

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

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION. NO 722 OF 2017**

*(Arising from Misc. Civil Application No. 542 of 2016)*

**ABDULRAHMAN SHARIF MAHMOUD.....APPLICANT**

**Versus**

**NAGAT AHMAD MOHAMED MUKHTAR.....RESPONDENT**

**RULING**

*Date of the last order 01<sup>st</sup> June, 2018*

*Date of Ruling 08<sup>th</sup> June, 2018*

**SAMEJI, K. R. J**

The applicant filed this Application praying for extension of time within which to file application for restoration of Application vide *Misc. Civil Application No. 542 of 2016* which resulted from the dismissal order of this Court dated 1<sup>st</sup> February 2017 issued by Hon. Kitusi J. The Application is brought under section 14(1) of the Law of Limitation Act, Cap. 89 [R.E.2002] and Section 95 of the Civil Procedure Code, Cap. 33 [R.E.2002]. The said Application is supported by the Affidavit of Mr. Gaudiosus Ishengoma, the learned Counsel for the applicant.

On the other side, the respondent has filed a Counter Affidavit vehemently challenged the applicant's Application that has no merit.

At the hearing of the Application, the applicant enjoyed the service of Mr. Gaudiosus Ishengoma, the learned Counsel, assisted by Yohannes Konda, the learned Counsel, while the respondent was represented by Mr. Clement Kihoko, the learned Counsel.

Submitting in support of the Application, Mr. Ishengoma prayed the Court to adopt the Affidavit in support of the Application together with the reply to the Counter Affidavit. He then argued that, for the current Application to succeed depends on the sufficient reasons for the delay to be adduced by the applicant. He said, the applicant's reasons for the delay are clearly indicated in the Affidavit in support of the Application. He said further that, in law, what amount to sufficient reasons is not defined and the same is for the Court to determine. Mr. Ishengoma argued that, in some cases reasons on travel, sickness and negligence of the Counsel have been considered to amount to sufficient reasons. To buttress his position he referred to the decision of the Court of Appeal in the case **of Fortunatus Masha v William Shija and Another**, (1997) TLR 154, where the Court *inter alia*

distinguished between technical and real delays. He then referred to paragraphs 7, 8, 9, and 10 of the Affidavit and noted that, in those paragraphs, the applicant had clearly explained sufficient reasons for the delay. He said, soon after the dismissal of the *Misc. Civil Application No. 542*, the applicant acted promptly by filing an Application No. 37 of 2017 for the Review, but the said Application was struck out for being filed under a wrong provision of the law. He said, immediately again the applicant filed a *Misc. Civil Application No. 657 of 2017* praying for extension of time to set aside the dismissal order. However, the said Application was again struck out. Then, the applicant decided to file this Application. Mr. Ishengoma said, all these time the applicant was busy in Court pursuing these Applications. He thus prayed the Court to note that, this is a technical delay as opposed to actual delay. He thus referred to the case of **Salvand K. A. Rwegasira v China Henan International Group Co. LTD**, Civil Reference No. 18 of 2006, where the Court of Appeal insisted on the issue of distinction between the technical and actual delays. He thus prayed the Court to grant the Application.

Mr. Ishengoma then argued that after perusal of the respondent's Counter Affidavit he had since observed that, the same do not materially challenge

the Application, but rather submitted on issues which would have been useful if the Court is considering the intended substantive application. Mr. Ishengoma referred to paragraphs 8 and 13 of the Counter Affidavit and argued that, since the Counter Affidavit is not relevant to this Application then, the same is unopposed and should be granted. Mr. Ishengoma emphasized that it is a cardinal principle that, a case should be heard inter-parties unless good cause are shown to the contrary. He said there is no strong reason as to why the applicant can be denied his constitutional right to be heard. He said, since there is nowhere indicated in the Counter Affidavit that, if this Application is granted will prejudice the respondent, the same should be granted.

In response to Mr. Ishengoma's submissions, Mr. Kihoko, while acknowledged the authority cited by Mr. Ishengoma in **Fortunata's** case, he admitted that, the events narrated by Mr. Ishengoma, which happened between the *Misc. Civil Application No. 657 of 2017 and Misc. Civil Application No. 722 of 2017* have clearly indicated reasonableness on the part of the applicant that they have acted promptly. He however wondered that, the applicant instead of lodging an Application for the review could have filed right away the application for the restoration of the dismissed

application. He then briefly argued that, since the applicant has failed to account for the period of eight (8) months and the same should be dismissed.

In rejoinder submission Mr. Ishengoma stated that, the applicant decided to file an Application for the Review instead of restoration because they wanted the Court to review its decision. He said, the said Application was filed on the second day after the issuance of the dismissal order. He argued further that, at the time the dismissal order was issued, the applicant had already filed a *Misc. Civil Application No. 895 of 2016*. He lamented that, the said Application was determined by the Court after expiry of almost eight (8) months. Mr. Ishengoma reiterated what he submitted in chief and prayed the Court to grant the Application with costs.

Having perused the record of the case and the submission by the applicant, I wish to start by pointing out that, it is well settled that in considering an application of this nature, the main issue should be *whether the applicant has submitted sufficient reasons, which contributed to the delay*. This position was discussed in the case of **Braiton Sospeter @ Mzee & Two**

**Others v. R.**, Criminal Appeal No. 358 of 2009 (unreported), where the Court categorically held that:

*"In the determination of applications for extension of time, be it under the Rules or any other law, the primary concern of the court is to probe into the causes of reasons for the delay and nothing more."*

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 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. In all these cases courts, while considering applications for extension of time, they, among other factors, considered special circumstances and sufficient reasons showing why the applicant should be allowed to argue the appeal out of time. I entirely agree with these reasoning and I will adopt them in this Application.

Now, in determining this Application before me, the main issue is *whether or not the applicant has given convincing explanation and reasons for the delay in lodging the intended application.*

As clearly submitted by Mr. Ishengoma, the main reasons that delayed the applicant to lodge the application was due to the fact that, soon after the dismissal order, he unsuccessfully filed several applications which were all struck out for being incompetent. For the sake of clarity, I have endeavored to summarize below the sequence of events as indicated in the Affidavit in support of the Application.

*'On 18<sup>th</sup> August 2016 the applicant petitioned in this Court through Misc. Civil Application No. 542 of 2016 praying for orders to have the Arbitral Award dated 9<sup>th</sup> July 2016 issued in favour of the respondent set aside. On 13<sup>th</sup> December 2016 the Court ordered the parties to file the written submission on the matter. The applicant was supposed to file his submission on or before 27<sup>th</sup> December 2016, and the reply by the respondent on or before 11<sup>th</sup> January 2017 and then the rejoinder to be filed on 18<sup>th</sup> January 2017. The Order was issued after Mr. Rweikiza, the*

determine whether the reasons submitted by the applicant fall under the realm of technical delay as claimed by Mr. Ishengoma, I have revisited the case of **Fortunatus** (supra), where the issue on the distinction between really and technical delays was discussed by the Court of Appeal. In that Case the applicant applied for an extension of time within which to file the appeal. The respondent opposed the application and the Court held that;

***"A distinction had to be drawn between cases involving real or actual delays and those such as the present one which clearly only involved technical delays in the sense that the original appeal was lodged in time but had been found to be incompetent for one or another reason and a fresh appeal had to be instituted. In the present case the applicant had acted immediately after the pronouncement of the ruling of the court striking out the first appeal. In these circumstances an extension of time ought to be granted."*** [Emphasis added].



Taking the spirit of the decision above, it is my considered view that, the Affidavit of the applicant in support of his *Application together with the submission by Mr. Ishengoma have clearly indicated that the applicant's delay is a technical one.*

In the circumstances and taking into account the tirelessly and unsuccessful efforts of the applicant to seek justice and the fact that the delay was mainly due to technicalities, I find that the reasons adduced by Mr. Ishengoma to have merit and constitute sufficient reasons.

I have however observed that, though Mr. Ishengoma argued that the respondent's Counter Affidavit is irrelevant, but the same is relevant and it has tried to respond to what has been stated in the Affidavit. Furthermore, though Mr. Ishengoma argued that, the respondent had not indicated that if this application is granted will not cause prejudiced to her, but under paragraph 13 of the Counter Affidavit, the respondent had clearly indicated that, granting of this application will prejudiced her. So, what was submitted by Mr. Ishengoma regarding the respondent's Counter Affidavit is misconceived.

Anyhow, since it is my considered opinion that, there are sufficient reasons for the delay and if the applicant is not given his statutory and constitutional right of being heard on this matter will amount to grave injustice, I find it prudent and reasonable to grant this Application.

All said and done, I hold that this Application is meritorious and ought to be granted. I accordingly, allow this Application and extend the time for the applicant to file an application as prayed. The applicant should act in accordance with the requirements of the law, within fifteen (14) days from the date of this Ruling. I make no order as to costs.

It is so ordered.

**DATED at DAR ES SALAAM** this 08<sup>th</sup> Day of June, 2018.



R. K. Sameji

**JUDGE**

**08/06/2018**

**COURT** - Ruling Delivered in Court Chambers in the presence of the Appellant and the Respondent.

A right of Appeal explained.



R. K. Sameji

**JUDGE**

**08/06/2018**