

**IN THE HIGH COURT OF TANZANIA
(MWANZA DISTRICT REGISTRY)**

AT MWANZA

MISC. CIVIL APPLICATION NO. 152 OF 2021

MASELE HUSSEIN MUPAMBWE APPLICANT

VERSUS

ONASIS E. LEMA t/a PAMBA ROAD SERVICES RESPONDENT

RULING

15th July, & 2nd September, 2022

ITEMBA, J.

This is an application for enlargement of time within which to institute an appeal to this Court, against the ruling and decree of the District Court of Mwanza, in respect of DC. Misc. Application No. 39 of 2019. The decision sought to be impugned was delivered on 12th February, 2019, and it was in the respondent's favor.

The application has been preferred under the provisions of section **14 (1) of the Law of Limitation Act Cap. 89 R.E. 2019**. Supporting the application is the affidavit of Masele Hussein Mupambwe, the applicant herself and it sets out grounds on which the prayer for extension of time is based. The applicant's ground for the prayer sought can be summed up as follows; one; that she was not properly served with summons hence she was not aware of the application. Two; that there was negligence on the

part of the applicant counsel which failed her and three that the impugned decision was tainted with illegality.

The respondent has opposed the application through a counter-affidavit filed in the court. The respondent has levelled grounds on which he holds the view that the application is misconceived. He prayed that the same be dismissed with costs.

At the hearing of the application through oral submissions, getting us underway was Mr. Denis Kahangwa, learned counsel who represented the applicant in the matter while Mr. Anton Nasirime, learned counsel services were enlisted by the respondent. Mr. Kahangwa began to address the court by praying that the chamber summons and the affidavit filed in support of the application be adopted and to form part of his submission. He argued further that the application to set aside an *ex parte* decree was dismissed by this court and it took the applicant one and half year to file this application. However, he stated that it was not due to applicant's negligence as all along the applicant was at the court's corridor seeking justice through several applications. He explained that, formerly the applicant was enjoying the service of her attorney Mr. Limus until when she was surprised with presence of an attachment of her property based on an execution application. That, at the stage he was engaged by the applicant

and he filed the present application. Citing section **21 (1) of Cap. 89**, he contended that applicant acted *bona fide*, when she was pursuing the application in the lower courts. In that regard, he is of the view that the applicant cannot be punished with the negligence of her advocate. He added that negligence of an advocate can be relied on as a ground of appeal as it was held in the case of **Kambona Charles Vs Elizabeth Charles, civil Application no. 529/17 of 2019**.

In the second limb of the submission, demonstrating on the point of illegality he stated that, the applicant ceased to be an administratrix of estate, on 27th of January, 2007 when she was lawfully discharged. That, when the suit was filed on 28th of June, 2017 against the applicant, she was no longer an administratrix. He cited the case of **Meet Singh Bhachu Vs The Administrator General & Another, Misc. civil application no. 70 of 2020**, which provides *inter alia* that once probate is closed an administrator cannot be sued on her own capacity, as she was *functus officio*.

Nonetheless, about service of summons, in relation to the impugned application, he argued that there was no proper service of summons as the applicant was not a proper party to be served, and that the appointed broker was one Isangi but the affidavit was sworn by Gibson. He finalized by stating that, the fact that the applicant was denied a notice of date of

judgement, she failed to file a proper application on time. In respect of the right of a party to be notified the date of judgment, he cited the cases of **Cosmas Construction Co. Ltd. v Arrows Garments Ltd TLR 127 (1992)** and **NICO Insurance (T) LTD Vs Basila Benedict Chuwa & Two Others.**

Replying to the submission on chief, the learned counsel for the respondent, Mr. Nasimiire, objected the application. He held the view that since the applicant was denied to set aside *ex parte* judgment, she was supposed to file an appeal against that decision but she remained silent and there are no clear reasons for that.

He added that the applicant's advocate in Misc. Civil application no. 39/2019 is being blamed for negligence but advocates' negligence cannot be a sufficient reason for extension of time. In this he cited the case of **Paul Martin v Bertha Anderson AR civil application no. 7 of 2005.** As regards the case of **Elizabeth Charles** (supra) he distinguished it, stating in that the case there was an 'advocate oversight' as opposed to this case where there is a delay of one and a half year.

In respect of the ground of illegality raised, he stated that, it has to be apparent on the face of records but in the present application one has

to go through the records, and still it is not clear why this ground is raised at this stage as it has never been raised before the lower court.

About service of summon, he argued that, the applicant could have received the summon as it is and then raise her concern at the hearing.

Finalizing, he held the view that no sufficient reasons were adduced to justify the delay and that the application has no chances of success. He prayed that the same be dismissed.

In a short rejoinder, Mr. Kahangwa submitted that it is clear this application is against the decision of dismissal to set aside *ex-parte* judgement and insist that client should not be punished for her attorney's mistake, further urged this court to grant the application.

From these rival submissions, the sole issue for determination is whether sufficient cause has been adduced to warrant grant of extension of time.

It is settled law that an application for extension of time is grantable where there is a credible case to warrant grant of such extension. This means that a party asking for extension of time has a duty to justify the reason for the extension. The law also requires the applicant to act in an equitable manner (See the Supreme Court of Kenya's decision in ***Nicholas***

Kiptoo Arap Korir Salat v. IEBC & 7 Others, Sup. Ct. Application 16 of 2014).

This requirement got a broadened scope in the epic decision of the Court of Appeal in ***Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania***, CAT-Civil Application No. 2 of 2010 (unreported), wherein key conditions on the grant of an application for extension of time were laid down. These are:

"(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 he intends to take.

(d) If the Court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as illegality of the decision sought to be challenged."

As courts lay emphasis on the need to assign sufficient cause, it is been stated, as well, that in determining what constitutes sufficient cause, reference has to be made to all circumstances of a particular case. While the term **sufficient cause** derives no definite terms, courts have come up with circumstances which are considered to constitute sufficient cause. These include the ***Lyamuya Construction Case*** (supra). In ***The***

Registered Trustees of the Archdiocese of Dar es Salaam v The Chairman Bunju Village Government and others Civil Appeal no.

147/2016, the Court of Appeal held thus:

"It is difficult to attempt to define the meaning of the words "sufficient cause". It is generally accepted however, that the words should receive liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bonafide, is imputable to the appellant."

It is trite law that grant of an application for extension of time is at the discretion of the court. This is done where the Court is satisfied that the application presents a credible case.

In her affidavit, the applicant, among others, states that she had delayed in filling the intended appeal because she believed that her advocate Mr. Linus Mushi was taking care of the business. In paragraph 4 of the affidavit, she states that, the said advocate at first, advised her to file an application to set aside *ex parte* judgment and decree, they did so but the application was dismissed.

She adds that still believing that the said attorney is working on her case, she was suddenly served with execution proceedings. She notified the advocate who insisted to be working on the matter.

That she decided not to rely anymore on the said advocate and opted for the services of Mr. Kahangwa learned Counsel who filed the present application. As mentioned, the applicant's counsel cited the case of **Kambona Charles v Elizabeth Charles** (supra).

The respondent has objected that ground stating that advocates negligence is not sufficient reason for extension of time. He relied on the case of **Paul Martin Vs Bertha Anderson AR (supra)**. He distinguished the case of **Kambona Charles v Elizabeth Charles**, stating that the circumstances were different as the advocate had an 'oversight' while in the present case there is inexcusable delay.

Having gone through the record, indeed the applicant had the service of the said advocate Linus Mushi but she had to resort to advocate Kahangwa.

She explains to have fully relied on the former learned counsel and believed that everything is in control, while it was not. In the case of **William Getari Kegege v Equity Bank and another** Civil Application no. 24 /08 of 2019 (CAT) at Mwanza it was held that:

'A litigant should not be allowed to suffer through the mistake of an officer of the Court connected with administration of Justice'.

In the circumstances, where the applicant is a layman and was failed by her advocate, and in consideration of the nature of the case, and its background, I see no negligent or inaction or want of bonafide on the part of the applicant. It is therefore my respectful view that a sufficient cause has been established by the applicant to warrant extension of time to institute her appeal. Both parties should be heard on merit in order to advance substantial justice.

In the premises, I find merit in the application and it is hereby granted.
Costs to be in the cause.

It is so ordered.

DATED at **MWANZA** this 2nd day of September, 2022.



L.J. ITEMBA
JUDGE

Ruling delivered under my hand and seal of the court in chambers in presence of the applicant in person and Ignas, RMA and in the absence of the respondent.

