

IN THE HIGH COURT OF TANZANIA

TABORA DISTRICT REGISTRY

AT TABORA

MISC. LAND APPLICATION NO. 44 OF 2020.

[Arising from the dismissal order in Land Application No. 103 of 2017 at the High Court of Tanzania at Tabora.]

DAVID SAMSONI BUTEMBA..... APPLICANT

VERSUS

CONSTANTINE COSMAS KIHALIYE..... RESPONDENT

.....
RULING
.....

Date of Last Order 22/10/2021

Date of Delivery 26/11/2021

AMOUR S. KHAMIS, J.

David Samsoni Butemba, the applicant herein moved this Court by way of Chamber Summons under Section 14(1) of the Law of Limitation Act, Cap 89, R.E. 2019 for the following reliefs:

1. That, this Honourable Court be pleased to extend time to set aside the dismissal order of the application No. 103 of 2017 out of time.
2. That, this Honourable Court be pleased to set aside the dismissal order of the application No. 103 of 2017 and hearing this application inter-parties.

3. That, this Honourable Court be pleased to allow the applicant to file an application to set aside the dismissal order out of time.
4. That, this Honourable Court be pleased to grant costs of this application.
5. That, this Honourable Court be pleased to make other order as it deems fit.
6. Order that the case be admitted and heard in merits.

The Chamber Summons was supported by an affidavit sworn by David Samson Butemba, the applicant herein

Before me, the applicant was unrepresented and thus tended for himself. Constantine CoSMAS Kihaliye the respondent was ably represented by Mr. Musa Kassim, learned advocate. With leave of the Court parties made written submissions.

It was deposed that his application, Misc. Land Application No. 103/2017 was dismissed by this Court (J.H.K. Utamwa, J) on 01/03/2018 for want of prosecution. The applicant deposed that on date of dismissal he was in prison serving of three (3) months imprisonment by Tabora Urban Court. The applicant deposed further that following a dismissal order, on 6/10/2017, he filed an application for extension of time in respect of the dismissed application.

According to him, the application titled Misc. Land Application No. 40/2017 was dismissed by Hon. Mallaba, J on the ground that the ought to have filed application for restoration of the dismissed application.

The applicant deposed that his Application No. 14/2019 was struck out by this Court on 24/11/2020 for wrong citation of the Law.

Constantine Cosmas Kihaliye, the respondent herein resisted the application. In an affidavit affirmed by Musa Kassim, learned Advocate for the respondent, it was deposed that Misc. Land Application No. 103/2017 was dismissed out of negligence.

Before me, the applicant was unrepresented and thus fended for himself. Constantine Cosmas Kihaliye, the respondent, was ably represented by Mr. Musa Kassim, learned advocate. With leave of the Court, parties made written submission.

The applicant contended that Misc. Land Application No. 103 of 2017 was dismissed on 01/3/2018 for want of prosecution because on the material date he was serving a custodial sentence in Criminal Case No. 52 of 2017 of the Tabora Urban Primary Court.

He averred that after being acquitted by the District Court of Tabora, he fell sick and could not apply for restoration of the dismissed Misc. Land Application in time.

He argued that a sick sheet attached to the affidavit clearly revealed that it was signed by a medical officer on 3/5/2018 contrary to the respondent's allegation that the date was not disclosed.

The applicant submitted that, the current position of law requires Courts to deal with cases justly, speedily and to have regard to substantive justice as per the principle of the overriding objective or oxygen principle.

He moved this Court, on interest of justice, to have this application granted taking into consideration that there is no failure of justice which will be occasioned if the said application will be granted.

Replying to the applicant's submissions, Mr. Musa Kassim contended that it was evident from the applicant's affidavit that his application (Misc. Land Application No. 103/2017) was dismissed for want of prosecution.

He asserted that through Misc. Land Application No. 40/2018, Hon. J.B. Mallaba granted the applicant twenty (20) days extension to file an application for restoration of the dismissed application i.e. Misc. Land Application No. 103/2017.

Mr. Kassim submitted that the extended days given to the applicant by this Court ended on 17/4/2019 but surprisingly the applicant filed the application at hand 369 days after the due date for filing an application for restoration of the dismissed Misc. Land Application No. 103/2017.

He submitted that the applicant had to account for the 369 days from 17/4/2019 to 22/12/2020 when he filed the present application.

Mr. Musa cited the case of **Wambele Mtumwa Shaheme v Mohamed Hamis**, Civil Application No. 138 of 2016 (unreported) in which the case of **Mustafa Mohamed Raze v Mehbood Hassanati Versi**, Civil Application No. 168 of 2014 (unreported) was quoted that;

“From the wording of this Rule, it is my view that an application for extension of time may be brought at any time even after the expiration of the prescribed time. It is also my understanding that the applicant’s obligation is to account for the delay for everyday within the prescribed period”.

Based on the above citation, Mr. Kassim submitted that the applicant lacked sufficient cause to warrant this Court extend time for restoration of Misc. Land Application No. 103/2017. He moved this Court to dismiss the application with costs.

In a short rejoinder, the applicant stated that; it was undisputed that through Misc. Land Application No. 40/2018, he was granted twenty (20) days to apply for restoration of the dismissed Misc. Land Application No. 103/2017 and contended that, he complied so.

He argued that the respondent mixed facts as this instant application was for extension of extend time to restore the application which was struck out for wrong citation of law. He

moved the Court to ignore the respondent's allegations that he failed to account for the delay.

Having considered rival submission from both parties and examined the records, the issue for determination is whether the applicant has furnished sufficient reasons for this Court to extend time for restoration of Misc. Land Application NO. 103/2017.

It is not disputed by either party that the applicant was granted twenty (20) days to file an application for restoration of the dismissal application and the main reason for his delay was said to be sickness. Record shows that he fell sick as soon as he was acquitted by the District Court of Tabora in Criminal Appeal Case No. 04 of 2018.

In **BLUELINE ENTERPRISES LTD V EAST AFRICAN DEVELOPMENT BANK, MISC. CIVIL CAUSE NO. 135/1995** (unreported), this Court pointed out the law that extension of time must be for sufficient cause and that extension of time cannot be claimed as of right.

Annexure "DSB 6" to the affidavit of David Samson Butemba in support of the Chamber Summons is a copy of the proceedings in Criminal Case No. 525/2017 of the Tabora Urban Primary Court.

The said case which involved Constantine Cosmas as the complainant and David Samson (Butemba) as the accused resulted to conviction of David Samson Butemba which supports his allegation of being imprisoned for the three (93) months.

Annexure “DSB 7” to the affidavit of David Samson Butemba is a medical chit issued by Njingo Medical Laboratory located at Ujiji Street Tabora. The document show that the applicant was diagnosed of a disease on 3/3/2018.

Annexure “DSB 9” to the applicant’s affidavit is a copy of the ruling of this Court in Misc. Land Case Application No. 40/2018. At page 2 – 3 of the typed ruling, it reads: *The application was dismissed because on material date and time, he was in prison having been convicted by the Primary Court of Tabora for the offence of Criminal trespass.....”*

This evidence on records proves that the applicant was indeed sentenced to serve a custodial sentence and that at the time of the dismissal, he was in prison.

The Court of Appeal laid grounds for extension of time in the case of **Lyamuya Construction Co Ltd vs. Board of Registered Trustees of Young Women’s Christian Association of Tanzania**, Civil Application No. 02/2010 (unreported) and it stated that;

“As a matter of general principle, it is in the discretion of the Court to grant extension of time. But that discretion is judicial, and so it must be exercised according to the rules of reason and justice, and not according to private opinion arbitrarily. On the authorities however, the following guidelines maybe formulated;

- 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 that 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 the illegality of the decision sought to be challenged.”*

Records further show that David Samson Butemba lodged Miscellaneous Land Case Application No. 14 of 2019 for extension of time to file an appeal.

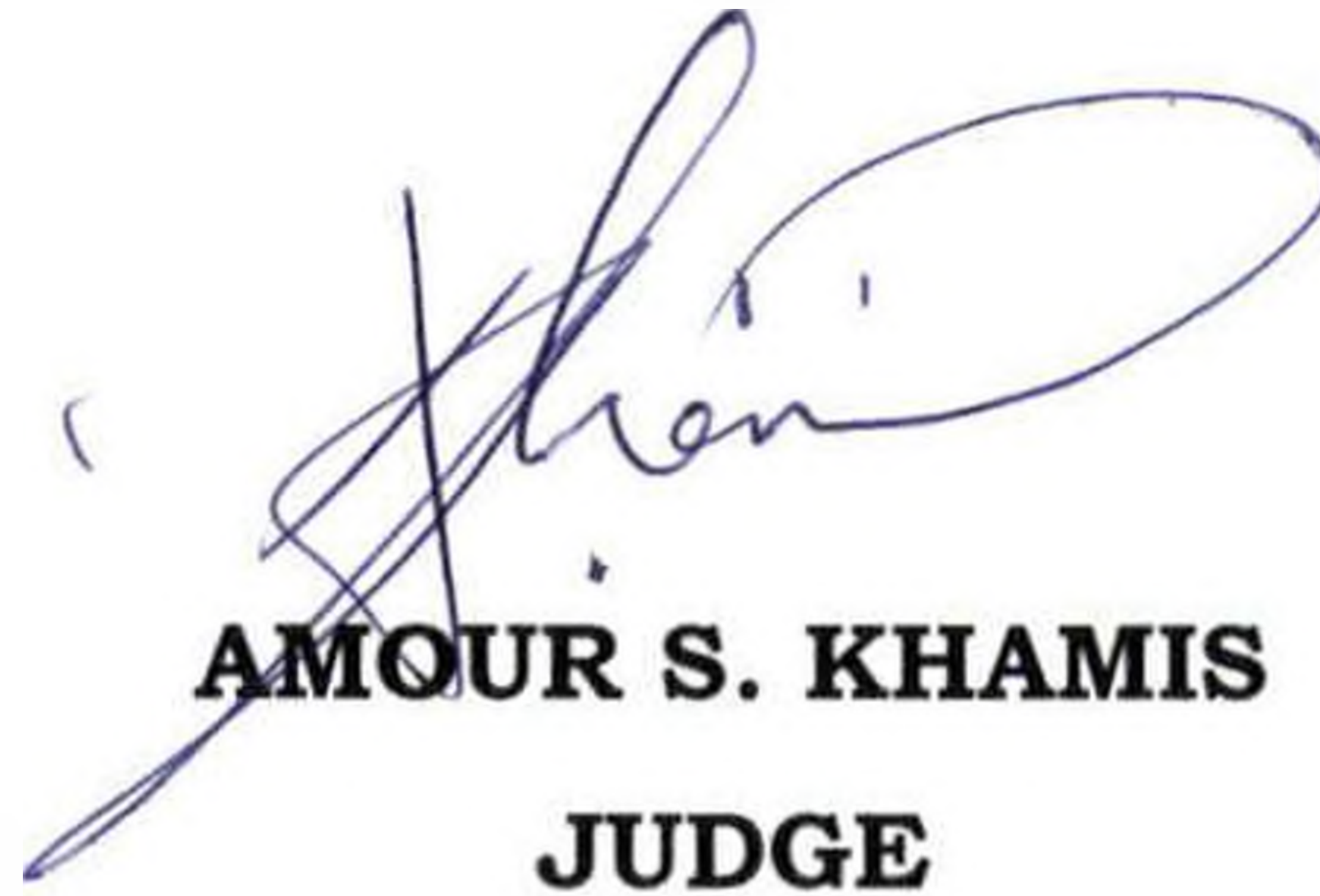
The application proceeded exparte against Constantine Cosmas Kihaliye who defaulted appearance but struck was out by this Court on account of wrong citation of the law.

Whereas the said application was struck out on 24/4/2020 the present application was lodged on 22/12/2020.

From this background, it is evident that at the time of dismissal of Misc. Land Case Application No. 103 of 2017, the applicant was in prison serving a three (3) months sentence on account of criminal trespass. It is equally clear that David Samson Butemba actively pursued his right and the delay was neither inordinate nor out of laxity.

Consequently, the application is granted with no order for costs and Misc. Land Case Application No. 103 of 2017 dismissed on 1/3/2018 is hereby restored.

It is so ordered.



AMOUR S. KHAMIS

JUDGE

29/11/2021

ORDER

Ruling delivered in chambers. In presence of the applicant in person and Mr. Musa Kassim, learned advocate for the respondent. Right of Appeal explained.



AMOUR S. KHAMIS

JUDGE

29/11/2021