

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

MISC. CIVIL APPLICATION No. 49 OF 2017

(From the decision of this Court (Hon. Koroso J) in (PC) Civil Appeal No. 43
of 2015 dated the 6th October 2016)

**DAVID WILLIAM
KAMBANYUMA.....APPLICANT**

Versus

**EDWARD EUGENE
MUSHI.....RESPONDENT**

RULING

26/07 - 08/10/2019

J. A. DE-MELLO, J;

This Chamber Application is brought under **section 14 (1)** of the **Law of Limitation Act, Cap. 89 R.E. 2002** and, **Order XXXIX Rule 19** of the **Civil Procedure Code Cap. 33 R.E 2002** where the Applicant whose care is under **Counsel Thomas BrAsh** swore an Affidavit in support of prayers for extension of time within which to apply for re admission of an Appealing **(PC) Civil Appeal No. 43 of 2015.**

Counter Affidavit by **Counsel Augustine Mathern Kusalika** noting some, while disputing other contents of the Applicants Affidavit, is also on

record. Written submissions were prayed and, duly granted and both are in compliance.

In his written submissions, **Counsel BrashI** remarks, as he reiterates the yardstick for consideration of similar Applications, as a result of advancing good reasons. Reasons apportioned includes loss rather misplace of file at the Trial Court's registry at **Kinondoni District Court**. Letter dated the **25th of January 2016** as well as details under **paragraphs 8, 9, 10, 11, & 12** of the Affidavit was referred to substantiate the fact. Strangely and a year later on the **28th of January 2017** it was observed from record that the Appeal has been dismissed for **Want of Prosecution** on the **6th of October 2016**. This being the position, on efforts to react for re admission were engaged and soon thereafter to be in line with what the case of **Tanga Cement Company Ltd vs. Jumanne MasAngwa & Amos A. Mwalwanda, Civil Application No. 6 of 2001** and endorsed by the case of **Zainab Hamisi vs. Fatuma Yusuf Kirobo, Misc. Land Application No. 282 of 2015** for what "**sufficient cause**" means.

Other than sufficient or good reasons, the Court has discretion to use its powers judiciously to extend time considering the existence of special circumstances like the immaterial illegality, which Counsel for the Applicant

finds present in this case at hand. It is the jurisdiction of the Trial Primary Court which is at stake which Counsel draws the attention of **section 18(1) (a) (i)** of **Cap. 11** confining it to matters of **Customary and Islamic laws**. The Trial Court even usurped powers to determine revocation of the Applicant as appointed administrator without being moved to do so. Reference was made to the case of **Amour Habib Salim vs. Hussein Bafagi Civil Application No. 52 of 2009** endorsing what the case of **Principal Secretary, Ministry of Defence & National Service vs. Devram Valambia [1992] TLR 182** with regard to illegality as point at issue for granting extension.

While mindful of the principles of law guiding extending time, my duty is confined in determining as to whether or not the reasons advanced are good and sufficient enough, while, exercising my discretion judiciously to readmit or not.

It is however obvious that the matter was dismissed in which the Applicant finds it deem to restore.

The law for dismissal as well as setting aside is as hereunder;

Order IX Rule 9 (1) of the Civil Procedure Code Cap. 33 RE. 2002

provides as follows, and I import;

“9(1)- Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action, but he may apply for an order to set aside the dismissal aside, and if he satisfies the court that there was sufficient cause for his non appearance when the suit was called on for hearing, the court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit and shall appoint a day for proceeding with the suit.”[Emphasis is mine].

The Respondents Counsel has brought the Court to the fact that even with these submissions, the Applicant has not been up to the scheduling order for filing. Instead of the **27th of June** it is one day later on the **28th of June 2019**, when the submissions were filed. He further registers a similar, rather same trend, which attracted dismissal way back in **October 2016** owing to failure to prosecute the case and seven times in a row. As if this is not enough, accounting for each day of delay as per the law, absence of which **paragraphs 3, 4, 5, 6, 7, 8, & 9** of the Counter Affidavit depicts. The translation and for such one year delay is nothing than inaction and gross negligence on the part of the Advocate and or the

Applicant. Loss or misplaced file, tracing and follow up and with no proof whatsoever leaves much to be desired Counsel states. This long delay, inordinate as it is and without support proof can not be considered as one which had been promptly lodged. The case of **Rutagatina C.L vs. Advocates Committe & Clavery Ngalapa, Civil Application No. 21 of 2001.**

Counsel is of a view that even the cases cited are distinguishable and or misconceived, considering even the case of **Zainabu vs. Fatuma** (supra) whose application was dismissed.

In his brief rejoinder **Counsel Brashi** disputed the contention that his submissions are out of time considering the scheduling order for 28th of June for the Applicant and which is complied to. Accounting is as evidenced from annexures B,C & D, paragraph 4 all showing how vigilant Counsel was. That, in absence of **Notice** for judgment and coupled with the predicament for misplaced file, translates in favour of the Applicant for extension. Promptness intervention was even clear as from the 28th of January when the Applicant learnt of the dismissal, it is soon thereafter in **February 13th** this Application was filed, inclusive of weekends and public holidays. Unless re admission is sought, this being a **Probate &**

Administration Proceedings rights of beneficiaries and heirs is at stake, in the event the illegality is not addressed. In as far as cases cited being distinguishable **Counsel Brashi** let the Court peruse copies attached for its opinion. He finds nothing on record as copies annexed as alleged by the Respondent. It is even vivid that, he is late, rather long overdue and the basis for this Application. What amounts to “**sufficient cause**” has not been defined but, 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, and lack of diligence on the part of the Applicant to mention just a few.

I have given the matter its appropriate attention and, seemingly to agree which also the Respondent does not controvert the misplacement of the Court file. It is also evident that, efforts to follow up as indicated by **annextures letters B, C, & D and what paragraph 4** of the Applicants Affidavit constitutes good reasons. The parties ought to be notified, that has no dispute absence of which will deprive their right to be heard or receive orders. The case of **Dar Es Salaam Education & Office Stationery & Another vs. NBC Holding & 2 Others, Civil Application No. 39 of 2009** refers. The dilatory conduct alleged by Counsel for the

Respondent is missing here. It is with this reasons that, the legality of judgment is explicitly at issue in which re admission sounds appropriate. I allow the application for filing within **seven (7) days** from the date of this order. Costs to ensue event.


J. A. DE-MELLO
JUDGE
08/10/2019