

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

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 246 OF 2019

*(Arising from the decision of Kinondoni District Court in Matrimonial
Cause No. 413 of 2016, Hon. I. Kasailo, RM)*

MAKRINA FELIX NGOSO APPLICANT

VERSUS

EBERHARD SAPRAPASEN RESPONDENT

RULING

3rd Mar & 20th Mar, 2020.

E. E. KAKOLAKI J

In this application the applicant is seeking an extension of time to lodge an appeal out of time in respect of the decision in Matrimonial Cause No. 413 of 2016 by the Kinondoni District Court. The application has been brought under Section 14(1) of the Law of Limitation Act, [Cap. 89 R.E 2002]; section 95 of the Civil Procedure Code, [Cap. 33R.E 2002] and any other enabling law at the instance of the applicant supported by affidavit of **Makrina Felix Ngoso** the applicant. In opposition the respondent filed his counter affidavit in the name of **Eberhard Saprapasen** strongly challenging the application.

Briefly, the applicant had filed a matrimonial cause No. 413 of 2016 at Kinondoni District Court petitioning for divorce in which she successfully secured. The judgment and decree were issued on the 28/03/2017 but certified and made available to the applicant 27 days later on the 25/04/2017. The applicant being dissatisfied with the division of matrimonial properties 30 days after collection of copies of judgment and decree on the 25/5/2017 lodged an appeal in this court, Civil Appeal No. 162 of 2017 which was placed for determination before Hon. Muruke J. Perusing the record Hon. Muruke, J on the 18/8/2017 noted that the appeal was filed out time by 58 days without leave of the court and suo motto decided to strike it out, ordering that parties be notified. The applicant who allegedly was sick got knowledge of the striking out of her appeal on the 15/05/2018 through her son one Claud Eberhard and 9 days after on the 24/5/2018 filed with this Court Misc. Civil Application No. 270 of 2018 seeking an extension of time to file the appeal. However due to technical flaws and having been advised by her lawyer, on the 7/3/2019 the applicant through her advocate one Kariwa prayed to withdraw the said application as a result on the 15/05/2019, 67 days later managed to file this application seeking an extension of time to file an appeal against the decision of Kinondoni District Court in Matrimonial Cause No.413 of 2016.

When the matter was called for hearing before me on the 3/3/2020 both parties had representation. The applicant was represented by Michael Kariwa learned advocate while the respondent had the service of Ms. Cecilia Assey learned advocate. Both parties were heard viva voce and when submitting craved leave of the court to adopt their affidavit and counter affidavit to form part of their submission the prayer which was granted. I find it also imperative to state from the outset that under

section 14(1) of the Law of Limitation Act,[Cap. 89 R.E 2002] this court has discretion to grant the application upon good cause established by the applicant. What amounts to good cause is left in the hands of court's unfettered discretion to decide basing on the circumstances of the case. See **Meis Industries Limited & Ors v Twiga Bankcorp (Misc Commercial Cause No. 243 of 2015) [2016] TZHCComD 17.**

In discharging her duty of establishing good cause the applicant explained the reasons that delayed her to file this application. It was Mr. Kariwa's contention that after the decision was entered in Matrimonial Cause No. 413 of 2016 it took 27 days for the applicant to be availed with the copies of judgement and decree which were supplied to her on the 25/4/2017 before he filed the appeal in this court Civil Appeal No. 162 of 2017, 30 days later on the 25/05/2017. That at all that time of making a follow up of judgment and decree the applicant was sick and was getting assisted by her elder son one Claud Eberhard. In his ruling of 18/8/2017 Hon. Muruke J when striking out the said Civil Appeal No.162 of 2017 stated that it was out of time by 58 days. Reckoning off 27 days spent for certification and issuance of the judgment and decree the remaining are days 30 which Mr. Kariwa submitted to be within the time limitation to file the appeal.

Mr. Kariwa was also of the contention that despite of court's directives to notify parties of its suo motto decision entered on the 18/8/2017 striking out Civil Appeal No.162 of 2017 the same was not affected for more than 8 months until 15/05/2018 when the applicant became aware of that decision and collected the copy of the court ruling again through her elder son Claud. She managed to file Misc. Civil Application No. 270 of 2018 on the 24/05/2018, 9 days later seeking an extension of time to file the appeal. That the said application was withdrawn on the 7/3/2019

on technical flaws and after collection of the copy 61 days later on 8/05/2019, the applicant managed to file this application on the 15/5/2019 which is 67 days after withdrawal of the application.

Apart from the applicant's sickness as one of the reasons to account for the delay Mr. Kariwa contended that the court was duty bound to inform the applicant of the collection date of the ruling striking out Civil Appeal No.162 of 2017, the duty which was not discharged. He was of the view that, that failure by the court to discharge its duty constituted good cause for extension of time. To bolster his argument he cited the case of **Tanzania China Friendship Textile Co. Ltd Versus Charles Kabweza and Others**, Civil Application No. 62 of 2015 where the Court held that none notification of the party of the date for collection of the copies of the decision amounted to good cause for extension of time. The last reason he advanced was to the effect that the applicant by filing the appeal and the application for extension of time which was withdrawn on technical flaws before filing the present one acted diligently and was busy in court pursuing her rights faithfully. That in reckoning time that the applicant delayed in filing this application under Section 21(1) of the Law of Limitation Act, [Cap. 89 R.E 2002], the time in which she was busy diligently prosecuting the referred cases in court should be excluded. And that the period during which the applicant was diligently and faithfully prosecuting her cases in itself constitutes good cause. To back up that submission he placed reliance on the case of **Elibariki Asseli Nnko Versus Shifaya Mushi & Lewanga Kinando**, [1998] TLR 81. All that said Mr. Kariwa prayed this court to find that the applicant has established good cause to warrant grant of the application.

Challenging the merits of the application Ms. Assey started with the reason of sickness of the applicant advanced by Mr. Kariwa. She was of

the view that there is no evidence produced neither in the applicant's affidavit nor during submission in chief by the counsel to substantiate that claim. On the issue of the decision of **Tanzania China Friendship Textile Co. Ltd** (Supra) cited by the applicant's counsel to support the claim of none notification of the applicant by the court of the date for collection of the decision in Civil Appeal No.162 of 2017 which allegedly constitute good cause, she submitted the same is not applicable in the circumstances of this case as the matter was already out of time.

On the case of **Elibariki Asseli Nnko** (Supra) relied upon by the applicant, Ms. Assey contended that the same also is not applicable in the circumstances of this case as no diligence has been shown by the applicant in the prosecution of her matter since no evidence has been put forward to prove sickness of the applicant and disprove negligence shown during prosecution of her case. She cited to court the case of **Ms. Henry Leonard Maeda and Another Versus Ms. John Anael Mongi and Another**, Civil Application No. 31 of 2013 to support her argument that the applicant ought to have acted diligently and/or inadvertently and not negligently as she did. Diligence ought to have been shown both in the affidavit and during the submission in chief something which the applicant failed to do she submitted. In that regard she cited the case of **Daud S/o Haga Versus Jenitha Abdon Machafu**, Civil Reference No. 19 of 2016 where the court held that there was nothing in the affidavit or oral submissions by the applicant to warrant sufficient reason in which case she invited this court to find the same against the applicant.

Ms. Assey added that in all of her conducts the applicant did not act urgently to make a follow up of her matter after it was struck out instead she shifted a blame to the court for not notifying her of the

collection date of the ruling of the court. That was negligence in her views. She referred the court to the case of **Regional Manager, TANRODS Kagera Versus Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007. She finally submitted that the applicant has failed to advance sufficient cause to warrant extension of time by this court.

Having introduced the gist of submissions by both parties I now turn to determine the issue as to whether the applicant has advanced good cause to warrant extension of time by this court. The respondent is attacking the reason of sickness by the applicant advanced by Mr. Kariwa in that the same has not been proved either by the applicant's affidavit or during the submission in chief by the applicant's counsel apart from being orally alleged. In his rejoinder Mr. Kariwa stated that the same is deposed in paragraph 4 of the applicant. I find merit in this complaint by the respondent's counsel. It is true that the question of sickness cannot just be deposed without any proof of medical chit especially when someone has a long standing sickness. My perusal of the affidavit has unveiled no any proof of applicant's sickness by medical chit apart from mere assertions. In absence of the said medical chit I am of the firm views that the reason of sickness advanced by the applicant has not been proved.

That being my finding I now proceed to consider another complaint by the respondent that the applicant acted negligently in prosecuting her case to the extent of failing to establish good cause for his delay as she ought to have accounted for each and every day of her delay. Mr. Kariwa for the applicant replied that at all time the applicant was acting diligently in prosecuting her case. That she managed to file the appeal in time though the same was struck out. However, the court failed to notify

the applicant of the collection date of the ruling something which caused her to delay in filing the application for extension of time within which to file the appeal which was later withdrawn for technical flaws.

It is true that the applicant when filed Civil Appeal No.162 of 2017, 58 days had lapsed since the judgment in Matrimonial Cause No. 413 of 2016 was entered. And that it took the applicant 27 days to make a follow up of the judgment and decree before filing the appeal in this court which if excluded the appeal could have been filed well within the time limitation of 30 days. The query on what to be accounted for is on the time delayed for collection of ruling by Hon. Muruke J, Civil Appeal No.162 of 2017 delivered on 18/08/2017 and allegedly collected on the 24/05/2018 by the applicant's aide more than 8 months because the applicant was not notified by the court of the decision and collection date as submitted by Mr. Kariwa and deposed by the applicant in paragraph 8 of her affidavit which I find it imperative to quote hereunder:

*8. That by sheer coincidence of luck the existence of the High Court ruling striking out the Appeal did come to my knowledge **until 15th May, 2018 when sent my aide for the third time to help pursue for the summons in respect of my appeal.** (emphasis supplied)*

On accounting for the delay of more than 8 months as stated above in paragraph 8 of the affidavit the applicant wants the court to believe that she did not receive notice from the court since the date of striking out of her appeal until the time when her aide went to court on the 15/05/2018 for the 3rd time to pursue the summons of the case. The applicant wants the court to believe that at all that period of more than

8 months the court never issued the summons to appear to the applicant. This is a serious allegation to the court which needs proof and ought to have been proved. In my opinion the assertion by the applicant in paragraph 8 of the affidavit does not prove the said allegations directed to court. I say so because this is not the fact which could be in the knowledge of the applicant as she wants the court to believe because she received information from her aide. If she wanted the court to so believe one would expect her to disclose the source of that information in her verification clause which information to the contrary she has claimed be of her own knowledge. In the alternative that information from the applicant's aide could or ought to have been proved by sworn affidavit of the alleged aide. Since there is no such affidavit by the alleged aide, I undoubtedly find that the applicant has failed to account for such delay of more than 8 months which in my opinion is an inordinate delay. It follows therefore and I agree with Ms. Assey that the case of **Tanzania China Friendship Textile Co. Ltd** sought to be relied on by the applicant to establish good cause for the delay by failure of the court to notify her of the collection date of the ruling is not applicable in the circumstances of this case.

Again there is a period of 67 days between the dates of withdrawal of Civil Appeal No. 162 of 2017 on the 7/3/2017 on technical flaws and collection of the copy of ruling on the 8/05/2019 before this application was filed on the 15/05/2019. This period of time has not also been accounted for by the applicant.

It was held in the case of **ALMAN INVESTMENT LTD VS PRINTPACK TANZANIA AND OTHERS**; Civil Application No. 3 of 2003 (Unreported) that;

"Applicant ought to explain the delay of every day that passed beyond the prescribed period of limitation."

In this case the applicant apart from accounting for the delay of 58 days before filing Civil Appeal No. 162 of 2017 which was struck out for being time barred has failed to account for the delay of every day that passed after the striking out of the appeal by Hon. Muruke J on the 18/08/2017 until when this application was filed which is more than 10 months. She has also failed to establish that at all that time she was prosecuting her cases diligently. It follows therefore that even the case of **Elibariki Asseli Nnko** (supra) that the applicant wished to rely on to cement her point on the fact that she was busy prosecuting her cases in court which fact amounts to sufficient or good cause to warrant extension of time to appeal out time is inapplicable in the circumstances of this case. For those reasons coupled with the applicant's failure to account for such inordinate delay of more than 10 months, I hold that when prosecuting her cases from the time of striking out Civil Appeal No.162 of 2017 by this court up to the time of filing this application the applicant acted without due diligence. She has therefore failed to establish good cause to warrant this court exercise its discretion by extending time for the applicant within which to file an appeal to this court as prayed.

In the upshot and for the foregoing reasons, I find that this application lacks merit and is hereby dismissed in its entirety with costs.

It is so ordered.

DATED at DAR ES SALAAM this 20th day of March, 2020.


E.E. KAKOLAKI

JUDGE

20/03/2020

Delivered at Dar es Salaam this 20th day of March, 2020 in the presence of **Mr. Cecilia Assey** learned advocate for the respondent who is also holding brief for Mr. Frank Kilian learned advocate for the Applicant and in the presence of the respondent.


E. E. Kakolaki

JUDGE

20/03/2020