

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO 5 OF 2017

**(Original Misc. Civil Application N0 168 of 2016 at the RM's Court of
Dar es Salaam Region at Kisutu)**

LUSAJO WATSON MWAKASEGE.....APPELLANT

VERSUS

NIKO INSURANCE (T) LTD.....RESPONDENT

JUDGMENT

Date of last Order: 24/4/2018

Date of Judgment: 3/5/2018

Munisi,J

The appellant, Lusajo Watson Mwakasege filed a suit against the respondent before the Kinondoni District Court which was on 10/3/2016 dismissed for want of prosecution. Following the dismissal, he filed an application for extension of time to file an application to set aside the dismissal order which was denied. He has thus filed the present appeal to challenge the order by the learned magistrate on the following grounds:

1. That the trial magistrate erred in fact by failing to evaluate the heavy sufficient reasons which had been adduced by the appellant (applicant by then) and given a ruling against him.
2. That, the decision reached was against the evidence adduced by the appellant before the learned magistrate.

On the 24/4/2018, when the appeal was called on for hearing, the appellant appeared in person unrepresented while the respondent was being advocated by Mr. Mudhihir Magee, learned counsel.

Submitting in support of his appeal, appellant faulted the magistrate for condemning him due to the negligence of his advocate. He contended that the settled principle through case law is that a party should not be punished on the basis of his advocate's negligence. To support his proposition, he cited the cases of **CRDB Bank Ltd V NBC Holding Cooperation (2002) TLR 429**, **Felix Tumbo Kisima V TTCL & Another (1997) TLR 57** and **South India Cooperation (T) Ltd (1968) HCD 336**. He argued that the three decisions propound the principle that mistakes of a counsel constitute sufficient reasons in an application for extension of time.. With regard to the 2nd ground he argued that the magistrate failed to consider the other grounds that he raised in his affidavit. He thus prayed for the appeal to be allowed.

On his part, Mr. Magee, learned counsel countered that the appeal was devoid of any merit. He contended that the trial magistrate was right in that the reasons given by the appellant for the delay were not sufficient. He argued that since the appellant admitted that his advocate failed to appear in court the day the case was dismissed; it could be imputed that he was negligent. He cited the cases of **Tanzania Revenue Authority V David Maeda, HC Labour Division Case No. 97 of 2009 (unreported)** and **William Shija V Fortunatus Masha (1997) TLR 213** which he argued restated the principle that the negligence of an advocate cannot constitute good cause. He thus insisted that since no good cause was demonstrated by the appellant, the trial court was justified to hold the way it did hence the appeal had no merit. He thus urged the court to dismiss the appeal with costs.

I have given due consideration to the counsel respective submission. It is apparent that appellant is challenging the discretionary order issued by the learned Principal Resident Magistrate. It is trite law in applications of this nature that the

applicant must demonstrate sufficient cause. In the case of **Shanti V Hindocha (1973) EA 207**, the eastern African Court of Appeal restated its principle set in the case of **Bhati V Tejwani (1962) EA 497** that; *the most persuasive reason is that the delay has not been caused or contributed to by dilatory conduct on his part*. This being a first appeal, I can step into the shoes of the trial court to reassess whether the reasons advanced by the appellant there which the trial court found insufficient were indeed sufficient. The reasons put forward by the appellant in his affidavit included:

3. That, the applicant engaged one GEORGE MWAKYEMBE advocate of P.O. Box 20797 Dar es Salaam to appear in this court and prosecute the case on behalf of the applicant who is not staying in Dar es Salaam.
4. That, the applicant is a government employee, employed as a legal officer at Maswa District Council in Simiyu Region.
5. That, on 10th March, 2016 the court proceeded to dismiss the suit for want of prosecution due to nonattendance in court by the applicant and his advocate the above said GEORGE MWAKYEMBE.
6. That, the applicant failed to appear in court on 10th March 2016 because he was engaged at his working station with the duty of verification of the government employees which was conducted countrywide.
7. That, since 10th March, 2016 the date when the suit was dismissed up to date the applicant have been trying to reach his above said advocate over the phone calls and text messages in order to get the status of the case in vain as he was not responding to either a phone call or answering to text messages.

It is clear that the appellant pleaded negligence of his advocate as the main reason for the nonappearance. The trial magistrate relying on the case of **Elias Msonde V Republic, Crim. Appeal No 93 of 2005** (unreported)), rejected the reasons given on the ground that no diligence was demonstrated by the appellant.

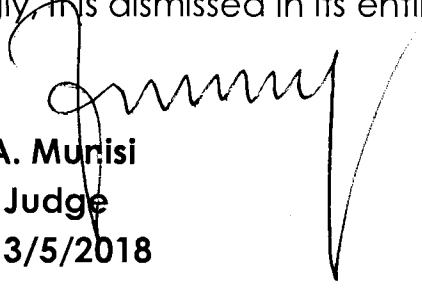
It is apparent from the pleaded facts that the main ground relied upon by the appellant was the failure by his advocate to enter appearance on the date the suit was dismissed. During the hearing of the appeal he insisted that such failure constituted good cause as it was occasioned by the advocate and not himself. With respect I reject such proposition because, the advocate was his agent hence he cannot dissociate himself from his acts. If the advocate was negligent then such negligence binds the appellant. I have gone through the cases **CRDB Bank Ltd** and **Felix Tumbo Kisima** cited by the appellant as supporting his proposition that negligence of an advocate will constitute good cause, with respect, I do not buy such general proposition. In the case of **Kighoma Ally Malima V Abas Yusuf Mwingamo, Civil Application No 5 of 1987** (unreported), the Court of Appeal observed thus;

"Sufficient reasons has been considered in a number of cases. Sometimes a slight lapse by an advocate might be overlooked, but fundamental nature like the non-supply of any supporting evidence for an application for enlargement of time."

From the above authoritative decision by the Court of Appeal, the omission that could be overlooked must be slight not grave ones such as failure to enter appearance as per the case at hand. Appellant has also pleaded in paragraph 6 that he failed to enter appearance because he was away in Simiyu conducting the government verification exercise. I have perused the application documents that he presented before the RM's Court, there is no single document to support the alleged participation or even that he was in Simiyu, save for a bus ticket which says nothing. The Principal Resident magistrate was thus right to hold that no good and sufficient cause had been exhibited by the appellant. The Case of **Kighoma Malima** held such conduct by an advocate not to constitute good cause. I am thus inclined to Mr. Magee's view that the reasons advanced by the appellant did not constitute good causes hence the magistrate was right in his decision.

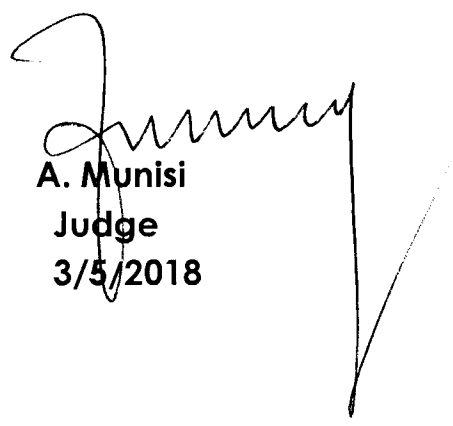
In the event, both grounds of appeal fail and I find the appeal devoid of any merit. Accordingly, it is dismissed in its entirety.

I make no order as to costs.



A. Munisi
Judge
3/5/2018

Judgment delivered in Chambers in the presence of Mr. Barnabas Luguwa, learned counsel holding brief for Mr. Mudhihir Magee, learned counsel for the respondent and in the absence of the appellant, this, 3/5/2018.



A. Munisi
Judge
3/5/2018