

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MAIN REGISTRY

AT DAR ES SALAAM

MISC, CIVIL APPLICATION NO. 21 OF 2022

(From High Court Main Registry Civil Application No.86 of 2018)

HARUNI RAMADHANI MIGIRE.....APPLICANT

VERSUS

MINISTER OF DEFENCE AND

NATIONAL SERVICE.....1ST RESPONDENT

ATTORNEY GENERAL2ND RESPONDENT

RULING

25/10/2022 & 18/11/2022

MZUNA, J.:

In this application, Mr. Haruni Ramadhani Migire, seeks extension of time to file an application for leave to appeal to the Court of Appeal against the ruling and orders of this court in Misc. Civil Application No. 86 of 2018 delivered on 25th March, 2019 by Hon. E.N Matogolo, J (as he then was).

The application has been preferred under section 14 (1) of the Law of Limitation Act, Cap 89, Revised Edition 2019 (LLA). It is supported by an affidavit of one Alphonse Nachipyangu, the Applicant' Counsel. There is also a counter affidavit deponed by Happiness Nyabunya, Principal State Attorney for the respondents opposing the application.

Brief facts as per the filed affidavit, the applicant applied for extension of time within which to file leave pending filing an application

for judicial review. The court dismissed the application as he failed to account for all 16 years of his delay after his termination from service.

Soon after the High court decision, the applicant preferred an appeal before the Court of Appeal vides Civil Appeal No. 98 of 2019. On 15th March, 2022, the Applicant who appeared unrepresented, opted to withdraw his application before that court because it was preferred without seeking leave from the High court as per the law.

Counting from 15th March, 2022 when the applicant's application was withdrawn by the Court of Appeal to 01st September, 2022 when this application was filed in this court, there is a lapse of about five and ½ months.

The main issue is whether the applicant has advanced sufficient reasons for the delay to file leave to appeal to the Court of Appeal within time?

During hearing of this application which proceeded orally, Mr. Alphonse Nachipyangu, the learned counsel for the applicant advanced two main reasons which constitute good cause for the delay:-

One, illness, in that the applicant was in shock after the withdrawal of his application. Consequently, the applicant submitted himself to

Muhimbili National Hospital for medical checkup and he was diagnosed with diabetes and heart disease. Due to his illness which persisted from 17th March, 2022 to 25th August, 2022, he resorted to instruct Mr. Alphonse Nachipyangu, Advocate who advised him to file this application.

Based on the decision in the case **Masalu Kazinza v. Christina Boniface**, Misc. Civil Application No. 90 of 2021, High Court, Mwanza Registry (unreported) at page 5, the learned counsel said that "sickness is good ground for extension of time".

Two, illegality as the learned Judge failed to give any justifiable reason to ignore the applicant's written submission.

In reply Ms. Celina Kapange, the learned Senior State Attorney strongly objected the application. She challenged paragraph 7 of Mr. Nachipyangu's affidavit. That it is hearsay otherwise there ought to have been another affidavit of the applicant corroborating that he was shocked after the withdraw contrary to the verification clause where it is alleged that it is within the Mr. Nachipyangu's knowledge and not the applicant's.

The case of **CATS Net Limited v. Tanzania Communication Regulatory Authority**, Civil Application No. 526/01 of 2020 CAT at Dar es salaam was cited in support.

Arguing on the main application, she submitted that the applicant has failed to account for days of delay from the withdraw of the case to the date when this application was filed. That, the filed application lacks sufficient cause for the delay as articulated in **Lyamuya Construction Company Limited v. Board of Trustees of Young women's Christian Association of Tanzania**, Civil Application No. 2/2010, Court of Appeal sitting at Arusha, (Unreported).

That even the attached documents "TAL 4" from Muhimbili National Hospital have no seal of the hospital. That the applicant attended once on 17th March 2022. There is nothing demonstrating his regular attendance at the hospital.

She ruled out the allegation of illegality based on the ruling of Matogoro, J otherwise it could have featured in the affidavit. Further that the alleged illegality is not apparent. She urged the court to dismiss this application.

In rejoinder, Mr. Nachipyangu objected that the contents of paragraph 7 of his affidavit have not been verified. It is the fact which the advocate was informed based on what transpired in paragraph 6. It is the continuation of paragraph 6.

Responding to the issue of accounting days of delay he relied on the case of **Abdul Ibrahim v. Ayubu Mwalemba & Another**, Civil Application No. 642/06 of 2021 that extension of time has no time limit. In regard to the issue that, there is no seal of the hospital in TAL 4, the learned State Attorney did not cite any law requiring the seal of the document. The court has to see its authenticity only. Its absence is not the applicant's fault. He proceeded further that, diabetes is not a disease which requires regular attendance instead the court should find that the State Attorney has not disputed the applicant's sickness.

He insisted as well on the existence of illegality which in its face value the court is not assessing the appeal but the application for leave.

In determining this application, I propose to start with two points which should not detain me. First, the argument that the learned advocate verified from hearsay. Paragraph 7 of Mr. Nachipyangu's affidavit, reads:-

That After the Appeal being withdrawn by the Appellant himself, the Appellant got a shock and started to feel weak, as a result the next date on 17th March, 2022 the Appellant submitted himself to the Muhimbili National hospital for medical checkup, as a result the Appellant has been diagnosed with diabetes and heart disease. Copy of medical documents are hereby attached herein as Annexure "TL4"

Paragraph 5 of the respondent's counter affidavit avers that the averment under paragraph 7 above is only hearsay which requires proof by applicant's affidavit otherwise it remains as hearsay.

In view of Order XIX Rule 3(1) of the Civil Procedure Code [Cap 33 RE 2019] and the case of **Mantrac Tanzania Limited v. Raymond Costa**, Civil Application No. 11 of 2011, Court of Appeal sitting at Mwanza(unreported);

Affidavits intended to be used in judicial proceedings, are by law required to be confined to facts as the deponent is able to prove and should be properly verified.

I am aware in view of the decision in the case of **National Bank of Commerce v. Superdoll Trailer Manufacturing Company Limited**, Civil Application No. 13 of 2002, that:- "*An affidavit which mentions another person is hearsay unless that person swears as well*". This defect nevertheless, with the advent of overriding objective principle, where court deals with substantive justice, the said paragraph 7 can be expunged or disregarded and still court can act "*if the expunged paragraph is inconsequential*". See, **Jamal S. Mkumba and Another v. Attorney General**, Civil Application No. 240/01 of 2019, CAT at Dar es Salaam (unreported) page 9 and **Benedict Kimwaga vs. Principal**

Secretary, Ministry of Health, Civil Application No. 31/2000, CAT (unreported). Other paragraphs can still move this court.

The second point is on issue of illegality of the decision sought to be challenged. The allegation that the learned Judge failed to give any justifiable reason to ignore the applicant's written submission was submitted from the bar "without oath or affirmation, and the party making them is not subject to cross-examination by his opponent". It cannot be relied upon. See, **Morandi Rutakyamirwa vs. Petro Joseph** [1990] TLR 49, 52 (CA). Even assuming that illegality is anything to go by, the position of the law in view of the decision in the case of **Lyamuya Construction Company Limited** (*supra*) is that:-

"Such point of law must be that of 'sufficient importance' and...must be apparent on the face of the record such as the question of jurisdiction not one that would be discovered by a long drawn argument or process."

I rule out the alleged point of law or "illegality" as a ground for extension of time.

Now, I move to the main application. Section 14 (1) & (2) of the Law of Limitation Act, Cap 89 RE 2019 (LLA) to which this application relates, confers the court with the discretion to extend time but the applicant must demonstrate "sufficient cause". In **Kalunga & Company**

Advocates Limited v. National Bank of Commerce Limited [2006]

TLR 235 the Court held;

"The court has discretion to extend time but such extension can only be done if sufficient cause has been shown."

However, such discretion must be exercised judicially.

In determining the application for extension of time, the court considers several factors including length of delay, the reason of delay, chances of success in the intended appeal and the degree of prejudice that the respondent will suffer if the application is granted. This is well articulated in **Henry Muyaga v. Tanzania Telecommunication Company Limited**, Civil Application No. 8 of 2011 cited in **Severini Lusiji v. Republic**, Criminal application No. 101/01 of 2019, Court of Appeal sitting at Dar es salaam (unreported)

I should make it clear that not every sickness entitles a litigant automatic right for extension of time. It is only where a party adduces material facts supporting the steps taken to account for the period of delay. The cited case of **Masalu Kazinza v. Christina Boniface**, (supra) at page 5, which I strongly agree with, supports the above proposition.

As well submitted by the learned State Attorney the applicant never attended to the Hospital regularly or that he was admitted. The alleged

attendance on 17/02/2022 and a covering letter of 17th March 2022 titled "To whom it may concern" cannot move this court. He alleges that he did not get a relief from 17th March 2022 to 25th August 2022 when he instructed his Advocate. He failed to account for the steps taken from 17th February, 2022 to 1st September, 2022 or even from 25th August to 1st September, 2022.

It was held in the case of **Godwin Ndewesi and Another vs. Tanzania Audit Corporation** 1995 TLR 200 (CA) citing with approval the case of Ratnam v Cumarasamy and Another [1964] 3 All ER 933, 935 that:-

'The rules of court must prima facie be obeyed and, in order to justify a court in extending time during which some step in procedure requires to be taken there must be some material on which the Court can exercise its discretion. If the law were otherwise any party in breach would have an unqualified right to extension of time which would defeat the purpose of the rules which is to provide a timetable for the conduct of litigation.'

Health problem could be good cause if he accounted for the period of delay. Failure to do so leaves this court in suspense. In the case of **Shembilu Shefaya vs. Omary Ally** [1992] TLR 245,246 (CA), the applicant alleged that the disease he had was not one for hospital

treatment. The court held that such excuse "*could be alleged by any body with impunity. For court work we need something more than excuses.*"

In our case hospital chits though are material evidence supporting illness, nevertheless could not support the period of delay for about five months. The applicant's application before the Court of Appeal was withdrawn on 15th March 2022, the instant application was filed on 1st September 2022. The applicant was to account for about five and ½ months which he has failed to do so. No good cause which has been established instead he advanced mere lame "excuses". This ground of illness fails.

Lastly though in passing, I am aware each case has to be decided depending on its peculiar facts. The application before the Court of Appeal was withdrawn based on defectiveness or lack of leave otherwise it was filed timely. This is what is termed as technical delay in view of the decision by the Court of Appeal in the case of **William Shija vs. Fortunatus Masha** [1997] TLR 213, at Page 218-19. This point nonetheless, cannot benefit the applicant who did not act diligently in prosecution his application after it was withdrawn.

I say so mindful of the fact that the application sought to be challenged was decided by Hon. Matogoro, J (as he then was) way back

in March 2019. This reminds me the decision in the case of **Royal Insurance Tanzania Limited vs. Kiwengwa Strand Hotel Limited**, Civil Application No. 116 of 2008, cited with approval in the case of **Sebastian Ndaula vs. Grace Rwamafa** (*Legal Personal Representative of Joshwa Rwamafa*), Civil Application No. 4 of 2014, CAT (unreported) that:

"It is trite law that an application before the Court must satisfy the Court that since becoming aware of the fact that he is out of time, act very expeditiously and that the application had been brought in good faith."

The present application, no doubt was not brought "in good faith" but in view of the decision in **CATS Net Limited v. Tanzania Communication Regulatory Authority** (supra) page 9, "the assertion is manifestly suspect and unreliable" to the prejudice of the respondents.

To this end and on account of the above summation, this application stands dismissed with no order as to costs.

Dated at Dar es Salaam this 18th November, 2022



11/18/2022

X 

Signed by: M G MZUNA JUDGE