

**IN THE HIGH COURT OF TANZANIA
(MWANZA DISTRICT REGISTRY)
AT MWANZA**

MISC. LAND APPLICATION NO. 171 OF 2019

MAGIGE GHATI KISABO APPLICANT

VERSUS

MSETI MANG'ARE RESPONDENT

RULING

13th May, & 14th July, 2021

ISMAIL, J.

In this application, the Court is called upon to exercise its discretion and grant an extension of time within which to institute a notice of intention to appeal to the Court of Appeal of Tanzania. The intended appeal seeks to impugn the decision of the Court (Hon. Mansoor, J.), delivered on 9th July, 2012, declaring Land Appeal No. 33 of 2007 time-barred. The applicant's latest effort follows four other back to back losses that he registered in Land Application No. 97 of 2012; Misc. Land Application No. 158 of 2014; Land Appeal 107 of 2016; and Land Appeal No. 16 of 2019. All of these applications were scuppered on account of fatal irregularities apparent on

the pleadings that found the actions and preference of matters in wrong forums.

The application is supported by an affidavit of Magige Ghati Kisabo, the applicant, setting out grounds on which the prayer for extension of time is based. The affidavit details the efforts that the applicant employed in trying to keep his matter afloat, but these efforts fell through as most of them were nipped in the bud by having them struck out. He attributes these gaffes to an ill-advice which was given to him by his erstwhile advocate in whom he put all his trust.

The application has been viciously fought by the respondent, through a counter-affidavit sworn by the respondent himself. Resisting the application, the respondent argued that the applicant's dilatoriness in taking action was as a result of negligent acts of his counsel. The respondent averred that acts of an advocate bind the principal, in this case the applicant, and he cannot deny what his agent did.

When the matter came up for orders, it was guided that the application be disposed of by way of written submissions whose filing was to conform the schedule. Whilst the applicant was to prefer his on or before 11th March, 2021, the respondent was scheduled to file his on or before 18th March,

2021, Rejoinder, if any, was to be filed on 25th March, 2021. Whereas the applicant conformed to the filing schedule, nothing has been filed by the respondent, to-date, and no word has been heard from him on the reason for the inability to conform to the schedule. This being the position, the question that follows is: what is the next course of action?

The settled position is that failure to file written submissions, when ordered to do so, constitutes a waiver of the party's right to be heard and prosecute his matter. Where the inability is on the part of the respondent, the consequence is to order that the matter be heard *ex-parte*. This position is consistent with the Court of Appeal's holding in ***National Insurance Corporation of (T) Ltd & Another v. Shengena Ltd***, CAT-Civil Application No. 20 of 2007 (DSM-unreported), in which it was held:

"The applicant did not file submission on the due date as ordered. Naturally, the Court could not be made impotent by the party's inaction. It had to act. ... it is trite law that failure to file submission(s) is tantamount to failure to prosecute one's case."

The stance taken in the just cited case is consistent with an earlier position, taken by this Court in ***P3525 LT Idahya Maganga Gregory v. Judge Advocate General***, Court Martial Criminal Appeal No. 2 of 2002 (unreported). It was held thus:

"It is now settled in our jurisprudence that the practice of filing written submissions is tantamount to a hearing and; therefore, failure to file the submission as ordered is equivalent to non-appearance at a hearing or want of prosecution. The attendant consequence of failure to file written submissions are similar to those of failure to appear and prosecute or defend, as the case may be. The Court decision on the subject matter is bound Similarly, courts have not been soft with the litigants who fail to comply with court orders, including failure to file written submissions within the time frame ordered."

See also: ***Tanzania Harbours Authority v. Mohamed R. Mohamed*** [2002] TLR 76; ***Patson Matonya v. Registrar Industrial Court of Tanzania & Another***, CAT-Civil Application No. 90 of 2011; ***Olam Tanzania Limited v. Halawa Kwilabya***, HC-(DC.) Civil Appeal No. 17 of 1999; and ***Geofrey Kimbe v. Peter Ngonyani***, CAT-Civil Appeal No. 41 of 2014 (both unreported).

In consequence of the foregoing, it is ordered that the matters be determined *ex-parte*, by considering the application based on the submission filed by the applicant.

In his submission in support of the application, Mr. Sijaona Revocatus, learned counsel for the applicant, has begun by tracing the genesis of the matter and the successive losses that the applicant registered along the way. He attributed the losses to the negligence on the part of the advocate who represented him in the applications, contending that the said advocate was less acquainted with the laws and procedures. The learned counsel argued that the applicant acted diligently, without no ill-intention, and that the Court should not shut its doors. To buttress his contention, Mr. Revocatus cited the decision of the Court of Appeal in ***Zuberi Mussa v. Shinyanga Town Council***, CAT-Civil Application No. 3 of 2007 (unreported), in which it was held that minor mistakes or lapses or oversight which do not amount to lack of diligence or gross negligence on the part of the applicant's counsel may constitute the reason for enlargement of time.

The learned counsel argued that the interpretation of the term "sufficient cause" should not be interpreted narrowly. Instead, a wider interpretation should be applied, encompassing all reasons falling outside the applicant's power to control or influence, resulting in the delay in taking necessary steps. On this he referred the Court to the decision in ***Yusuf Same & Another v. Hadija Yusufu***, CAT-Civil Appeal No. 1 of 2002

(unreported); and ***Felix Tumbo Kisima v. TTC Limited & Another***, [1997] TLR 57.

The counsel prayed that, having been in court corridors since 2007, the applicant deserves another chance. He prayed that the application be granted.

From the applicant's contention, the issue for determination is whether the application has revealed any material on the basis of which the Court may grant the application.

It is now a settled position that an extension of time is granted the Court's discretionary powers. The Court's discretionary powers are exercised upon satisfaction, by the applicant, through presentation of a credible case. Exercise of such powers requires that the applicant should act in a manner that upholds equity. This position is consistent with the Supreme Court of Kenya's persuasive position sprinkled in ***Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others***, Sup. Ct. Application 16 of 2014.

Thus, it is emphasized that the applicant of extension of time should not have his right of appeal impeded or stifled, unless circumstances of his delay are inexcusable, and his or her opponent was prejudiced by it (see ***Isadru v. Aroma & Others***, Civil Appeal No. 0033 of 2014 [2018] UGHCLD

3. It follows that, the condition precedent for the grant of extension of time is the party's ability to demonstrate existence of reasonable or sufficient cause. The whole essence of going through this painful route is to ensure that a party who is at fault does not benefit from his own inaction, consistent with the holding in ***KIG Bar Grocery & Restaurant Ltd v. Gabaraki & Another*** (1972) E.A. 503, wherein it was held that ***"... no court will aid a man to drive from his own wrong."***

As to what constitutes sufficient cause, numerous authorities have given an invaluable guidance. These include the decision in the landmark decision in ***Lyamuya Construction Company Limited v. Board of Trustees of YWCA***, CAT-Civil Application No. 2 of 2010 (unreported), wherein the following conditions were restated:

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

(b) The delay should not be inordinate.

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

(d) If the Court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as illegality of the decision sought to be challenged."

See: ***Aviation & Allied Workers Union of Kenya v. Kenya Airways Ltd, Minister for Transport, Minister for Labour & Human Resource Development, Attorney General***, Application No. 50 of 2014 (Supreme Court of Kenya).

In the instant application, the reason given as the basis for extension of time is the delay caused by the applicant's prolonged court actions. The question that arises from this fact is whether such delay is justified and good enough to amount to a sufficient cause. The trite position is that delays that arise as a result of pursuit, by the applicant, of a matter which turns out to be defective or untenable are excusable. They constitute a delay which is known, in legal terms, as a technical delay, and it operates as the basis for extension of time. Underscoring this principle was the Court of Appeal in ***Fortunatus Masha v. William Shija*** [1997] TLR 154. This decision became a foundation on which subsequent decisions stood. In ***Amani Girls Home v. Isack Charles Kanela***, CAT-Civil Application No. 325/08 of 2019 (Mwanza – unreported), a diligent pursuit of the appeal through unsuccessful applications was deemed to be sufficient to warrant extension of time.

Reviewing the circumstances of the instant case, what comes out is that what the applicant went through in his battles prior to the latest effort is a mirror image of what befell the applicant in the ***Amani Girls Home***


(supra). The applicant was on the receiving end of the lapses and errors committed by her counsel. The Upper Bench took the view that such lapses did not have the effect of slamming a door on her and deny her yet another opportunity to challenge the decision of the trial court. I draw an inspiration from this incisive decision and hold that, in the absence of any lack of diligence or negligence on the part of the applicant, this is an excusable delay in respect of which the quest for extension is justified.

In consequence of all this, I hold that the application has passed the legal threshold set for extension of time. Accordingly, the same is granted. Costs to be in the cause.

Order accordingly.

DATED at **MWANZA** this 14th day of July, 2021.




M.K. ISMAIL
JUDGE

Date: 14/07/2021

Coram: Hon. C. Tengwa, DR

Applicant: }

Respondent: Present

B/C: J. Mhina

Court:

Ruling delivered in the presence of both parties.

C. Tengwa

DR

At Mwanza

14th July, 2021

