IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM
REVISION NUMBER 58 of 2011

(Originating from District Court of Temeke in Civil Cause Number 2 of 2006: Nzowa-RM)

GAPCO (T) LIMITED.....APPLICANT

VS

TEDVAN C. NABORA.....RESPONDENT

Last Order: 01-06-2012
Ruling: 27-07-2012

RULING

JUMA, J.

The applicant GAPOIL (T) LIMITED and respondent TEDVAN NABORA were the defendant and the plaintiff, respectively, in the District Court of Temeke Civil Cause No. 2 of 2006. In that civil cause, the learned trial Magistrate allowed the respondent to prove his case *ex parte*. On 24th March 2010 upon such *ex parte* proof, the trial court granted the respondent his prayers directing the applicant GAPOIL (T) Ltd to pay the respondent a sum of TZS

46,200,000/= and another TZS 50,000,000/= as general damages for malicious prosecution.

Nineteen (19) months later on 31st October, 2011 the applicant commenced this application by Chamber Summons to seek four substantive prayers:- (i) leave to file an application for revision out of time; (ii) stay of execution pending the determination of the revision; (iii) revise and set aside the *ex parte* decision of the trial district court; and (iv) costs. In moving this court, the applicant employed:

i) Section 14 (1) of the **Law of Limitation Act, Cap. 89**;

ii) Sections 95, 79 (1) (2);

iii) Order XXI Rule 24 (1);

iv) Order XXXIX Rule 5 of the **Civil Procedure Code, Cap. 33** and,

v) Section 31 of the **Magistrates Courts Act, Cap. 11**.

Respondent has opposed this application, by filing his Counter Affidavit on 16th February 2012 together with a Notice of Preliminary Objection contending that the

application for extension of time is improperly before this court because it was filed under wrong provision of law. The objection also contended that the affidavit made in support of the application is incurably defective for lack of attestation. I overruled the two points of objection on 1st June 2012 and directed the parties to submit their positions on prayers under this main application.

Before considering the written submissions filed by Henry Sato Massaba, Advocate (for the applicant) and Issa Maige (for the respondent), it is important to point out that the applicant has in one application prayed for three substantive prayers. These are prayer for leave to file an application for revision out of time; prayer for a stay of execution pending the determination of the revision and prayer for revision and setting aside of the *ex parte* decision of the trial district court.

In my opinion, combination of several prayers in one application is not bad in law as long as appropriate provisions of law are cited to sustain each substantive prayer. But in this application before me, the applicant must

first obtain an order of extension before his other prayers (of stay of execution pending the determination of the revision and prayer for revision and setting aside of the *ex parte* decision of the trial district court) can be heard. For purposes of application before me, if there are no sufficient grounds for granting an extension of time to the applicant then this Court shall not go on to consider the applicant's two other remaining substantive prayers.

Having stated my opinion that this present application before must first get an extension of time, it is important now to determine this first hurdle on whether from its supporting affidavit and submissions, the applicant has advanced sufficient reasons to explain the nineteen-month delay that prevented the applicant from lodging his revision proceedings within the prescribed time.

Mr. Henry Sato Massaba the learned Advocate representing the applicant does not dispute that according to paragraph 21 of the First Schedule to the **Law of Limitation Act, Cap. 89 R.E. 2002**, an application for revision is supposed to be instituted within 60 days of 24th

March 2010 when the trial court delivered its *ex parte* decision. The applicant's first reason explaining the delay is contained in paragraph 5 of the supporting affidavit. According to this paragraph, when the Civil Cause No. 2 of 2006 came up for hearing at the Temeke District Court on 27th August, 2009 Mr. Mlelwa who was conducting that civil cause had earlier on 31st July 2009 resigned without handing over files to his colleagues. Paragraphs six and seven of the affidavit provide additional explanation contending that on 27th August, 2009 only the respondent was in attendance at the District Court of Temeke. The district court ordered the respondent to notify the applicant about the hearing date, but the respondent did not comply with this order. Instead, on the date set for hearing, respondent prayed and was allowed to proceed *ex parte*.

Mr. Issa Maige the learned Advocate filed the replying submissions on behalf the respondent. Mr. Maige submitted that the applicant did not bring concrete evidence to prove that Advocate Mlelwa had indeed resigned thereby occasioning the delay. Mr. Maige further submitted that the

applicant did not attach to the supporting affidavit a copy of the letter from Advocate Mlelwa to prove his resignation. The learned Advocate believes that the alleged resignation of an Advocate who was handling the case can only be relevant for purposes of setting aside of an *ex parte* judgment but cannot explain the delay for purposes of extension of time. With regard to the allegation that respondent did not inform the applicant the date of the hearing, Mr. Maige submitted that the applicant has not accounted for astonishingly long delay between the day when the *ex parte* judgment was delivered and the date when the applicant filed this chamber summons application.

From the submissions of the two learned Counsel on leave to file an application for revision out of time, the outstanding issue calling for my determination with is whether (i) the resignation of an Advocate who was handling the Civil Cause No. 2 of 2006 at Temeke District Court; and (ii)-the failure of the respondent to notify the applicant that hearing date has been set down for hearing, - constitute sufficient grounds to explain delay to file revision

proceedings within the 60 days that are prescribed by paragraph 21 of the First Schedule to the **Law of Limitation Act**.

This Court has in more than an occasion restated the law to the effect that the power to extend time under section 14 (1) of the **Law of Limitation Act, 1971** is a matter of judicial discretion depending on the special facts of each particular case or application. In the exercise of my discretion I will be guided by the need to do justice to both the applicant and respondent. I do not with due respect agree with the suggestion by the applicant in its rejoinder submissions suggesting that the key principle for granting extension of time is reasonableness. The principle guiding courts is whether the applicant company has manifested sufficient reasons to explain what prevented it from lodging its application within the prescribed time. Court of Appeal in the case of **Aluminum Africa Ltd vs. Adil Abdallah Dhiyebi (Civil Appeal No.6 of 1990 (CA)** has stated that it is the duty of an applicant seeking extension of time to account for every day of delay.

Applying the foregoing principles to this application, the applicant company has not accounted for every day of delay, from 24th March 2010 to 31st October 2011 when the applicant woke up to file this Chamber Summons application. In my opinion, neither the resignation of Advocate Mlelwa on 31st July 2009 nor the failure of the respondent to inform the applicant of the hearing date, can excuse the applicant from accounting for each day of delay running from 24th March 2010 when the district court delivered its *ex parte* judgment right up to the 31st October 2011, when the applicant filed this application. I do not think the applicant company can shift to the respondent its duty to diligently follow-up on the Civil Cause number 2 of 2006 it had filed at the District Court of Temeke. The Court of Appeal in the case of **Maneno Mengi Ltd. and 3 Others Vs. Farida Saidi Nyamachumbe and Another [2004] TLR 391** which originating from Zanzibar, stated that when there is a clear case of negligence of advocate, the party cannot be allowed to suffer, but at the same time, a negligent litigant cannot be permitted to put blame upon the advocate.

The reasons which the applicant has averred in the supporting affidavit and submitted upon are not sufficient and are at best perfunctory to the point of lack of seriousness on the part of the applicant to prosecute its civil cause at the district Court.

For the foregoing reasons, the applicant has clearly failed to advance sufficient reasons to account for the nineteen-month delay to file application for revision. This Court cannot as a result exercise its judicial discretion to order an extension of time. In conclusion, it will serve no utility to address the two remaining prayers in the chamber application. The application is as a result dismissed with costs.

DATED at DAR ES SALAAM this 27th day of July, 2012

I.H. Juma
JUDGE