

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA DISTRICT REGISTRY]

AT ARUSHA

MISC. CIVIL APPLICATION NO. 74 OF 2022

(Arising from PC. Civil Appeal No. 51 of 2020, High Court Arusha further arising from Civil Appeal No. 07 of 2020 Karatu DC, Originating from Civil Case No. 85 of 2019 of Karatu Primary Court)

ESTHER MANONGA.....APPLICANT

VERSUS

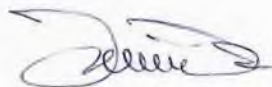
ESTHER LOHAY.....RESPONDENT

RULING

22nd August & 2nd September, 2022

TIGANGA, J

This is an application for extension of time made by the applicant to be allowed to file an application to set aside the order which dismissed PC. Civil Appeal No.51 of 2020 for want of prosecution. In this application, the applicant was the appellant in PC. Civil Appeal No.51 of 2020 which was before this court. That appeal was dismissed on 18/05/2021 following the appellant default to appear and prosecute the appeal for two consecutive court sessions. While aggrieved by the order which dismissed her appeal, after about one year and one month later, that is on 15/06/2022, she realized that she was out of time, therefore, she filed

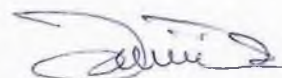


this application asking for extension of time to file an application to set aside the order which dismissed his appeal on 18/05/2021.

The application was filed under section 14(1) of the Law of Limitations Act [Cap 89 R.E 2019] through the chamber summons supported by the affidavit sworn by the applicant herself. In the affidavit the ground advanced is that, the applicant did fall sick when the appeal was pending, and the doctor recommended her a bed rest for about five months, from 3rd June 2021 and that during that period, he was hospitalized at Slahhamo Dispensary. From the affidavit filed, the applicant did not recover until 4th May 2022. To support that allegation, she attached the medical chit issued on 3rd June 2021 which was recommending her for bed rest for five months.

He deposed also further that, even after five months had lapsed, she did not get well, she fully recovered in May 2022, and after recovery he started searching for legal assistance and latter filed this application.

The application was opposed by the respondent by filing the counter affidavit sworn by Esther Lohay, the respondent, in which she disputed all the facts deposed in the affidavit filed in support of the application. In her view, those facts have no proof at all as the attached medical chit cannot be trusted because it does not have an official headed paper, the name



as well as the signature of the medical officer who attended the patient, i.e the applicant.

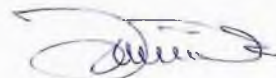
Further to that, he deposed that, the applicant did not take reasonable steps to notify the court of her sickness by sending the attached medical report which was purportedly issued on 03rd June, 2021.

He also deposed that, if the applicant had a had a bed rest, then the same ended in October 2021. That being the case, from November, 2021, the applicant was expected to take action by making follow of her case.

Question the credibility of the application he deposed that, the applicant did not attach any proof showing that, she has been attended by the medical Doctor from that hospital and that she could not be sick for more than one year without being referred to a referral hospital.

In the reply to the counter affidavit sworn by the applicant, she did not introduce any new facts, she only disputed the facts deposed in the counter affidavit and put the respondent to strict proof.

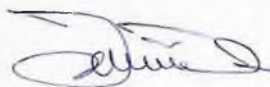
With leave of the Court, hearing of the application was by way of written submissions. In the submission in chief, the applicant who was being represented by Mr. Mitego Methusela, learned counsel, submitted

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that, before this court in the appeal which was dismissed, the applicant was not represented by lawyers, therefore, after being informed of the dismissal of the appeal, she did not know the procedure to be followed. That is why she resorted into asking for legal assistance on what to do, before she actually engaged the lawyer to file this application for her. The counsel submitted further that, 24 days counted from when she fully recovered on 04/05/2022, were used to make follow up to the High Court to collect the dismissal order and find a lawyer who was instructed on 01/06/2022. In his view, 24 days are sufficient to do all these.

Regarding to when the applicant got better from sickness, the counsel submitted that, the applicant was sick, he fully recovered on 04th May, 2022 and soon thereafter made follow up of her case. He submitted that, the Court of Appeal of Tanzania in numerous decisions accepts ill health as good reason for extension of time for doing any act which is not done within the time prescribed by law. In support of that contention he cited the case of **Alasai Josiah (suing by his Attorney Oscar Sawuka) vrs. Lotus Valley Ltd**, Civil Application No. 498/12 of 2019 (unreported), in which it was held that

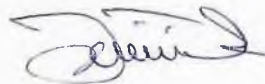
"Sickness is beyond human control and therefore nobody will fault the applicant for being sick."



He submitted that, the applicant proved her sickness by attaching the medical prescription chit which was issued by Slahhamo Dispensary. In his view, there is no prescribed format of medical chit, and that the format cannot be used to measure or test the validity of the medical chit. He urged the court to find that that, the right of appeal is fundamental as guaranteed by the constitution and the law, therefore, the applicant is entitled to a leave to pursue her appeal.

He further to that submitted that, the sickness cannot be taken to be the applicant loss of appetite to prosecute the appeal, and that the applicant has been adamant, persistent and diligent to take necessary steps to set aside the dismissal order. Lastly, he told the court that, the presence of the application for execution does not prevent her from pursuing her right for extension of time. He asked the application to be granted with costs.

In reply, the respondent through the service of Mr. Samwel S. Welwel, leaned counsel who was engaged for drawing only, save for very few issues which were elaborative, he made a submission which was a replica of the counter affidavit. He started by pointing out that, extension of time can be granted or refused basing on the principle propounded in the case of the **Lyamuya Construction Company Limited vrs. The**



Board of Trustees of Young Women Christian Association of Tanzania, Civil Application No. 02 of 2010 where the applicant is required to prove three things.

- i. To account every day or delay.
- ii. To prove to the court that, the delay is not inordinate.
- iii. To show diligence not apathy and negligence in the prosecution of the action he intends to make.

Mr. Samwel S. Welwel, insisted that, of all the three factors, the need to account everyday of delay has been emphasized in a number of cases one of them being the case of **Zuberi Nassoro Moh'd vrs. Mkurudari Zanzibar**, Civil Application No. 93/15 of 2018, where it was insisted that the days delayed should be accounted one after the other.

Whereas he agrees that sickness is one of the ground for extension of time, he submitted that, sickness should not be presumed, it must be proved by documentary evidence.

In his view, the evidence produced purportedly in proof of sickness of the applicant is wanting, because it shows that, the applicant was given five months bed rest, which were ending in October 2021. Therefore, if any action that she was to take, then she was supposed to start taking the same from November, 2021. But she did not take any action up to



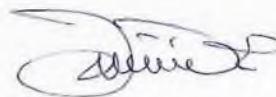
when she was served with execution application when she came up with this application.

The counsel further submitted that, even if we agree that, the applicant received the information about the dismissal on 06th May 2022, yet from that date, she spent about 24 days to file the application, and has not accounted these days. In the premises, he asked the application to be dismissed with costs.

In rejoinder, the applicant submitted that, the applicant continued to receive medical care from October, 2021 to 04th May, 2022 when she fully recovered and started to make follow up.

He also submitted that, the 24 days that the counsel for the respondent has attacked him to have failed to account, was used to make follow up to the High Court, find the legal advice on what is to be done and to engage lawyer to draft the documents and file the application for her. On that base he asked the application to be allowed as prayed.


That, presents a summary of the submissions and affidavits sworn and filed by the parties in support and against the appeal. From these materials, the question for determination by this court is whether, the application at hand has merit. Now, without beating around the bush, it instructive that the application of this nature is not a virgin ground in this



court. A number of principles have already been laid down laying guideline or rather factors to consider in granting or refusing applications for extension of time.

Some of these principle have been cited to me by the learned counsel, which I accepts to be good law, but considering them all, I entirely agree that, generally, for the applicant to be entitled to the grant of extension of time, he must show good cause.

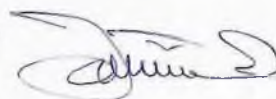
Although the term good cause has not been defined by statute, counts through case laws defines it to mean the liability of the applicant to account for each day of delay and prove that, the delay is not inordinate, and that he was diligent enough, as opposed to apathy or negligence, in taking action in prosecuting the action he intends to take. The other criteria which constitutes good cause is an illegality of the decision sought to be challenged. In this case, as already pointed out, the ground of delay relied upon by the applicant is the sickness of the applicant which according to him prevented her from filing an application to set aside an order which dismissed her appeal before this court. it is on record that sickness if proved has also been one of the good ground for extension of time falling under the umbrella of accounting the days



delayed in that the applicant could not by reason of sickness file the appeal during the time when he was sick.

I also agree with the counsel for the respondent, that mere allegation of sickness is not enough, the applicant must produce concrete evidence, which are normally required to be presented in the affidavit filed in support of the application filed. The reasons and ground should not be assumed, or presumed, the same must, as a matter of guiding principle be proved or justified by evidence. In this case, the applicant has attached to the affidavit a copy of medical chit giving her the bed rest for five months from 03rd June 2021 which arithimecally were expiring on the corresponding date of November 2021.

From then, there is no any other evidence showing that, the applicant was still on bedrest. Therefore, the assumption as inferred from the evidence presented by the applicant himself is that, the applicant was well, that is why there is no any other medical chit extending the bedrest either for further five months or any other period thereafter exempting her from duty or attending to court. It was expected of her, as a person who filed the appeal, to make follow up to the court in order to know the status of the case she filed in court, which would have assisted her to make an application for restoration as early as possible. To the contrary, she did



not do so. What she actually did, is to seat quite up to when she was served with the application for execution.

That being the case, and basing on the above findings, I find the delayed period is more than five months which have not been accounted for by the applicant. This period cannot by any standard be taken to be not inordinate, and there is no evidence of what the applicant was doing in that period to prove that he was diligent. That means, she has failed to give good cause, therefore, the application is dismissed for want of good cause.

It is accordingly ordered.

DATE at **ARUSHA**, this 02nd September, 2022




J. C. TIGANGA

JUDGE