

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)
AT DAR ES SALAAM
MISC. CIVIL APPLICATION NO. 147 of 2021

(Arising from the decision and Order of the Resident Magistrate of Dar es Salaam at Kisutu in Civil Case No 45 of 2020 of 30/06/2020 and 14/07/2020 before Hon. R.W Chaungu, SRM)

MUSSA HAJI KIBELLA.....APPLICANT

VERSUS

DR. JOSHUA GARRISSON.....1ST RESPONDENT

HERIETH MHINA OR

NAJMA STEPHEN MHINA.....2ND RESPONDENT

REGENCE MEDICAL CENTRE LTD.....3RD RESPONDENT

AIRTEL TANZANIA PLC.....4TH RESPONDENT

VODACOM (T) PLC.....5TH RESPONDENT

MIC TANZANIA.....6TH RESPONDENT

RULING

Date of last Order: 13/07/2022

Date of Ruling: 19/08/2022

E.E. KAKOLAKI J.

This is an application for extension of time within which to institute an application for revision to revise the decisions and orders of the Resident Magistrate of Dar es Salaam at Kisutu, in Civil Case No 45 of 2020 of

30/06/2020 and 14/07/2020. It is brought under Section 14(1) of the Law of Limitation Act, [Cap 89 R.E 2019] (the LLA) supported by the sworn affidavit of Symphorian Revelian Kitare, Applicant's advocate. The same is strongly resisted by the respondents who filed their counter affidavits vehemently disputing most of the facts averred by the applicant. Hearing of the matter proceeded by way of written submissions as all parties were represented. The applicant proceeded under representation of Mr. Symphorian Revelian Kitare whereas the 1st and 2nd respondents hired services of Mr. Moses Gumba, while the 4th respondent being represented by Mr. Sued Ismail, all learned counsels. The 3rd, 5th and 6th respondents were represented by Ms. Mariam Ismail, Mr. Juvenalis Ngowi and Ms. Norah Mara, both learned counsel respectively. Save for the 3rd respondent, all parties filed their respective submissions.

Briefly what prompted the applicant to prefer this application as gathered from the Affidavit goes thus, on 13/02/2020, the applicant filed Civil Case No. 45 of 2020 at the Resident Magistrate court of Dar es Salaam at Kisutu against the respondents. The case was for different causes of action related to trespass into applicant's marriage by the first respondent the act which led into his divorce by the second respondent who was his wife. After

institution of that case, the 4th and 6th respondent raised a similar preliminary point objection that, the applicant has no cause of action against them, the objection which on 30/06/2020 was upheld and applicant was ordered to amend the plaint to exclude both 4th and 6th respondent from the plaint within 14 days. Discontented with the decision the applicant did not amend the plaint within specified time, instead he formed an opinion of appealing against it as a result on 14/07/2020 the trial court struck out the case for want of prosecution. The applicant applied for copies of ruling and order which were availed to him on 26/08/2020 before he filed the unsuccessful appeal on 28/08/2020, as the first respondent picked an objection against it on the ground that the said ruling and order were not appealable the objection which he conceded to on 18/03/2021, the date fixed for hearing hence the appeal was struck out.

Following that legal stuck, disgruntled the applicant's advocate had to trace the applicant who was in Kigoma region and inform him of the orders in which he succeeded to reach him on 24/03/2021, whereby the latter was aggrieved with the orders hence instructed him to take necessary steps. From that instruction this application was prepared before its filing on

25/03/2021, online, where the applicant is praying the Court for an extension of time to institute the revision application.

This Court has unfettered powers to entertain and grant the application upon good cause or sufficient reasons supplied by the defendant expressing as to what delayed him to perform the actions in which extension of time is sought for or any other reason that may warrant the court extend him time. As to what amounts to good or sufficient cause there is no fast and hard rule as the term is relative one and is dependent upon the circumstances of each individual case. See the cases of **Oswald Masatu Mwizarubi Vs. Tanzania Fish Processor Ltd**, Civil Application No. 13 of 2010 and **Elfazi Nyatega and 3 Others Vs. Caspian Mining Ltd**, Civil Application No. 44/18 of 2017 (both CAT-unreported). It is therefore upon the party seeking extension of time to provide the relevant material in order to move the court to exercise its discretion. The ruling and order sought to be impugned by the applicant were delivered by the trial court on the 30/06/2020 and 14/07/2020. As per item 21 of part III of the schedule to the LLA, the application for revision is to be lodged in Court within sixty (60) days of the date of the impugned decision or order which in this matter going by the last order of 14/07/2020, the application for revision ought to have been

preferred on or before 13/09/2020. However, the same could not be so preferred in time hence the filing of this application allegedly online on the 25/05/2021 though the ERV receipt shows filing fees was paid on 01/04/2021, which is a period of more than 196 days, the period which the applicant has to account for.

Discharging the above stated duty Mr. Kitare for the applicant while adopting the affidavit, submitted that, the time limit for filling an application for revision is 60 days from the date of the decision. According to him, the last date the applicant was supposed to institute the application for revision was on 12/09/2020 but he could not file the same because he was time barred, thus the applicant had to institute this application for extension of time on 01/04/2021 due to several reasons.

Firstly, he submitted, the applicant was prosecuting with due diligence another civil proceeding in this court against the same party, for the same relief. He placed reliance in the provisions of section 21 (2) of the LLA, which excludes the time when applicant was prosecuting another civil Proceeding with due diligence. He argued, when the lower court orders were issued, the applicant appealed in time against the said orders but the fact that appeal was not a proper avenue to challenge the orders, the same was struck out.

In his view the spent time when he was prosecuting that appeal is excluded by the above cited provisions, thus the period from 28/08/2020 when the applicant instituted Civil Appeal No. 208 of 2020 until 18/03/2021, when the same was struck out should be excluded. He further submitted that, the period since 30/06/2020 and 14/07/2020 when the orders to be appealed against was issued until 28/08/2020 when the appeal was instituted cannot be accounted for because the appeal was filed in time, meaning within 90 days.

Secondly, is the time spent to apply and make a follow up a copy of the court order which struck out the appeal, he said. According to him, after the appeal was struck out on 18/03/2021, on the next day the applicant's advocate applied for the court order but the same was never released to date. He submitted that, the fact that he applied for that order but the same was not secured within time is enough reason to entitle him to secure extension period. He went on to cite the case of **The Registered Trustees of the Marian Faith Healing Centre @ Wanamaombi Vs. The Registered Trustees of the Catholic Church Sumbawanga Diocese**; CAT at Dar es Salaam Civil Appeal No.64 of 2007, where the court held that, the mere fact that the appellant has made an application but he has not been furnished

with the same, without any default on his party is sufficient to entitle him secure extension of the period from computing the period of limitation for appeal.

The third reason according to Mr. Kitare is the time used to trace the applicant who stays at Kigoma so as to inform him of the order which struck out the appeal and secure instructions to file the present application for revision of which he managed to reach him on 24/03/2021. The fourth reason according to him, is the time used to make online filing which was done on 25/03/2021 and the same was admitted on 30/03/2021 and after admission, on 01/04/2021 the undersigned advocate filed the present application.

Mr. Kitare further requested the Court to apply overriding objective as provided for under section 3A and 3B of CPC as amended by the written Laws Miscellaneous amendment Act so as to attain just determination which according to him, is to review the lower court decision which excluded the fourth and sixth defendants/respondents from the suit whose mobile gadgets facilitated mobile telephone communication between the first and second respondent, which facilitation enabled trespassing of the first respondent into his marriage, hence his divorce by the second respondent

(his wife). And second to review the lower court decision which struck out the suit due to the absence of the plaintiff on the date scheduled for mention which was improper remedy.

In response, Mr. Gumba for the 1st and 2nd respondent resisted the application. While adopting paragraph 8 of the counter affidavit in opposition of the application he submitted that, on what amounts to reasonable cause, applicant had to account for each day of delay as stated in the case of **Sebastian Ndaula vs Grace Rwamafe**, Civil Application No 4 of 2014 which is quoted in the case of **Elfazi** (supra) but he has failed to so do. He contended that, the order sought to be challenged was delivered on 30th June 2020 but no information was in court until 29th July 2020 which is 30 days later, when applicant requested for copies of the court's order. He said, the narrated chronological events of his late filling of the said revision by the applicant displays nothing than lack of diligence and inaction on his part and his advocate as a matter of law, lack of diligence and inaction do not amount to reasonable cause for extension time. He placed reliance in the case of **CRDB Bank Limited Vs. George Kilindu & Another**, Civil Application No. 87 of 2009. He concluded that, basing on his submission the applicant has not met the prerequisite criteria for extension of time as per the provisions

of section 14 (1) of LLA, thus the application is devoid of merit and the same should be dismissed with cost.

On his side, Mr. Sued Ismail for the 4th respondent while adopting the counter affidavit sworn by David Patrick, like the 1st and 2nd Respondent, he challenged the applicant's submission and contended that, applicant failed to establish good and sufficient cause. He restated Mr. Gumba's assertion that, the applicant failed to account for the delay as his chronological events shows lack of diligence and inaction on his part and his advocate in handling the case which under the law cannot be counted as the sufficient and reasonable cause to justify the delay. He argued that, the applicant's inaction for 30 days from 30th June 2020 up to 29th July 2020 should not be condoned by this Court. He rested his submission by convincing the Court that, this application is not grounded on sufficient cause for the delay hence lacks merit and should be dismissed with costs.

As for the 5th respondent Mr. Juvenalis Ngowi submitted in contest of the application that, since the decision of the trial court sought to be impugned during the revision upon extension of time was for striking out the application on 14th July 2020, the remedy was to reinstitute a fresh suit but the applicant ignored the same and proceeded to file an appeal instead hence acted

without diligence. He placed reliance in the case of **Tanzania American International Development Corporation 2000 Ltd Vs. The Mining Commission & Another**, Misc. Civil Application No 25 of 2019 [2020] TZHC 4601.

He further faulted the applicant reasons for delay and submitted that, applicant failed to account for each of delayed days. Added that, applicant acted negligently by filling multiplicity of suits and failed to follow the proper cause. To him applicant is on forum shopping and that, filling multiplicity of suits on the same subject matter is abuse of court process, hence the application deserves dismissal.

On her side Ms. Norah Mara for the 6th respondent also adopted the counter affidavit and submitted that, Civil Case No. 45 of 2020 was dismissed for failure to comply with courts orders and failure of the applicant to enter appearance in court. Like the 4th respondent he submitted on the remedy of the case which is struck-out. He then argued that, applicants counsel misconceived the provisions of section 21(2) of the LLA as the same is applicable only where a party has exercised the so-called due diligence. She explained the meaning of due diligence as per Black's Law Dictionary 2nd Edition to mean a measure of prudence, activity, or assiduity, as is properly

to be expected from and ordinary exercised by a reasonable and prudent man under the particular circumstances, not measured by any absolute standards, but depending on the relative facts of the special case. She concluded that, in this matter the applicant failed to show good reasons for the court to exercise its discretion to extend him time, as he failed to account for the delayed days and he was full of negligence and reckless, the conducts which do not constitute good cause for extension of time. And finally remarked that, the application is not maintainable as it aims at prolonging courts process, hence be dismissed with costs.

Rejoining on 1st, 2nd and 5th respondents' submission, Mr. Kitare disputed the contention by the 1st and 2nd respondents that he failed to account for the delay from 30/06/2020 to 29/07/2020, as during that period the applicant was still in time of appeal against the decision of the trial Court under CPC. According to him, since item 1 of part II of the schedule to the LLA provides for 90 days as limitation period for such appeal, that time should be excluded. He then reiterated his submission in chief. Attacking the 5th respondent submission on assertion that, the applicant acted negligently submitting that, his efforts of remedying the wrong doing is acceptable in law hence his act of challenging the decision though in wrong forum does

not constitute negligence. He placed reliance in the case of **Michael Leseni Kweka vs John Eliya** (1997) TLR, 152. He concluded by disputing 5th respondents' submission that, after the case was struck out applicant had to re-institute his case afresh. To him, instituting the fresh suit was not a remedy to the applicant as he was challenging the order of removal the 5th and 6th respondent from the suit and not otherwise. Thus, if he had to institute the suit afresh, he would be forced to exclude the said parties, which was not his intent.

Rejoining on the 4th respondent's submission the applicant's counsel contended that, the principle of accounting for each day is misconceived as the same is not applicable in an action taken within a prescribed period by the law or order of the court, and that all the cases cited are distinguishable. In his view, the limitation time for his appeal was 90 days. According to him, the letter requesting for the order of 14/07/2020 striking out the suit was filed in court on 29/07/2020 which was within the prescribed time of 90 days, the preferred appeal though filed in this Court wrongly was preferred in time. To him the principle of accounting for each day of delay is no applicable in the circumstances of this application as there is no law which regulates as

to when the letter requesting for the requisite documents should be filed in Court. He therefore invited this Court to allow the application.

I have keenly considered the affidavit, counter affidavits and the submissions of respective counsels for the parties in this application. As alluded to herein above, the applicant has to advance good cause which covers several factors for this Court to grant him extension of time as sought there is no hard or fast rules on what constitutes a sufficient/good cause. One of the factor is whether applicant has accounted for each day of delay and such reasons for delay must be sufficiently proving that he acted diligently. It is noteworthy that, even a single day delay should be accounted. See the cases of **Tanzania Coffee Board Vs. Rombo Millers Ltd, Civil Application No 13 of 2015** (CAT Unreported) and **Bushiri Hassan Vs. Latina Lukio, Mashayo**, Civil Application No. 3 of 2007 (CAT-unreported), where the Court stated:

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

Apart from accounting for each and every day of delayed days, other factors depends on whether the application for extension time has been brought promptly as well as whether the applicant exercised diligence on his part in

performing other actions before bringing the application for extension of time. See the case of **International Airline of the United Arab Emirates Vs. Nassoror**, Civil Application No. 263 of 2016 (CAT Unreported).

Now the issue for determination by this Court is whether the applicant before the court has met the above tests. In the present case looking at the applicant counsel's averments, the ruling and order sought to be revised was delivered on 30/06/2020 and the order striking out Civil Case No. 45 of 2020 was delivered on 14/07/2020. Thus as per item 21 of part III of the schedule to the LLA the revision application ought to be filed in court by 13/09/2020 which sixty days from the date of the last decision sought to be impugned as copies of ruling and order were timely supplied to him on 26/08/2020 as per paragraph 6 of the affidavit. Mr. Kitare submitted that, this application which was filed on line on 25/03/2021, admitted on 30/01/2021 and presented for filing on 01/04/2021. As per Rule 21 (1) of the Judicature and Application of Laws (Electronic Filing) Rules, 2018, G.N. No. 148 of 2018, a document filed electronically is deemed to have been filed in Court on the date it was submitted online. In this matter the submission by Mr. Kitare is neither supporting nor elaborating what is being averred in paragraph 8 of the affidavit which reads:

8. That after the above order was issued, the next day I had to trace the applicant who stays in Kigoma to inform him of the issued order. However, I did not be in touch with him until on 24/03/2021. The applicant was aggrieved with the order hence instructed to take necessary steps. It was when on 25/03/2021 I prepared the application before online filing.

What is gleaned from the above paragraph is the fact that, the application was prepared on 25/03/2021 before it was filed online. However, the date of online filing is not disclosed. That aside the applicant has not provided with this Court any evidence proving to its satisfaction that, the same was filed online on 25/03/2021 and admitted on 30/03/2021 as alleged, the missing facts which entitle this court to conclude that, Mr. Kitare's submission that it was filed online is an afterthought, as this court cannot act on advocate's submission for not constituting evidence. It is trite law that, arguments and submission by an advocate in court cannot be a substitute of evidence. This stance was aired by the Court of Appeal in the case of **Tina & Co. Limited and 2 Other Vs. Eurafrican Bank (T) Ltd Now known as BOA Bank (T) Ltd**, Civil Application No. 86 of 2015 (CAT-unreported) when cited with approval the Ugandan Court of Appeal case of **Trasafrika Assurance Co. Ltd Vs. Cimbria (E.A) Ltd** (2002) E.A where the court held that:

"As is well known a statement of fact by counsel from the parties is not evidence and therefore, court cannot act on."

As there is no proof that the application was filed online on 25/03/2021, I hold the days to be accounted for are 196 days counted from 13/09/2020, the date when an application for revision was supposed to be filed in this Court.

Accounting for the period of more than 196 days Mr. Kitare submitted that, after collection of the said copies of ruling and order, on 28/08/2020 the applicant filed the appeal whose case number is not mentioned before the same met objection from the 1st and 2nd respondent that, the sought to be challenged ruling and its subsequent order were not appealable which objection he conceded to on 18/03/2021, hence the appeal was struck out. That, thereafter the applicant's counsel had difficulties in communicating the applicant for the instruction to further pursue the matter which consent was obtained on 24/03/2021 and this application filed online on the 25/03/2021. It was Mr. Kitare's submission that, as the applicant was busy in court diligently pursuing wrong remedy, he is covered by section 21(1) of LLA, hence the delayed period in filing this application has been accounted for. With due respect to Mr. Kitare's submission, his interpretation of the said

section 21(1) of LLA is misconceived as the same applies only to matters though wrongly prosecuted similar action with due diligence or good faith in the appellate or same Court which from defect of jurisdiction or any other cause of like nature. In this matter there is no averred facts by the applicant in affidavit exhibiting to this Court that the appeal was being prosecuted in good faith or diligently and that it was struck out for want of jurisdiction as per the dictates of section 21(1) of LLA, so as to warrant this Court exclude such period from 196 days. The requirement of the party seeking to rely on that section to prove those facts was insisted in the case of **Salim Lakhani ad 2 Others Vs. Isfaque Shabir Yusuphali** (*As administrator of the estate of the Late Shabir Yusufali*), Civil Appeal No. 237 of 2019 (CAT-unreported).

*"...it is clear, before the respondent can press into service the applicability of the said provision, he has to satisfy the following conditions among others:- **one**; the earlier proceeding from which the respondent is seeking to exempt the time spent prosecuting the same was rejected for want of prosecution for want of jurisdiction or other cause of a like nature, **two**; that the earlier proceeding and the latter proceeding are founded upon the same cause of action or*

*matters at issue, and **three**; he was prosecuting High Court Civil Revision No. 105 of 2002 with diligence and in good faith."*

It is uncontroverted fact that, applicant was represented not only by a mere advocate, but also a qualified person in this field , who knew or ought to know or ought to have known a right path or course to go after the ruling was delivered, but chose improper one which ended into such inordinate delay of 196 days. What applicants counsel did was procedural mistake hence lack of diligence and negligence on his part, which I hold does not constitute good cause for extension of time. This legal stance was pronounced in the case of **Omari R. Ibrahim Vs. Ndege Commercial Services LTD**, Civil Application No 83/01 of 2020 (CAT-unreported) where the Court of Appeal adumbrated that:

*It should be stated once that, **neither ignorance of the law nor counsel's mistake constitutes good cause** in terms of Rule 10 of the Rules. (See *Bariki Israel v. The Republic*, Criminal Application No. 4 of 2011 and *Charles Salungi v. The Republic*, Criminal Application No. 3 of 2011 (both unreported)). In the case of *Umoja Garage v. National Bank of Commerce*, [1997] TLR 109, the Court stated that **lack of diligence on the part of the counsel is not sufficient ground for extension of time**. In the current application, the record speaks loudly that the Applicant was negligent on*

the path he chose which culminated into inordinate delay which he failed to account for. For the foregoing and taking into consideration the circumstances pertaining in the current application, it is my view that no good cause has been shown by the Applicant to warrant extension of time sought. In the final result, this application is devoid of any merit and the same is dismissed with costs.

Applying the above principle in the circumstances of the present application where the applicant's counsel decided to take a wrong procedural path or course, it is apparent to me that, the time when applicant was pursuing wrong remedy, I find cannot be excluded from 196 days to be accounted for. This includes the time alleged to have been spent by the applicant who sworn the affidavit to communicate with his client as there is no evidence to prove that he in fact communicated him as that fact ought to have been deponed by the applicant himself. I so hold as where the affidavit is mentioning another person is a hearsay unless the fact stated therein are exhibited by person mentioned in the affidavit. This was the position of the law 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."

See also the case of **Benedict Kimwaga Vs. Principal Secretary Ministry of Health**, Civil Application No. 31 of 2000 (CAT-unreported).

As stated earlier on above, it is a well principle of law as stated in the case of **Sebastian Ndaula Vs. Grace Rwamafae (supra)** that, in an application for extension of time, the applicant has to account for every day of delay. As demonstrated above, the Applicant has not established any good reason for such inordinate delay of more than 196 days rather than trying to hide under the umbrella of section 21 of LLA which under the circumstances cannot accommodate him as rightly submitted by the counsels for the respondents. Mr. Kitare has invited this court to invoke the principle of overriding objectives as provided for under section 3A and 3B of CPC so as to attain just determination of this application. With due respect this court is not prepared to heed to his prayer, as the overriding principle is not applicable to litigant who does not exercise diligence in prosecuting his matter then sit at his back waiting to benefit from the same. This was also the stance of the Court of Appeal in the case of **Erick Raymond Rowberg**

and 2 Others Vs. Elisa Marcos and Another, Civil Application No. 571/02
of 2017 (CAT-unreported)

"It is therefore not expected of a party to sit back and simply wait at the receiving end to ride on the principle of overriding objectives."

In view of the above, I find the prayer for extension of time to have been unmerited, hence the application is hereby dismissed.

Given the nature of the matter, I order each party to bear its own costs.

It is so ordered.

DATED at DAR ES SALAAM this 19th August, 2022.



E. E. KAKOLAKI

JUDGE

19/08/2022.

The Ruling has been delivered at Dar es Salaam today 19th day of August, 2022 in the presence of Mr. Kelvin Lubago, advocate for the applicant, who is also holding brief for Ms. Hamisa Nkya, advocate for the 3rd Respondent and Ms. Nora Marah advocate for the 6th Respondent, Mr. Moses Gumba advocate for the 1st and 2nd Respondent, Mr. Sued Ismail

advocate for the 4th Respondent, Ms. Beatrice Soka advocate for the 5th Respondent and Mr. Asha Livanga, Court clerk.

A handwritten signature in blue ink, appearing to be 'E. E. Kakolaki', written in a cursive style.

E. E. KAKOLAKI
JUDGE
19/08/2022.