IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 358 OF 2022

ACCESS BANK TANZANIA LIMITED ..... APPLICANT

VERSUS

OMARI BARIE DODO ..... RESPONDENT

RULING

8th September & 11th October, 2022

ISMAIL, J.

This ruling is in respect of an application for two orders. One, for extension of time within which to institute an application for setting aside an order for dismissal of Misc. Civil Application No. 439 of 2021. Two, for setting aside an order that dismissed Misc. Civil Application No. 439 of 2021. The dismissal of the said application was on account of numerous incidents of non-appearance when the matter was called for orders.

Supporting the application is the affidavit sworn by a Mr. Amon Meja, who has presented himself as the applicant's principal officer and an advocate duly instructed to represent the applicant. Two grounds have been

advanced as the basis for the orders sought. These are: prolonged illness on the part of counsel who represented the applicant in the dismissed application; and irregularities and illegalities which reside in the allegation that the Court did not have jurisdiction to entertain the suit. With respect to illness, the averment is that a Mr. Baraka Joram Mwakyalabwe who had the conduct of the matter was admitted to hospital for 230 days, counting from 3rd September, 2021.

The respondent is strongly opposed to the application. His contention, as averred in the affidavit sworn by Deo Ukani Ngusaru, is that the Court was justified in dismissing the application following consecutive non-appearances without any sufficient cause. The respondent further averred that, in between learned counsel's illness, two applications were filed by him and served on the respondent personally. The respondent further argued that the applicant had multiple other advocates who represented the applicant on different occasions. These would represent the applicant in the absence of the ailing counsel.

Pursuant to an order of the Court, dated 8th September, 2022, disposal of the application was ordered to be done by way of written submissions, consistent with the schedule drawn by the Court. Counsel for the parties duly conformed to it.

Submitting in support of the application, Mr. Amon Meja, learned counsel, argued that in applications for extension of time and an order for setting aside a dismissal, sickness may constitute a good reason. He cited the decisions of the Court of Appeal of Tanzania in ***Kapapa Kumindi v. The Plant Manager, Tanzania Breweries Limited***, CAT-Civil Application No. 6 of 2010; ***Alasai Josiah (suing by his Attorney Oscar Sawuka v. Lotus Valley Limited,*** CAT-Civil Application No. 498/12 of 2019; and ***Masunga Mbegeta & 784 Others v. The Honourable Attorney General & Another***, CAT-Civil Application No. 173/01 of 2019 (all unreported). In the latter, it was held that "*…. mere discharge from hospital is not an indication of full recovery from sickness."*

It was Mr. Meja's contention that as Mr. Mwakalyabwe's condition worsened, the applicant resorted to recruitment of another counsel who, on studying the matter, he realized that it required filing of the instant application.

Regarding the documents allegedly filed in the period the applicant's counsel was confined to a hospital bed, the argument by the applicant is that the same are not authentic documents on account of a few anomalies such as absence of a case number and a date on which it was signed by the Registry Officer.

Imputing a denial of the right to be heard, Mr. Meja contended that dismissal of the application constituted a breach of a fundamental principle of natural justice. He argued that allowing the application will conform to the requirements of the law on the right to be heard, as underscored in the case of ***Luckson Rutafubibwa Kiiza (The Administrator of the Estate of the Late Angelina Bagenyi) v. Erasmus Ruhungu (The Administrator of the Estate of the Late Gaudensia Rwakailima),*** CAT-Civil Application No. 498/12 of 2019 (unreported).

The applicant further urged the Court to take cognizance of section 3A of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 which insists on the preference of substantial justice to technicalities. Learned counsel prayed that the application be granted.

Mr. Deo Ngusaru, learned counsel who represented the respondent is valiantly opposed to the application. In his rebuttal submission, learned counsel began by giving a sequence of events and a number of applications filed subsequent to the dismissal of the application that bred this matter.

The respondent further acknowledged that grant of extension is predicated on the applicant's ability to demonstrate sufficient cause. On this, he cited the decision in ***Lyamuya Construction Co. Ltd v. Board of Registered Trustee of Young Women Christian Association of***

Tanzania, CAT-Civil No. 2 of 2010 (unreported), in which several conditions were enumerated. He contended that such grant is in the discretion of the Court and that the discretion must be exercised judiciously. Mr. Ngusaru argued that, from the date the application was filed to the date it was dismissed, the same was called on three occasions and in none of them did the applicant enter appearance.

On the alleged ill health of the applicant's advocate, Mr. Ngusaru argued that there is no way the former was of ill health while he actively signed and filed a couple of documents and served copies thereof on the respondent. He argued that service of the said documents was done by Mr. Mwakyalabwe himself. Mr. Ngusaru contended that the said counsel was involved in interviews which were held between 2nd and 21st March, 2022 in Dodoma, subsequent to which his name was published in the Government Publication dated 9th April, 2022. In terms of the said publication, his name featured as item 95 of 105.

The respondent's further contention is that the applicant is an institution that has a battery of legal counsel who would take action in the absence of one of them. Mr. Ngusaru contended that all of these counsel represented the application at one point in the proceedings filed in courts.

Regarding failure to file an application within the prescribed time, the view held by Mr. Ngusaru is that this is a negligent conduct that was abhorred in the case ***National Bank of Commerce v. Sadrudin Meghji*** [1998] T.L.R. 505. He fortified his view by citing the decision in ***Mbogo v. Shah*** [1968] EA 93.

The respondent concluded that no sufficient reasons were given to justify the delay. He urged the Court to dismiss the application with costs.

Submitting in rejoinder, the applicant's counsel castigated the respondent's contentions on the allegation of the applications to Kinondoni Court. The reason is that these were not averred in the counter affidavit. They are, in his view, submissions from the bar which carry no weight, as was clearly illustrated in ***Gilbert Zebedayo Mrema v. Mohamed Issa Makongoro***, CAT-Civil Application No. 369/17 of 2019; and ***Gulf Concrete & Cement Productions Co. Ltd v. D.B. Shapriya & Co. Ltd***, CAT-Civil Appeal No. 88 of 2019 (both unreported). In the former it was held:

> *"…. the Affidavit deposition is evidence on oath which cannot be contradicted by statements from the bar. Such evidence like any other type of evidence given under oath can only be contradicted by evidence on oath."*

The applicant maintained that applicant's erstwhile counsel was of ill health, a fact she contended that had been proved through production of medical report and discharge form. Applicant's counsel held the view that subsequent to the decision by counsel to resign, a recruitment process for the departed counsel began the conclusion of which paved the way for the steps taken in filing the instant application.

On the contention that the applicant has a pool of counsel from which to pick a successor, the argument by the applicant is that it is Mr. Mwakyalabwe who was entrusted with the responsibility of handling the matter. The applicant discarded the respondent's contention, arguing that the same are not in conformity with sections 110 and 111 of the Evidence Act, Cap. 6 R.E. 2019 which require the person making the allegation to prove it.

The counsel's rival arguments bring out one key question. This is as to whether the application has met the threshold for its grant.

It is a matter of legal certainty, in our jurisdiction, that extension of time would be granted in all cases in which applicants demonstrate that their inability to take the desired actions was due to sufficient cause. Dozens of court decisions have underscored this long held principle. These include; ***Mbogo v. Shah*** (supra) and ***Lyamuya Construction Limited*** (supra),

cited by Mr. Meja. In the case of ***Republic. v. Yona Kaponda and 9 others*** [1985] TLR 84 (CA), the Court of Appeal of Tanzania held:

> *"In deciding whether or not to allow an application to appeal out of time, the court has to consider whether or not there are sufficient reasons" not only for the delay but also " sufficient reasons" for extending the time during which to entertain the appeal."*

Needless to say, therefore, that to grant or not to grant extension is a discretionary power vested in the court. It is a discretion that calls for equitable exercise, as was held in the persuasive decision of by the Supreme Court of Kenya in ***Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others***, Sup. Ct. Application 16 of 2014, wherein it was guided as follows:

> *"Extension of time being a creature of equity, one can only enjoy it if [one] acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that [one] was not at fault so as to let time lapse. Extension of time is not a right of a litigant against a Court, but a discretionary power of courts which litigants have to lay a basis [for], where they seek [grant of it]."*

While illegality had been cited in the supporting affidavit, as the basis for the prayer, the same was not pursued when the applicant made his submission. Since the basis for contending that the Court lacked jurisdiction

to preside over the matter was not elaborated, the Court cannot pronounce itself on this contention. I choose to ignore this point of contention.

The applicant's other limb of contention is illness that befell its counsel. The contention that does not resonate with the respondent is that during the illness of counsel, which lasted for in excess of 200 days, no action could be taken.

I need to state, right away, that illness is legally accepted as a sufficient cause for having extension of time granted. This has been accentuated by many a decision some of which are: ***Christina Alphonce Tomas (as Administratrix of the late Didas Kasele versus Saamoja Masinjiga***, CAT-Civil Application No. 1 of 2004 and ***Richard Mlagala & 9 Others v. Aikael Minja & 3 Others***, CAT-Civil Application No. 160 of 2015 (both unreported). The condition precedent, however, is that such ailment must be sufficiently evidenced. Absence of such proof renders the contention a hot air which cannot be supported, as it would be considered to be an afterthought.

The applicant had adduced evidence to substantiate that the applicant's counsel was of ill health. Though the respondent has ferociously denied this contention, nothing has been produced to counter what appears to be the factual account. The annexures in the application reveal the fact

that Mr. Mwakyalabwe had a health condition that led to his lengthy hospitalization. I also agree that, during the time, the applicant's counsel could not attend to any business. In the absence of any evidence to prove that the applicant was of good health or was not hospitalized during the period in consideration, any suggestion to the contrary is unjustified and can hardly find any purchase. I am not persuaded, therefore, that evidence of admission and eventual discharge from hospital is work of a fraudster.

While that is the position with respect to counsel's illness, what does not come out clearly is the applicant's decision to let everything go to a halt because of the illness of one counsel out of several whose names were listed by the respondent. The applicant has not seriously challenged their presence in the list of personnel that the applicant either maintains as her employees, or use them as counsel in matters in which she is involved. This means that, in the absence of one, either of the rest would slot in and let matters proceed seamlessly. The applicant could also choose to outsource and bring in new counsel to take charge of the proceedings, without holding the Court or the opposite party to ransom. Anything short of that would bring no different impression from that held by the Court, when it considered the applicant's inaction as amounting to reducing the Court into a parking lot.

On the basis of the foregoing, I take the view that sufficient cause has not been demonstrated to trigger the Court's discretion and grant the prayers sought. Doing otherwise would draw no other inference than that of aiding a man to drive from his own wrong, a conduct which was abhorred in the case ***KIG Bar Grocery & Restaurant Ltd v. Gabaraki & Another*** (1972) E.A. 503.

Consequently, the application fails and it is dismissed with costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 11th day of October, 2022.

M.K. ISMAIL

JUDGE

11.10.2022