

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)
AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 141 OF 2022

(Arising from the judgment and decree of the High court of Tanzania, Dar es salaam District Registry at Dar es salaam, in Civil Appeal No.43 of 2020 dated on 28th May,2021)

NEEMA JONAS SARIA APPLICANT

VERSUS

SIGBERT JUSTINE SWAI..... RESPONDENT

Date of Last Order: 13/ 07/ 2022

Date of Ruling: 05/ 08/ 2022

RULING

E.E. KAKOLAKI, J.

The Court is moved by the applicant for grant of an order for extension of time within which to file an application for setting aside exparte judgment of this Court delivered on 28th May, 2021, in Civil appeal No. 43 of 2020. The application is made under section 14(1) of the Law of Limitation Act, [Cap. 89 RE 2019] (the LLA), supported by an affidavit sworn by the applicant. The effort to procure attendance of the respondent became fruitless as he signed the chamber summons but defaulted appearance on the scheduled date. Upon proof of service through an affidavit duly sworn by process server one Moses Mchome, this Court ordered hearing of the application to proceed

exparte. The applicant through pro bono service of Women's Legal Aid Centre (WLAC) filed her written submission in support of the application.

Briefly as gathered from the applicant's affidavit, before the District Court of Kinondoni in Matrimonial Cause No. 136 of 2018, she had successfully petitioned for the divorce relying on presumption of marriage, custody of the issue of marriage and division of matrimonial properties jointly acquired or improved. On pressing for execution of the trial Court's order, she was informed that the respondent had filed the appeal in this court in which upon making a follow up could not establish its existence, hence kept on waiting until when she was served by the respondent with the Notice and application for execution of Matrimonial Cause No. 136 of 2018, on the 16/03/2022, and learnt from the High Court District Registrar of existence of ex-parte judgment against her. Discontented with the said decision on 23/03/2022 applied for copy of judgment and supplied with the same and its decree on 25/03/2022. And that thereafter she consulted WLAC who advised her to prefer this application as she was out of time within which to apply to set aside the ex-parte judgment of this court dated 28/05/2021, hence the present application.

I have had enough time to go through the said submission as well as the affidavit in support of the chamber summons. I do not intend to reproduce the same as it will be considered in the course of this ruling. It is in the applicant's submission which I fully subscribe to that, this Court has unfettered discretion to grant the application under section 14(1) of the LLA upon good cause supplied. And that good or sufficient cause is not limited to accounting for the delayed days only but it entail a number of reasons that delayed the applicant in performing the action in which extension of time is sought for and whether or not the application has been brought promptly. See the cases of **Dar es salaam City Council Vs. Jayantilal P.Rajani**-CAT Civil Application No.27 of 1987 and **Tanga Cement Company Limited Vs. Jumanne D. Masangwa and Amos A.Mwalwanda**-Civil Application No.6 of 2001. The above notwithstanding it is also a principle of law that in application of this nature the applicant must account for each and every day of delay even if it a single day. See the cases of **Bushiri Hassan Vs. Latina Lukio, Mashayo**, Civil Application No. 3 of 2007 (CAT-unreported) and **Mohamed Athuman Vs. R**, Criminal Application No.13 of 2015 (unreported).

The decision of this Court in which the applicant is seeking to file an application for setting it aside upon grant of this application was handed down on 28/05/2021. And this application was filed in Court and endorsed by the Registrar on 11/04/2022, more than ten (10) months from the date of the decision in which the applicant is duty bound to account for. Now the issue before this Court is whether the applicant has managed to advance good cause to warrant this court exercise its discretion judiciously.

In an attempt to discharge her duty the applicant in paragraphs 7,8,9, 13 and 17 of her affidavit deposed that, she made a follow up at the High Court several time sometimes January and February to establish whether was any appeal filed by the respondent, only to be informed by the Registrar that none was in existence, until when the same Registrar informed him of existence of the ex-parte judgment. She therefore claims to be unaware of the decision of this Court as no notice before its delivery was issued to her, hence a good cause for this Court granting her extension of time as the delay in filing timely the application for setting aside ex-parte judgment did not result from her negligence nor was it intentional. Thus this Court was urged to grant the application as the application for setting aside ex-parte judgment has overwhelming chances of success.

I wish to be specific from the outset that chances of success has never been good ground for extension of time as to engage in examining the same this court will be going into merits of the intended application or appeal. See the case case of **Azizi Mohamed Vs. R**, Criminal Application No. 84/07 of 2019 (CAT-unreported) where the Court of Appeal had the following observation to make on chances of success as good cause for extension of time. The Court said:

*"...I think the merits of the intended application are outside the purview of the application under consideration. **It has been held that chance of success is not relevant factor by itself because the Court in an application for extension of time is not concerned with the merit of the intended application or appeal rather on whether the applicant has shown good cause for the order sought.** Discussing chances will not only be beyond the power of the Court in such applications, but premature on the authority of this Court's previous decision in **The Regional Manager Tanroads Lindi Vs. DB Shapriya and Company Ltd**, Civil Application No. 29 of 2012 (CAT-unreported)". (Emphasis supplied)*

I now turn another ground where the applicant claims to be unaware of the decision until when the same was disclosed to her by the High Court District Registrar as stated in paragraph 13 of her affidavit. However the applicant

has failed to state on which date she receive such information apart from claiming that she was asked to write a letter requesting for copies of the said judgment and decree in which she complied with on 23/03/2022. The alleged information received from the unmentioned Registrar in January and February 2021, that the respondent's appeal was not in existence and later on existence of ex-parte judgment in my opinion is very important information to make this court not only believe but also appreciate the applicant's efforts in making a follow up of her matter. In other words if proved would convince this court to exclude such period from the days delayed. In my opinion, since it is the Registrar of the High Court who is mentioned by the applicant to have informed absence of appeal by the respondent in this Court and later on existence of ex-parte judgment, such information remains a hearsay unless the affidavit is sworn by the said Registrar to prove those facts. It is the position of the law that, where the affidavit is mentioning another person is a hearsay unless the fact stated therein are exhibited by another affidavit. This position was made clear in the case of **NBC Ltd Vs. Superdoll Trailer Manufacturing Company Ltd**, Civil Application No. 13 of 2002 (CAT-unreported), where the Court of Appeal categorically stated that:

"...an affidavit which mentions another person is hearsay unless that other person swears as well."

In this case since the applicant failed to secure the Registrar's affidavit, I hold her contention that, she made an effort to establish existence of the appeal by the respondent in this Court in January and February, 2021 and that it is the same person who told her of existence of the ex-parte judgment is a hearsay. Hence the fact that the applicant was not aware of existence of the appeal by the respondent is unestablished and the period from the date when the decision of this Court in Civil Appeal No. 43 of 2020, was delivered on 28/05/2021 until when the copies of ex-parte judgment and its decree were requested by the applicant on 23/03/2022 and obtained on 25/03/2022, I find is unaccounted for. The only period I find to be accounted for is the time from 25/03/2022 when the necessary documents for filing this application were obtained until when the same was filed on 11/04/2022 after consultation with the lawyers from WLAC, which period is insufficient to account for the delayed period of more than ten (10) months. Hence the applicant has failed to furnish this Court with good cause warranting it grant the sought prayers.

That said and done, I am of the finding that the present application is devoid of merits and the same is hereby dismissed.

I make no order as to costs.

DATED at DAR ES SALAAM this 5th August, 2022.



E. E. KAKOLAKI

JUDGE

05/08/2022.

The Ruling has been delivered at Dar es Salaam today 05th day of August, 2022 in the presence of the applicant in person, Mr. Sylvester Sengerema advocate for the Respondent and Mr. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

05/08/2022.