

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 646 OF 2020

(Arising from the decision of the District Court of Kinondoni, Hon. H.A. Kikoga, R.M, in Misc.

Civil Application No. 39 of 2020 dated 23rd June, 2020)

DR. KANDORE MUSIKA..... APPLICANT

VERSUS

THE MANAGING DIRECTOR OPTIMUM TRAVEL & TOURS CO. LTD.....RESPONDENT

RULING

Date of last Order: 14/12/2021.

Date of Ruling: 18/02/2022.

E.E. KAKOLAKI, J

In this application, the applicant is seeking an extension of time within which to file an appeal out of time against the decision of the District Court of Kinondoni in Misc. Civil Application No. 39 of 2020 dated 23/06/2020. The application is preferred under section 14 (1) of the Law of Limitation Act, [Cap. 89 R.E 2019] referred as LLA, supported by the affidavit of the applicant himself and is strenuously resisted by the respondent who through his advocate one Deogratius Godfrey, sworn and filed the counter affidavit

challenging merits of the application. Hearing of the application proceeded by way of written submission, while the applicant and respondents represented by Ms. Idda Alex Lugakingira and Deogratius Godfrey, both learned counsels respectively.

Briefly the background story of this matter as gathered from the affidavit and its annexures can be narrated as follows; sometimes in October, 2019 the applicant engaged the advocate one Mr. Boniventure Mwambaja to handle his suit in Civil Case No. 267 of 2019 filed in the District Court of Kinondoni, in which he negligently acted by defaulting appearance as a result the same was dismissed for want of prosecution on 11/02/2020. The said advocate unsuccessfully filed an application for setting aside the said dismissal order vide Misc. Civil Application No. 39 of 2020, as the District Court in its ruling dated 23/06/2020 dismissed it for want of merit. On making a follow up of his case file, the said advocate Mwambaja who by then was employed by one of the Government entity directed him to collect it from one advocate Deogratius Mwarabu, though he had no any contractual engagement to render legal services for him. At all that time, the applicant was not aware of the development of his case until 07/10/2020, when he managed to collect his file from the said advocate Mwamrabu and

successfully engaged the present law firm to take conduct of his matter. On follow up of the development of the case by the newly engaged advocate, it came to light that, the suit was dismissed and the efforts to set aside the dismissal order in Misc. Civil Application No. 39 of 2020 dated 23/06/2020 was futile as at time also the former advocates' practicing certificate had expired. And further that, the applicant was time barred to appeal against that decision in the application for setting aside the dismissal order of the main suit, hence the present application.

In application of this nature under section 14(1) of LLA, this court has discretion to grant the prayers sought upon good cause shown. What amounts to good cause there is no hard and fast rule as it depends on the reasons or material advanced by the applicant accounting for the delayed period, or any other sufficient reason moving the court to exercise its discretion in extending time, illegality of the decision sought to be challenged being one of them. See the cases of **Republic Vs. Yona Kaponda and 9 Others** (1985) T.L.R 84, **Oswald Masatu Mwizarubi Vs. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010, (CAT-unreported), **Lyamuya Construction Company Ltd Vs. Board of Registered Trustees of Yong Women's Christian Association of Tanzania**, Civil

Application No. 2 of 2010 (CAT-unreported) and **Khadija Rehire Said and 5 Others Vs. Mohamed Abdallah Said**, Civil Application No. 39 of 2014 (CAT –unreported) as cited by the counsel for the applicant in her submission. Like in **Lyamuya’s case** (supra) in the case of **Khadija Rehire Said and 5 Others** (supra) the Court of Appeal restated factors or principles to be considered by the court when determining the application for extension of time. The Court mentioned the principles to be but not limited to:

- 1. The length of the delay.*
- 2. The reason for the delay.*
- 3. The decree of prejudice to the respondent if the application is granted and*
- 4. Whether it raises any point of public importance or illegality of the decision, that is to say, if there is an arguable case.*

In her submission in support of the prayer in the chamber summons, while adopting the applicant’s affidavit, Ms. Lugakingira informed the court that the principles set out in **Khadija Rehire Said and 5 Others** (supra), were all met as the reasons for delay in filing this application were well stated in paragraph 14(a),(b) and (c) of the applicant’s application by accounting for each day of delay in all 61 delayed days. She argued the delay was not resulted from dilatory act by the applicant but lack of information from his

former advocate that his matter was dismissed for want of prosecution and that the efforts to set aside the dismissal order had proved failure. On the issue of illegality of the decision she said the District Court's decision was entered without according the applicant of his right to be heard as the matter was not set for hearing and the Notice of Preliminary objection was still pending in the said suit. To reinforce his stance the court was referred to the case of **M/S Tanzania Wildlife Corporation Vs. Ms. Frida Mwijage**, Civil Application No. 32 of 2014 (CAT-unreported) where the Court of Appeal insisted on the need of parties to be accorded with their right of hearing before the decision affecting them is made by the court, since it is their constitutional right under Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977. The learned counsel went on to argue that even the provision of Order IX Rule 8 of the CPC cited by the counsel for the respondent and invoked by the trial court to dismiss the suit, was in total misdirection as the same does not provide for such prayer of dismissal. To her, that was material error on the face of record which amounted to illegality of the decision. She said, where the issue of illegality of the decision is established, it is sufficient ground for granting the application. She relied on the case of **CRDB Bank Ltd Vs. Serengeti Road Services**, Civil

Application No. 12 of 2009 (CAT-unreported). Lastly was on the degree of prejudice where she submitted, the respondent won't be prejudiced if the application is granted as compared to the applicant if the same is refused as he will be condemned unheard on his claims against the respondent. She therefore prayed this court to find the applicant has advanced sufficient ground to warrant the grant of this applicant and proceed to grant it.

On the respondent's side, Mr. Godfrey for the respondent resisted Ms. Lugakingira's submission putting that, under section 25(1) of the Magistrates Courts Act, [Cap. 11 R.E 2019], the applicant was supposed to appeal against the decision within 30 days thus he delayed for 163 days and not 61 days as submitted on by the applicant. It was his submission that, the applicant has failed to account for such inordinate delay as the applicant's act of giving instruction to advocate Mwambaja does not mean shifting his interest of case and follow up duty totally to him, therefore his failure to prosecute his case and the intended appeal resulted from nothing but lack of diligence, negligence, apathy and sloppiness. As to the issue of illegality of the decision he contended, it is not true that the applicant was not accorded of his right to be heard as for the best known to himself neither him nor his advocate appeared in court or supplied prior notice or sufficient reasons that

prevented him from entering appearance before his matter was dismissed. As to the argument by Ms. Lugakingira that the matter was dismissed on the date of mention and not that of hearing, Mr. Godfrey countered that, she failed to cite the law that requires the suit to come for mention after the pleadings are complete since Order VIII Rule 15 of the CPC provides that, once the WSD is filed and replied to, then the case shall be deemed ready for hearing which was the case in the concerned suit. He added, the applicant's submission that the respondent moved the court under Order IX Rule 8 of the CPC [Cap. 33 R.E 2019] to dismiss the suit is misleading as the same was under Chapter 33 R.E 2002, which after being revised it became Order IX Rule 5 of CPC. On the issue of illegality of the decision he argued the law under the case of **Hamisi Mohamed Vs. Mtumwa Moshi**, Civil Application No. 407/17 of 2019 (CAT-unreported), requires the same to be apparent on the face of record which is not the case in this matter. He said, the applicant is calculating to prolong the proceedings unnecessary thus prayed the court to dismiss the application for want of merit with costs. In rejoinder submission Ms. Lugakingira almost reiterated her earlier submission in chief and the prayers thereto.

I have dispassionately considered the rival submission by both advocates for the parties, as well as revisiting the pleadings so as to satisfy myself of correctness of what has been submitted on. From the record, the decision sought to be challenged by the applicant in Misc. Civil Application No. 45 of 2020 was delivered by the District Court of Kinondoni on 23/06/2020 and this application was filed on 04/12/2020. 30 days within which to appeal if deducted, then time for the applicant to prefer the appeal lapsed on 23/07/2020. Counting from that date to the date of filing this application 04/12/2020, I hold the applicant is duty bound to account for 166 days of delay and not 61 days. In discharging that noble duty according to paragraph 14(a) of the applicant's affidavit, from 23/06/2020 to 07/10/2020 when the applicant collected his case file from advocate Mwarabu was not aware of the existence of dismissal order of the suit and refusal of the application for setting the dismissal order aside in Misc. Civil Application No. 39 of 2020. Mr. Godfrey is of the contrary view that, the applicant's act of not making close follow up of his matter was actuated with lack of diligence, negligence and apathy such that could not amount to good cause. I tend to agree with Mr. Godfrey's submission. I so find as there is nothing to indicate or prove that the applicant made a close follow up of his matter to the former advocate

Mr. Mwambaja and that he was directed to Mr. Deo Mwarabu where he collected the alleged case file which was abandoned by Mwambaja. In order to prove that the said file was collected late on 07/10/2020 one would expect the applicant to secure an affidavit of the said Mr. Deogratius Mwarabu to evidence that fact, in which he failed to do. In absence of the important evidence it is concluded that the applicant has failed to account for the period between 23/06/2020 to 07/10/2020. As for the period between 07/10/2020 to 23/11/2020, the applicant deposed in paragraph 14(b) of the affidavit that he was making a follow up of the Ruling in Misc. Civil Application No. 39 of 2020 as the process took long due to change of the Registry Officer and absence of one Ester, registry officer, who was making a close follow up of the matter. Again I don't find merit on this reason, as there is nothing to show or prove that the applicant requested for the said ruling allegedly delayed and that it is the said Ester, registry officer who delayed the process of its collection. In this fact, it was also expected the affidavit of this mentioned registry officer would be secured to not only prove that she was making follow up of the said ruling, but also tell the court when it was collected. In absence of such important evidence, I hold the days between 07/10/2020 to 23/11/2020 also remain unaccounted for. As to the period between 23/11/2020 to the date

of filing this application in which it was submitted was for preparation and presentation of the documents for admission, the court is not told as to why it took ten days to complete the process. If there was difficulties in preparation and filing document, then the same must have been stated instead of giving a blanket argument. I also find the 10 days unsuccessfully accounted for hence make a finding that generally the applicant has failed to account for 166 delayed days which apparently to me appear to be inordinate delay.

Next for determination is the ground of illegality, in which Ms. Lugakingira submitted that, the applicant was denied of his right to be heard as the suit, Civil Case No. 267 of 2019 was dismissed for want of appearance under Order IX Rule 8 of the CPC on 11/02/2020, the date which it was not set for hearing but rather for mention. And that the said provision of the law does not speak of dismissal order against the plaintiff, but rather of the scenario when one or more defendant defaults appearance in court. Mr. Godfrey is of the view that, the applicant has failed to establish existence of any illegality in the decision sought to be impugned for failure to cite the law that forbids dismissal of the suit when the matter comes up for mention. I think this ground need not detain me much. It is the law that allegation of illegality of

the decision sought to be challenged in itself, suffices for extension of time. This position of the law was stated by the Court of Appeal in the case of **Hamisi Mohamed** (supra) when restating the position in **Lyamuya's** case (supra) where it was held thus:

*"It follows then that **an allegation of illegality by itself suffices for an extension of time.** However, **such an allegation "must be apparent on the face of record, such as the question of jurisdiction;** not one that would be discovered by long drawn argument or process." (Emphasis supplied)*

Similarly in the case of **Principal Secretary, Ministry of Defence and National Service Vs. Dervam Valambhia** [1992] TLR 182 as cited in **CRDB Bank Ltd** (supra), the Court of Appeal on the court's duty to consider allegation of illegality when determining an application for extension of time, had this to say:

"In our view when the point at issue is one alleging illegality of the decision being challenged, the court has the duty even if it means extending the time for the purpose, to ascertain the point and, if the alleged illegality be established, to take appropriate measure to put the matter and record right." (Emphasis supplied)

Relying on the above cited position of the law, it is evident to me that, in establishing the ground of illegality, such illegality must be reduced from the decision sought to be impugned and not otherwise. In this matter, the decision sought by the applicant to be challenged to the Court of Appeal if the application is granted is none than Misc. Civil Application No. 45 of 2020. However, the applicant's arguments in which the allegation of illegality is inferred refers to the decision of the trial court in Civil Case No. 267 of 2019, which is not the decision sought to be challenged. In other word the applicant has failed to establish or point out to this court any illegality of the decision in Misc. Civil Application No. 39 of 2020 sought to be impugned, something which forces me to agree with Mr. Godfrey though with different reason that, applicant has failed totally to establish the alleged ground of illegality of the decision sought to be challenged as per the requirement of the law in **Dervam Valambhia** (supra) as quoted in **CRDB Bank** (supra), **Lyamuya's** case and **Hamisi Mohamed** (supra). It follows therefore that the case of **M/S Tanzania Wildlife Corporation** (supra) relied on by the applicant to support the point that he was denied of his right to be heard, is inapplicable in the circumstances of this case.

In the upshot and for the fore stated reasons I am inclined to hold that this application is devoid of merit and the same is dismissed.

As regard to the costs, I order each party to bear its own costs.

It is so ordered.

DATED at DAR ES SALAAM this 18th day of February, 2022.



E. E. KAKOLAKI

JUDGE

18/02/2022

The Ruling has been delivered at Dar es Salaam today on 18th day of February, 2022 in the absence of both parties who have failed to enter appearance for the second time but in the presence of Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

18/02/2022

