

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(SONGEA DISTRICT REGISTRY)**

AT SONGEA

MISC. CIVIL APPLICATION NO.9 OF 2021

(Arising from Civil Case No.2 of 2020 before the High Court of Tanzania at Songea)

PHILIP SAMSON CHIGULU T/A

PHILIP SAMSON CHIGULU AGENT.....APPLICANT

VERSUS

MARKET INSIGHT LTD1ST RESPONDENT

VIDYA SAGAR2ND RESPONDENT

LIGINIKO M. CHARLE.....3RD RESPONDENT

NIMIT HAMBARDIKER.....4TH RESPONDENT

ELISHA C. MWINUKA.....5TH RESPONDENT

EX-PARTE RULING

16th August 2022 & 08th September 2022

U. E. MADEHA, J.

The Applicant by way of chamber summons filed this application under *Section 14 of the law of the Limitation Act [Cap 20 Revised Edition 2019]*, seeking for orders of extension of time to file an application for restoration of Civil Case No. 2 of 2020 and Misc. Civil Application No. 14 of 2020. The Chamber Summons is supported by an affidavit sworn by the Applicant.

Out of parties' consensus, the Court ordered the application be canvassed by way of written submissions. The Applicant was unrepresented, he proceeded in person while Mr. Lazaro Simba, a Learned Advocate (holding brief for Advocate Angela Massesa) represented the first (1st) and second (2nd) Respondents. Mr. Melkioni Mpangala, a Learned Advocate represented the third (3rd) Respondent. The fourth (4th) and fifth (5th) Respondents never entered appearance despite that they were served with summons by way of the Court Process Server including publication summons. As a result, the Court ordered that 4th and 5th Respondents be notified that the case will proceed ex-parte against them.

In augmenting the application, the Applicant made a lengthy submission but his alleged reasons for the delay can be briefly captured from two points: First, that the Honorable Judge mistakenly dismissed his case for his non-appearance because he had filed a notice of absence ('Annexure A') which as per the Court's proceeding the same did justify his absence. Second, the Applicant alleges that he was busy preparing, instituting, and prosecuting a constitutional case to wit Misc. Civil Cause No. 23 of 2021 before the High Court of Tanzania at Dar es Salaam as evidenced from 'Annexure C' as attached.

In response to the Applicant's submission, the third (3rd) Respondent through his Counsel submitted that he has carefully read the Applicant's affidavit together with written submission wherein he is requesting for the extension of time to file an application for restoration of Civil Case No. 2 of 2020 and Misc. Civil Application No. 14 of 2020 but the same is hopeless and baseless and hence a wastage of the precious time of the Court.

The learned Counsel went on submitting that the essence of this application for the extension of time within which to file restoration of two cases is non-appearance of the Applicant which the same is legally justified under *Order IX Rule 5 of the Civil Procedure Code [Cap 33 Revised Edition 2019]*. He contended that it is trite law that the Court is vested with the power to grant or refuse an application for the enlargement of time whereby the same is entirely the discretion of the Court. To fortify his point, he requested this Court to make reference to the case of **Benedict Mumello v. Bank of Tanzania**, Civil Appeal No.12 of 2002 Court of Appeal of Tanzania at Dar-es-salaam (unreported). Moreso, he insisted that in the exercise of such discretion the Court has to consider as to whether or not the Applicant has adduced sufficient reason. Additionally, he referred the Court to the case of **Benedict Mumello** (*Supra*) in which different

factors that constitute a good cause for the Court to grant the extension of time were stated. The Counsel added that such factors were also stated in the case of **Modestus Daudi Kangalawe (Administrator of the estate of the late Daudi Kangalawe) v. Dominicus Utenga** Civil Application No. 139 of 2020 Court of Appeal of Tanzania at Iringa (unreported) whereby the Court had this to say:

"The Court can only exercise its power given by Rule 10 of the Rules if good cause is shown. Whereas there is no invariable universe definition of what constitutes good cause, in exercising its discretion under the said provision, the Court is bound to consider a number of factors such as the length of delay, the reasons for the delay, the degree of prejudice the respondent stands to suffer if time is extended."

On his side, the first (1st) and second (2nd) Respondent's Learned Counsel asserted that based on the strength of the above facts and authorities the Applicant has not shown any reasonable cause or sufficient reasons for his delay and therefore this application is of no merit thus it should be dismissed in its entirety with costs. He made reference to the case of **Paul Martin v. Bertha Anderson**, Civil Application No. 7 of 2005 Court of Appeal of Tanzania (unreported) where it was held that:

"In the instant case, it is my view that, from facts, the following two (02) aspects are established, first the delay in seeking the extension of time to file a leave to appeal to this Court out of time for a period of well over four (04) years was, to say the least inordinate. Secondly, the delay was a result of inaction and lack of diligence on the part of the applicant, these factors I am satisfied do not constitute sufficient reasons ... in the upshot, and for the foregoing reasons the application is dismissed with costs."

Rejoining, the Applicant submitted in voluminous and extraneous in respect to the Application. But of essence is that, he reiterated what he submitted in chief.

I have subjectively considered the chamber summons, affidavits together with the written submissions from both sides and found that the central issue for this Court's determination is whether the Applicant has demonstrated sufficient cause to justify his application. At the back of my mind is the general principle that granting of extension of time or otherwise is a discretion I have. Further, I am cautious that such discretion must be exercised judiciously according to rules of reasoning and justice and not otherwise.

In the current application, I have observed that, the reason(s) for delay by the Applicant to file an application for setting aside the dismissal order and consequently restore his case as advanced in various paragraphs of the supporting affidavit and his written submission are insufficient. I shall explain.

Firstly, he has failed to account for each day of delay taking into account it has been past six months. It is not yet clear before this Court as to what the Applicant was doing from the date that Civil Case No.2 of 2020 and Misc. Civil Application No. 14 of 2020 were dismissed. It can be recalled that Civil Case No. 2 of 2020 and Misc. Civil Application No. 14 of 2020 were dismissed in this Court for non-appearance of the Applicant on the 27th of May 2021. The present application has been filed on 19th of November 2021. Thus, calculating from 27th May 2021 up to 19th November 2021 there is a delay of approximately six (06) good months in which the Applicant failed to file an application for setting aside the dismissal order and has thus not provided a sufficient account for failure to do so. In the case of **Shaunti v. Shindocha & Others** [1973] E.A 207 the Court observed that:

"The position of an applicant for an extension of time is entirely different from that of an applicant for leave to appeal. He is concerned with showing sufficient reasons why he should be given more time and the most persuasive reasons that he can show. Is the delay has not been caused or contributed by dilatory conduct on his part. But there may be other reasons and these are all matters of degree."

In light of the above guide, it is my considered view that the delay to set aside the dismissal order appears as a result of his inaction and lack of diligence on the part of the Applicant.

Second, the claim that the Applicant gave notice of his absence on 27th of May 2021 when the case was dismissed is appears feeble. The notice informed and begged for permission of absence for the date of 27th day of May 2020. But perusing through the proceedings the Applicant had on prior diverse dates been absent in Court. As resonated by the trial Judge on page 6-7 of the typed proceedings that he did not tender any evidence to verify his excuse of absence hence his claim was baseless.

In the alternative to the afore argument, it is my considered view that there is no record that, there was no any illegality from the

proceedings and order by the Court calling for a grant of extension of time to set aside the order. This is because, the application was dismissed out of non- appearance by the Applicant, an aspect that is legally justified. That, the trial judge found and hold that there was no genuine reason for his non-attendance because he never attached any medical chit to prove that his mother was indeed sick. That finding in itself does not amount to a manifest error on the face record to prompt grant of an extension of time.

Third, the Applicant could not substantiate that on the actual planned dates as arranged by this Court he was constrained from entering appearance mainly because he was making a following up of the Constitution case at High Court Main Registry at Dar-es-Salaam. Thus, bearing into mind that he also at the same time claimed that his appearance was hindered by the reason of nursing his sick mother. Therefore, I find that his justifications ingenuine.

For the reasons stated herein above, I find and hold that the application is unmerited because the Applicant has failed to show sufficient cause to warrant this Court extend time in which he may apply for an order setting aside the dismissal order thus restore the proceedings in Civil Case

No. 2 of 2020 and Misc. Civil Case No. 14 of 2020. Conclusively, the application is hereby dismissed with costs. Order accordingly.

DATED at **SONGEA** this 08th Day of September 2022




U.E. MADEHA

JUDGE

08/09/2022