

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

CIVIL APPEAL NO. 187 OF 2020

(Originating from Misc. Civil Application No. 81 of 2020 District Court of Ilala)

**BRENDA EMMANUEL MSAKI APPELLANT
VERSUS
UNIVERSITY ABROAD LINK RESPONDENT**

RULING

9th August, 2022 & 30th September, 2022

MASABO, J.:-

The Appellant herein was a plaintiff in Civil Case No. 44 of 2019 before the District Court of Ilala at Kinyerezi. Her suit was dismissed for nonappearance for mediation on 13/2/2020. Desirous of restoring the dismissed suit, on 18/3/2020, she filed Misc. Civil Application No. 81 of 2020 praying for extension of time to set aside the dismissal order so that she can be heard on merit. In the chamber summons accompanied by an affidavit of her counsel she alleged that she was unaware of the dismissal order as she was misled by a court clerk who wrongly mentioned the date by which the matter was to come for mention. Instead of 29/1/2019 she inadvertently mentioned 29/2/2019, a mistake which transcended into the dismissal of the suit when the matter was called for mediation on 13/2/2019. The application for

extension of time ended barren as it was dismissed by the trial court after it found that she failed to account for each day of delay hence the current appeal in which she raised four grounds. During hearing her counsel prayed to abandon one ground hence she remained with the following three grounds;

1. That, whereas the trial court rightly heard that contents of paragraph 4 and 5 were sufficient grounds to allow restoration of a dismissed case, the trial magistrate erred in fact in dismissing the application in ignorance of the current rules which require application of restoration be made 7 days from the day of dismissal.
2. That, the trial magistrate erred in law and facts in dismissing the application for want of sufficient grounds while the affidavit adduced sufficient grounds which were not controverted by the respondent.
3. That, the trial magistrate misdirected himself in his decision basing on cited authorities which do not emanate from the court of record and irrelevant finding that the Applicant failed to adduce enough reasons for the delay.

During the hearing which proceeded through written submission the Appellant was represented by Mr. Said Dua Ding'ohi, learned counsel who submitted that the court overlooked the fact that the delay was not occasioned by the appellant's negligence but a confusion of on the dates scheduled by the court. As to the second and third grounds of appeal, Mr. Ding'ohi submitted them jointly that, paragraph 3,4,5 and 6 of the Appellant's affidavit adduced sufficient reasons for the applicant's non-appearance in the Civil Case No. 44 of 2019. In that regard, he argued that, the trial magistrate erred in dismissing the application for extension of time within which to apply for restoration of the suit as the applicant had demonstrated a good cause. He prayed that the appeal be allowed, the trial court's decision be set aside and the Appellant be allowed to file her application for restoration of Civil Case No. 44 of 2019.

In reply, Mr. Daniel Lisanga, learned counsel for the Respondent, opposed the first ground of appeal and submitted that, the Appellant failed to adduce good reasons and to account for each day of delay before. He argued that, the trial magistrate did not err in dismissing the appellant's application as the applicant failed to show good cause and to account for each day of delay. He averred that, the case of **Lyamuya Construction Company Vs. Board**

of Trustees of Young Women Christian Association, Civil Application No. 2 of 2020 CAT (unreported) relied upon by the trial magistrate to substantiate his decision was a good reference.

Regarding the second and third grounds of appeal, it was Mr. Lisanga's submission that, the Appellant's default appearance in court, failure to attend mediation process twice and failure to make perusal of the court record in order to know the status of the case draws inference that she was negligent and lost interest of her case. He cited the case of **Isaack Sebegele Vs. Tanzania Portland Cement Co. Ltd**, Civil Application No. 25 of 2002, CAT where the Court of Appeal cited the case of **Alison Xerox Sila Vs. Harbours Authority**, Civil Reference No. 14 of 1998 in which the it observed that;

"lapse, inaction or negligence in the part of the applicant in seeking extension of time does not constitute sufficient cause to warrant extension of time..."

He concluded that, the Appellant cannot blame the trial court for her negligence to file the Application for restoration timely. He prayed that this appeal be dismissed with cost.

In his rejoinder, Mr. Ding'ohi maintained his earlier stance that the Appellant adduced sufficient reasons in her application for extension of time thus it is in the interest of justice that the appeal be allowed.

Having considered the rival submissions from both parties and the trial court's record, I am of considered view that this appeal hinges on one issue to wit *whether there were sufficient reasons for the trial court to grant application for extension of time and if so whether the application for extension of time was wrongly dismissed*. Before going to the merits of this appeal, I wish to start with the position of the law regulating applications for extension of time. It is an established principle of law that granting the application for extension of time is entirely in the discretion of the court which has to be exercised judiciously upon the applicant demonstrating a good cause, which require, among others,¹ that the days of delay be fully accounted for. This trite law has been expounded in numerous authorities. In **Philipo Katembo Gwandumi Vs. Tanzania Forest Services Agent and Permanent Secretary, Ministry of Natural Resources and Tourism**, Revision Case No. 891 of 2019, the Court of Appeal while cementing this position held that;

“It is also a tenet principle of law that, in application for extension of time a party should account for each day of delay. This is the position in numerous decisions including the case of **Bushiri Hassan Vs. Latifa Lukio Mashayo, Civil Application No. 3 of 2007 (unreported)** the Court of Appeal held that; I quote” delay of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken”

The appellant in the present has faulted the learned magistrate for failure to exercise its discretion properly. She has argued that, she did not consider that the reasons deponed in the affidavit of the applicant’s counsel were sufficient to grant the extension of time for restoration of the suit. From the impugned judgment, it is deciphered that in analyzing the affidavit, the trial magistrate reasoned as follows;

“In fact, the assigned reasons especially under paragraph 4 and 5 of the affidavit in support of the application are, in my view, proper reasons for the intended application for restoration. I note that the applicant stated under paragraph 6 of the same affidavit that he became aware of the dismissal order on 3.3.2020 while the same order was delivered on 13.2.2020 therefore that (sic) the applicant was already out of time. However, he could not support his allegation with

any evidence for the court to believe that he truly became aware on that date. Also, he failed to account for a period of about 15 days from the said 3.3.2020 when he became aware of the dismissal order to 18.3.2020 when he lodged the present application...”

In my perusal of the record to ascertain the veracity of the alleged misapprehension by the lower court, I have observed that, as submitted by both parties, the main suit was dismissed on 13th February, 2020 owing to the appellant’s nonappearance for mediation. According to the Appellant’s affidavit, the reason for her default appearance was confusion of dates emanating from a court clerk’s wrong pronouncement of the date by which the appellant was made to believe that the matter was fixed for mention on 29/2/2020 instead of 29/1/2020. As she was still waiting for this date to arrive, the matter was fixed for mediation on 13/2/202 on which date it was dismissed for non-appearance for mediation a fact she discovered on 3/3/2029 after making an inquiry at the registry. On 18th March, 2020 she filed her application for extension for time whose dismissal order is challenged in this appeal.

Going by the above authorities, I see no reason to fault the trial court because, as it correctly held, the applicant was duty bound to fully account

for delay a duty which she failed as she did not account for the time between 3/3/2020 when she became aware of the dismissal order and 18/3/2019 when she filed her application. These days ought to have been fully accounted for. Omission to account for these days was a fatal mistake for, as held in the authorities above, the delay must be fully accounted for even if it is just for a single day.

The finding by the trial magistrate that the allegations as to the confusion of dates and the fact that the appellant became aware of the dismissal order on 3/3/2020 were unsubstantiated is correct and I fully subscribe to. I may also add here that, the affidavit filed in support of the application offended the trite law that if an affidavit mentions another person that other person should also take an affidavit (see the decision of the Court of Appeal in **Franconia Investments Ltd Vs. TIB Development Bank Ltd**, Civil Application No. 270/01 of 2020 and **Sabena Technics Limited Vs. Michael J. Luwunzu**, Civil Application No. 451/18 of 2020 (all unreported). As the affidavit mentions a court clerk as the main reason behind what transpired, it was incumbent for Mr. Kambo's affidavit to be supplement by an affidavit of the court clerk substantiating the deposition made by the counsel but none is on record. The absence of such affidavit rendered the deposition in

paragraph 3, 4, 5 and 6 hearsay and devoid of any legal value. As the deposition in these paragraphs go to the root of the application, the learned magistrate cannot be faulted in his finding as she did not err in exercising her discretion negatively.

In the circumstances, I find no merit in the grounds of appeal raised by the Appellant and proceed to dismiss the appeal. Costs to follow event.

It is so ordered.

Dated and at Dar es Salaam this 30th day September, 2022.

X



Signed by: J.L.MASABO

J.L. MASABO

30/09/2022

