

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA

Misc. APPLICATION NO. 35 OF 2022

(Arising from Civil Case No. 02 of 2022 of the High Court of Mwanza at Mwanza.)

TANZAGOLD REFINERY LIMITED----- APPLICANT
VERSUS
DOTTO ZANZUI LUDEHA----- RESPONDENT

RULING

Last Order: 08.09.2022

Ruling Date: 29.09.2022

M. MNYUKWA, J.

The applicant herein has moved this court under section 14(1) of the Law of Limitation Act, Cap. 89 R.E 2019 and section 95 of the Civil Procedure Code, Cap. 11 RE: 2019, praying this court to extend time, for the applicant to file an application to set aside an Order dismissing Civil Case No. 02 of 2021 dated 29th March 2022 before W.P. Dyansobera, J. and restore the same and, any other orders that this court see fit and just to grant. The application was supported by an affidavit sworn by CHIYENGERE GAYA WANDORE, Advocate for the applicant. The

application was contested by the respondent through a counter affidavit sworn in by GODWIN KABAGO, Advocate for the respondent.

During the hearing of this application, Chiyengere Gaya Wandore, the learned advocate appeared for the applicant and Godwin Kabago, the learned advocate too represented the respondent, and the application was argued orally.

In his submissions, the applicant's learned advocate started by adopting his affidavit and the affidavit sworn in by Gibson Ishengoma who is also a learned advocate to form part of his submissions. He further submitted that, as deponed on the affidavit, the delay is of 16 days from 29.03.2022, when the matter was dismissed to 29.04.2022 when this application was filed. He avers that, he was misled by his fellow counsel Gibson Ishengoma who was present at the hearing and informed him that the trial was scheduled for hearing on 23.04.2022 and he came to notice that, the matter was scheduled for pre-trial conference on 23.03.2022 instead of 23.04.2022, as he realized that on that day it was weekend and that he made follow-up on the next working day which was on 25.04.2022 and he was informed that, the matter was dismissed for applicant's non-appearance. He avers that, both affidavits deponed reveals that there was



a misleading information and he insisted that it is unjust to be penalized for the misleading information.

Insisting, he referred this court to the decision of this court in **Total Tanzania Limited vs Seet Penf Swee**, Misc. Application No. 428 of 2020 where it was decided that a party cannot be punished for the reason of misleading information by the officer of the court. He went on that, since advocate Gibson Ishengoma is an officer of the court his misleading information should not be taken, to penalise the applicant.

Referring to paragraph 10 of advocate Ishengoma affidavit, he avers that he was not notified despite the order by the court dated 23.03.2022 that required the plaintiff to be notified. He insisted that if the advocate for the respondent could have adhered by the order of the court, he could have been notified and the matter could not have been dismissed. Referring this court to the case of **Omari Mosi vs Mariam Omary Ismail**, Misc. Land Application No. 62 of 2021, he claims that failure to notify the party is a sufficient reason for extension of time. He therefore, prays this court to extend time to file an application for restoration of Civil Case No. 02 of 2022, out of time.

Replying, the respondent learned Advocate also adopted the counter affidavit filed on 28/06/2022 to form part of his submissions. He



went on opposing the application and referring this court to the case of **Bernard Mumelo vs the Bank of Tanzania**, Civil Appeal No. 12 of 2002 that, though this court has discretion to extend time, its discretion has to be exercised judiciously. Again, he submitted that a party applying for extension of time must account for every day of delay referring to the case of **Kibo Hotel Kilimanjaro Limited vs Treasury Registrar and Impala Hotel**, Civil Application No. 502/17 of 2020, and there should be a sufficient reason.

He claims that, the applicant did not show sufficient reasons and account for each day of delay. Referring to Order VIIIB Rule 20(2) of the Civil Procedure Code Cap.11 RE: 2019, he highlighted that, the applicant was required to restore the matter within 14 days which expired on 11.04.2022. He avers that, this application was filed on 29.04.2022 whereas the applicant delayed for 17 days and did not account for every day of the delay. He insisted that, on 23.04.2022 when the matter was called up, Advocate ishengoma was present therefore the applicant was represented and that was a professional negligence.

Referring this court to the case of **Omar R. Ibrahim vs Ndege Commercial Services Ltd**, Civil Application No. 83/01 of 2020, he insisted that Advocate's negligence is not good cause for the extension of



time. Reacting on the case of **Total Tanzania Limited** (supra), and the case of **Omari Mosi vs Mariam Omary Ismail** (supra) he avers that they are distinguishable in our case at hand. He retires insisting that, the application is devoid of merit and prays the same to be dismissed.

In his rejoinder, the applicant reiterates what he had submitted in his submission in chief and added that, he is well aware that granting of extension of time is the court's discretion but insisting that on paragraphs 10, 11 and 13 of the applicant's affidavit, he accounted for every day of delay. He avers that, the cases cited are not distinguished for the court clerk and the advocate are both officers of the court. Insisting, he avers that advocate of the respondent was duty bound to notify the plaintiff, the duty he chooses to abdicate. He therefore prays this application to be granted.

From the parties' submissions, and their respective affidavits and counter affidavit, I now have one issue for determination, which is whether this application is merited.

The application before me is for the extension of time, a prayer by the applicant who also wishes to set aside an order dismissing Civil Case No. 02 of 2021 dated 29th March 2022 before W.P. Dyansobera, J. and restore the same. It is settled position of the law that granting of



extension time is within the discretion of this court as to whether to extend the time or refuse to do so. However, this discretion should be exercised judiciously as the court must be guided by the principle as to whether the applicant has advanced good cause for the court to consider his application as provided for under section 14(1) of the Law of Limitation Act Cap, 89 R.E 2019 and along the good cause, the applicant is required to account for each day of delay.

The term, good cause has not been defined under the law and therefore, each case has to be determined in accordance with its own facts and circumstances surrounding it. This was also said in the case of **Jacob Shija vs M/S Regent Food & Drinks Limited & Another**, Civil Application No. 440/08 of 2017, where the Court of Appeal at Mwanza held that;

"What amounts to good cause cannot be laid by any hard and fast rules but are dependent upon the facts obtained in each particular case. That is, each case will be decided on its own merits, of course taking into consideration the questions, inter alia, whether the application for extension of time has been promptly, whether every delay has been explained away, the reasons for the delay, the degree of prejudice to the respondent if time is extended as well as whether there was diligence on the part of the applicant."



From the filed affidavits, the applicant's advocate, Mr. Wandore narrated the situation as from paragraphs 4 to 12 that he once appeared on 09.02.2022 when the matter was scheduled for mention on 17.03.2022 whereby on that day he asked his fellow advocate, one Gibson Ishengoma to hold brief on his behalf. He claims that he was wrongly informed by him on the date when the matter will be called up by the court.

I went to the records; it reveals that the matter was scheduled for first pre-trial conference on 23.03.2022. On that day, the record shows that, the applicant did not show up and the matter was again scheduled for first pre-trial conference on 29.03.2022. Along with the order of scheduling the matter to come for first pre-trial conference on 29.03.2022, the court issued an order that the applicant be notified. For better understanding of what transpired, I find it pertinent to quote part of the proceedings as reflected in the court's record;

"Date: 23.3.2022

Coram: Hon. W.P. Dyansobera, J

Plaintiff: Absent

Defendant: Ms. Monica Kabadi

B/C: Felister Mlolwa (RMA)

Ms. Monica Kabadi:



My lord, the matter was for first pre-trial conference. We are ready to proceed.

Order: *1st pre-trial conference on 29.03.2022, plaintiff to be notified.*

W.P Dyansobera

Judge

23.03.2022"

As earlier on stated, the respondent strongly opposed this application insisting that the applicant did not give sufficient reasons for his delay. As it is revealed from the applicant's affidavit and submissions, one of the arguments raised by the applicant's learned counsel is the claims that had he been informed as ordered by the court, justice could have been served as he could enter appearance.

The above argument triggered me to revisit the court's record to see the compliance of the order of the court and as to whether the applicant was informed or not. Upon carefully perusal of the court record, I didn't find anything to exhibit that the applicant was informed. I then scrutinize the typed proceedings of the Civil Case No 2 of 2022 in which part of the proceedings as shown on page 4 reads as here under:



"Mr. Kabago:

... The court ordered the plaintiff's advocate to be notified so that the 1st pre-trial conference is conducted today. Advocate Monica communicated with the plaintiff's advocate that the case would be coming for 1st pre-trial conference today. Surprisingly, neither the plaintiff nor his advocate is present. We are not informed why both are absent."

First of all, I agree with the respondent cited cases of **Kibo Hotel Kilimanjaro Limited** (supra) and **Omar R. Ibrahim** (supra) that for the application of extension of time to be granted, the applicant must give sufficient reasons and account for every day of delay. As to whether the applicant has given sufficient reasons, I went to the court records and as I analysed what transpired, it is on records that, it is neither the applicant nor his counsel, Mr. Wandore was present in person on 17.03.2022 when the matter was scheduled for 1st pre-trial conference which justified his reason that, he was misinformed. Again, when the matter was scheduled on 23.03.2022, as the applicant was not aware as he claimed, Ms. Monica Kabadi was present and the court ordered that the other party be notified.

Upon carefully examining the respondent's counter affidavit, which is deponed by Mr. Edwin Kabago, I did not see anywhere he averred that advocate Monica Kabadi communicated with the applicant's counsel to inform him on the date of the 1st pre-trial conference. Even the submission



of the learned counsel for respondent, did not averred that the applicant's counsel was informed on the day of the 1st pre-trial conference contrary to what has been stated before the trial court on 29.3.2022 before the dismissal order was issued. As reflected on page 4 of the proceedings, advocate Kabago informed the court that the counsel for applicant's received communication on the day of the 1st pre-trial conference to show that the order of the court was well communicated and that they have complied with the court order.

As an officer of the court who has a duty to the court and a duty to his fellow advocate, he was supposed to communicate the order of the court to his fellow advocate. For what transpired, I find the affidavit sworn by Mr. Gibson Ishengoma to acknowledge that indeed he mislead the applicant and that he was not informed of the order of the court, as it is seen on paragraph 4, 5, 6, 7 and 10 is nothing but the truth. In that regard, I find that the applicant has advanced sufficient reasons for this application to be granted.

On whether the applicant accounted for every day of delay, it can be seen on his advocate's affidavit from paragraph 10 and 11. It is my findings that, the applicant has sufficiently accounted for each day of delay. As the dismissal order was given on 29.03.2022, the applicant was

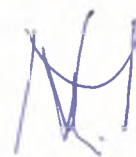


supposed to bring the present application within 14 days as it is provided for under Order VIII B Rule 20(2) of the Civil Procedure Code, Cap 33 R.E 2019. That means the 14 days lapses on 12.04.2022 and that, the present application was supposed to be brought on 13.03.2022. That means the applicant delayed for 16 days as he filed the present application on 29.04.2022.

As the applicant's counsel deponed on his affidavit, it is undisputed that 23.04.2022 it was weekend, Saturday. In the following Monday, that is on 25.04,2022 the applicant's counsel made follow-up and he was informed that the matter was dismissed for non-appearance. As he deponed in his affidavit that, from 26.04.2022 up to 28.04.2022, he was making follow up of the copy of the Ruling and preparation for this application to which in my view is the sufficient explanation on the delay as the period of three days are reasonable in the circumstances of this case.

For the aforesaid reason, this court can now exercise its discretion to grant extension of time to the applicant.

After granting the extension of time, is now upon the court to see whether the applicant had shown reason for setting aside dismissal order. It is a settled principle of law that a party has to adduce sufficient reason



in the eyes of law for the court to restore the case which has been dismissed. My careful perusal and analysis of the applicant's affidavit and the affidavit of Gibson Ishengoma, I am convinced that the applicant managed to establish the good cause as it shows that, he received the misled information from the advocate who hold brief, advocate Gibson Ishengoma when and he was not informed either by the court through summons or by his fellow advocate of the day of the 1st pre-trial conference as it was ordered by the court for him to be informed. I say so because nothing in the court file exhibit that the court order of informing the applicant on the day of the 1st pre-trial conference was complied.

Thus, to me that explanation is a sufficient cause as to why the applicant did not appear when the matter was called up for 1st pre-trial conference. Again, for the interest of justice to both parties of the case, as the matter was dismissed in the initial stage, I don't find if there will be serious injury if the suit will be restored considering the fact that the applicant managed to give plausible explanation for his non-appearance.

In the final result, I find the applicant's application with merit and therefore granted. The dismissal Order in the Civil Case No 2 of 2022 is hereby set aside. I further proceed to order restoration of the suit to the



register so as to proceed with the necessary steps from where it stopped on 29.03.2022 when it was dismissed for non-appearance of the applicant. The matter will proceed for necessary steps on the date that will be scheduled by the Judge who will be assigned the case.

I make no order as to costs.

It is so ordered.




M. MNYUKWA
JUDGE
29/09/2022

Court: Ruling delivered in the presence of parties' advocates.


M. MNYUKWA
JUDGE
29/09/2022