

HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(IRINGA DISTRICT REGISTRY)

(LAND DIVISION)

AT IRINGA

MISCELLANEOUS CIVIL APPLICATION NO.11 OF 2021

(Originating from Civil Appeal No.12 of 2020)

CLARENCE MGAYA APPLICANT

VERSUS

ENHANCEMENT OPEN SCHOOL RESPONDENT

08/4 & 17/5/2022

RULING

MATOGOLO, J.

This is an application by the applicant one Clarence Mgaya for an order that this court be pleased to enlarge time to the applicant so that he can file an application for re-admission of Civil Appeal No. 12 of 2020 which was dismissed on 1st day of October 2020 for the appellant's non-appearance.

The application is by way of Chamber summons made under Section 14(1) of the Law of Limitation Act, (Cap. 89 R.E 2019) and is supported by an affidavit taken by the applicant.

Briefly, the applicant filed before this Court Civil Appeal No.12 of 2020 which was dismissed on 01/10/2020 for non- appearance. On 5/11/2020 the applicant filed Miscellaneous Application No. 35 of 2020 praying for this Court to grant an order for re- admission of Civil Appeal No. 12 of 2020, but the application was found to be time barred and the counsel for the applicant prayed to withdraw it, the prayer which was granted and the application was withdrawn on 04/05/2021, hence this application.

At the hearing of this application parties were represented, the applicant was represented by Mr. Leonard Lazaro Sweke learned Advocate and the respondent enjoyed the service of Mr. Innocent Kibadu learned Advocate. The matter was disposed of by way of written submissions.

Mr. Sweke first of all he prayed for the affidavit and chamber summons to be adopted.

In support of this application he submitted that, the applicant in this application was the appellant, in Civil Appeal No. 12 of 2020 which was lodged in this Court on 23rd day of June, 2020. Sometime in June, 2020 the applicant consulted his Advocate One Edwin Enosy from Jells Law Chambers instructing him to handle his case. The Applicant managed to pay him part of the instruction fee.

He went on contending that, on 23rd June, 2020 the applicant's Advocate via his phone informed the applicant that he managed to lodge the impugned Appeal in this Court, he served the respondent with the

summons to appear to his matter that was scheduled for mention on 30th day of July, 2020. But he was insisted by his advocate that, there is no necessity for him to enter appearance before this Court simply because the case before the Court is an appeal in which the applicant had nothing to utter before the Court in that he had instructed the advocate, the applicant therefore had to leave each and everything in the advocate's conduct.

He submitted further that, on 30th September, 2020 the applicant's daughter one Witness Clarence Mgaya was admitted at Consolata Hospital Ikonda within Njombe Region for having chronic leg ulcer. He submitted that, from 5th to 10th October, 2020 while the applicant was still at Consolata Hospital Ikonda taking care of his daughter, he tried several times calling his advocate in order to be availed with some information from him pertaining to the progress of his case, but the applicant's advocate was not picking up his calls.

On 15th October, 2020 the applicant decided in his own volition to come to the Court Registry, inquiring upon the progress of his case leaving the patient with her mother, the applicant was informed by one of the registry officers that his appeal was dismissed on the 1st day of October, 2020 for non appearance, and that his advocate never entered appearance since the appeal was lodged. On the same date, the applicant managed to be supplied with certified true copies of proceedings and ruling to that effect. He submitted further that, he decided to consult another advocate one Leonard Sweke who advised him to lodge an application seeking re-admission of his appeal No 12 of 2020. He submitted that, the applicant

via- his advocate managed to file an application for re- admission of the appeal No. 12 of 2020 on 5th November,2020, Application No. 35 of 2020 of which on 4th May, 2021 the applicant's advocate realized that the application was filed out of time being an expiry of 4 days. The same day he decided to pray to the court to withdraw the said application, the prayer which was granted by the court (Hon. P. M. Kente. Judge).

He went on submitting that, on 13th May 2021 and on 4th, 15th and 16th May 2021, were public holidays to wit, Eid el Fitri and weekend.

He went on submitting that, the applicant in this matter has sufficient reasons moving this court to grant him extension of time within which to file an application for re- admission of his Appeal No. 12 of 2020. To support his argument he cited the cases of ***Fortunatus Masha versus William Shija and Another*** [1997] TLR 154, ***Mumelo v. Bank of Tanzania*** [2006] 1 EA 227 and ***Kalunga & Company Advocates v. National Bank of Commerce*** [2006] TLR 235.

He went on submitting that, his delay is a technical delay following the withdrawal of Misc. Application No. 35 of 2020 which was withdrawn by the Applicant's advocate on 5th November, 2020. He argued that, the technical delay pointed out in the applicant's affidavit consist enough grounds for this Court to grant the applicant of extension of time within which to file an application for re- admission of the dismissed appeal. To support his argument, he cited the case of ***Wambele Mtumwa Shahame v. Mohamed Hamis***, Civil Application No. 138 of 2016, CAT of Tanzania at Dar es Salaam (unreported) at page 14 &15 where it was held that:-

"The power of the Court to grant extension of time under Rule 10 of the Court of Appeal Rules, is discretionary. The matters that the Court would consider in exercising its discretion, include (1) Length of delay (2) Reasons of the delay (3) The degree of Prejudice to the other party, if granted, and (4) The chances of success, if the Application is granted".

He contended that, the applicant has managed to account for each day of delay as the requirement of the law at this point in time as it decided by the Court of Appeal in the case of ***Finca (T) Limited & Kipondogoro Auction Mart v. Boniface Mwalukisa***, Civil Application No. 589/12 of 2018, Court of Appeal of Tanzania at Iringa (unreported), at page 7.

Mr. Sweke concluded his submission by praying this court to grant this application.

In reply Mr. Kibadu first of all prayed for the respondent's counter-affidavit to be adopted so as to form part of their submission.

He argued that, the applicant's unnecessary appearance in court is mere words which ought not to be emphasized to bolster it with affidavit of Edwin Enosy.

With regard to the reason by the applicant on failure of his former advocate to appear before this Court because he was busy campaigning for Parliamentary sit for Lupembe Province, Mr. Kibadu said is a mere words as there is neither campaigning time table indicating the dates the said Civil Appeal was scheduled for hearing his advocate had campaign meeting at Lupembe nor affidavit of Edwin Enosy to that effect. He contended that, the applicant despite of engaging a lawyer has a duty to appear in court whenever the case is scheduled by the court for any necessary order as the applicant conceded that it is improper, but in absence of affidavit of Edwin Enosy, advocate to support his submission this court can draw an inference that the said story as narrated by the applicant is an afterthought.

He went on contending that, the guiding principle regarding accounting for the delay was enunciated in the case of ***Benedict Mumelo versus Bank of Tanzania (2006) 1 EA 227.***

He submitted that the applicant submits that he commenced preparing institution of this application on 17th May, 2021 and on 20th May 2021, the application was ready for filing. He posed a question that, if the application was prepared on 17th May 2021, why the record shows that the application was received on 21st May, 2021.

Mr. Kibadu was of the considered opinion that the applicant failed to account for days from 18th-19th May, 2021.

He argued further that, applicant is duty bound to account for each and every day of the delay. To cement his argument he cited the case of ***Wambura N.J Waryuba vs The Principal Secretary Ministry of***

Finance and Another, Civil Application No. 320/01 of 2020. (unreported), where Ndika JA, at page 8 had this to say:-

“Furthermore, it is a trite law that, in application for the extension of time, the applicant should account for each day of delay, and failure to do so would result into the dismissal of the application.”

He went on contending that, the Court of Appeal in case of ***Oswald Mruma v. Mbeya City***, Civil Application No. 100/06 of 2018 as cited with approval by this Court in the case of ***Octavian Mbungani (Ex 8648 CPL) v. Inspector General of Police and The Attorney General***, Misc. Civil Application No. 42 of 2020 (unreported) at page 11 last paragraph, Mwanges JA 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”.

With regard to the allegation that, there is a great chance of success in the intended appeal, Mr. Kibadu submitted that, the applicant has failed to point out the apparent indication of chance of success in the appeal sought to re-admit, failure to pointing the indication of chances of success in the appeal sought leaves this court in dilemma.

Mr. Kibadu concluded his submission by saying that, the applicant failed to show good cause and accounted for the delay to the required standard particularly on the 18th and 19th May, 2021 as what transpired in those dates before continuing with preparation of this application on 20th and filed it in court on 21st May, 2020. Thus, he prayed for the application be struck out with costs.

In rejoinder the applicant reiterated what he submitted in submission in chief, and with regard to the allegation that the applicant received information from his former advocate, the applicant did not receive information from his former advocate, and instead he made some inquiries to what had come over him, within that inquiries he realized that his advocate was one of the contestant of Parliamentary seats in 2020 Tanzania General Election. He contended that, under normal circumstances, it was impossible for the applicant to get in touch with his advocate in order for him to be availed with an affidavit to that effect due to the fact that his former advocate was not picking up his calls, therefore the applicant's story does not amount to afterthought as it has been submitted by the learned Counsel for the Respondent in his written submission in chief.

Regarding the issue of his failure to account for every day of delay, Mr. Sweke submitted that, as he has submitted in his submission in chief, the applicant's advocate managed to be supplied with a copy of the order of this Court on 13th May, 2021 and on 14th, 15th and 16th May, 2021 were Public holidays to wit Eid el Fitri and weekend., and he started preparing

the institution of this application on 17th May, 18th, 19th May and on 20th May 2021 this application was ready for filing in this Court and what transpired on 20th May 2021 in the e- filing system was beyond the control of neither the applicant nor his advocate.

He concluded by insisting for this application to be granted.

Having read the respective submissions by the parties, the issue for determination here is whether the applicant has advanced sufficient reasons to warrant this court to exercise its discretion to grant the application or not.

It is principle of law that, an application for extension of time is a discretion of the court to grant or refuse it, the same as it was held in the case of ***Benedict Mumelo versus Bank of Tanzania (supra)***, in which the Court of Appeal of Tanzania held that:-

"Extension of time to appeal is discretion of the Court to grant or to refuse it and that extension of time may only be granted where it has been sufficiently established that the delay was with sufficient cause".

The Court of Appeal of Tanzania in the case of ***Lyamuya Construction Company Limited versus Board of Trustees of Young Women Christians Association of Tanzania***, Civil Application No. 02 of 2010 (unreported) set out four factors to be considered before the court decides to grant extension of time, that is:-

“(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 existence of a point of law of sufficient importance such as illegality of the decision sought to be challenged.

In the instant application, the applicant has stated the reasons for his delay in his affidavit to be technical delay.

Mr. Sweke submitted that, he filed the Civil Appeal No. 12 of 2020 and the same was dismissed on 1/10/2020 for non- appearance, and on 5th November, 2020 they filed an application for re- admission of the Civil Appeal No. 12/ 2020 but Mr. Sweke prayed to withdraw the same after the Counsel for the respondent has raised preliminary objection on point of law to the effect that the same was time barred. The application was withdrawn on 4th May, 2021, and the instant application was filed on 21/05/2021. It took him about 17 days until when the instant application was filed.

Mr. Sweke submitted that, after the application being withdrawn he was supplied with the copy of order on 13th May, 2021 and on 14th, 15th and 16th May, 2021 were Public holidays to wit Eid el Fitri and weekend.

He went on submitting that, he commenced preparing the institution of this Application on 17th May 2021 and on 20th May, 2021 this Application was ready for filing in this Court.

I join hands with Mr. Kibadu that, the applicant has failed to account for 18th -19th May 2021 as to what he was doing, as if real the application was ready on 20th May 2021 why the same was filed on 21st May 2021. This is evidence that the applicant was not diligent but negligent.

It is a requirement of law of accounting for every day of delay as it was emphasized by the Court of Appeal of Tanzania in the case **of Bushiri Hassan versus Latifa Lutiko, Mashayo**, Civil Appeal No.3 of 2007 (unreported), the court stated:

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

Not only that the applicant has not complied with the factors for extension of time formulated in **Lyamuya Construction Company Limited case**, of being diligent and not apathy or sloppiness in prosecuting the act he intended to take. The applicant did not make follow up to his case but left it to his advocate as a result the case was dismissed for non-appearance. He negligently filed an application for it to be re-admitted, but the application was filed out of time. Although that was done by his advocate but negligence of an advocate is not sufficient cause for

the delay as it was held in the case of ***A.H. Mhimbila and 2 Others vs. John K. Mwanguku***, Civil Application No. MBY. 13 of 2005 CAT (unreported). In the case of ***Bahati Mussa Hamis Mtopa vs. Salum Rashid***, Civil Application No. 15 of 2017, CAT (unreported) at page 7 the Court held that:-

"...Generally speaking an error made by an advocate through negligence or lack of diligence is not sufficient cause. It can be sufficient cause only on exceptional circumstances surrounding the case where such an error can amount to sufficient cause". (Emphasis added).

The applicant's counsel did not explain if there were exceptional circumstances for the present application to fall in such exception to the general rule. Mr. Sweke learned advocate tended to lament the former advocate for the applicant Mr. Edwin Enosy that he did not avail information to what was going on in the case because he was busy with campaign as he was contesting for parliamentary seat for Lupembe constituent, however there is no any affidavit from Mr. Edwin Enosy was filed to this court to prove that the learned advocate was so busy as alleged. Because of this negligence, and as the applicant has failed to account for every day of delay as to what he was doing from 17th -20th this application cannot be granted.

Having so discussed, it is my considered opinion that, the applicant has failed to advance sufficient ground to enable this Court to exercise its

discretion and extent the time. Hence this Application has no merit the same is dismissed with costs.

It is so ordered.



F.N. Matogolo
F.N. MATOGOLO
JUDGE
17/5/2022.

Date: 17/05/2022
Coram: Hon. F. N. Matogolo – Judge
L/A: B. Mwenda
Applicant: Absent
For the Applicant: Mr. Lazaro Hukumu holding brief
Respondent:
For the Respondent: Absent
C/C: Grace

Mr. Lazaro Hukumu - Advocate:

My Lord I am holding brief for Mr. Leonard Sweke advocate for the applicant.

My Lord according to what Mr. Sweke told me the matter is for ruling. I am ready.

COURT:

Ruling delivered today this 17th day of May, 2022 in the absence of the parties but in the presence of Mr. Lazaro Hukumu learned advocate holding brief for Mr. Leonard Sweke advocate for the applicant.



F. N. Matogolo
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JUDGE
17/05/2022.

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