred me to the case of **Bank of Africa Tanzania Limited** (supra). It is my considered view that the circumstances of the case referred to by Ms. Jasson is distinguishable from the case at hand. In the former case, the Court was satisfied that the ground of illegality in the decision subject to the application was apparent on face of record. In the case before, the ground of illegality was not pleaded.

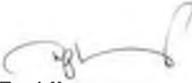
Having considered the above, I am satisfied that the applicant has not shown sufficient reason to warrant this Court to exercise its discretionary powers to extend the time within which to apply to set aside the *ex-parte* judgment. I am also satisfied that the applicant has failed to account for every day of delay and that there are no other special circumstances that would otherwise warrant the extension of time. Consequently, I find it not useful to consider the second prayer, which invited this Court to set aside the *ex-parte* judgment.

I wish to comment further that, the interest of justice is that litigation must come to an end. Parties are required to exercise their respective rights within the time specified by law. The law of limitation knows neither equity nor

sympathy: rather, it is aimed at assisting parties who are vigilant in pursuit of their rights, as opposed to those with laxity. [See **Barclays Bank Tanzania Limited vs Phylisiah Hussein Mchini**, Civil Appeal No. 19 of 2016, CAT at Mwanza (unreported)].

In the upshot, the application is in devoid of merit, and it is hereby dismissed with costs.

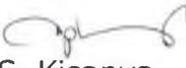
DATED at DAR ES SALAAM this 27th day of September, 2021.


E. S. Kisanya
JUDGE

COURT: Ruling delivered this 27th day of September, 2021 in the presence of Mr. Erasto Ntondokoso, learned advocate for the respondent and in the absence of the applicant.

Right of appeal explained.




E. S. Kisanya
JUDGE
27/09/2021