

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM
Miscellaneous Civil Application No 122 of 2010

ARNOLD MBUYA.....APPLICANT

VS

EQBAL EBRAHIM.....RESPONDENT

Ruling

Date of last Order: 31-10-2012

Date of Ruling: 18-12-2012

JUMA, J.:

According to the file records, this is for the second time, the applicant Arnold Mbuya is coming to this court to seek yet another opportunity of appealing against the Judgment of the District Court of Kinondoni in Civil Case No. 164 of 2000. That decision of the District Court was delivered on 17th February 2003. For the first time, Mr. Mbuya came to this court on 1st September 2010, when he filed a chamber summons application to seek an extension of time to enable him to file his appeal to this Court out of the prescribed time. He brought that application under section 43-(2) of the **Magistrates Courts Act**

and section 14-(1) of the **Law of Limitation Act, Cap. 89**. The law requires an applicant seeking an extension of time to appear and prosecute his application. Mr. Mbuya did not appear to be heard on his first application. For want of prosecution, this court had no alternative other than to dismiss that application on 22nd February, 2011.

Mr. Mbuya was not deterred by the dismissal of his first application. He came back to this same court on 20th January 2012 with his present application under Order IX, rule 9 (1), sections 68 (e), 95 of the **Civil Procedure Code, Cap. 33**, and section 14 (1) of the **Law of Limitation Act, Cap. 89**. Mr. Mbuya has two distinct prayers. First, he is seeking an extension of time within which to apply for an Order to set aside the 22nd February 2011 dismissal of his first application. In case he gets the extension, Mr. Mbuya would like this court to set aside the dismissal of his first application.

This application is supported by an affidavit of Arnold Mbuya. Respondent Egbal Ebrahim opposed this application through a counter affidavit and a Notice of Preliminary Objection. To expedite the hearing of the application Mr.

Kinguji, the learned Advocate who appeared on behalf of the respondent, withdrew the notice of objection.

Before determining the veracity of the application, it is important to look at the background facts which brought the parties before this court. Mr. Mbuya was a defendant at the District Court of Kinondoni in Civil Case Number 164 of 2000 which Mr. Eqbal Ebrahim (the respondent herein) had filed. The Judgment of the District Court was delivered on 17th February 2003 by Kalombola-PRM. In that judgment, Mr. Ebrahim was not only declared as the lawful owner of disputed plot number 2004 at Block H Mbezi Medium Density, but Mr. Mbuya was permanently restrained from trespassing onto that plot.

Hearing of the two prayers in the present application proceeded by way of written submissions. I shall first deal with the first prayer seeking the extension of time. I shall be guided by the question whether from the affidavits and supporting submissions, the applicant has disclosed reasonable or sufficient cause for me to exercise my judicial discretion to extend the period of limitation. Item 4 of Part III of the 1st Schedule to the **Law of Limitation Act, Cap. 89** has prescribed limitation period of thirty days (30 days) for an order under the **Civil**

Procedure Code or the **Magistrates' Courts Act**, to set aside a dismissal of a suit. The law governing the exercise of judicial discretion on extension of time requires Mr. Mbuya to account for the delay between 22nd March 2011 when the thirty days limitation period to set aside the dismissal order of 22nd February 2011 expired, to 20th January 2012 when he finally filed this Chamber application to seek an extension of time in order to set aside the dismissal order.

In his supporting affidavit, the applicant has attributed his delay to lack of notice about the dismissal of his original application and that had he received that notice he would have filed his application to set it aside within prescribed period. According to the applicant, he only came to learn about the dismissal on 10th January 2012 when he received an eviction notice. The applicant further directs his blame to his Advocate Mr. S.K. Madulu, who he had instructed on 1st September, 2010. The applicant claims that his learned Advocate later became uncooperative.

In the counter affidavit he affirmed to oppose the application, the respondent Eqbal Ebrahim has replied that Mr. Mbuya has not assigned sufficient reasons to justify an

extension of time. Mr. Ebrahim, through Kinguji & Co. Advocates, submitted that the applicant was negligent for not only failing to follow-up on his earlier application, but to also lose touch with Mr. Madulu, his Advocate.


From submissions of the parties, there are certain facts which are worth highlighting. Almost ten months separate 22nd March 2011 when the thirty days limitation period to set aside the dismissal order expired, and 20th January 2012 when the applicant filed this second application to set aside the dismissal order. Lack of notice and uncooperative services of an Advocate are not sufficient reasons to explain the ten months delay. The applicant has not in his affidavit made a convincing account what prevented him during all these ten months, from following up on his application personally or linking up with his Advocate or engaging another Advocate to make follow-ups on his behalf.

I am surprised at the audacity of the applicant who after filing his application on 1st September 2010 and instead of actively prosecuting his application to be allowed to appeal against the decision of a subordinate court out of time, he decided to sit back and wait for notice of dismissal to follow

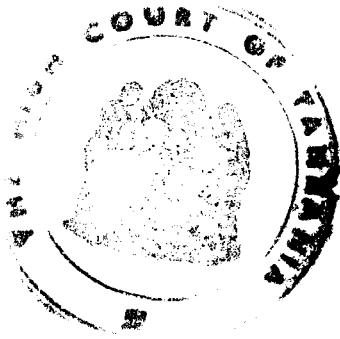
him wherever he was. It is the applicant who, being aggrieved by the decision of the District Court of Kinondoni (Civil Case No. 164 of 2000) wanted to appeal out of time hence his first application which he should have actively prosecuted. Having moved this court as he did on 1st September 2010, the duty was on the applicant follow up on his application instead of waiting for the court to send him a notice dismissing his application for want of prosecution.

Further, it is important to point out that courts are not privy to the substance of instructions parties give to their Advocates. Rather, it is the parties who should ensure that the Advocates they engage; dutifully follow up on their assigned cases and applications in court.

Finally, I do not find any reasonable or sufficient cause to justify an extension of the period of limitation which the applicant has asked in his Chamber Summons Application which he filed on 20th January 2012. There is similarly no need for me to consider his remaining prayers. Otherwise this application is hereby dismissed with the costs. It is ordered accordingly.

 J.H. Juma
JUDGE
18-12-2012

Ruling is delivered in the presence of Mr. Kinguji, Advocate
and in the absence of the Applicant.




V.H. Juma
JUDGE
18-12-2012