

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA**

MISC CIVIL APPLICATION NO 40 OF 2020

(C/F Misc. Land Application No. 58 of 2019 at the High Court of Tanzania, in the District Registry of Arusha, Original Land Appeal No. 63 of 2018)

LAZARO MASONG MASSAY.....APPLICANT

Vs

SERIKALI YA KIJIKI CHA GETAMOCK.....RESPONDENT

RULING

Date of last order: 6/10/2021

Date of ruling : 17/11/2021

B.K.PHILLIP,J

This application is made under the provisions of section 14(1) and (2) of the Law of Limitation Act (Cap 89 R.E 2002). The applicant prays for the following order;

- ~~a) That this honourable Court be pleased to grant the applicant an~~
extension of time to file an application to set aside the dismissal
Order of the High of the United Republic of Tanzania at Arusha in
Misc. Land application No. 58 of 2019 dated 5th day of February ,
2020.
- b) Any other order(s) as this Court shall deem fit to grant.

The application is supported by an affidavit sworn by the applicant.

The application is contested. Three Counter affidavits, sworn by the learned State Attorney Peter Jackson Mseti, the respondent's former Village chairman, Mr Axwesso Shauri Kirway and the learned Advocate Gwakisa Kakusulo Sambo have been filed in opposition to the application.

The learned State Attorney Peter Jackson Musetti appeared for the respondent. Mr Israel Lazaro Masong holding a power of attorney appeared on behalf of the applicant. I ordered the application to be disposed of by way of written submissions. Both parties filed their written submissions as ordered by the Court.

Before going to the analysis of the submissions made by the parties, it is worthy having the brief background to this application. The same is as follows; In 2015, the applicant herein instituted a case at the District Land and Housing Tribunal for Karatu at Karatu against the respondent vide Land Application No. 66 of 2015, claiming that the respondent invaded into his land measuring five (5) Acres. The application was decided in favour of the respondent. The Land Tribunal ordered the applicant to be evicted from the suit land and the same be handed over to the respondent. Being aggrieved with the said decision, the applicant appealed to this court vides Land Appeal No. 63 of 2018

which did not sail thorough. It was dismissed. The applicant was not amused with the decision of this Judgment of the District Court. He filed a notice of Appeal and lodged an application for leave to appeal to the Court of Appeal of Tanzania Vide Misc. Land Application No.58 of 2019 which was struck out by this Court (Hon Massara,J) on 5th February 2020 for want of prosecution.

Now, back to the application at hand, the major argument raised by the applicant in his submission which is also reflected in his affidavit is that upon filing the application he requested to be provided with the summons and the documents for serving the respondent but he was informed by the Court clerk that the application was not yet assigned to the Judge. He kept on coming to Court several times without being provided with the summons and the documents for the application.

Finally, on 20th March, 2020 he came to Court again as usual to ask for the summons. To his astonishment, he was supplied with the proceedings in respect of Land Appeal No.63 of 2018. Upon further enquiry about the documents in respect of Misc. Application No.58 of 2019, he was informed that the same was struck for want of prosecution. It is on that date when he became aware that his application had been struck out. He promptly did the needful by

requesting to be supplied with the Court order vide a letter which he lodged in court on 25th March 2020. He was supplied with the Court order on 13th of April 2020. Thereafter he started seeking for legal assistance and on 28th April 2020, he lodged the instant application.

The applicant contended that he has accounted for the delay and given sufficient reasons for the same, thus this application has merits.

In addition to the above, the applicant contended that he is not fluent in Kiswahili. He believes that the failure to smoothly communicate with the registry officers attributed to what happened. He invited this Court to grant this application.

In rebuttal, the learned State Attorney started his submission by stating the position of the law in respect of applications of this nature, that is, the applicant is required to adduce good reasons/sufficient cause for the delay. Relying on the case of **Regional Manager, Tanroads Kagera Vs Ruaha Concrete Company Limited, Civil Application No. 96 of 2007**, (unreported), the learned State Attorney submitted that there are no hard and fast rules on what constitutes sufficient cause. Each case is determined on its own merits but the applicant has to present before the Court sufficient

reasons which will move the Court to exercise its judicial discretion to grant the application. The learned State Attorney went on submitting that in the instant application the applicant has failed to adduce any good cause for the delay. The applicant's allegation that he was misled or misinformed by the Court clerk that the application had not been assigned to a Judge is not substantiated in any way as there is no any affidavit sworn by the Court clerk to support that allegation. To cement his argument, he cited a number of cases including the case of **Zuberi Nassor Moh'd Vs Mkurugenzi wa Shirika la Bandari Zanzibar , Civil Application No. 93/15 of 2018 CA at Zanzibar, (** unreported) , in which applicant alleged that he was supplied with some documents by a Court clerk. The court said the following;

"... Besides that the applicant's account that he had to find a court clerk to supply him with another set of documents is not supported by any evidence . Indeed, as was correctly argued by Mr Rajab, the applicant did not even mention the name of the said clerk.Neither did the said court clerk swear /affirm an affidavit to substantiate his allegations."

The learned State Attorney maintained that in the absence of any affidavit sworn by a Court clerk, the applicant's allegation aforesaid remains to be a hear say. Also, he cited the case of **Sabena Technics Dar Limited Vs Michael J. Luwunzu, Civil Application No. 451**

of 2018 (unreported) to buttress his arguments. Furthermore, the learned State Attorney contended that the applicant's affidavit contains false information. The applicant's assertion that his application was dismissed and that was informed by the Court clerk that the application was not yet assigned to a Judge is false as his application was struck out. Also a Copy of the chamber summons attached to the affidavit (annexure L-4) shows that the application was assigned to Honourable Judge Masara. He maintained that the affidavit in support of this application contains false information, therefore it is not worthy to be acted upon. Technically, this application is not supported by any affidavit, he added. To fortify his argument he cited the case of **Ignazio Messina Vs Willow Investment SPRL, Civil Application No.21 of 2001** (unreported) in which the Court of Appeal held that an affidavit which is tainted with untruths is not an affidavit at all and cannot be acted upon to resolve any issue.

With regard to the time spent in looking for legal assistance , the learned State Attorney's response was to the effect that the law should be enforced even at a risk of hardship to a particular party. Looking for legal assistance is not a good reason for this Court to grant extension of time to the applicant . To support his stance he

cited the case of **Ally Kinanda and 2 others Vs The Republic, Criminal Application No. 1 of 2016**, (unreported) . Likewise, the learned State Attorney contended that the inability to speak Kiswahili fluently cannot be an excuse

Having perused the pleadings as well as passionately analyzed the rival submissions made by the parties, I entirely agree with the learned State Attorney that Application No.58 of 2019, was not dismissed as stated by the applicant in the chamber summons, but it was struck out. This is proved by Annexure L-4 to the affidavit in support of this application.

It has to be noted that this Court has been moved by way of application through a chambers summons which stipulates the orders sought. ~~In this matter as I have pointed out earlier, the applicant~~ prays for an order for extension of time to set aside a dismissal order made by this Court in Misc Land Application No.58 of 2019. In my considered view the order sought by the applicant is misconceived and not tenable as the said Misc Land Application was not dismissed. In other words there is no any dismissal order in respect of the said Application No.58 of 2019. In the Court order, the subject of this application the court said the following;

"It is noted that since this application was filed in August 2019, the applicant has not appeared even to take the summons /documents to serve the respondent .It is apparent that he no longer wishes to prosecute the application. Application is struck out for want of prosecution"

In short the applicant seeks for extension of time for setting aside a non- existing order. I have noted that the applicant has been using the terms "struck out " and dismissed" interchangeable. This is not correct. There is a difference between an order striking out an application and an order dismissing an application. The former gives the applicant a room to refile the application subject to the limitation period as per the law applicable, whereas the latter does not give the applicant such an option.

Without prejudice to my findings herein above, by passing ,I wish to point out that the position of the law in an application for extension of time like the one at hand is that, the applicant is required adduce sufficient reasons for the delay in filing this application . [See the case of **Tanga Cement Co Ltd Vs Jumanne D.Msanga and Another, (TAG) Civil Application No. 6 of 2021 (CA) and Consolidated Holdings Corporation Vs Official Receivers of**

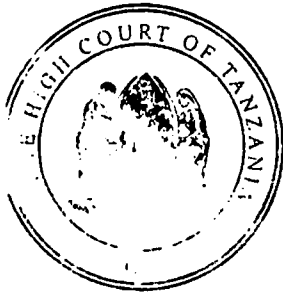
Tanzania Films Company Limited , Civil Application No. 366

/01/ 2017 (Both unreported)].The applicant has alleged that on 20th March 2020 he became aware that his application was struck out. He filed the letter for request to be supplied with the copy of the Court order on 25th March 2020. So, it took him five good days to request for the copy of the Court order. No explanations have been offered as to why the applicant took five days to request for the Court order. Again, the applicant claims that he was supplied with the Court order on 13th April 2020. This application was filed in Court on 28th April 2020, that is two weeks after receipt of the Court order. The reason behind spending two weeks as can be discerned from the applicant's affidavit is that he was looking for legal assistance.

Let me say outright that I am inclined to agree with the learned State Attorney that the aforesaid reason given by the applicant is not a sufficient reason for the delay. It is a general excuse which cannot be substantiated. After all, even before the applicant was supplied with the Court order, he was quite aware that his application was struck out. Thus, the applicant's contention that he started looking for legal assistance and Court fees on 13th April 2020 depicts nothing than sheer negligence which is unacceptable in law.

In the upshot, this application is dismissed with costs.

Dated this 17th Day of November 2021.




B.K.PHILLIP

JUDGE