

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM
(DAR ES SALAAM REGISTRY)
MISC. CIVIL APPLICATION NO 222 OF 2017.
(ORIGINATING FROM MISC APPLICATION NO 647/2016)

BETWEEN
MOUNT UKOMBOZI HOSPITALAPPLICANT
VERSUS

STRABAG INTERNATIONAL RESPONDENT

RULING:

MAGOIGA, J.

The applicant preferred the instant application following the dismissal order of this court by her lady Justice Munisi, J for non-appearance under Order IX rule 8 of Civil Procedure Code, CAP 33 (R. E 2002), praying, among others, that this court be pleased to set aside/reinstate the suit following dismissal order given on 30/03/2017. The instant application is preferred under Order XLIII(2) of CPC, Order IX(7), Order IX rule 9, section 68(e), section 95 and any other enabling provisions of the law, supported by the affidavit of Bernadeta Kinyenje, advocate, from Amani Law Chambers. The respondent, through the services of Rose Mgallah, advocate, from ZealMark Advocates strongly opposed this application through her counter affidavit filed on 21st July 2017.

The record shows, when this application was before her lady Justice Munisi, J on 17/10/2017 the predecessor Judge ordered the parties to address her on the competency of the application with regard to the issue of limitation. One, Dr. Nickson Njola who is for the applicant requested to be given time to come with his advocate. His prayer was granted. The matter was adjourned to another date and the order of last adjournment

was so recorded. When the matter was placed before me on 4/6/2018 for hearing, the applicant was represented by one, Dr Nickson Njola who introduced himself as the Director of the applicant and the respondent enjoyed the services of Rose Mgallah, advocate. Readily, the applicant's director informed the court that his advocate is undisposed and he will proceed with the hearing alone and was ready for hearing. His prayer was granted and hearing took off.

Submitting in support of the application the applicant's director adopted the chamber summons and the affidavit in support of the application. He further submitted that 30 days in which the applicant was supposed to bring her application should start to run on 31/03/2017 and not the date the order was given. He buttressed his submission that 30 days ended on 30 April 2017 which was Sunday, hence not a working day. To bolt up his submission further, he submitted the filing fees were deposited into the court's account on 28/04/2017 and on that day and other subsequent working days the cashier to issue exchequer receipt was not available till on 2nd May 2017. He strongly threw blames to court for issuing the exchequer receipt on 2nd May 2017 and caused the application to look as filed out of time. When asked by the court if he has any affidavit from the civil registry to support his allegation he said to have none. As to the negligence of her advocate, he strongly argued that an advocate's negligence should not be used to punish parties. He quoted the case of **Felix Tumbo Kisima v.TTCL and another [1997] TLR 57** to support his argument that negligence of an advocate is a sufficient reason for the court to consider in granting the application.

In winding up his submission the director of the applicant submitted that it is a well-established principle that the objects of the court are to decide rights of the parties and not to punish them for the mistakes they make in conduct of their cases by deciding otherwise than in accordance of their rights. Therefore, according to him courts do not exists for the sake of discipline but for deciding matters in controversy. He thus invited me to see that the instant application is competent and proceeded to grant the same as prayed.

On the other hand, the counsel for the respondent strongly objected the application. The learned counsel as well adopted her counter affidavit to support her stance. He reminded the court that on 30/03/2017 what was before the court was Misc Civil Application no 647/2016 between same parties and as such there was no pending suit as prayed in the chamber summons. The dismissed application was for review of the dismissed Civil case no 25/2015. She further argued that on 30/03/2017 the said application was scheduled for hearing and not mention as argued by the applicant's director. She challenged the competency of the sick sheet annexed to the application to show the counsel for applicant was sick on that day on reasons that same might have been fabricated by the applicant to suit her negligence demonstrated by her advocate. She quickly disputed the statement by the applicant director that advocate's negligence is a good reason to grant the application and strongly said the reverse is the truth and the applicant might have missed the cited authority on the point. She distinguished all cases cited as not relevant to the issue at hand.

As to the competency of the application, the counsel for the respondent was brief to the point that the instant application was filed out of time by 4 days, on 2nd May 2017. She agreed with the applicant that if the last day falls on weekends or public holiday then the first working day will be the deadline. She further argued that all that was said to blame the court and failure to file in time are mere words not supported by evidence and should not be considered at all. If the applicant wanted to be believed, he should have come with affidavit to substantiate her claim. Lastly, she invited the court to dismiss the instant application with costs.

During hearing I invited the parties to address me on merits and demerits of the application and its competency for avoidance of coming on the same issue endlessly. But for purpose of this ruling I will start with the competency of the application and the result of which will determine the way forward.

From both arguments by both sides, I gathered that there are several matter which are not in dispute. One, there is no dispute that the instant application was filed on 2nd May 2017 after paying necessary court fees and an exchequer receipt no 1376481 dated 2/5/2017 was accordingly

issued. This fact is supported by the chamber summons which goes as “**Presented for filing this 2nd day of May 2017**” and the affidavit in support of the same which goes “**dated for filing 2nd day of May 2017**”.

Second, there is no dispute that in computing period of limitation in the instant application same has to start counting from 31st March 2017 a day after the order was given as provided for under section 19 (1) of the Law of Limitation Act, Cap 89 [R.E 2002]. Therefore, counting from 31st March 2017 the 30 days ended on 29/04/2017 Saturday/a weekend hence the deadline was transferred to 1st May 2017. But more so, the 1st day of May 2017 was a public holiday known as “Mei Mosi” hence the next working day was 2nd May 2017.

From the above undisputed facts and on different reasons as opposed to the argument advanced by the applicant’s director I find as I hereby do that the instant application was filed well within time and is competent for determination before this court.

Now having find the instant application being competent, my second task is to determine its merits or demerits. I have taken into account both rival arguments by the parties on the merits and demerits of this application. Nevertheless, this point need not detain this court too much. There is only one reason advanced by the applicant through the affidavit of advocate Kinyenje, that is, her illness. Advocate Rose Mgallah when asked by the court if illness can be a good reason if demonstrated and proved, she admitted that sickness is a good reason for one not to attend in court. In the premise, I tend to believe the counsel for the applicant falling sick on the material day and the attached sick sheet is enough to convince this court in the absence any evidence to the contrary. The only dispute on the part of the respondent is that the said ED was issued by the applicant who has interest to save on this matter. However, the counsel for respondent is not disputing the applicant being a hospital capable of offering such treatment to the alleged illness. It could be a different thing if the question was whether the applicant is not a hospital at all. It is for the above demonstrated reasons I hereby find merits on this application and proceed to grant it as prayed.

In the upshot, therefore, I hereby set aside the order of this court dated 30/03/2017 and restore the Misc. Application no 647/2017 to be determined inter parties. No order as to costs.

It is so ordered.

Dated at Dar es salaam this 08th day of June 2018.



A handwritten signature in blue ink, appearing to read "S.M. Magoiga", is written over a dotted line.

S.M. Magoiga

JUDGE

08/06/2018.