

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM
MISC. CIVIL APPLICATION NO.628 OF 2021
KILIMANJARO TRUCK COMPANY LIMITED.....APPLICANT
VERSUS
ATLAS COPCO TANZANIA LTD.....RESPONDENT

RULING

Date of Last Order: 07/10/2022

Date of Ruling: 13/10/2022

Kamana, J:

By way of chamber summons, Kilimanjaro Truck Company Limited hereinafter to be referred to as the Applicant filed an application for extension of time to apply for setting aside an order dismissing Civil Case No.97 of 2017 dated 22nd January,2021 and an order for restoration of the said suit to proceed from the stage reached on the said date. The application was made under section 14(1) of the Law of Limitation Act, Cap.89 [RE.2019] and Order IX Rule 6(1) of the Civil Procedure Code, Cap.33 [RE.2019]. The Respondent is Atlas Copco Tanzania Limited.

The application was supported by an affidavit of one Mrs. Rose Rowland Sawaya, the Applicant's Director and an affidavit of Mr. Michael Ngalo, learned Counsel for the Applicant. On the other side, there were counter affidavits of Mr. Athanas Wigan, learned Counsel for the Respondent. With the leave of the Court, the matter was handled by way of written submissions.

In support of the application, Mr. Ngalo, learned Counsel for the Applicant contended that Civil Case No.97 of 2017 was instituted on 25th April, 2017 and the Applicant the then the Plaintiff was represented by Mr. Thobias Kavishe, learned Counsel. It was his submission that the suit in question was dismissed for want of prosecution on 22nd January, 2021 after the Applicant's Advocate (Mr. Kavishe) failed to appear before the Court when the matter was called on for hearing on 17th December,2020 and on 22nd January, 2021. Mr. Ngalo submitted that on 17th

December, 2020 the Court ordered service of a notice to the Applicant's Advocate to the effect that the matter was adjourned to 22nd January, 2021. Despite the notice being issued and served to the Advocate's firm, the Advocate did not enter appearance on 22nd January, 2021 hence precipitating the dismissal of the suit.

It was submitted by Mr. Ngalo that Mrs. Sawaya became aware of the dismissal of the suit on 31st August, 2021 through her Assistant in the name of Terry. Thereafter, she sought the services of Mr. Ngalo, learned Counsel to advise him on the way forward. According to the affidavit of Mrs. Sawaya, as submitted by the learned Counsel, the reasons for the delay to submit this kind of an application within the time was lack of communication between Mrs. Sawaya and her Advocate (Mr. Kavishe) on the date fixed for hearing and progress of the said suit. Another reason for the delay was the fact that Mrs. Sawaya, the one who was dealing with the said suit, was sick and there was no one within the Applicant that could make a follow up on the case.

On the issue of break of communication between Mrs. Sawaya and the Applicant's Advocate (Mr. Kavishe), the learned Counsel for the Applicant submitted that the Applicant lost communication with its Advocate and the latter was not providing the former with updates with regard to progress of the case. He contended that the service of the notice issued on 17th December, 2021 was not proper since the receiver of that notice one Advocate Lydia had neither been instructed to represent the Applicant nor represented the Applicant in the suit in question at any time. It was submission that their efforts to trace Advocates Kavishe and Lydia to explain what transpired have proved futile.

Mr. Ngalo, learned Counsel for the Applicant pleaded that the Applicant should not be made to suffer on account of faults of her Advocate. To buttress his position, he referred this Court to the decision of the Court of Appeal and this Court in the cases of **Tauka Theodory Ferninand and Eva Zakayo Mwita (As Administrator of the Estate of the Late Albanus Mwita (Deceased) and 3 Others**, Civil Reference No.16 of 2017 and **Afriq Engineering & Construction Company Limited v. Registered Trustees of Central Tanganyika**, Misc. Commercial Cause No. 4 of 2020 respectively. Essentially, the cited cases are expounding that in

some cases, inadvertence of the Advocates should not be used to the detriment of their clients.

Basing on the fact that there was no communication between his client and its previous Advocate and the cited cases, the learned Counsel prayed this Court to consider that fact as sufficient and good cause to extend time and set aside the dismissal order.

On the issue of sickness, learned Counsel submitted that Mrs. Sawaya was sick since January, 2021 and from that time she was attending medical services within and outside the country. This was also contended in Mrs. Sawaya's affidavit in which medical reports and a copy of passport were attached to prove that fact. In the absence of opposite evidence, Mr. Ngalo wanted this Court to believe that Mrs. Sawaya was sick from January, 2021.

Referring to paragraphs 19,20 and 21 of Mrs. Sawaya's affidavit, the learned Counsel for the Applicant contended that there was no proper and effective service on the Applicant. He further submitted that the Court failed to ascertain if that notice was properly and effectively served to the Applicant. He was of the view that in the circumstances in which the Applicant's Advocate failed to appear twice, the Court was supposed to order services on the Applicant in person and as a last resort by way of publication. To him, that actions would be within the purview of overriding objectives as provided in sections 3A(1) and (2) and 3B(1)(a) of the Civil Procedure Code.

The learned Counsel for the Applicant beseeched this Court to exercise its discretion by taking into consideration the peculiar facts and circumstances of the matter in question. He submitted further that, if this Court orders extension of time, there is no prejudice that the Respondents will suffer as the Counter Affidavits do not indicate that the Respondent will suffer any prejudice or any injustice in case the application is granted.

Lastly, Mr. Ngalo submitted that if the application is not granted, the Applicant will suffer loss of its substantive claims in the suit without having been heard on merit on account of reasons not attributed by her. He argued that amounts to illegality

which should not be condoned by the Court. He invited this Court to the decision of the Court of Appeal in the case of **Prosper Baltazar Kileo and Another v. Republic**, Criminal Application No. 1 of 2010.

Responding to the submission in chief, Mr. Wigan, learned Counsel for the Respondent was quick to invite this Court to the decision of the Court of Appeal in the case of **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No.2 of 2010. It was his submission that before granting an extension of time in favour of the Applicant, the Applicant must demonstrate that it has met all the conditions stated in the cited case.

He submitted that the Applicant is supposed to account for all the period of delay after the expiry of thirty days period from the date of dismissal order. In this regard, the learned Counsel stressed that the Applicant has failed to account for each day of delay from 22nd February, 2022 (after expiry of 30 days period) to 14th December, 2021 when the application for extension of time was filed. He contended that the arguments that Mrs. Sawaya was sick from January, 2021 aimed at misleading this Court since her passport and medical reports were stamped in May, 2021 and August, 2021. The attachments, he averred, do not account for the period of March and April, 2021.

Mr. Wigan further submitted that the Applicant has failed to account for each day of delay from 23rd September, 2021 to 4th October, 2021 when the affidavits were signed. Apart from that, he submitted that the Applicant failed to account for each day of delay from 4th October, 2021 to 14th December, 2021 as the affidavits were sworn and verified on 4th October, 2021 and filed in Court on 14th December, 2021. The learned Counsel for the Respondent contended that the Applicant has managed to account for few days of delay and hence has failed to account for each day of delay in the spirit of the case of **Lyamuya Construction Company Limited (Supra)**.

Mr. Wigan, in his submission, contended that the delay of more than 9 months and such other periods which have not been accounted for is inordinate delay. He

referred this Court to the case of **Lyamuya Construction Company Limited (Supra)** in which it was observed that the delay for extension of time to be granted should not be inordinate.

It was the submission of the learned Counsel for the Respondent that the Applicant is trying to shift the blame to the Advocate. He submitted that courts in a number of decisions have discouraged shifting of blame to Advocates as ground for extension of time. In this regard, he referred this Court to the cases of **Tauka Theodory Ferninand and Eva Zakayo Mwita (As Administrator of the Estate of the Late Albanus Mwita (Deceased) and 3 Others (Supra)** and **Lim Han Yung and Another v. Lucy Treseas Kristensen**, Civil Appeal No.219 of 2019. In view of those cited cases, the learned Counsel was of the position that allegations of the Applicant regarding lack of communication is baseless and can not warrant the extension of time.

With regard to illegality, Mr. Wigan submitted that there was no illegality so far as service of a notice is concerned. He averred that the said notice was served to the address provided by the Applicant in the Plaint. To bolster his argument, he referred this case to the case of **Damas Assey and Another v. Raymond Mgonda and Others**, Civil Application No. 32/17 of 2018.

With regard to an application for restoration of the dismissed suit, the learned Counsel for the Respondent submitted that the application was filed under wrong provision. He contended that Order IX Rule 8 is applicable in circumstances where there is non-attendance of one or more of several defendants. It was his submission that the application is wrongly before this Court. In alternatively, the learned Counsel submitted that the Applicant has failed to furnish sufficient cause on why as Plaintiff did not appear in two consecutive sessions despite being served with a notice.

Responding to reference as to Advocates Kavishe and Lydia, the learned Counsel was of the position that the said Advocates were supposed to submit their affidavits testifying what transpired and alleged by the Applicant. In the absence of their affidavits, the application is incompetent. He referred the case of **Franconia**

Investment Ltd v. TIB Development Bank Ltd, Civil Application No.270 of 2020.

In reply to the counter affidavits, the learned Counsel for the Applicant reiterated his position save for minor corrections.

Having gone through the pleadings, submissions of both Parties and other records, the issue for the determination of this Court is whether the Applicant has furnished good reasons for the application for extension of time to be granted. In establishing the merits of this application, I am going to be guided by the case **Lyamuya Construction Company Limited (Supra)**. In that case, the Court of Appeal laid down essential factors to be judiciously considered in the exercise of the discretion vested in courts of extending time beyond the limits stated in legislation. The Court stated:

'As a matter of general principle, it is in the discretion of the Court to grant extension of time. But that discretion is judicial, and so it must be exercised according to the rules of reason and justice, and not according to private opinion or arbitrarily. On the authorities however, the following guidelines may be formulated:-

(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 that 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 the illegality of the decision sought to be challenged.

On whether the Applicant accounted for each day of delay, it was the submission of the Applicant that she became aware of the dismissal order on 31st August, 2021. This means that from 22nd January, 2021 up to that date which is almost six months, the Applicant was not aware about the progress of the case of which she was the Plaintiff.

I take cognizance of the fact that she was sick between May, 2021 and August, 2021 as proved by passports and purported medical reports but I am not convinced that from 22nd January, 2021 to May, 2021 the Applicant was sick since there is no proof to that effect. In view of that, I hold that the Applicant has failed to account for each day of delay from 22nd January, 2021 to May 2021.

A serious Plaintiff has the duty of making a follow up on his case regardless of engaging an advocate. The Applicant, being a company, was aware that its Director Mrs. Sawaya was sick, why did that Company fail to assign another person to follow up the progress of the case? Being not aware of what transpired in the court room with regard to the case for almost six months demonstrates how indiligent the Applicant was with regard to the dismissed suit. In this regard I take the position taken by the Court of Appeal in the case of **Lim Ham Yun and Another (Supra)** in which the Court of Appeal held:

'The appellants cannot throw the whole blame on their advocates. We think that a party to a case who engages the services of an advocate has a duty to closely follow up the progress and status of his case. A party who dumps his case to an advocate and does not make any follow ups of his case, cannot be heard complaining that he did not know and was not informed by his advocate the progress and status of his case.'

That being the case, I am satisfied that the Appellant was not diligent and has a share of blame for the suit to be dismissed regardless of assertions that the Advocate was negligent.

According to item 3 of Part III of the Schedule to the Law of Limitation Act, an application for setting aside the dismissal order ought to be filed within thirty days from the date of dismissal. In the issue at hand, the dismissal order was pronounced on 22nd January, 2021. In that case, the application for setting aside was supposed to be filed on or before 22nd February, 2021. This Application was filed almost nine months after dismissal order and a large part of that period was not accounted for by the Applicant. In view of that I do not hesitate to hold that there was inordinate delay.

With regard to the illegality, without much ado, I do not think if that ground with regard to this application is meritorious. As rightly contended by Mr. Wigan, learned Counsel for the Applicant, the address for services was provided in the Plaint and it was through that address the learned Counsel was served with a notice of hearing. I am holding that for the ground of illegality to sustain that illegality must be on the face of record and does not require long arguments to be established. This ground fails accordingly.

That being the position, the Application is dismissed with costs. Consequently, the application for restoration of the suit crumbles.

It is so ordered.

Right to appeal explained. **DATED** at **DAR ES SALAAM** this 13th day of October, 2022.



KS KAMANA

JUDGE



Delivered at Dar es Salaam in Chambers this 13th day of October, 2022 in the presence of both Counsel for both parties.