IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

MISC. LAND APPLICATION NO. 184 OF 2019

(Arising from the decision of HC of Tanzania Case Appeal No. 77 of 2016 and DLHT of Tarime Land Appeal No. 06/2015)

MTATIRO KEMANYA & ANOTHER .....APPLICANTS

VERSUS

MUSETI GACHUMA .....RESPONDENT

RULING

17th March & 07th May, 2020.

TIGANGA, J.

The applicant in this application Mtatiro Kemanya and another filed this application under Order XXXIX Rule 19, section 68 (e), 95 all of the Civil Procedure Code [Cap 33 RE 2002] and section 14 (1) of the Law of Limitation Act [Cap 89 RE 2002].

The orders sought in this application are, an order for this court to extend time to restore an appeal out of time, costs of this application to follow the event, and any other orders or and relief(s) as this honourable court may deem fit to grant.

The chamber summons was supported by the affidavit sworn and filed by the applicant, in which affidavit, the reasons for application were given. In that affidavit, it was deposed that, the applicant appealed in Misc. Land Appeal Case No. 77/2016 against the District Land and Housing Tribunal of Tarime in Land Appeal No. 06/2015. After filing an appeal, the parties commenced the process of resolving the dispute out of court. According to the affidavit, the settlement of the dispute was done through the District Executive Director of Tarime, who directed them to call the clan meeting and try to solve the matter. Apparently, after several attempts, the aspired settlement did not succeed, the decision was taken to the District Executive Director who instructed to re-institute the case. During that time when they were trying to settle, their appeal before the High Court that is Misc. Land Case Appeal No. 77/2016 was dismissed for want of prosecution. According to him, it is that state of affairs that caused him to delay the re-institution of the Appeal.

The application was served to the respondent, who filed the counter affidavit in opposition of the application. By the order of the court, the application was argued by way of written submissions which were filed in accordance with the schedule. The contents of the submissions in chief resemble that of the affidavit in support of the application, therefore for the purpose of clarity, I adopt the contents of the affidavit as summarised above.

It may be noted that the contents of the counter affidavit have not been summarised above, however the reasons for such an omission will be given soon in this ruling. It is important to note for purposes of record that, after all submissions were filed, the applicant through the service of Mr.

Kweka learned Advocate, filed a notice of preliminary objection against the submission filed by the respondent. Also this notice has been disregarded for the reasons to be given soon hereafter.

Now before going to the merit, I find it pertinent to say that, upon a close examination of the contents of the counter affidavit which was sworn and filed by Museti Gachuma in opposition of the application, two observations are clear. These observations make the said counter affidavit defective. One, that the counter affidavit was not signed and verified by the deponent, and two, the contents of paragraph 3 of the said counter affidavit are argumentative.

These two defects are actually in contravention of section 3 of Order XIX of the Civil Procedure Code [Cap 33 RE 2019], which provides for matters to which affidavits shall be confined as hereunder provided.

> *(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted:*
>
> *Provided that the grounds thereof are stated.*
>
> *(2) The costs of every affidavit which unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents shall (unless the court otherwise directs) be paid by the party filing the same."*

In the case **Phantom Modern Transport (1985) Ltd vs D.T. Dobie (TANZANIA) Ltd**, Civil Reference 15 of 2001 (unreported) quoted in **Anna**

Makanga vs Grace Woiso, Civil Reference No. 21 of 2006 all Court of Appeal decisions (unreported), it was held that the affidavit which contains the argumentative information must have the paragraph containing such arguments expunged. Consequently the content of paragraph 3 is hereby expunged for being argumentative.

Further to that, as earlier on pointed out, the counter affidavit at hand was also not signed and verified by the deponent. This means it falls short of the requirement set out in the law. In the case of **Job Mlama and 2 Others vs Republic,** Criminal Application No.18 of 2013 CAT – Mwanza (unreported) quoting the authority in the case of **DPP vs Dodoli Kapufi and Another,** Criminal Application No. 11 of 2008, extensively discussed the form and contents of the affidavit in which it held *inter alia* that;

The valid affidavit must contain;

i) The statement or declaration of facts

ii) Verification

iii) Jurat of attestation and

iv) *The signature of the deponent.* [Emphasis supplied]

The counter affidavit filed by the respondent, has no signature of the deponent and the verification, it therefore fall short of the quality of the affidavit as recognised by law. That said, the whole counter affidavit is incurably defective, it is thus expunged from the record. That results into the concurrent findings that, the application is taken to be defended, therefore even the written submission filed by the respondent is therefore disregarded,

thereby founding the reasons as to why the notice of objection raised by Mr. Kweka against the submission has been disregarded.

Having so found, let me go back to the merit of the application. As earlier on pointed out, the application seeks for extension of time to file an application for restoration of an appeal out of time.

The same has been filed under Order XXXIX Rule 19, sections 68 (e), and 95 of the Civil Procedure Code [Cap 33 RE 2002] and section 14 (1) of the Law of Limitation Act [Cap 89 RE 2002]. These provisions do not give the criteria of what should be considered in determining whether to grant or refuse the application. However the general rule is that, the application for extension of time to file or do anything out of the time prescribed by the law may be granted only if the applicant has shown good or sufficient reasons for delay to file or do what he was supposed to do within the prescribed time. See **The Registered Trustees of the Archdiocese of Dar Es Salaam Versus The Chairman Bunju Village Government and 11 Others,** Civil Appeal No. 147 of 2006 CAT DSM (unreported)

In showing good or sufficient cause, the applicant needs to comply with the requirement elaborated in the case of **Lyamuya Construction Company Ltd vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania,** Civil Application No.2 of 2010 (unreported) which held as follows;

(a) The applicant must account for all the period of delay.

(b) The delay must not be inordinate.

(c) The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intended to take.

(d) If the court feels that there are sufficient reasons, such as the existence of a point of law of sufficient importance; such as the illegality of the decisions ought to be challenged. "

From the time when the appeal was dismissed for want prosecution up to when the application for restoration was filed is almost three years, it is exactly 1,058 days, which is almost 35 month and three days. This is relatively a long time.

The reasons given for such a delay is that parties were actually trying their best to negotiate and settle their matter out of court, using the clan meeting by adopting customary procedure which also involved the District Executive Director. When they failed to settle, it was when they decided to file this application. I entirely comment on the spirit by the parties, that it is a good thing to settle the dispute out of court. However, it is un-procedural if there is a pending dispute between them before the court, to decide so to settle without informing the court. Doing so leaves the court in suspense and dilemma, and the only right recourse for the court is to dismiss the deserted appeal for want of prosecution just like it did. This is because court proceedings are sanctity, they should be taken as serious as they are. Parties should know that court registry is not a library or a depository of cases, where cases are filed and left to stay, to the contrary, cases are filed in court to be heard and determined. What the applicant did, can be properly referred

to as an abuse of the court process, which behaviour at this level, should be discouraged.

Having said all these, I find the application devoid of merit, as the applicant has failed to give sufficient reason for his delay to file the application for restoration of the appeal. He has just given a general excuse, he has failed to account all days he delayed, the delay is so long and inordinate, there is no diligence shown in taking any action, and there is no any illegality seriously shown in the decision sought to be challenged. That said, the application is dismissed with costs.

It is so ordered.

DATED at **MWANZA** on this 07th May 2020

J. C. Tiganga

Judge

07/5/2020

Ruling delivered in open chamber in the absence of the parties, they will be informed of the result by court clerk via their Mobile phones.

J. C. Tiganga

Judge

07/5/2020