

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(IRINGA DISTRICT REGISTRY)

AT IRINGA

MISCELLANEOUS CIVIL APPLICATION NO.02 OF 2021

(Originating from Civil Case No.07 of 2017)

KIBO SEED COMPANY LIMITED APPLICANT

VERSUS

DEUSDEDITH HUNJA 1ST RESPONDENT

VITUS CHIGULA 2ND RESPONDENT

STEPHANO MAHUNDI 3RD RESPONDENT

ELETERI MLELWA 4TH RESPONDENT

23/6 & 12/7/2022

RULING.

MATOGOLO, J.

This ruling emanates from the application by the applicant Kibo Seed Company Limited, praying to this court to extend time so that she can file an application of Bill of Costs out of time.

The application is by way of chamber summons made under order 40 (2)(c) and 68 of The Advocates Remuneration Order, 2015. The same is supported by an Affidavit sworn by Emmanuel F. Kinabo.

At the hearing of this application parties were represented, while the applicant was represented by Mr. Emmanuel F. Kinabo the learned Advocate, the respondents enjoyed the service of Ms. Happy Ilomo the learned Advocate.

The matter was disposed of by way of written submissions.

Before submitting in support of the application, Mr. Kinabo found it important to evaluate the evidential weight of the counter-affidavit deposed by the Advocate for the respondents and filed in this court.

He contended that, that affidavits are evidence, and that facts alleged in an affidavit have to be controverted by facts in a counter-affidavit. Thus, placing the applicant under a strict proof is deemed to be an admission of the facts stated in the applicant's affidavit by the respondent. To support his argument, he cited the case ***of East African Cables (T) Limited versus Spencon Services Limited***, Misc. [application No. 61 of 2016 (unreported)]. The High Court (Commercial Division) at Dar es Salaam in the said case observed at page 7 of its ruling that:-

"In law affidavit and/or counter affidavit (as the case may be) is evidence. It is a voluntary declaration of the facts written oaths, unlike pleadings (plaint and written statement of defence and other pleadings) affidavit and counter affidavit are prima

fascie evidence of the facts stated therein. When a fact is stated on oath, it has to be controverted on oath and this gives the court an opportunity to weigh which fact is probably true than the other. When the fact sworn to or affirmed is not controverted then it is deemed to be admitted. When a person swears or makes a sworn declaration of a fact which tends to show that what he sworn to was false. Putting him to strict proof of the fact without giving your side of the story which you want to be believed, amounts to admission of the fact. A requirement of strict proof of the facts applies to pleadings in the suit (Plaint, Written statement of defense reply etc.) and not affidavit and counter affidavit which are as said earlier evidence”.

He submitted that, the respondents have admitted the facts stated in the applicant’s affidavit, he said the applicant is aware that the present application for extension of time is solely under the discretion of the Court, and that good cause have to be shown for the applicant to succeed in this application. The present application has been brought under Order 40(2)

(c) and Order 68 of The Advocates Remuneration Order, 2015. It can be observed that section 14(1) of The Law of Limitation Act (Cap 89 R.E 2019) has not been cited and also that order 40(2) (c) of The Advocates Remuneration Order, 2015 is unnecessary provision. He argued that, Order 68 of the Advocates Remuneration Order, 2015 gives the taxing officer the mandate to extend time of any proceeding before him.

He said the question to be answered at this point is whether the non- citation of section 14(1) of The Law Limitation Act (Cap 89 R.E 2019) and the citation of order 40 (2) of The Advocates Remuneration Order, 2015 is fatal?

He argued that, when one enabling provision is cited, the rest are superfluous which need not to be cited. Also, he said that, the citation of superfluous provisions of the Law in the chamber application does not make the application incompetent. He supported his argument by citing the case of ***Joseph Shumbusho versus Mary Erase Tigerwa & 2 Others***, Civil Appeal No. 183 of 2016, (unreported) CAT at Dar es Salaam in which the decision in ***Mic Tanzania Limited and 3 Others versus Golden Elobe International Services Limited***, Civil Application No. 1/16 of 2017 (unreported) was referred. The court observed that when one enabling provision is cited, the rest were surplusage which need not be cited. He went on arguing that, in the case of ***Joseph Shumbusho*** (supra) the court also held that the citation of superfluous provisions of the law in the chamber application does not make the application incompetent.

Mr. Kinabo went on submitting that, the citation of wrong provision of the law is curable under the overriding objective principle, to that he cited the case of ***Dangote Cement Limited vs. NSK Oil and Gas Limited***, Misc. Commercial Cause No. 08 of 2020 (unreported).

He contended further that, taking the two authorities cited above into account, it is clear that the present application is a valid application because since Order 68 of The Advocates Remuneration Order, 2015 was cited in the chamber application, there was no need of also citing section 14(1) of The Law of Limitation Act (Cap 89 R.E 2019) as the same was surplusage. And the citation of Order 40(2)(c) of The Advocates Remuneration Order, 2015 which is a wrong and superfluous provision of the law does not make the present application incompetent.

Regarding the issue as to why this application for an order of extension of time should be granted, Mr. Kinabo argued that, it is trite law that no authority need be cited on the assertion that an application for extension of time can only be granted upon good cause being shown. He went on arguing that, in the case of ***Alasai Josiah (suing by his attorney Oscar Sawuka) versus Lotus Valley Ltd***, Civil Application No. 498/12 of 2019(unreported) the Court of Appeal of Tanzania at Dar es Salaam observed that in order to determine good cause, circumstances of each case need to be considered as there is no single definition of that term.

He said the circumstances of the present case can be observed from paragraphs 3 to 6 of the Applicant's affidavit, which stipulate that on the

10th July, 2020 an order for the dismissal of Civil Case No. 07 of 2017 with costs was made in favour of the Applicant. The applicant then made an application in Taxation Cause No. 29 of 2020, which was struck out on the 14th December, 2020. He argued that, at the time when the ruling was delivered, the time for lodging a fresh bill of costs allowed by the law had already lapsed.

He went on contending that, from 10th July 2020 until the 29th December 2020 is 5 months and 19 days.

He said in the case of ***Elisa Ole Markos & Another versus Erick Raymond Rowberry & Another***, Misc. Civil Application No. 126 of 2019, the High Court of the United Republic of Tanzania at Arusha cited the case of ***Lyamuya Construction Company Limited versus Board of Trustees of Young Women's Christian Association of Tanzania***, Civil Application No. 2 of 2020 (unreported) in which it was held 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 natural justice, and not according to private opinion or arbitrarily. On the authorities, however the following guidelines may be formulated,

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

(b) The delay should not be inordinate.

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

(d) N/A".

He contended further that, from 10th July 2020 to the 14th December 2020 when the application in Taxation Cause No. 29 of 2020 was dismissed, the applicant had been prosecuting the said application, and he obtained a copy of the ruling. He went on contending that, from 14th December 2020 to the 29th December, 2020 that is two weeks the applicant had been preparing an application for extension of time through her advocate and the filing of the same took place on the 29th December, 2020.

Mr. Kinabo went on submitting that, the delay is not inordinate or excessive as from the striking out of the Taxation Cause No. 29 of 2020, the applicant used only two weeks to prepare and file the present application for extension of time.

He further argued that, the applicant has shown diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take because the same had been in court corridors since 10th July 2020 to 14th December 2020 when the Taxation Cause No. 29 of 2020 was struck out. And after the same was struck out the applicant did not sit back and relax, she prepared and filed an application for extension of time

to file an application for bill of costs through her advocate within two weeks that is from 14th December, 2020 to 29th December, 2020 He submitted further that, the delay by the applicant was a technical delay because Taxation Cause No. 29 of 2020 was struck out on the reason that, it was defective and not because of the inaction of the parties or their Advocate. He said as the same was struck out on technical grounds, the court should rest its hand by granting the applicant an extension of time as it was done in the case of ***Elisa Ole Markos*** (supra), the Court held at page 8 of its ruling that:-

*“Much as I am aware that technical delay, are excusable as it was so held in the case of **Kabdeco versus Wedcu Limited** (supra). Yet, the reasons leading to the striking out the application must be based on its defects (i.e. defective application) but not purely on the inaction of the parties and or their advocates as in the present case”.*

Mr. Kinabo cited the case of ***Mobrama Gold Corporation Ltd versus Minister of Energy and Minerals & 2 Others*** (1988) TLR 425 where the High Court of Tanzania at Dar es Salaam held that it is generally inappropriate to deny a party an extension of time where such denial will stifle his case, as the respondent’s delay does not constitute a case of procedural abuse or contemptuous default and because applicant will not suffer any prejudice, an extension of time should be granted. He argued

that, the position in the above cited case applies to the instant application that, if the application will be granted, will not prejudice the respondents because they were all parties in Taxation Cause No. 29 of 2020.

Mr. Kinabo concluded by praying that, the time to file bill of costs in the High Court of Tanzania at Iringa in Civil Case No. 07 of 2017 be extended.

In reply Ms. Happy Ilomo submitted that, the provision cited by the applicant in his application to move this court are all wrong provisions for purposes of this application. Thus, she was of the considered opinion that, as the applicant cited wrong provisions, the court cannot be said to have been properly moved.

She went on submitting that, the applicant has failed to account for each single day of delay, as from 14th December 2020 when the previous application was struck out to 14th January 2021 when the instant application was filed.

She went on contending that, in order for the court to exercise its discretion to extend time, the applicant has to account for each day of delay the duty which the applicant has not discharged in the present application. Neither in her affidavit nor in the written submission can such account be found. To support her argument she cited the case of ***Zuberi Nassor Moh'd versus Mkurugenzi Mkuu Shirika la Bandari Zanzibar***, Civil Appeal No. 93/2018 Court of Appeal at Zanzibar (unreported) page 12, that the applicant has to state the reason as to why he failed to appeal within time and to count for each day of delay.

With regarding to the argument by the applicant that, after ruling dated on 14th December 2020, he spent two weeks preparing this application and filed the same on 29th December 2020, Ms. Ilomo was of the view that, the present application was filed on 14th January 2021 a month after the said ruling. No account whatsoever has been offered for the period from 29th December to 14th January 2021 when the present application was filed.

She concluded by submitting that, as the application was brought under the wrong provisions of law, and for the failure by the applicant to account for each day of delay, the application must fail.

In rejoinder Mr. Kinabo had nothing to add.

Having heard the learned counsel in their submissions and having carefully perused the court records the only issue for determination by this court is whether this application has merit.

In her reply submission Ms. Ilomo raised the issue of citing wrong enabling provisions and thus this court is not properly moved. The applicant cited Order 40 (2) (c) and 68 of the Advocate Remuneration Order, 2015. But the learned counsel did not mention the proper provision which applicant was supposed to cite nor did she expound on that.

However it was correctly submitted by Mr. Kinabo, and I agree with him that as the applicant has cited the above mentioned order which gives the Taxing Master powers to extend time failure to cite

section 14 (1) of the Law of Limitation Act is not fatal. But Mr. Kinabo further submitted that, in their supporting affidavit, they supported the application. However in her counter-affidavit paragraph 1, 2, 3, 4, 5 and 6 in particular noted what is contained therein. For paragraphs 7 and 8 she put the applicant/deponent to strict proof of the same. He argued that, failure to adduce facts controverting the same is an admission to what is contained in the affidavit. Normally counter-affidavit must controvert what is contained in an affidavit but without raising argument. See the case of ***East African Cables (T) Limited Spencon Services Limited***, (supra). Failure to controvert contents of an affidavit amounts to an admission.

Going to the issue of extension of time, it is a general principle that an application for extension of time is entirely in the discretion of the court to grant or refuse to grant. However, that discretion must be judiciously exercised. This position of the law was stated by the Court of Appeal of Tanzania (Msofe J.A as he then was) in ***Martha Iswalile Vicent Kahabi versus Marieta Salehe and 3 Others***, Civil Application No. 5 of 2012 at Mwanza (unreported), in which the Court held that:-

"It is common ground that an application of this nature is at the discretion of the court. In exercising the discretion, the court must be satisfied that there are good grounds to decide in favour of an application".

Also, it is a requirement of the law that, in order for the court to grant an application for extension of time, the applicant is bound to account for every single day of delay, as it was held by the Court of Appeal of Tanzania in the case of ***Osward Mruma v. Mbeya City***, Civil Application No. 100/100/06, where the court had this to say:-

"Delay even of a single day has to be accounted for, otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken".

In the instant case the court records reveal that, the applicant lodged an application for bill of costs in Taxation Cause No. 29 of 2020, but the same was struck out on 14/12/2020. The applicant has submitted in his submission in chief that, she obtained a copy of the ruling on 14th December 2020, that is to say the copy of ruling supplied to the parties the same day after the ruling was delivered. And the instant application was filed on 14th January 2021, it means it took about one month from when taxation cause No.29 of 2020 was truck out until when the present application was filed.

Mr. Kinabo submitted that, from 10th July 2020 to 14th December 2020 when the application was struck out, the Applicant had been prosecuting the said application. He went on submitting that, from 14th December 2020 to the 29th December 2020 that is two weeks the applicant had been preparing an application for extension of time through

his advocate and the filing of the same took place on the 29th December, 2020. To him, the delay is not inordinate.

Ms. Ilomo on her side had a different view, she said the applicant has failed to account for every single day of delay.

Having carefully perused the court record, I agree with the submission by Mr. Kinabo that, the applicant has managed to demonstrate sufficient cause for the delay. While I understand the importance of accounting for each day of delay, but each case must be decided in its own circumstances. The circumstance of one case cannot be identical to that of another case. Understandably, there was a delay by the applicant to lodge an application for bill of costs. But this was a result of the application in Taxation Cause No. 29 Of 2020 being struck out on 14th day of December, 2020. It is trite law that for a court to grant extension of time the applicant must show sufficient cause for the delay. However it is difficult to define the meaning of the words "sufficient cause" as the Court of Appeal observed in the case of ***The Registered Trustees of the Archdiocese of Dar es salaam vs. The Government of Bunju village and 11 Others***, Civil Application No. 64 of 2005 in which at page 9 the Court stated:-

" It is accepted however that the words should be given a liberal construction in order to advance substantial justice, when no negligence, inaction or want of bonafides is imputable to the applicant".

It was correctly submitted by Mr. Kinabo, at that time the period for lodging fresh bill of costs had already elapsed. The applicant was therefore required to apply for extension of time first before lodging fresh bill of costs, hence this application. But that delay falls in the category of technical delay as the same was caused by the act of the first bill being struck out. But the same was filed in time. Technical delay is excusable in law per the decision of this court in the case of ***Elisa Ole Markos*** (supra). In the case of ***Fortunatus Masha vs. William Shija [1997] TLR 154***, the Court of Appeal observed as follows:-

" A distinction had to be drawn between cases involving real or actual delay and those such as the present one which clearly involved technical delay in the sense that the original appeal was lodged in time but had been found to be incompetent for one or another reason and a fresh appeal had to be instituted. In the present case the applicant had acted immediately after the pronouncement of the ruling of the Court striking out the first appeal. In these circumstances an extension of time ought to be granted". (Emphasis supplied).

The question to be considered here is whether the applicant was diligent in pursuing the matter. Like in the case referred above, the applicant acted diligently in filing an application for bill of costs, which was filed in time. But the same was struck out. The applicant engaged an advocate to prepare and filed this application for extension of times which was filed on

15th January, 2021, that is 30 days after the first application was struck out. In my view this is not inordinate delay. In the case of ***M.B. Business Limited vs. Amos David Kasanda and 2 Others***, Civil Application No. 48/17 of 2018, CAT (unreported), Ndika, JA has this to say:-

"To resuscitate its quest for revision, the applicant on 20th February, 2018 lodged the instant application for condonation of delay. This happened only thirteen days after the initial revision was struck out. I would not consider this intervening period inordinate in the circumstances of this matter and so, I am satisfied that the delay was not occasioned by only indolence on the part of the applicant".

I share the same view with that position taken by the Court of Appeal taking into account the circumstances of the matter at hand. In my considered view justice will be met if the applicant is given chance to argue his case on merit rather than determining the same basing on technicalities, more so due to the fact that there is no provision of law providing for a specific period for filing application for extension of time. In the case of ***Samwel Sichone vs. Bulebe Hamisi***, Civil Application No. 8 of 2015, CAT (unreported), Mugasha, JA found a delay of 50 days was not inordinate taking into account the circumstances of that case. So even in the present case the delay by 30 days is not inordinate. By considering the need of furthering substantial justice the same cannot be fettered by technicalities. The Court of Appeal of Tanzania in the case of ***Sanyou***

Service Station Ltd. vs. BP Tanzania Ltd (Now Puma energy (T) Ltd.), Civil Application No.185/17 of 2018, has this to say:-

"Undoubtedly as the rule goes, the discretion has to be exercised judicially. On the advent of the overriding objective rule introduced by the Written laws (Miscellaneous Amendments) (NO. 3) Act, 2018, the need of exercising the discretion is all more relevant".

Majority of cases insisting on accounting for each day of delay were passed before the advent of the principle of overriding objective, but now courts are inclined to substantive justice.

In the view of the aforesaid, I am satisfied that the applicant has advanced sufficient cause for the delay warranting extension of time by this court. I grant the application, the applicant to file her bill of costs within 30 days from today.

It is so ordered.



F. N. Matogolo
F. N. MATOGOLO

JUDGE

12/7/2022.

Date: 12/07/2022
Coram: Hon. F. N. Matogolo – Judge
L/A: Blandina Mwenda
Applicant:
For the Applicant:
1st Respondent:
2nd Respondent:
3rd Respondent:
4th Respondent:
For the Respondent:
C/C: Grace

Absent

Mr. Jonas Kajiba – Advocate:

My Lord I am holding brief for Mr. Emmanuel Kinabo advocate for the applicant. The matter is for ruling if is ready we are ready to receive it.

COURT:

Ruling delivered.



F.N. Matogolo
F.N. MATOGOLO

JUDGE

12/07/2022