IN THE HIGH COURT OF TANZANIA

AT IRINGA

(DC) CIVIL APPEAL NO. 5 OF 2008

(Originating from Civil Case No. 22 of 2008
of the District Court of Iringa District
at Iringa)

HAWA MASHAKA (as an administratrix of the Estate of the late Zuberi M. Maftah) ..... APPELLANT

VERSUS

1. MTAMI MAFTAH
2. MODESTUS MFILINGE ..... RESPONDENTS

19/8/2014 & 10/10/2014

RULING

MADAM SHANGALI, J.

(DC) Civil Appeal No. 8 of 2001 Zuberi Mashaka Maftah Vs. Mtami Mashaka Maftah and Modestus Mfilinge (*Originating from Iringa Civil Case No. 22 of 1998*) was dismissed by this court (*Hon. Lukelewa, J.*) for want of

prosecution back on 18/07/2006. Later, on 18/07/2007 the present applicant Hawa Mashaka who was appointed administratrix of the estate of the late Zuberi Mashaka Maftah filed this application seeking for leave of the court to file an application for the re-admission of the appeal out of time.

The application has been filed under the provisions of Section 93 and 95; and Order XXXIX Rule 19 of the Civil Procedure Code, Cap. 33. The same is duly supported by the affidavit deponed by the applicant in person.

In this application the applicant was represented by Mr. Mwamgiga, learned counsel while the respondent was represented by Mr. Zuberi Ngoda, learned counsel. On the request of the counsel the application was argued by way of written submission.

This matter has a chequered history. There is no dispute that having lost the Civil Case No. 22 of 1998 before Iringa District Court, the late Zuberi Mashaka Maftah (*hereafter called "the deceased"*) filed Civil Appeal no. 8 of 2001. At that time the deceased was being represented by Mr. Mushokorwa, learned counsel. According to the record of proceedings of that appeal on 5/08/2004 Mr. Mushokorwa reported before the court that his client Zuberi Mashaka Maftah had passed away and consequently he prayed for a long adjournment to

enable the deceased's relatives to appoint the administrator. The record also reveal that on 18/07/2006 Mr. Mushokorwa decided to withdraw from the case for lack of instruction and failure of the deceased relatives to appoint the administrator. Following the withdrawal of Mr. Mushokorwa, the counsel for the respondent, Mr. Mbise prayed for the dismissal of the appeal for want of prosecution. That application was granted.

Later, on 16/7/2007 the applicant was appointed administratrix of the estate of the deceased and promptly engaged Mr. Mwamgiga to revive the dismissed appeal. This is the very application.

Both counsel have filed lengthy submissions but the crucial issue in this application is whether the applicant has advanced or proved any sufficient cause for the re-admission of the dismissed appeal. Order XXXIX Rule 19 of the Civil Procedure Code, Cap. 33 provide that where an appeal is dismissed the appellant may apply to the court for the re-admission of the appeal and where it is proved that the appellant was prevented by any sufficient cause from appearing when the appeal was called on for hearing, the court shall re-admit the appeal on such terms as to costs or as it thinks fit.

In her affidavit in support of the application the

applicant/appellant has stated that the late Zuberi M. Maftah died on 30/12/2002 and she was appointed to be an administratrix on 16/7/2007. That all along before his death, the deceased was conducting the Civil Case No. 22 of 1998 and it's appeal in the assistance of Mr. Mushokorwa, advocate. That upon her appointment as an administratrix and when she was administering the estate of the deceased it was when she discovered the existence of (DC) Civil Appeal No. 8 of 2001 which was dismissed on 17/08/2006 for want of prosecution. She avers that the subject matter in that appeal is still in dispute and the default to appear before the court was beyond her control because she was not aware of the existence of appeal.

In support of that deposition of the applicant Mr. Mwamgiga submitted to the effect of attempting to shift the blame for the dismissal of the appeal on his learned friend, Mr. Mushokorwa for his failure to exercise minimum degree of diligence to communicate with his client from 2001 when he lodged the appeal up to 2006 when he wrote a letter to the family of the deceased informing them about the dismissal of the appeal. Mr. Mwamgiga argued that if Mr. Mushokorwa had exercised a minimum degree of diligence to look for his client he would have discovered earlier the death of his client and probably prayed for the court to adjourn the appeal sine die pending the appointment of the administrator.

The learned counsel contended that it is a settled principle of law that where the counsel fails to exercise the minimum decree of diligence to act on a certain matter, the counsel can only have himself to blame for ill consequences following from such failure. In support of that he cited the cases of **Umoja Garage Vs. National Bank of Commerce (1997) TLR 109** and **Isabela John Vs. Silvester Magembe Cheyo & others, Commercial Case No. 49 of 2003** (*unreported*).

Mr. Mwamgiga prayed for the application to be granted on ground that the objective of the courts is to decide the rights of the parties and not to punish them for the mistaken they make in the conduct of their cases.

In response Mr. Ngoda vehemently resisted the application on three grounds:-

One, that the counsel for the applicant has totally failed to advance sufficient cause or reasons to warrant the re-admission of the appeal;

Two, that the applicant's counsel has failed to adduce sufficient reasons for delay to warrant extension of time for re-admission of the appeal; and

Three, that the application for extension of time was filed under wrong provisions of the law because Section 93 and 95 of the Civil Procedure Code, Cap. 33 are not applicable.

On the first ground Mr. Ngoda submitted to the effect that there is no point of blaming Mr. Mushokorwa at this stage because the proper avenue on matters of professional negligence claims are known. However, he conceded to the decisions in the cited cases of **Umoja Garage** (*supra*) and **Isabela John** (*supra*) but submitted that the authorities are distinguishable and not applicable in this application because they do not discuss the sufficient course to be considered in the determination of this application. Mr. Ngoda submitted to the effect that the negligence or lack of diligence or incompetence of the advocate is not a sufficient reason for the grant of the application to re-admit the appeal. He prayed the court to see whether the application is real meritorious or a mere abuse of the judicial process and unnecessary delays intended to prolong a hopelessly time barred application so that the applicant can proceed to occupy the suit premises.

Mr. Ngoda complained that for a period of 17 years now, the case has been dragging in court and inspite the fact that the applicant employed the services of senior counsel, they had no interest to prosecute the appeal to such an extent that

counsel had no proper instruction and had to withdraw and the appeal was dismissed for want of prosecution. He contended that it is the principle of law that litigation should come to an end at sometime and since this application is hopeless out of time, to entertain it is to prolong an unnecessary litigation which amounts to do injustice to the other party. He insisted that under Order XXXIX rule 19 of the Civil Procedure Code the applicant is obliged to adduce sufficient reasons which would warrant the re-admission of the appeal. He contended that the applicant has failed to show sufficient cause for the re-admission or restoration of the appeal. He cited the case of **The Commissioner of Transport Vs. The Attorney General of Uganda (1959) E.A. 329.**

On the second ground, Mr. Ngoda submitted that it is trite law that where there is an application to extend time for a judicial act, sufficient reasons for the delay must be given. Mr. Ngoda contended that going by the affidavit of the applicant it is clear that Zuberi M. Maftah died on 30/12/2002 and that the five whole years elapsed between that date until 3/03/2007 when the family had a meeting to propose the administrator of the estate. Mr. Ngoda argued that the deceased handled the appeal between 8/02/2001 when the appeal was filed to the date of his death 30/12/2002. Meaning that the appeal was lying in court since 30/12/2002 without any action from the applicant and

the deceased family until when the advocate decided to withdraw for lack of instructions. Mr. Ngoda contended that, the applicant and other beneficiaries failed to act diligently and follow-up and prosecute the appeal because to them the appeal was a gimmick of delaying execution of the decree of the trial court. He argued that the dismissed appeal and the unending applications for stay of execution are mere delays and tactics of the applicant to abuse the judicial process and delay the execution of the decree eternally. He cited the case of **Alhaji Abdalla Talib Vs. Eshakwe Ndotokiweni Mushi (1990) TLR 108** where it was held that in such applications sufficient reasons for delay must be given.

On the third ground, Mr. Ngoda submitted that it was a misdirection on the part of the counsel for the applicant to rely on Section 93 and 95 of the Civil Procedure Code which are not applicable. He argued that it is now settled principle of law that where there is a specific provision of the law catering for a particular situation, Section 93 and 95 of the Civil Procedure Code are not applicable. He contended that such sections comes into play where there is no specific provision of the law catering for a particular situation. In support of his proposition he cited the cases of **Jooma and Joffer Vs. Bhamba (1967) EA 326 and Alnoor Shariff Jamal Vs. Bahadur Ebrahim Shamji, Civil Appeal No. 25 of 2006** (*unreported*) where the application of Section 95 of the Civil

Procedure Code was discussed.

Mr. Ngoda went further and submitted that it is settled principle that the Law of Limitation Act 1971, Cap. 89 prescribes the periods of limitation, set out maximum period within which those intending to sue or file their claims in court should observe. He stated that in this application the appeal was dismissed on 18/07/2006 and this application was filed on 18/07/2007, exactly after one year of dismissal. That, Section 5 of the law of Limitation Act provides for the accrual of right of action in certain cases and in the case of an appeal the right of action is deemed to have accrued on the date on which the judgement or decision or order appealed against was delivered or made.

The counsel for the respondent also submitted that it is a principle of law that where the applicant applies for extension of time where the time has expired or there is an inaction or delay on the part of the applicant/appellant, such applicant must give sufficient reasons to enable the court to exercise its discretion. He cited the case of **Kalunga and Company Advocates Vs. N.B.C. Ltd. (2006) TLR 235** where it was emphasized that the courts discretion, however wide it may be, must be exercised judiciously having regard to the particular circumstances of each case. The learned counsel prayed for the court to dismiss the application with costs.

Having carefully scanned and scrutinized the entire record of proceedings of this matter and having carefully gone through the submission from both counsel I am certain that the duty of this court at this juncture is to determine on two limbs of the application. The first limb is the application for re-admission or restoration of appeal and the second limb is the application for the re-admission of the appeal out of time.

Order XXXIX rule 19 of the Civil Procedure Code provides for the re-admission of the appeal dismissed for default. It states;

> *"19. Where an appeal is dismissed under sub-rule (2) of rule 11 or rule 17 or rule 18, the appellant may apply to the court for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the court shall re-admit the appeal on such terms as to costs or otherwise or it thinks fit".*

The question is whether the applicant who is wearing the shoes of the appellant as an administratrix has adduced sufficient cause for the re-admission of the dismissed appeal. The appeal was dismissed for want of prosecution following the withdrawal of Mr. Mushokorwa who was representing the

deceased/appellant. According to the record of the proceedings of the (DC) Civil Appeal No. 8 of 2001, on 5/8/2004, Mr. Mushokorwa had informed the court about the demise of his client. On that date, Mr. Mushokorwa dutifully requested for a long adjournment in order to give the deceased's family (*i.e. including applicant*) a chance to appoint an administrator. The request was granted and appeal was adjourned to 15/12/2004. Come 15/12/2004, nothing was done and another request was made on the same reasons and appeal was adjourned to 30/03/2005. After that several adjournments followed and eventually on 15/5/2006 the appeal was fixed for hearing on 18/7/2006. On 18/7/2006 Mr. Mushokorwa applied for withdrawal from the conduct of appeal for lack of communication and instruction from the deceased relatives. For avoidance of doubt let me re-produce verbatim what transpired in court on the material date.

"*Mr. Mushokorwa for the appellant;*

The appellant died in 2004 and I informed this court on 5//8/2004 accordingly. I expected the relatives of the appellant to seek letters of administration of the estate of the deceased. I have made every effort but no relative of the appellant has ever come before me.

Under the above circumstances, it appears that

they have no interest with the case. I pray for leave to withdraw.

(Sgd.)

S.B. Lukelelwa, J.

Court:- Prayer to withdraw from the conduct of the appeal by Mr. Mushokorwa advocate is hereby granted.

(Sgd.)

S.B. Lukelelwa, J.

Mr. Mbise Advocate:-

My Lord, as said by Mr. Mushokorwa learned advocate, in addition that he has no proper instructions from the late Maftaha, the case has taken over four years and we are not sure who will foot our costs. I pray the appeal be dismissed for want of prosecution.

(Sgd.)

S.B. Lukelelwa, J.

Order:- Having considered the submissions made by Mr. Mushokorwa learned advocate of the appellant whom, I had allowed to withdraw from the conduct of the appeal, and having

considered the submissions of Mr. Mbise learned advocate, holding brief for the second respondent, I am satisfied that neither the deceased nor the deceased relatives have interest in the conduct of the appeal. I hereby grant the prayer by Mr. Mbise, advocate, and order that this appeal is dismissed with costs for want of prosecution.

Order accordingly.

(Sgd.)

S.B. Lukelelwa, J.

That was exactly what transpired in court. The question is whether in such circumstances one can seriously stand and blame Mr. Mushokorwa for mishandling the appeal. Mr. Mushokorwa played his role as an advocate to advice the deceased family (*including the applicant*) to appoint an administrator since 2004 although the deceased died in 2002. However, when his advice met deaf ears and his efforts ended in vain he found himself representing a case without instruction and dutifully notified the court. The attacks marshaled against Mr. Mushokorwa by Mr. Mwamgiga have no leg to support unless Mr. Mwamgiga is intending to suggest that Mr. Mushokorwa was misleading the court.

Therefore I agree with Mr. Ngoda that what Mr. Mwamgiga was supposed to do is to adduce sufficient cause or reasons to justify re-admission instead of attacking his learned friend for indiligence or inaction or professional negligence. After all negligence or lack of diligence on the part of an advocate is not a sufficient reason for the grant of application to re-admit the appeal or to enlarge time.

In my considered opinion the applicant's counsel is required to tell this court as to why the family of the deceased stayed put for more than five years without appointing the administrator of the estate of the decease. The question is whether the court should condone to such laxness, inaction and indiligence on the part of the deceased family and keep on dragging the case in court indefinitely. The allegation in the applicant's affidavit that she became aware of the case in 2007 when she was appointed an administratrix appears to be attractive but it is not a good reason to readmit a hopelessly time barred application. After all, as pointed out above, Mr. Mushokorwa informed the court how he advised the deceased family to appoint an administrator since 2004 but the family members ignored him.

The circumstances of this case indicate clearly that both applicant and other beneficiaries or family members of the deceased were not diligent in making a follow-up and

prosecuting the appeal. They remained silent, shrouded in negligence and slumbered on their rights for five solid years. To say the truth they had no interest in the appeal.

In my considered opinion the dismissal of (DC) Civil Appeal No. 8 of 2001 was justifiable and the applicant has failed to show reasonable cause for restoration or re-admission of the appeal.

Having concluded so, the second limb of the application is also bound to fail. I agree with Mr. Ngoda that where the applicant applies for extension of time where the time has expired such applicant has to give sufficient reasons to enable the court to exercise it's discretion. The court has discretion to extend time but such discretion can only be exercised where sufficient reasons has been revealed. As I have pointed out above the applicant and other beneficiaries were not diligent in following-up the matter after the death of the deceased. The appeal was dismissed on 18/7/2006 and the application for re-admission and extension of time was filed on 18/07/2007 after a period of one year.

To crown it all, and as submitted by Mr. Ngoda the application for extension of time was filed under wrong provisions of the law. Where there is specific provision of the law catering for a particular situation Section 93 and 95 of the

Civil Procedure Code, Cap. 33 are not applicable. It must be noted that the essence of Sections 95 is that whenever it is necessary for the ends of justice or to prevent abuse of court process, the powers of the court are not barred and if there is a lacuna in the statute the court can exercise its inherent powers to do justice to the parties. The law applicable in this application is the law of Limitation Act, Cap. 89 which prescribes the periods of limitation and set out maximum period within which those intending to sue, file claims or applications should observe.

In conclusion, this application is devoid of merit. To say the least the application is bad in law, vexatious, frivolous and an abuse of the judicial process intended to resurface matters which has already been adjudicated upon and forgotten. It is a mere effort to frustrate the execution of the decree of the court in Civil Case number 22 of 1998 which was decided in favour of the respondent fourteen years ago.

The application is hereby dismissed with costs.

M. S. SHANGALI

JUDGE

10/10/2014

Ruling delivered in the presence of Mr. Mwamgiga, learned advocate for the applicant and Mr. Kenyuko Edward learned advocate for the respondents.

M. S. SHANGALI

JUDGE

10/10/2014