IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NO. 56 OF 1994

PETER WILLIAM MATOKE .... APPELLANT

Versus

ABDALLAH CHAMPION .... RESPONDENT

RULING

SUBJECT: 1. Application for setting aside dismissal order. Application for extension of time to file the appeal out of time.

2. Application for appointment of Legal Representative of Late Peter William Matoke out of time.

3. Application for stay of execution.

KATITI, J.

This is a composite application, and I shall, seriatim deal with the same, the first one, being for restoration of appeal out of time, to which, I now turn.

In the course of progression of the case, on the 3/2/1998, the appellant never appeared, either in person nor through his Advocate, and the fateful hearing date, 20/5/1995 was fixed when for failure of appellant and his Advocate to appear, the appeal was dismissed with costs, and hence this application - filed on 30/6/1998, three years after, by Tanzania Legal Corporation, as Chamber Summons, for extension of time, for appointment of Legal Representative, by the learned Counsel Mr. K.M. Nyangarika, overshadowing and phasing out the Tanzania Legal Corporation, came on the 12/11/2000. Mr. Nyangarika raised what he called a preliminary objection in the submissions against the Counter Affidavit by the respondent. This is apropoisterous procedure. Affidavits having the nature of pleadings, objections thereto should be by way of known procedure. It is wrong to raise preliminary objection against Affidavit, in concluding submissions for with the surprise element how does the other party reply. I shall exercise my liberty, to call it frivolous and ignore it, which I hereby do.

I think it is no flying off at a tanget, to put on rail the subject that is first for consideration, and that is the issue of restoration of appeal, dismissed for non-appearance on the 20/5/1995. For restoration or reviving of an appeal, dismissed for default, under ORDER XXXIX Rule 17 of the Civil Procedure Code, hence to be called the Code, the applicant may resort to the following options:

(i) Under Rule 19 of the above ORDER he may file an application for the restoration of the appeal and showing "sufficient cause" for non-appearance.

(ii) If, he/she is still within time, he may file another appeal.

The applicant's learned Counsel Mr. Nyangarika, has chosen the first option, whose applicable rules condition precedent, is to show "sufficient Cause." It does appear, that "sufficient cause" has taken the command of Rule 19. But while so clearly commanding, it is still a phrase, without statutory definition. However abounding case law, is to the effect that, it should receive a liberal construction, so as to advance substantial justice, when no negligence, nor want of bonafides is imputable - see SARPANCH vs RAMGIRI GOSAVI AIR 1968 SC 839. With the above in mind, the Court, should with a liberal view bear in mind, that: 1. An innocent party who has engaged an Advocate, and done all he could, or was required him to do, should not suffer for the inaction or deliberate ommission of his Counsel, - he cannot act as watch dog of his Advocate. 2. That, subject to constraints of law, it is preferable, that a contestant is given free and fair opportunity, to contest fully the action in Court. In other words, in a case for re-admission of an appeal, and where a humanly sufficient reason is adduced, the Court should ordinarily be inclined to set aside the appeals dismissal order, unless there has been gross negligence, on the party concerned.

How does the applicant fare here? In this case the applicant's Counsel Mr. Nyangarika, has to be frank, been appearing for the appellant intermittently and hence his absence on the 20/5/1998, when the appeal was dismissed, hence this application filed on the 30/6/1998 - fourty days after the dismissal of the appeal. But, it does equally appear, that Mr. Nyangarika, had according to one Thomas William Matoke's affidavit Para 10 been served, and yet he

makes no any defensive reference, or otherwise in the written submissions. Therein, while Thomas William Matoke deponed, that Mr. Nyangarika, would on the material date be suffering from Malaria, and would be attending Hospital, Mr. Nyangarika makes no mention of such illness, nor does he use such illness if any at all, explain his non-appearance. I would therefore hold and conclude from the above, that sufficient cause for non-appearance, has not been shown, and the appeal would have no cause for being admitted, so that I do not see how prejudicial, the change of Advocates, so laboured, was.

Having done the above, my job does not seem to end there. The deceased died on 6/4/1995, and the appeal was dismissed on 20/5/1998, three years later. The question is whether, by the date of such dismissal, there was in law an appeal to dismiss. I purposely pose this question, because by then, there had not been an application for joining of Legal Representative, as the same was filed on the 12/4/2000, about five years after the death of the deceased. Consequently I pose, what are the Legal Consequences, of the appellant's death, during the pendency of an appeal? The obvious answer is that the void occasioned by death is filled by the Legal Represantative who has to be joined within (90) ninety days - see Para 16 of First Schedule to the Law of Limitation 1971 hence to be called the Act. His being joined, as Legal Representative under ORDER XXII of the Code, clothes him/her with the right to obtain relief, which the deceased prayed for, he/she is legal representative, for purposes of proceedings, without the effect of conferring of any right of heirship, to the deceased's estate at all. It therefore seems, the law speaking loud, that where the sole appellant as was the case here dies, and there is no application to join his legal representative within limitation of ninety days, the appeal abates. Therefore any party wishing to move the Court, beyond such period i.e. to have legal representative he has to set aside abatement beyond sixty, and have legal representative beyond ninety days (as per Para 12 and 16 of First Schedule to the Act) has for sufficient cause apply for extension of time, so to do out of time, under Section 14 of the Law of Limitation, 1971. Buttressing, this legal position, is the persuasive Indian case LAL SINGH vs GURNAM SINGH A 1986 P & H 93, where application to bring legal representative, on record was made after the prescribed time was over, it was decided, that the matter should be decided after allowing the parties, to lead evidence on sufficient cause for setting aside the abatement. It is my view, that ORDER XXII of the Code

provides rules of procedure, meant and are designed to advance and promote justice, and not there as punitive provisions, against parties. They should receive literal construction. It therefore follows, that upon sufficient cause being shown, delay in bringing the legal representatives of the deceased, should be condoned - see SITAL PRASAD SAXENA vs UNION (1985) 1 SC 163. To conclude what is conspicuous therefore, is that by the time the Hon. Judge purported to dismiss the appeal, about five years after the death, it was well beyond the limitation periods, for have legal representative, and even setting aside abatement. The appeal had already abated, there was in law, no appeal to dismiss at all. This disposes subject (1) above.

Now comes the application for extension of time, for joining a Legal Representative, without one for setting the abatement aside. This obviously was done under Section 14 of the Act, delt with above, though I feel the urge for completeness. While it may be conceded, that the provisions of ORDER XXII of the Code should be liberally construed, such liberality, should not go to make the law a rogue and vagabond, and without fixed above. It is, neither in judicious, nor in appropriate, to first note the nature of Section 14(1) of the Act, it is only available:

(i) If the proceedings are of judicial nature,

(ii) If such proceedings, are pending before a Court of Law.

(iii) If a period of limitation, has been prescribed for it - see INDU ENGINEERING & TEXTILE LTD. AGRA vs COMMISSIONER AGRA AIR 1984 ALL 334 at 339.

I venture to honestly say that the subsection is applicable here. The parties have made their submissions, and their pleadings, playing noless, in their partisan roles. I have had good opportunity to dutifully consider the same. The question of re-admission of appeal does not longer arise, as above it was conclusively delt with. Left in Mr. Nyanduga's armoury is one issue, or contention whether reasonable or sufficient cause, for condonation of delay, of application for joining and substitution of Legal Representative, had not been shown. In our part, I do not intend to belabour hard on the definitional aspect of "sufficient cause" or "reasonable cause" for purposes of Section 14, it was obviously left without definition, to permit flexibility, as would demand, the variant human circumstances. That means, any guiding rules on the same are

Court of Law made. What then, are these guiding principles for determination of sufficient cause or reasonable cause without pretantions at exhaustion, the few I can lay my hands on, are as follows:

1. "Reasonable, or sufficient cause" for delay should be such bonafide cause, as is patently beyond the control of the party, seeking the assistance, or invoking the Law of Limitation, so that not only should the cause for delay be reasonable, it should also be sufficient see JOHN vs MAMMOOTTY AIR 1985 Ker 120 at 126.

2. The words, "reasonable or sufficient cause" given that the applicant has acted with due care, and attention, must be objectively assessed, and its construction, must be such as to advance substantial justice.

3. The Court, has to do the act of balancing interest, for against the above, is an important principle. That is, the expiry of the period of limitation, gives to the decree holder, the right to consider, or treat the decree, as beyond challenge, and such right should not easily be interferred with - STATE OF WEST BENGAL vs HOWRATH MUNICIPALITY AIR 1972 SC 749. In other words, when a period of limitation fixed has expired, the decree holder has gained a benefit under the Law of Limitation, to treat the decree, as unchallenged, and his legal rights have accrued to him by lapse of time.

4. Extension of time, or condoning delay by the Court, is discretionary. It does appear that, discretion has been granted to the Court, to condone delay, obviously for reason that Judicial power and discretion in that behalf, should be exercised to advance substantial justice, the other facet being that even after reasonable and sufficient cause has been shown, the applicant would not be entitled to condonations as of right - the proof reasonable or sufficient cause, is just a condition precedent for the exercise of the discretionary jurisdiction, under Section 14(1), so that if reasonable and sufficient cause is not proved, then nothing is left to be done.

5. That every day's delay needs explanation, though not in a pedantic manner - see COLLECTOR LAND ACQUISITION vs KATIJI AIR 1987 SC 1833, RAMLAL vs REWA COALFIELD LTD. AIR 1962 SC 361 p.364.

It is hardly my mission, to catalogue exhaustively, what would possibly amount to "reasonable or sufficient cause" and closing the list is not even imaginable. However retreating to the case at hand, I have seriously considered the submissions, and pleadings. Thomas Selele Matoke's affidavit, that application for long adjournment upon

he death of the deceased was sought is patently false without relevant
lirection and supported by no record. The law does not demand long
adjournment but deman joining legal representative within a period
of ninety days. That the wife of the deceased objected to appointment
of Legal Representative since the death of the deceased since 6/4/1995
till she died - on 2/11/1997, lacks credit, for it is not imaginable,
that if they were serious, she would hold them at ransom for so long.
Even if I accept the applicant's claim, which I have no inclination
to do, if the widow/wife who was the stumbling block died on 2/11/1997,
why did it take the applicant so long about two years after to act?
That they had "gone to Musoma to attend burrial and other family
procedure" is a prepoisterous explanation in the circumstances,
when the computation of time yields about seven months so doing. And
computatively even after her death, two years went by without action,
and yet no explanation why, has been ventured at all. I have tried
to apply the exclusionary Section 25 of the Act, to exclude the period
of the Probate and Administration Cause No. 42/1995. It is to be noted,
that the same, was for non-appearance dismissed on the 30/6/1998, and
yet the applicant still did nothing for a period of over twenty months,
to pursue the matter.

When all is said and done, in my view, though very humble, the
applicant, has not shown sufficient or reasonable cause, and even if
there had been one, and I maintain there is none, I would not be
disposed to exercise my discretion in favour of the applicant, for
reasons of indifference or inaction. The application is hereby
dismissed with costs. It would be futile in my view, to indulge in
the solution of application No. 3.

Sgd: E.W. KATITI
JUDGE

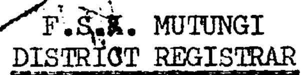
11/5/2001
Coram: Meela, Ag. D.R.
Absent for the Applicant
Mr. Nyanduga for Respondent
cc Eliuter

COURT: Ruling is read in Chambers in the presence of Mr. Nyanduga for the
respondent and in the absence of the Applicant duly notified.

Ruling read on the 11th day of May, 2001.

Sgd: Meela, Ag. DR.
11.5.2001

I certify that this is a true copy of the original



F.S.K. MUTUNGI
DISTRICT REGISTRAR