IN THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 297 OF 2017

(Arising from the Judgement of the High Court of Tanzania at Dar es Salaam in respect of Civil Appeal No. 36 of 2010 before Hon. Juma. J dated 31st August 2010)

ISAYA SWAI.....APPLICANT

VERSUS

GREVEN NGUMUO.....RESPONDENT

Date of last Order, 15th May 2018
Date of Ruling, 25th May, 2018

RULING

KEREFU SAMEJI, J.

The applicant herein being dissatisfied with the Judgement and Decree of the High Court of Tanzania at Dar es Salaam issued by Hon. Juma, J, (as he then was), on 31st August 2010 in respect of *Civil Appeal No. 36 of 2010* has lodged this Application seeking for orders of this Court on the extension of time to allow him to lodge the Notice of Intention to Appeal to the Court of Appeal out of time. The Application is bought under section 11(1) of the Appellate Jurisdiction Act, Cap 141 [R.E.2002]. The Application is also supported by an Affidavit deponed by the applicant himself. The

respondent on the other side has filed a Counter Affidavit challenging the said Application.

At the hearing of the Application the applicant enjoyed services of Mr. Amin Mshana the learned Counsel, while the respondent was represented by Ms. Glory Venance, the learned Counsel.

In his submission in support of the Application Mr. Mshana stated that, after the first Notice of Intention to Appeal was struck out by the Court of Appeal on the failure by the applicant to take necessary steps, the applicant decided to lodge this Application. Mr. Mshana informed the Court that the reasons for the delay are indicated under paragraphs 4, 5, 6, 7, 8, 9, 10 and 11 of the Affidavit in support of the Application. He thus prayed the Court to adopt the said Affidavit as part of his submission. He said, the applicant filed the Notice of Intention to Appeal after he was aggrieved by the Judgement of the High Court and he as well applied for the leave to appeal. Mr. Mshana explained further that, prior to the grant of the leave to appeal to the Court of Appeal, parties through the assistance of Mr. Kariwa, who was the good friend and neighbor of the parties, engaged in consultations with a view to get an amicable settlement of the matter out

of the Court. He said, the applicant believed that, the said negotiations and settlement were made in good faith, which finally was concluded with an agreement that, the house should be for the children. Mr. Mshana stated further that, upon that belief, even after the grant of leave to appeal to the Court of Appeal, the applicant did not bother to collect and process the same, as he was satisfied that, the matter was amicably settled and it has come to an end. He submitted further that, six (6) months after filing of the Notice of Intention to Appeal before the Court of Appeal, the respondent herein applied to the Court of Appeal to have the said Notice be struck out. He said, at the hearing of the said Application the applicant became sick and could not attend. Mr. Mshana contended that, due to the failure of the applicant to appear and explain the reasons for non action, the Notice of Intention to Appeal was struck out. (He referred to page 6 of the Court of Appeal's Ruling dated 8th May 2017). Mr. Mshana argued further that, since the applicant is now out of time, he has decided to file this Application for extension of time within two weeks after being issued with the Court of Appeal's Ruling.

Mr. Mshana stated that, the main reason for the delay is the fact that the applicant was mislead by Mr. Kariwa, the person he trusted. He said the applicant being a layperson, could not know the appeal processes at the Court of Appeal. Mr. Mshana argued that, the principle that, *ignorance of law has no defence* should not be applied strictly to the applicant, because the same can only be true and applicable in the developed country, where everybody is educated and aware with the laws. He supported his position by citing cases of **Felix Tumbo Kisima V Tanzania Telecommunication Company Limited and Another**, 1997 TLR 57 and **DT Dobbie Tanzania Limited V Fantom Modern Transport 1985 Limited,** Civil Appeal No. 141 of 2001 CAT.

He finally noted that, it is in the interest of justice that this appeal is revived because there are important points of law to be considered by the Court of Appeal. He then prayed for the Application to be granted with costs.

In response Ms. Venance started by praying the Court to adopt the Counter Affidavit filed in Court to challenge the Application. She then prayed also to be allowed to narrate a brief background on the matter.

She said, the applicant and the respondent were husband and wife and their marriage was dissolved in 2010 by Kawe Primary Court in *Civil Case No. 54 of 2007,* where it was ordered that each party should take one child of the marriage for custody and also the matrimonial properties were divided between the parties. The applicant was aggrieved and filed an appeal before Kinondoni District Court, which was dismissed by Hon. Rugemalila RM on 28th January 2010. Again dissatisfied with that decision, the applicant filed before the High Court a PC Civil Appeal No. 36 of 2010, which was also dismissed by Hon. Juma, J. on 31st August 2010. Then the applicant filed a Notice of Intention to Appeal before the Court of Appeal. However, the said Notice was struck out for the failure on the party of the applicant to take necessary steps to institute the appeal.

After that brief background on the matter, Ms. Venance referred the Court to paragraph 5 of the applicant's Affidavit and spiritedly argued that, the respondent has never been engaged in any sought of amicable settlement claimed by the applicant. She contended further that, there was no any amicable settlement of the matter outside the Court, because even in his Affidavit the applicant has not indicated when the same was conducted and

has not attached any Deed of Settlement to prove the same. She argued also that even the allegation by Mr. Mshana that parties have agreed that the house should be for the children has not been stated in the applicant's Affidavit, but it is only a statement from the Bar, which should be disregarded by this Court.

She thus argued that, the applicant's mere allegations that there was settlement should be disregarded by the Court. Ms. Venance argued further that, paragraphs 6, 7, and 8 of the Affidavit shows lack of due diligence on the part of the applicant in pursuing his case that led to the struck out of the Notice of Intention to Appeal by the Court of Appeal. Ms. Venance contended further that, after the struck out of the said Notice and the grant of leave to appeal the applicant has delayed to lodge his appeal for a period of four (4) years.

On the submission by Mr. Mshana that the principle on ignorance of the law should apply differently to the applicant, Ms. Venance argued that, if the Court will adopt the interpretation of Mr. Mshana, many criminals in this country could have been acquitted. She thus prayed the Court to avoid double standards in its decisions. She as well challenged Mr. Mshana for

only alleging that the leave to appeal was granted and that there were point of law to be considered by the Court of Appeal without availing the Court and the respondent a copy of the said leave and even point out the said issues on the point of law. She insisted that the Court should not rely to those mere allegations. She referred to sections 110-115 of the Tanzania Evidence Act, Cap. 6 [R.E.2002] and prayed the Court to dismiss the applicant's Application with costs.

In rejoinder submission Mr. Mshana noted that, the applicant has submitted his Affidavit which is enough evidence taken under oath. He said, through that Affidavit the applicant has proved all the matters. As for the act of not attaching the leave to appeal, he said the Ruling of the Court of Appeal, which is attached to the Affidavit, is adequate to prove that there was a leave to appeal. On the issue of not attaching the Deed of Settlement he said the same was done orally. He then reiterated what he submitted in chief and insisted that the Application be granted.

I have given a careful consideration to the arguments for and against the Application herein advanced by the learned Counsel for the parties and I wish to start by pointing out that, it is well settled that in considering an

application for an extension of time, the main issue to be considered by this Court is *whether the applicant has submitted sufficient reasons, which contributed to the delay*.

In other words, the applicant must show ***with evidence*** that, the delay was not caused by his dilatory conducts, inaction, negligence, or compliance. He must convince the court that, he acted diligently and reasonably in pursuing his appeal. This position was discussed in the case of **Yusufu Same and Another Vs Hadija Yusuf**, Civil Appeal No. 1 of 2002 and **Braiton Sospeter @ Mzee and 2 Others v. R.,** Criminal Appeal No. 358 of 2009, both decisions of the Court of Appeal (unreported). In the case of **Yusufu Same**, (supra) the Court of Appeal categorically stated, at page 5 that:-

> *"It is trite law that **an application for extension of time is entirely in the discretion of the court to grant or refuse it.** This discretion however has to be exercised judicially and the overriding consideration is that **there must be sufficient cause** for so doing. What amount to "sufficient cause," has not been defined. From decided cases a number of factors have to be taken*

into account, including, ***whether or not the application has been brought promptly; the absence of any or valid explanation for the delay; lack of diligence on the part of the applicant****".* [Emphasis supplied].

Therefore, extension of time is entirely in the discretion of the court to grant or refuse it and the same may be granted only where "*good cause*" or "*sufficient reasons*" for the delay has been established. This position was also discussed in the cases of **Sospeter Lulenga v. the Republic**, Criminal Appeal No. 107 of 2006, Court of Appeal of Tanzania at Dodoma (unreported); **Aidan Chale v. the Republic**, Criminal Appeal No. 130 of 2003, Court of appeal of Tanzania at Mbeya, (Unreported) and **Shanti v. Hindoche & Others** [1973] EA 207.

It is also a trite law that, the applicant is required to account for each day of the delay. In the case of **Al Imran Investment Ltd V Printpack Tanzania and another Misc. Civil Cause No 128 of 1997** in determining a similar application for extension of time, Hon. H. Nsekela J, as he then was, made the following observation which was underscored by at page 2 of his Ruling, that:-

"In order for ***the applicant to have the benefit of Section 14(1) of the Law of Limitation, applicant ought to explain the delay of every day that passes beyond the prescribed period of limitation"*** *[Emphasis added].*

In all these cited cases above courts, while considering applications for extension of time, they, among other factors, considered (i) special circumstances, (ii) sufficient reasons showing why the applicant should be allowed to lodge his application out of time (iii) *Length of delay* (iv) *the degree of prejudice to the respondent if the application is granted.* I entirely agree with these authorities and I will adopt them entirely in this Application. I should also emphasize that, application of this nature cannot be granted if reasons adduced by the applicant were contributed by **indolent, inaction and lack of vigilance on the part of the applicant and/or the Counsel, if he has one.**

Now, in determining this Application before me, the main issues are (i) *Whether or not the applicant has given sufficient and convincing explanation and reasons for the delay in pursuing his appeal* and (ii)

Whether the delay is inordinate (iii) whether the applicant has explained or accounted for each day of the delay and (iv) *whether there are points of law of sufficient importance, such as the illegality of the decision sought to be challenged.*

It is on record at page 3 of the Ruling of the Court of Appeal delivered on 8th May 2017 that, the applicant was granted leave to appeal to the Court of Appeal on 23rd October 2015. Counting from that date to the date of this Application, 13th June 2017, the applicant has delayed to lodge his appeal for almost three (3) years, which is about 1,095 days which is definitely *inordinate delay*. The main reasons for such delay as indicated in the applicant's Affidavit and submitted by Mr. Mshana are that (i) *there were efforts by the parties to solve the matter amicably out of the Court* and Mr. Mshana said indeed the matter was settled and an agreement was reached that the house should be for the children, though, the said agreement or settlement deed were not produced, as Mr. Mshana said it was made orally. Mr. Mshana also said, (ii) *the applicant was misled by Mr. Kariwa*, the then Counsel for the respondent, who was handling the said

negotiation. All these remained to be mere allegations without any concrete proof.

It is also on record that, under paragraphs 4 and 5 of her Counter Affidavit, the respondent has completely disassociated herself with the said negotiations, consultations and/or any family meeting claimed by the applicant. In her submission before this Court, Ms. Venance also spiritedly emphasized that, the respondent had never been involved in any negotiations or any family meeting or consultations out of the Court.

It is also on record that, though, Mr. Mshana is talking about the settlement he has completely failed to prove the same before the Court. The Tanzania Civil Procedure Code, Cap 33 [R.E 2002], recognizes the procedure of settling matters out of the Court. Pursuant to Order XXIII of the Civil Procedure Code, courts are empowered to adopt *settlement deed* by the parties and pronounce it as a decree of the Court. The said provision of the law provides that:-

> *"Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by* ***any lawful agreement*** *or*

compromise, *or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit,* ***the court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith*** *so far as it relates to the suit. [Emphasis added].*

In the circumstance and as it was eloquently explained by Ms. Venance, if there was such arrangement of settling the matter out of the Court by the parties, the applicant was supposed to inform the Court about the same and finally submit the deed of settlement before the Court for the adoption. Now in this case Mr. Mshana has:

(a) failed completely to indicate in his Affidavit when exactly such negotiations were conducted;

(b) failed to prove with concrete evidence that the said negotiations indeed took place. I know that his main argument was that the same were done orally and that the applicant has proved it in his Affidavit which was taken under oath. With due respect Mr. Mshana is a senior Counsel who knows very well how matters are

being established and proved before the Court of law. I therefore find it difficult to believe only mere words and allegations. Since our law encouraged settlement of matters amicably by the parties out of Court, the applicant was required to follow the legal procedures and practice, as well as informing the Court of such move and submit the outcome (Deed of Settlement) of the said negotiation for adoption by the Court and prove that the matter was settled amicably between the parties; and

(c) the said Deed could have been adopted in Court and pronounced as a decree of the Court.

It is also on record that, even after the claimed settlement the applicant decided to stand aloof without making any follow-up either in the High Court or even at the Court of Appeal to notify both courts that, the matter was settled and even pray for the withdrawal of the said Notice of Intention to Appeal. All these are issues, which raise doubts on the way the applicant handled and pursued his case. I would put it this way; that, the act of the applicant of staying aloof without making any follow-up on the Notice he had once lodged before the Court of Appeal and/ or even the

act of not informing the courts on the on-going negotiations depicts outright negligence, lack of diligent and seriousness on his part.

Furthermore, Mr. Mshana had as well submitted the sick chits for the applicant to justify his non-appearance before the Court of Appeal, where he said he could have explained all these reasons which hindered him to process the appeal. With due respect, it is on record that, on 27th April 2017 when the matter was called for hearing before the Court of Appeal, the applicant appeared in person and the matter was adjourned to 30th April 2017, where again both parties appeared, but upon prayer made by the respondent, which was not opposed by the applicant, the matter was scheduled for hearing on 3rd May 2017. In my respectful view, failure to enter appearance on the part of the applicant can be associated also **with his own negligence, inaction, omission and mistakes,** which again cannot constitute sufficient cause. If the applicant was unable to attend to the court's session, for the sickness reasons, as claimed, he could have sent even someone, a relative or a friend, just to inform the Court of his situation. Again, non-attendance without notice indicates **lack of vigilance and seriousness on his part in pursuing his case.** See the

cases of **Chesco Muhyinga V. Sietco** Misc. Civil Application No. 50 of 2005, High Court Dodoma and **Hamza Aziz Vs Millicom International & Another**, Civil Case No. 94 of 1995 (both unreported) where the court refused to bless the negligence of the applicant. Similarly, in this case, the applicant's **negligence, ignorance**, **indolent, inaction and lack of vigilance** cannot be blessed by this Court. Let me say it straight forward that there is nothing in the submission of Mr. Mshana capable to constitute sufficient reason to justify this Court to grant prayers sought in the Chamber summons. By the way Mr. Mshana had not even accounted for each day of the delay. See the case of **Al Imran,** (supra); **Mwananchi Engineering and Constructing Corporation v. Manna Investimates (PTY) Limited and Holtan Investiments Company Limited**, Civil Application No. 5 of 2006, CAT, Dar es Salaam Registry (unreported).

It is also on record that, Mr. Mshana has informed this Court that, the agreement reached by the parties was to the effect that, the house should be left for the children. This claim was vehemently disputed by Ms. Venance that the same is not indicated in the applicant's Affidavit, but only a statement from the Bar and she said, the same cannot be considered by

the Court. Mr. Mshana had since objected and argued that, the same is covered and proved by the applicant in his Affidavit taken under oath. With due respect to Mr. Mshana, I have since perused the entire Affidavit to verify this submission by Mr. Mshana and none was seen. It is a settled principle and legal practices that, evidence or proof of any matter cannot come from the Bar. See the case of **The Registered Trustees of Korea Evangelical Church and 5 Others V Yum Yun Hwa and Another,** Civil Application No. 80 of 2003 (CAT).

Before penning of, I should point out that, I am alive to the fact that, Mr. Mshana had since reminded this Court to do substantive justice as opposed to procedural law. Though, I know that, to uphold principles of natural justice and doing substantive justice is a noble duty of this court, but due to the laid down principles and lack of sufficient reasons submitted herein, I am constrained to grant this application. I should remind Mr. Mshana that, *Court is not a place where clients are at liberty to choose to enter appearance at will and on the day when they do feel to appear the court just winds up the clock*!!! Since the applicant was once accorded an

opportunity to appear and defend his case, but ignored, this Application has failed to pass the test.

In upshot and taking into account the above points, it is my respectful view that, the applicant has failed to show sufficient reasons for his inordinate delay and therefore the Misc. *Civil Application No.297 of 2017*, is hereby dismissed with costs. It is so ordered.

DATED at **DAR ES SALAAM** this 25th Day of May, 2018.

R. K. Sameji
JUDGE
25/05/2018

COURT - Ruling Delivered in Court Chambers in the presence of Ms. Glory Venance, the learned Counsel for the Respondent, who also held brief for Mr. Amin Mshana, the learned Counsel for the Applicant.

A right of Appeal explained.

R. K. Sameji
JUDGE
25/05/2018