

IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 380 OF 2019

ASIA ABDU APPLICANT

VERSUS

JUMA ABDALLAH NASSORO RESPONDENT

RULING

14th Feb & 6th March, 2020.

E. E. KAKOLAKI J

This is an application for extension of time within which to lodge an application to this court to set aside the dismissal order in Misc. Civil Application No. 386 of 2017 dated 31/7/2018. The application was brought under Section 14(1) of the Law of Limitation Act, [Cap. 89 R.E 2002] at the instance of **Machibya Professional Attorneys** supported by affidavits of **Asia Abdu** the applicant and **Samwel Gerald** the legal officer and assistant to one advocate **Paul J. Mbuya**. In addition to that, there is also a supplementary affidavit of the applicant **Asia Abdu** to support this application. On the other side the application was strongly resisted by the respondent who filed his counter affidavit.

When the application was called on for hearing before me on 13th and 14th February, 2020 the applicant was represented by Miss Lilian Kimaro

learned Advocate while the respondent enjoyed the services of Mr. Francis Mgare learned advocate. Introducing her submission Miss Kimaro craved court's leave to adopt the affidavits of **Asia Abdu** and **Samwel Gerald** plus the supplementary affidavit of **Asia Abdu** together with the annexures thereto to form part of her submission. Submitting on the application she invited this court to grant the application for extension of time within which to lodge an application to this court to set aside the dismissal order of the court in Misc. Civil Application No. 386 of 2017 dated 31/7/2018 as empowered by the provisions of section 14(1) of the Law of Limitation Act, [Cap. 89 R.E 2002]. She stated that the delayed days to be accounted for by the applicant for being late to file the application for setting aside the dismissal order for want of prosecution were 330 days from the ruling date 31/7/2018 up to the time of filing this application on 26/7/2019 with exclusion of 30 days allowed by the Law of Limitation Act [Cap. 89 R.E 2002] in part III paragraph 2.

Accounting for such delay Miss Kimaro advanced four reasons which she submitted that constituted good cause to warrant this court to exercise its discretion judiciously and grant the application. In support of those reasons she placed her reliance on the case of **Lyamuya Construction Company Limited Vs. Board of Registered Trustees of Young Women Christian Association of Tanzania, Civil Application No. 2 of 2010** (unreported) which reiterated factors to be looked unto when considering what amount to good cause, the case which was cited with approval in the case of **Tropical Air (TZ) Limited Vs. Godson Eliona Moshi**, Civil Application No. 9 of 2017. The said factors are:

- 1. The applicant must account for all the period of delay.*
- 2. The delay should not be inordinate.*

- 3. The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.*
- 4. If the Court feels that there are other reasons, such as the existence of point of law of sufficient importance, such as the illegality of the decision sought to be challenged.*

Submitting on the four reasons that delayed the applicant to file this application Miss Kimaro contended that, **firstly** applicant's advocate one **Paul J. Mbuya** failed to attend the court and inform her of the dismissal order when the application was called for hearing on 31/07/2018, and that she could not reach him over his mobile phone. That, following that communication failure the applicant used her relative who was in Dar es salaam to inquire into the case's status from the court only to be informed that the same was dismissed, before she learnt further through **Samwel Gerald** a legal officer in advocate **Paul Mbuya's** law firm that the said advocate fell sick since July 2018 and was undergoing treatment at his home village. **Secondly** that, on that date (31/6/2018) being resident of Dodoma region she could not afford bus fare to Dar es salaam to attend court sessions physically. **Thirdly**, the applicant unsuccessfully tried to challenge the said dismissal in this court by lodging Misc. Civil Application No. 509 of 2018 which unfortunately was struck out for wrong citation of the law on 28/6/2019 and the application which lasted in court for 298 days. And **lastly**, she contended that, there was no negligence, sloppiness or apathy on the part of the applicant as she acted diligently. That, it took the applicant some time to secure another advocate from 28/6/2019 when Misc. Civil Application No. 509 of 2018 was struck out up to 23/7/2019 when she

engaged Mr. Elias Machibya advocate who filed the present application on 26/7/2019. Miss Kimaro stressed that the applicant despite of all those predicaments acted diligently and her conducts show that she was busy in court corridors pursuing her rights. That she never acted negligently or with apathy in pursuing her rights. She invited this court to find that the four conditions referred in the case of **Lyamuya Construction Co. Ltd** (supra) were met by the applicant. Further to that she also cited the case of **Zaidi Baraka and 2 others Vs. Exim Bank (T) Limited**, Commercial Cause No. 300 of 2015 which held that, since the applicants were pre-occupied with court proceedings in the Court of Appeal it was a good cause to grant extension of time. Miss Kimaro urged the court to apply the decision of **Zaidi baraka's** case in this case and find that the applicant genuinely and diligently spent 298 days prosecuting Misc. Civil Application No. 509 of 2018 which was desperately struck out for citing wrong provision of the law. She convincingly prayed the court to be pleased to grant the application by extending time as prayed.

As already noted above, the application was strongly resisted by the respondent's counsel Mr. Mgare. He aggressively submitted that in all four corners of this application the applicant failed to advance not only reasonable reasons to account for the delay but also insufficient enough to constitute good cause to warrant this court exercise its discretion judiciously in considering whether to grant the application or not. Attacking the reasons advanced by the applicant one by another Mr. Mgare contended that, the alleged evidence by the applicant in paragraph 9 of **Asia Abdu's** affidavit that she learnt of the dismissal of her application Misc. Application No. 386 of 2017 for want of prosecution

on 31/7/2018 from her relative who resides in Dar es salaam was insufficient, unfounded and thus could not be believed by this court. That, the names of that relative were not disclosed nor were there affidavits to prove the alleged facts, he lamented. He added that, in absence of proof of those facts by the alleged relative sent to court by the applicant to inquire the status of the application plus the dates when the applicant knew of that dismissal of the application the facts which could be proved by that unmentioned relative, it will be difficult for this court to gauge and consider reasons advanced by the applicant to account for the delay before filing another application. I find merit in this complaint. It is true that the applicant one **Asia Abdu** in her affidavit did not mention that relative who gave her that important part of information concerning dismissal of the application for want of prosecution. Further to that the court had a glance of an eye of one **Asia Abdu's** affidavit and its supplementary part. There is nowhere in the verification clause it is acknowledged by the deponent that the information contained in paragraph 9 relating to inquiry made in court and its findings were actually sourced from that unnamed relative. She averred that that all information was true to the best of her knowledge including the information she averred in paragraph 9 to have been received for the relative which in my firm opinion she cannot prove. Now how can this court believe that it was the same unnamed relative who inquired in court the status of the application and notified her? I am therefore in agreement with Mr. Mugare that there was a need for that relative's name to be disclosed and swear affidavit to prove that important fact whether it is true that she/he is the one who made that inquiry and when was the applicant notified. Otherwise it is difficult for

this court to know when it came to knowledge of the applicant that her application was dismissed and properly gauge the time spent before the applicant took further steps. That reason by the applicant therefore fails.

I now turn to Mr. Mgare's second lamentation. He stated that the alleged applicant's failure to afford bus fare from Dodoma to Dar es saam to attend her application is nothing but a total lie on oath. Amplifying this point he averred that there is nowhere stated in the affidavit that the applicant is a pauper. And if one is to believe that she is a pauper how did she manage to engage advocates in all applications she has been pursuing in court including this one, Mr. Mgare asked. In this point Miss Kimaro was quick to rejoin that the instruction to the advocate and payment of fees is the arrangement between the client and the advocate, as payment could be made by instalments. Therefore there was no any lie told by the applicant. I also think this lamentation by Mr. Mgare is worth of consideration too. As found out when considering the first reason by the applicant that it is difficult to believe whether she communicated her relative or not, it is also difficult to believe whether the applicant was in Dodoma when her application was dismissed and that she could not afford a bus fare to Dar es salaam to attend her case. She has failed to tender any evidence to prove that she was in Dodoma on 31/7/2018 as there is no evidence to show when did she come to Dar es salaam to file and pursue her second application in Misc. Civil Application No. 509 of 2018 that sought to set aside the dismissal order in Misc. Application No. 386 of 2017. One would have expected her to state the dates she came to Dar es salaam and tender bus tickets to that effect. She was also expected to state when she collected a copy of ruling in Misc. Application No. 386 of 2017 and the

dates when she filed Misc. Civil Application No. 509 of 2018 challenging the dismissal order the application which was struck out. A mere assertion that she was in Dodoma in absence of evidence as to when she came to Dar es salaam leaves much to be desired and avail this court with no tangible evidence to gauge the time she delayed in filing the present application. This reason also does not constitute good cause for the delay.

On the third reason of sickness of the applicant's advocate Mr. Mgare submitted that the same was not sufficiently established. The reason he advanced was that one **Samwel Gerald** who sworn affidavit to prove advocate Paul Mbuya's sickness was not competent to do so at this moment. That the evidence he is trying to prove is that of what happened to advocate Paul J. Mbuya on 31/7/2018 the date which he is alleged to have fallen sick as result failed to enter appearance in court and consequently dismissal of the application for want of prosecution. That neither the said **Samwel Gerald** nor the applicant **Asia Abdu** in their affidavits disclosed the where about of Mr. Paul Mbuya at the time of filing this application as their affidavits were sworn and annexed to this application on 26/7/2019 almost one year after the alleged sickness of Mr. Paul Mbuya. That advocate Mbuya would be the best witness to tell this court through his affidavit what had happened to him on the 31/7/2018 and soon thereafter. Failure of that applicant's delay was a result of own negligence and lack of diligence he submitted. Mr. Mgare added further that assuming the said advocate had fell sick before taken to the home village as alleged still there could be medical chits to prove his sickness which were not tendered. Responding to this Miss Kimaro stated that medical chit could not be obtained to a patient who was

undergoing traditional treatment in the village. She urged this court to dismiss that contention.

In considering the third point as raised by Mr. Mgare, I am at one with him that, it is true advocate Mbuya would be the best witness to tell what befell him and failed to enter appearance on the day when the application was dismissed. I say so because the court is not told where he was at the time of filing this suit instead the applicant is trying to bring that evidence through one Samwel Gerald who could not even tell where said advocate Mbuya was after almost a year since he missed in court 31/7/2018. I am therefore in agreement with Mr. Magare's submissions that Samwel Gerald was incompetent person to testify on the alleged indispose of advocate Mbuya, thus this fact remains unproved as well. Since the same is unproved then it does not constitute good cause as well.

On the last reason as submitted by Miss Kimaro that the applicant acted diligently and had spent almost 298 busy in court prosecuting Misc. Civil Application No. 509 of 2018 seeking to set aside the dismissal order in Misc. Civil Application No. 386 of 2017 that constituted good cause Mr. Mgare strongly disputed those facts contending that the applicant or her advocate acted negligently. And for that matter she could not be heard submitting to have acted diligently. It was Mr. Mgare's submission that Misc. Civil Application No. No. 509 of 2018 was struck out by the court basing on appellant's advocate negligence of citing a wrong provision of the law. Thus due to that negligence time cannot be counted on applicant's favour for the negligence caused by her advocate in prosecuting the application with diligence. In her rejoinder Miss Kimaro

reiterated what was submitted in submission in chief and insisted that the applicant acted diligently.

I have investigated this allegation to see whether it is true or not and if true who is to blame. Traversing through the both affidavits of **Asia Abdu** and **Samwel Gerald** and the supplementary affidavit thereto I have been unable to unveil any evidence mentioning the advocate who prepared the said application so that he could be blamed. What is discerned from the applicant's affidavit in paragraph 11 is that after learning of her advocate's problems and dismissal of her application she lodged in this court Misc. Civil Application No. 509 of 2018 to set aside the dismissal order, the application which was struck out. She attached the ruling of said Misc. Civil Application No. 509 of 2018 delivered on 28/6/2019. As noted earlier it is not known who prepared the said application. In absence of that fact blames must be on applicant's head for wrong citation of the law that led to striking out the said application. Even if we are to take that the same was prepared by the advocate who is not mentioned still blames were to be thrown to the advocate who acted negligently as per the decision in **Umoja Garage V National Bank of Commerce (1997)** TLR 109 (CA). In this case the advocate had relied on wrong Registrar's certificate to file an application for extension of time to lodge Notice of Appeal the Court, the Court had this to say:

- (i) *It was clear that the error had been committed by the applicant's counsel and the Registrar could not be held blameworthy;*
- (ii) *In the circumstances no sufficient cause had been made out for enlarging the time as prayed.*

In the case of **William Shija Vs. Fortunatus Masha** (1997) TLR 213 in an application for extension of time where the delay was caused by wrong application filed in the High Court, the Court of Appeal had this to say:

*" ... the delay was caused by wrong application filed in the High Court. This, we are convinced that convinced, is a clear manifestation of negligence on the part of the Counsel. In our view, such negligence on the part of the counsel for the first respondent goes to the very root of the matter, it cannot be regarded as a mere slip. On a number of occasions, this Court has held that negligence on the part of Counsel is not sufficient reason for extending time under Rule 8. See the following among others: **Maulidi Juma Vs. Abdalla Juma**, Civil Application No. 20 of 1988 and **Kighoma Ali Malima Vs. Abas Yusuf Mwingamo**, Civil Application No. 5 of 1987."*

Having no evidence to the contrary that it is not the applicant who filed the application which was struck out she has to carry all the blames associated to wrong citation of the law. In that regard she cannot be heard to claim that the delay of 298 days to file the current application

is not associated to her negligence. I find that the applicant was negligent in prosecuting the said application. Having so found the case of **Zaidi Baraka and 2 others** which the applicant is seeking to rely to convince the court that she was busy in court prosecuting Misc. Civil Application No. 509 of 2018 for 298 day in my opinion does not apply in a situation where the applicant acted negligently in prosecuting the alleged cases.

It has been also alleged by the applicant that it took her some time to secure a new advocate who is Elias Machibya to file the present application on 26/7/2019 after the striking out of Misc. Civil Application No. 509 of 2018 on 28/6/2019. One would ask how could she have taken almost 28 eight days without securing an advocate. The law requires the applicant to account for each and every day that she delayed. 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."

There is no reasons assigned that caused the applicant to spend about 28 days looking for another advocate. All those unsubstantiated reasons that led the applicant to delay for about 330 days to lodge this

application as was submitted by Miss Kimaro put in one basket, I hold that the applicant acted negligently and without apathy in the conducts of this matter.

The last ground which if established by the applicant could in itself be aconstitute good cause for extension of time is illegality of the decision sought to be challenged as it was considered in the case of **Ezron Magea Maryogo Vs. Kassim Mohamed Said and Another**, Civil Application No. 227 of 2015, CAT at Dar es salaam (Unreported) at page 12, where the court cited with approval the decision in the case of **VIP Engineering Marketing Limited and 2 Others Vs. CIT Bank Tanzania Limited**, Consolidated Reference No. 6,7 and 8 of 2006 and held that:-

'... a claim of illegality of the challenged decision constitutes sufficient reason for extension of time regardless of whether or not a reasonable explanation has been given by the applicant to account for delay.'

The applicant in this application has not raised any point of illegality. That being the position and after considering other reasons advanced, I am inclined to hold that the applicant has failed to establish good cause to warrant this court exercise its discretion to grant the application. This application therefore has no merits and is hereby dismissed with costs.

It is so ordered.

DATED at DAR ES SALAAM this 6th day of March, 2020.




E.E. KAKOLAKI

JUDGE

06/03/2020

Delivered Dar es Salaam today on 06/03/2020 in the presence of **Mr. Mgare** advocate for the respondent and in the absence of the applicant.




E. E. Kakolaki

JUDGE

06/03/2020