IN THE HIGH COURT OF TANZANIA

AT MBEYA

MISCELLANEOUS CIVIL APPLICATION NO. 13 OF 1999

(ORGINAL MBEYA DISTRICT COURT CIVIL CASE NO.92 OF 1994)

YESAYA TEWELA MWAMBUNGU ..... APPLICANT

VERSUS

N.B.C. HOLDING CORPORATION .....RESPONDENT

R U L I N G

MACKANJA, J.

Yesaya Tewela Mwambungu has taken out a chamber summons by which he has instituted a chamber application seeking the following orders:-

(1) that this application be entertained out of time;

(2) that the ruling in the Mbeya District Court Civil Case No.92 of 1994 dated 9th January, 1997 be revised and be quashed;

(3) that he be given leave to present a written statement of defence to the counter claim in the said Civil Case, presumably No.92 of 1994;

(4) that this Court do order that Civil Case No.92 of 1994 should proceed to full hearing and final determination.

The application is supported by the affidavit of the applicant. In order to lay a clear background to what I propose to say about that affidavit I have deemed it expedient to reproduce it in extenso, namely:-

"I, YESAYA TEWELA MWAMBUNGU, an adult christian, of Uyole area, Mbeya, do hereby solemnly swear and state on oath as follows:-

1. I am the plaintiff in Civil Case No.92/94 at the Mbeya District Court . This case was finished in a manner that will appear in the following paras of this affidavit.

2. In the said Civil Case the defendant was the former National Bank of Commerce the presecessor of the respondent. The said defendant had counter-claimed under Order 35 of the CPC in the sum of shs.9,676,194/45 as at 25/10/1994 allegedly being the outstanding amount together with interest and bank charges arising out of a term loan and overdraft amounting to shs.3,700,000/- taken in 1987.

3. The main suit that I had filed was for prayers that my property which had been wrongfully attached by the Bank be returned to me. The said property was a Valmet Tractor No. TZ 86392 and an Isuzu 7 ton Lorry No. MB 3769. The said vehicles had been wrongfully grabbed and attached by the Bank in May, 1989.

4. I do not dispute that I took the said loan and overdraft of shs.3,700,000/= from the respondent in 1987. But my complaint is that the Bank did not follow the loan agreement in attaching my property as follows:-

(a) Para 3 of the Bank's letter approving my loan of shs.3,400,000/= stipulated that the first instalment of shs.170,000/= towards repayment of the loan was due to be paid in June, 1989. Yet as early as 4.4.1989 the Bank had started claiming that I was over-due in repayment of the loan and that I was not adhering to the loan repayment programme.

(b) Para 10 of the said Bank's letter stipulated that the loan was secured by my farm at Uyole registered under Certificate of Occupancies Nos.3734 L/o Nos. 72125 and 72131 valued at that time at shs.4,100,000/=.

Yet the Bank grabbed the said motor vehicles instead of foreclosing and selling the mortgaged farm.

(c) As stated above, para 3 of the Bank's letter stipulated that the first repayment instalment was supposed to be paid in June, 1989.

Yet the Bank attached the said motor-vehicles in May, 1989 before the start of the agreed repayment period.

Attached are copies of the said Bank's letter marked A and B to be part of this affidavit.

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5. What has been stated in para 4 above was the theme in the said Civil Case No.92/94 which I filed at the District Court of Mbeya praying for the return of the said motor-vehicles. As stated earlier, the Bank counter-claimed in the sum of shs.9,676,194/45 under Order 35 of the CPC.

6. I applied for leave todefend myself against the Counter-claim as stipulated in Order 35 of the CPC. My reasons for applying for leave to defend were essentially those as stated in para 4 hereinabove. If given leave to defend, I would have raised the defence on the following issues:

   (a) Whether it was proper for the Bank to attach my property which had not been mortgaged to the Bank.

   (b) Whether the Bank was right to foreclose any property before the repayment date had become due.

   (c) Whether the Bank has powers to attach any property of a customer which is not secured on the loan.

7. In the ruling for the said application for leave to defend, the trial Resident Magistrate dismissed the application with costs. The court insisted that there was no triable issue worth allowing me to defend against the counter-claim and ordered me to pay the Bank the said shs.9,676,194/45.

8. Naturally, I was dissatisfied with the ruling. I instructed my former advocate to appeal to the High Court. The said advocate, the learned Mr. Mwangole, informed me that he had filed the appeal on 5.2.1997. He even served me with the copy of the memo of appeal which showed that my appeal was No.8/97 at the High Court, Mbeya.

I attach a photo-copy of the said memo of appeal which is marked C as part of this affidavit. The copy of the ruling is marked D. All to form part of this affidavit.

9. So, from 5.2.1997 I have been of the impression that my appeal was pending to be heard at the High Court. My advocate has been telling me that the appeal was yet to be fixed for hearing every-time I enquired from him about the progress of the appeal.

10. However, when I found that the appeal was rather dragging on for too long, I decided to go straight to the civil Registry of the High Court on 18/8/1999 to enquire about the progress of the case:

A was deeply astonished to be told that there is no pending appeal in the High Court in which I am the appellant. I was further told that even the so-called Civil Appeal No.8/97 as shown in the purporte memo of Appeal is a fake one. The High Court registry shows that (D) Civil Appeal No.8/97 is of different parties altogether.

11. In the circumstances, I am likely to lose my rights for no mistakes of my own. Hence this application in which I am praying for the following reliefs:

(a) The High Court ravise the proceedings and ruling in the District Court of Mbeya Civil Case No.92/94.

(b) Quash the said District Court's rulling dated 9.1.97 and set aside the orders thereto.

(c) I be given leave to defend myself against the Bank's counter-claim of shs.9,676,194/45.

(d) The Civil Case No.92/1994 proceed to hearing and final determination.

12. I verify that what has been stated in paras 6 and 11 above are obtained from information supplied by my present advocate, Mr. Mkumbe. The rest of the p are true to the best of my own personal knowledge."

The affidavit, particularly paragraphs 1 to 8, chronicles stages through which the application for leave to defend passed

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The said application for leave was dismissed. The applicant swears in paragraph 8 that the dismissal of his application aggrieved him, so he instructed his advocate, Mr. Mwangole, to institute an appeal before this Court. To his astoshment Mr. Mwangole did not do what he was instructed to do. That it was on 18th August, 1999, when he discovered that the appeal had not been instituted after all. Unless, therefore, this application is allowed he will lose his rights.

The counter affidavit by which the respondent bases her opposition to the application is fatally defective as it does not conform to the requirements of Order XIX rule 2 of the Civil Procedure Code. It is defective because even though it is partly based on the deponent's belief, the grounds for such beliefs are not disclosed.

Mr. Mkumbe, learned counsel for the applicant, has filed written submissions which are made up of two sentence, except for the opening address and concluding words. Learned counsel says this:-

> "... The reasons for this application are as indicated in the affidavit by the applicant which supports the Chamber Summons. I humbly pray that Your Lordship regard what ever has been written in the affidavit as part of this written submission...".

Mr. Mwakilasa, learned counsel for the respondent, has not been exhaustive either. In essence he submits that it is clear from the counter affidavit that the decision of the District Court was not appellable, so that the allegation by the applicant that he filed a memorandum of appeal is not true for it has not been countered by the applicant's advocate who is alleged to have drawn the said memorandum of appeal. Like Mr. Mkumbe, Mr.Mwakilasa

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also invites this Court to consider the counter affidavit as part of his submissions.

As the chamber summons vividly shows this application seeks four interelated reliefs. Of course, by its very nature, the success of the application much depends on the first relief. For should it fail, then the rest of the application will also crumble.

What, then, must be done in order that the application may succeed. The answer resides in the Law of Limitation Act, No.10 of 1971. In Order for an application such as this one to succeed the requirements of section 14(1) of the Law of Limitation Act must be met. It provides thus:-

> "14(1) Notwithstanding the provisions of this Act, the court may, for reasonable or sufficient cause, extend the period of limitation for the institution of an appeal or application, other than an application for execution of a decree...".

As by law provided the applicant must show that he was prevented by "sufficient or reasonable cause" to act within the time prescribed by law.

The expressions "sufficient cause" or reasonable cause" have not been defined. No doubt these expressions are as wide as they are comprehensive in their meaning. It may be said that in their natural meaning they cover a situation which is beyond the control of the party who seeks to justify his delay. According to the learned authors of Mitra: Commentaries on the Law of Limitation, 4th Edition at page 99:-

> "... The test, whether or not a cause is sufficient, is to see whether it is a bona fide cause, inasmuch as nothing shall be taken to be done bona fide or in good faith which is not done with due care and

> attention. Subject to the above test, the words "sufficient cause" should receive liberal construction so as to advance substantial justice. When no negligence nor inaction nor want of bona fides is imputable to a party for the delay in filing an appeal it would constitute a sufficient cause...".

The Indian scholars were making a commentary on section 5(1) of the Indian Law of Limitation Act which is in pari materia with section 14(1) of our Law of Limitation Act. The commentary is, therefore, relevant to our circumstances. Applying the principle that is embodied in the Indian jurisprudence, the question is whether the applicant passes the above test which I propose to apply here. This can be done if the applicant can show that he has accounted for the time of the delay; and this must be done strictly. He must show that he is not guilty of laches or negligence.

According to the affidavital evidence which supports the application the whole delay is blamed on Mr. Mwangole, learned counsel, who it is alleged, neglected to file the appeal in time. If that was the case then the applicant was required to have Mr. Mwangole testify regarding whether indeed he had instructions to institute the appeal. In any case, proof was required for the fact that the applicant retained Mr. Mwangole to act for him. There is no such proof. Even if Mr. Mwangole was instructed, it is now trite law in our country that counsel's negligence does not constitute "sufficient cause or reasonable cause" for any delay. It follows that the delay of over two years is not only inexplicably inordinate, it was not caused by sufficient or reasonable cause. As a result the first prayer would fail; with it go the other three prayers.

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Let me now say a word or two about "submissions" by learned counsel. Seriously theirs were not submissions; they were prayers. As I had occasion to say in another case, and I feel disadvantaged to have to quote from my own judgment, Kulwa v. Returning Officer, [1996] T.L.R. 320 at pages 322 and 323:-

> As regards the first ground of appeal when this appeal was called for hearing the parties were directed to make formal written submissions. It would appear that Mr. Byabusha, an advocate based in Musoma, was engaged by the appellant to prepare the written submissions for the appellant. He did so and filed a document with five sentences, the operative part of which read thus:
>
> 'May it please your Lordship.
>
> In addition to my grounds of appeal I wish to submit that the learned Trial Resident Magistrate misconstrued s. 19(1) of the Local Government (Elections) Act, 1979 No. 4 since that section relates to a voter and not a petitioner like myself. A petitioner is governed by the provisions quoted in my first ground of appeal ...'

Learned counsel who drew the appellant's submissions did not care to make a correct citation of the Act, nor did he find it necessary to elaborate on the alleged misconstruction of s. 19(a) although he should have realised that his generalisation is pregnant with serious aspersion on the professional capability of the learned Trial Magistrate. I find it unnecessary to admonish learned counsel but he should realise that what he drew for his client are not submissions at all. Submissions must contain reasons and bases for legal and factual propositions which are put forward by learned counsel as officers of the court. In these circumstances the appellant has not filed any written

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submissions as required by the Court."

With that said, the application is dismissed with costs.

Ruling to be delivered by the District Registrar on 6th April, 2001.

sgd: J. M. MACKANJA

JUDGE

4/4/2001

Court:

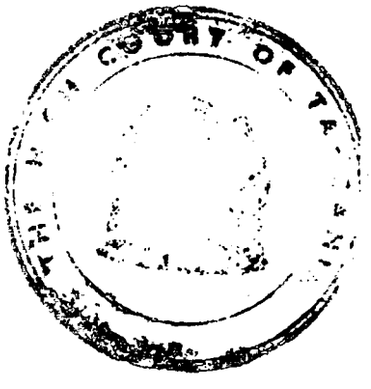
Ruling delivered this 12th day of April 2001 in the presence of Mr. Mkumbe learned counsel for the applicants and Mr. Mwakilasa, learned counsel for the respondent.

sgd: M.G. Mzuna

Ag. DISTRICT REGISTRAR

12/4/2001

Certified true copy of the original Ruling.



DISTRICT REGISTRAR

MBEYA