

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**IN THE SUB-REGISTRY OF DAR ES SALAAM**  
**AT DAR ES SALAAM**  
**MISC. CIVIL APPLICATION NO. 557 OF 2021**  
**SALOME KAHAMBA.....APPLICANT**  
**VERSUS**  
**SIRIL AUGUSTINE MALLYA.....RESPONDENT**  
**(Arising from the order of this Court (Kakolaki, J) dated 25<sup>th</sup> day of**  
**March, 2021 in Civil Appeal No. 178 of 2020)**

**RULING**

21<sup>st</sup> June & 21<sup>st</sup> July 2022

**KISANYA, J:**

By chamber summons made under section 14 of the Law of Limitation Act, Cap 89 R.E.2019 and sections 93 and 95 and Order IX Rule 9 of the Civil Procedure Code, Cap. 33, R.E. 2019 (the CPC), Salome Kahamba, the applicant has moved this Court to grant the following orders: -

- (i) *That this Honourable Court be pleased to extend time for the applicant to be allowed to file application for restoration of Civil Appeal No.178/2020.*
- (ii) *Any other relief or remedies this honourable Court may deem fit and just to grant.*

The application is supported by applicant's affidavit which set out the grounds for delay in paragraphs 4 to 17. However, it is resisted by the

respondent, Siril Augustine Mallya vide his counter affidavit sworn on 21<sup>st</sup> April, 2022.

Before embarking to the merit of the application, I find it apt to give a brief background of the matter. The respondent was the plaintiff at the District Court of Kinondoni in Civil Case No.141 of 2017. His claim against the applicant (the then defendant) was for payment of a sum of Tshs. 174,636,000/= being the outstanding loan advanced to the applicant herein. The said suit ended in the respondent's favour. Aggrieved by that decision, the applicant appealed to this Court in Civil Appeal No.178 of 2020. Following non-appearance of the applicant and her advocate, the appeal was dismissed for want of prosecution on 25<sup>th</sup> March 2021. When the applicant endeavoured to apply for restoration, she found herself out of time and hence, the instant application.

By consensus of the parties, the hearing proceeded by way of written submissions which were filed by Mr. Fulgence, learned advocate for the applicant and Mr. Massawe, learned advocate for the respondent.

Arguing in support of the application Mr. Fulgence submitted that the cause for delay to file the application for restoration in time was triggered by the applicant's advocate who was engaged to prosecute the appeal. He contended that it was not in the applicant's knowledge that the appeal was dismissed for non-appearance. His contention was based on the ground that there was miscommunication between the applicant and her former advocate.

It was also his contention that the said advocate failed to answer the applicant's call when she (the applicant) tried to make follow up of her case.

Mr. Fulgence further submitted that it was on 16<sup>th</sup> October 2021 when the applicant learnt that the appeal had been dismissed for want of prosecution and thus, filed the present application on 1<sup>st</sup> November 2021. Citing the case of **Samwel Sichone vs Bulebe Hamis**, Civil Application No.8 of 2015 (unreported), Mr. Fulgence submitted that the applicant was diligent to file this application after finding out that the appeal had been dismissed.

He also submitted that the applicant has accounted for the delay of the 14 days, and they were used to engage another advocate and prepare and file the documents for this application. To bolster his submission, Mr. Fulgence cited the case of **Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young Women Christians Association of Tanzania**, Civil Application No.2 of 2010. Mr. Fulgence excluded the seven months before 16<sup>th</sup> October, 2016 claiming that it was not in the knowledge of the applicant on the trend of her case. He faulted the previous advocate for failing to furnish the applicant with proper information of her case.

Further to his submission Mr. Fulgence argued that the decision of the trial court sought is tainted with irregularities. He contended that such ground is sufficient reason for this court to extend time so that the applicant can be given an opportunity to address the pointed irregularities. To support his

argument, Mr. Fulgence cited the case of **Principle Secretary, Ministry of Defence & National Service vs DP Valambia** (1992) TLR and the case of **Mohamed Salum Nahdi vs Elizabeth Jeremiah**, Civil Reference No.14 of 2017. That said, the learned counsel urged this court to grant the application as prayed.

Contesting on the application, Mr. Massawe first adopted the contents of the respondent's counter affidavit. He then restated the settled law that extension of time is granted when there is sufficient cause for the delay. He was of the firm view that the applicant had not advanced good cause for the delay. As regards the reason of poor communication between the applicant and her former advocate, Mr. Masawe argued that the applicant was duty bound to make follow up of her case and that the omission to do so exhibits negligence on her part.

It was further submitted that the applicant had not accounted for each day of delay. His submission was premised on the reason that the applicant had conceived the fact that she was only late for 14 days while the appeal was dismissed on 25/3/2021 and the instant application filed on 1/11/2021 which is 242 days. To support his submission, Mr. Massawe cited the cases of **Musa S. Msangi & Rafia S. Msangi vs Anna Peter Mkomea**, Civil Application No.188/17 of 2019 and **Davis Haule vs National Microfinance Bank**, Civil Application No.195/9 of 2019.

On the ground of illegality, Mr. Massawe submitted that the said ground was based on the decision of District Court of Kinondoni encompassing. However, he was of the view that the applicant was required to demonstrate how the illegality is on the face of record. He, thus, invited this court to disregard that ground and dismiss the application for want of sufficient reasons.

In his rejoinder submission, Mr. Fulgence reiterated that the applicant had accounted for the whole period of delay and that the applicant acted diligently to rescue the matter after becoming aware of the dismissal order. He was of the view that upon engaging the advocate who filed the appeal electronically, the latter was in a better position of knowing the trend of the case. The applicant reiterated further that there was an illegality in the decision of the trial court and that such ground suffices for extension of time.

I have carefully considered the chamber summons, affidavits in support, counter affidavit, rival submissions and cited authorities. The main issue for my determination is whether the application is meritorious.

In terms of section 14 of the Law of Limitation Act (supra) under which the instant application is preferred, an extension of time is granted upon the court being satisfied that the applicant has demonstrate sufficient cause. What amount to sufficient cause is not defined by the above cited law. It is therefore determined basing on the circumstances of each case. Further to this, case law has set out the guiding principles or factors which aid the court in determining

whether the applicant has shown good cause. For instance, in the case **Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young Women's Christian Association of Tanzania**, (supra), the Court of Appeal underlined that: -

- (i) The applicant must account for all the period of delay*
- (ii) The delay should not be inordinate.*
- (iii) The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.*
- (iv) If the court feels that there are other sufficient reasons such as the existence of point of law of sufficient importance, such as illegality of the decision sought to be challenge.*

Reverting to the instant application, the record bears it out that the order subject to this application was issued on 25<sup>th</sup> March, 2021 when the applicant's appeal was dismissed for want of prosecution. Pursuant to item 9, Part III of the Schedule to the Law of Limitation Act, the application for restoration of the appeal ought to have been filed within 30 days from date of dismissal. Therefore, as rightly submitted by the respondent's counsel, the time to file the application for restoration of the appeal elapsed on 24<sup>th</sup> April, 2021. It is not disputed that this application was filed on 1<sup>st</sup> November, 2021. The question that arises is whether the appellant had accounted for all the period of delay of almost 220 days. The requirement to account for each day of delay was also underscored in **Dar es Salaam City Council vs S. Group Security Co. Ltd**, Civil Application No.234 of 2015 (unreported) as follows: -

*"As a matter of general principle, it is always in the discretion of this court to grant extension of time, but the instance which this court has consistently taken is that in an application for extension of time, the applicant has to account for every day of delay".*

In his submission in support of the application, Mr. Fulgence divided the period of delay into two parts. The first part covers from 26<sup>th</sup> March to 16<sup>th</sup> October, 2021, while the second runs from 16<sup>th</sup> October to 1<sup>st</sup> November, 2021.

I prefer to start with the second part in which Mr. Fulgence contends that the applicant became aware of the dismissal order on 16<sup>th</sup> October, 2021. As indicated earlier, the learned counsel was of the view that the applicant has accounted to have used the period from 16<sup>th</sup> October, 2021 to 1<sup>st</sup> November, 2021 to engage an advocate, prepare the documents and file the present application.

Reading from the supporting affidavit, I am of the considered view that the submission that the applicant became aware of the dismissal order on 16<sup>th</sup> October, 2021 is not supported by evidence. In terms of paragraph 14 of the supporting affidavit, 16<sup>th</sup> October, 2021 is the date when the applicant instructed *Legal Base Associates* to prepare the application for restoration of the appeal. On the other hand, paragraphs 10, 11 and 12 of the supporting affidavit show that the information as to the dismissal order was conveyed to applicant—by the newly engaged advocate one, Onesmo Kivumo before 16<sup>th</sup> October, 2021. She deposed on oath that, the said Onesmo Kivumo was

engaged upon learning that the respondent was executing the decree of the District Court of Kinondoni. In the circumstances, it is clear that the affidavit of Onesmo Kivumo ought to have been appended to the chamber summons. As a result, it is not known as to when the applicant became aware of the dismissal order. Also, since the applicant was already late for over 200 days, she ought to have ensured that the application is filed immediately from 16<sup>th</sup> October, 2021. This is when it is considered that the application was filed by Onesmo Kivumo who is said to have perused the court record. It is therefore, the findings of this Court that the period from 16<sup>th</sup> October to 1<sup>st</sup> November, 2021 has not been accounted for.

Reverting to the first part, I have held herein that the applicant has not proved that she became aware of the dismissal order on 16<sup>th</sup> October, 2021. That fact is by itself sufficient to hold that the delay from 26<sup>th</sup> April to 16<sup>th</sup> October, 2021 has not been accounted for. Even if I was to consider the same, the reason advanced thereto is lack of knowledge that the applicant's advocate defaulted to appear in court whenever the appeal was called on for order or hearing as deposed in paragraph 9 of the supporting affidavit.

In my considered view, lack of knowledge about the status of the case or poor communication between the party to the case and his or her advocate is not a sufficient cause for extension of time. It is settled law that party to the case who instruct an advocate to prosecute his or her case is duty bound to make follow up of the case. I agree with Mr. Masawe that failure to make



follow up on the status of the case exhibits negligence on the party to the case.

This position was also stated in **Lim Han Yun and Another vs Lucy Theseas**

**Kristensen**, Civil Appeal No. 219 of 2019 when the Court of Appeal held:

*"The appellants cannot throw the whole blame on their advocates. We think that a party to a case who engages the services of an advocate, has a duty to closely follow up the progress and status of his case. A party who dumps his case to an advocate and does not make any follow ups of his case, cannot be heard complaining that he did not know and was not informed by his advocate the progress and status of his case."*

Although the above position is related to an application for setting aside the *ex-parte* judgment, I am of the view that it applies to the applicant who raises negligence of his or her advocate as a ground for extension of time. Thus, the applicant is expected to demonstrate how he or she made follow up of his or her case after engaging the advocate. Otherwise, the law is settled that negligence of the advocate is not a defence. See also the case of **Deodat Dominic Kahanda & Another vs Tropical Fisheries (T) Limited & Others**, Misc. Commercial Application No.200 of 2017, HC Commercial Division (unreported) where it was held that:-

*"What is glaring to the eye here is sheer negligence of the advocate, which has often times been held not to be sufficient reason to extend time".*

Therefore, much as the applicant has not demonstrated how she made follow up of the matter and in the absence of the exact date of becoming aware of the dismissal order, I am of the view that the first part of delay has not been accounted for.

Last for consideration is the ground of illegality. In terms of the trite law, when there is an allegation of illegality, the Court is bound to give an opportunity to the party advancing such allegation to have the same considered. There is a list of authorities stating that position. One of them is the case of **The Principal Secretary, Ministry of Defence and National Service vs. Devram Valambia** (1992) TLR 182 where it was held: -

*"In our view when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record right."*

However, the law is further settled that illegality stands as a ground for extension of time if it is apparent on face of the decision subject to the application. This position was emphasized in **Ngao Godwin Losero vs Julius Mwarabu**, Civil Application No.10 of 2015, where it was held:-

*"I am not persuaded that the alleged illegality is clearly apparent on the face of the impugned decision. Certainly, it will take a long drawn process to decipher from the*

*impugned decision the alleged misdirection or non-directions on points of law”.*

In the instant case, the applicant did not depose how the impugned order is tainted with illegality. Her counsel contended that the illegality is in the judgment of the trial court. In the circumstances, the ground of illegality lacks merit.

From the foregoing, I hold that the applicant has not demonstrated any good cause for this court to extend time.

In the upshot, this application fails and is accordingly dismissed for want of merit. Considering the circumstances of this case, each party is ordered to bear its own costs.

DATE at DAR ES SALAAM this 21<sup>st</sup> day of July, 2022.



S.E. Kisanya  
JUDGE