

**IN THE HIGH COURT OF TANZANIA**

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 45 OF 2003**

**ASHARAF A KIMARO.....APPELLANT**

**VERSUS**

**MARIAM MOHAMED KIHIO.....RESPONDENT**

*Date of last order 29/5/2007*

*Date of Ruling 26/06/2007*

**RULING**

**MLAY, J.**

The appellant ASHARAF KIHIO filed a memorandum of appeal in this Court on 18/3/2003 against the decision of the District Court of Ilala in Civil Case No. 21/2000. The appeal came up for hearing on 6/7/2004 on which day, Mr Mkali advocate appeared for the Appellant while Mr Mlango advocate represented the Respondent. The respondents advocate having raised a preliminary objection, the hearing of the appeal could not proceed and the counsels were allowed to argue the preliminary objection by way of written submissions. The preliminary objection was dismissed on 1/12/04. On the same day, in the presence of the appellant and the respondent in person, I made an order that the appeal be argued by way of written submissions as counsels of both parties were absent. The appellant was to file written submissions on the appeal by 5/01/2005 and the respondent to file a reply by 5/2/2003, with any rejoinder to be

filed by 12/2/2005. Judgment was set to be delivered on 24/05/2005. When the appeal came up on 20/2/2006, long after the date set for judgment, the appellant had neither filed any written submissions nor applied for extension of time in which to do so. Mr Mlango advocate who was present prayed that the appeal be dismissed for want of seriousness on the part of the appellant for having failed to file written submissions.

The prayer was duly granted as the appellant had not filed written submissions as ordered.

On 28/4/2006, some sixty eight (68) days after the dismissal of the appeal, the Appellant through his advocate MKALI AND COMPANY ADVOCATES, filed an application by Chamber Summons, under section 14 (1) of the Law of Limitation Act 1971, section 95 and Order XXXIX Rule 19 of the Civil Procedure Act 1966. According to the Chamber Summons, the applicant is seeking for the following orders:

- (i) That this Honorable Court be pleased to extend to time within which the applicant herein can apply for restoration of his dismissed appeal.
- (ii) That this court be pleased to vacate its dismissed order dated the 20<sup>th</sup> day of February 2006 dismissing the applicant's appeal and restore the appeal so dismissed.
- (iii) That costs of this application be provided for
- (iv) Any other relief (s) the court may deem fit and/or just to grant.

The application is supported by the affidavit of ASHRAF AMIR KIHIO, the applicant.

In his affidavit the applicant has deposed in part, as follows:-

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3- *That on the 7<sup>th</sup> day of December, 2005 this Honourable court made an order that the said appeal be argued by way of Written Submission and schedule for filing the said submission were fixed*

*4. That after the order was given I did not make very close follow up as I was in the firm belief that my counsel would prepare and file the relevant submission effectively and on time as ordered by this Honourable Court .*

*5. That after a longtime passed without getting feedback from my advocate I made a follow up myself in court, and after perusal of the courts file and or records I learned that my appeal had been dismissed for want of prosecution for failure of my advocate to file the written submission time as per the courts order.....*

*6. That the said appeal so dismissed had overwhelming*

*chances of success and the dismissal has accessioned great injustice on my part as the some was not determined merits to not ends of justice.*

*It will be on the interest of justice if the orders prayed for in the application will be granted as I stand to suffer great and irreparable loss should the same denied or refused.*

The respondents advocate HASHIM HAMZA MWANGA filed a counter affidavit to which, the applicants advocate MKALI AND COMPANY ADVOCATE filed a Notice of Preliminary objection. The preliminary objection was argued by way of written submissions filed by both counsels and was dismissed, paving the way for the disposal of this application. The application was ordered to be argued by way of written submissions.

It is not without interest that although MKALI AND COMPANY ADVOCATE were representing the applicant in the original appeal and that the same advocate raised the preliminary objection to the respondent's counter – affidavit and also filed submissions to argue the preliminary objection, the submissions filed on behalf of the applicant in this application, are apparently, "DRAWN AND FILED BY A. KIHIOYO, THE APPLICANT".

In his written submissions the applicant has stated:

*"Your lordship the main ground for this application is failure of the applicants Advocates to attend the matter and he failed to file submissions as ordered by the court and consequently the Applicant's case was dismissed for want of prosecution. Your Lordship, looking to the facts of the case it is obvious that the Applicant's advocate having received construction form had client and after being paid he had a duty to attend the matter diligently. Contrarily, the said Advocate (Mordekale) abandoned his client and did and did not attend the matter as required under the law. Further said Advocate did conceal some facts about the Applicants appeal and he did not informed his client about the dismissed appeal and or about his failure to file submission as ordered by the court counsel when the client himself in his nor effect decided to peruse court record".*

The applicant relied on the decision of the Court of Appeal of Tanzania in FELIX TUMBO KISIMA V TANZANIA TELECOMUNICATION CO LTD AND ANOTHER 1997 RLR 57, and prayed that the application be granted.

The respondents advocate Mr Mlango submitted that the application being time barred, the delay is also associated with the negligence of the of the applicant. He contended that the order to file written submissions was made on 12/12/2004 while the "Judgment" was delivered on 20/1/2006, some 14 months and 14 days. He submitted that the Applicants contention that his advocate did not inform the applicant of the order cannot be accepted because the applicant admits in his submissions that he did not make serious close follow up. He distinguished the facts of the case of FELIX TUMBO KISIMA from the Applicants case for grounds that the Applicant himself pleads that he did not seriously consult and make follow up with his advocate. He further submitted that Mr Mkali's practicing certificate was clean at the time when he was handling the applicants case and it was the applicants choice to be represented by Mr Mkali.

The application is in effect, two applications made in the same Chamber Summons. The first application is for extension of time in which to make the second application which is for the resoration of the dismissed appeal. The second application is therefore dependent upon the success of the application for extension of time.

In order to succeed in the first application, in terms of Section 14 (1) of the Law of Limitation Act Cap 89 RE 2002, the applicant has to show "*any reasonable or sufficient cause*" for this court to extend the period of limitation, which is sixty days, for the institution of the second

application for resoration of the appeal. In his supporting affidavit the applicant has stated in Paragraph 5 " *That after a long time passed without getting feed back from my advocate I made follow up myself in court and after perusal of the courts file..... I learned this my appeal had been dismissed*".

In his written submissions, the relevant part blames his advocate. "He stated, "*The Applicants Advocate did never inform the Applicant about this order (dismissal ) until when suo motu made his efforts to trace the court records whereas he discovered that his matter was dismissed long time ago and when the time for applying for necessary order had elapsed.....*"

The applicant did not state the date on which he learned of the dismissal order and did not append the receipt for perusal of record as he has stated in his affidavit. Be that as it may, the order scheduling the timetable for filling written submissions on the appeal was made in the presence of the applicant on 07/12/2004 and the applicant was aware that judgment would be delivered on 24/03/05, as it was part of the matters which were provided in the order made on 7/12/2004. For over one year, the applicant did not bother to make a follow up even to know if judgment was delivered on 24/03/05 as scheduled. If he had done so he would have been made aware that his advocate had not filed written submissions and the present application could have been made much earlier. I agree with the respondents advocate that the applicant was personally negligent in not making a follow up with his advocate or the

court much earlier than he did, when he was well aware that judgment would have been delivered on 24/03/05, according to the schedule of filing submissions which was made in his presence. The applicants admitted failure to make a close follow up with his advocate of his own case, is not a reasonable cause for granting an extension of time.

The question is whether any other "sufficient cause" exists for extending the time.

The applicant has not only blamed his advocate but also contended that his appeal has a chance of success, and that if the application is not granted, he will suffer irreparable loss. First, as for the blame on the advocate, it is of interest that after the advocate had failed to file the written submissions in time and as alleged by the applicant, having failed to inform the applicant of the dismissal of the appeal, the applicant still retained the same advocate for the purpose of raising a preliminary objection to the respondents counter – affidavit to this very application, and to file written submissions in support of the preliminary objection. The very advocate whom the applicant is blaming for failure to attend to the applicants case. The applicant was able to let the same advocate to raise and argue the preliminary objection but was unable to ask the advocate to swear an affidavit to explain the circumstances which led to his failure to file submissions and also to inform the applicant of the dismissal of the case. Considering that the appellants advocate did not file an affidavit to explain the reasons of the delay to file this application



and also, the reasons for failing to file written submissions within the time ordered, it is unlikely that the second application for restoration of the application can succeed.

The FELIX TUMBO KISIMA'S case cited by the applicant is clearly distinguishable on the facts from the appellant's case. In the former case the advocate misled the applicant "*That he was attending to the matter when infact he was not:*"The court found that the advocate "*was in fact telling lies to his client*". In the applicant's case there is no evidence that the advocate did anything to mislead or even inform the applicant that he was dealing with the appeal. Infact, the applicant admitted that for a longtime he did not contact his advocate at all but instead, decided to come to court to peruse the record only to discover that the appeal had long been dismissed. He did not bother to ask the advocate what happened, as the applicant said nothing about this in his affidavit. The applicant even avoided to ask his advocate to provide an affidavit to explain what happened. I am saying the applicant avoided to do so because he used the same advocate to file a notice of preliminary objection to the respondents counter affidavit and to file written arguments on it, but did not use the advocate to argue the application it self or to file an affidavit in support of it, while it is the advocate who was conversant with the facts.


I do not think that the case cited can be called into aid to help the applicant. There is no other sufficient cause to extend the time which has been demonstrated by the applicant.

In the final analysis, the application for extension of time is dismissed with costs. As the result of the first part of the application being dismissed, the application for restoration of the appeal is improperly before this court and its accordingly struck out.



J.I. Mlay  
**JUDGE**

Delivered in the absence of both parties Ramadhani Mohamed the young brother of Respondent being present, this 26<sup>th</sup> June, 2007.



J.I. Mlay  
**JUDGE**

**26/06/2007**