

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**IN THE SUB – REGISTRY OF MWANZA**  
**AT MWANZA**

**MISC. CIVIL APPLICATION NO. 89 OF 2021**

*(Originating from HC. Civil Case No 89 of 2021)*

**GERALD S/O PAUL GEDI ..... APPLICANT**

**Versus**

**JOSEPH S/O LWIZA KASHEKU ..... RESPONDENT**

**RULING**

*1<sup>st</sup> & 22<sup>nd</sup> March, 2022*

***Kahyoza, J:***

**Gerald S/O Paul Gedi**, the applicant, prays for extension of time to file an application to set aside *ex parte* judgment of this Court dated 09<sup>th</sup> March, 2021. **Joseph Lwiza Kasheku**, the respondent filed a counter affidavit to oppose the application.

The issue is whether the applicant has adduced sufficient cause for delay to apply for setting aside the *ex parte* judgment. The applicant's main reason for delay is that he was not aware of the existence of Civil Case No. 27 of 2019. He contended that he never received a summons for hearing or delivery of the judgement.

**Joseph Lwiza Kasheku**, the respondent opposed the application deponing that the applicant was dully served with the summons to appear on 15<sup>th</sup> August, 2019 and he acknowledged receipt.

### **Has the applicant adduced sufficient reason for delay?**

The application is based on the provisions of section 14 (1) and (2) of the Law of Limitation Act, [CAP. 89 R.E. 2019] (the LLA), which provides as follows-

*Notwithstanding the provisions of this Act, the court may **for any reasonable or sufficient cause**, extend the period of limitation for the institution of an appeal or an application, other than an application for the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application. (emphasis added)*

The law did not define what amounts to good cause or sufficient cause. The Courts have held what amounts to good cause is a question of fact, depending on the facts of each case; for that reason, many and varied circumstance could constitute good cause in any case. The Court of Appeal of Tanzania in the case of, **Yusuph Same and Hawa Dada Vs. Hadija Yusuph**, Civil Appeal No. 1 Of 2002, (CAT-Unreported) observed that-

*"It is trite law that an application for extension of time is entirely in the discretion of the court to grant or refuse it. This discretion however, has to be exercised judiciously and the overriding consideration is that there must be sufficient cause for so doing."*

This Court's duty is to find out if the applicant adduced good cause for delay. The applicant's main ground for delay is that he was not aware of the suit filed against him. The applicant's advocate Mr. Bernard

submitted during the hearing of the application that the applicant did not know the existence of Civil Case No. 27 of 2019. He knew that he was sued on the date he was served with a copy of the judgment on the 20<sup>th</sup> May, 2021. Immediately after the applicant became aware of the was an *ex parte* judgment, fell sick on 21<sup>st</sup> May, 2021. Thus, from 21<sup>st</sup> May, 2021 to 4<sup>th</sup> June 2021 the applicant was sick. To support his averment, the applicant tender two documents; **one**, a letter issued by Medical officer of Geita-Nzera District Hospital; and **two**, a medical sheet issued by the said hospital.

The letter depicts that the applicant was admitted from 20<sup>th</sup> May, 2021 for 3 days and later advised to take a bed rest for 3 days. The applicant's advocate submitted further that the applicant spent time from 5<sup>th</sup> June, to 10<sup>th</sup> July 2021 looking and negotiating for legal representations.

The respondent's advocate prayed to adopt the counter-affidavit and submitted that it was false for the applicant to depone that he was not aware of the existence of Civ. Case No. 27/2019 as the respondent served him served on 15<sup>th</sup> August, 2019. He refuted the applicant's allegation that he delayed because he was sick as the attached sick sheet did not indicate that he was admitted. He argued that the applicant's averment that he spent time from 4<sup>th</sup> June to 10<sup>th</sup> July negotiating for legal representations was baseless. He added that the applicant did not account for the time from 11<sup>th</sup> July,2021, the day the applicant accomplished negotiations, to 27<sup>th</sup> July,2021 when he filed the instant application.

In his brief rejoinder, the applicant's advocate submitted that the applicant had accounted for all time of delay, that is from the day he received a copy of the judgment until the day he filed the application.

Before determining the issue whether the applicant has adduced sufficient reason for delay, I will answer four sub issues. The sub issues are, **one**, whether the applicant was aware of the existence of civil case No. 27/2019; **two**, whether the applicant was prevented by sickness from taking necessary legal step; **three**, whether the applicant's act of negotiating for legal representation was good cause for delay; and **lastly**, whether the applicant was bound to account for delay from 11<sup>th</sup> to 27<sup>th</sup> July, 2021 when he filed the current application.

### **Was the applicant aware of the civil case No. 27/2019?**

The applicant contended that he was not aware Civ. Case No. 27/2019. The respondent's advocate argued that the applicant was aware of existence of Civ. Case No. 27/2019 as he was served on 15<sup>th</sup> August, 2019. He added that the applicant acknowledged service.

I wish to state that the records depict that the applicant was duly served with a notice to appear on 15<sup>th</sup> August, 2019. He did not enter appearance. Not only that but also reading the applicant's affidavit one gets an impression that the applicant was aware of the existence of the suit filed against him. The only thing the applicant was not aware is whether the case was still pending until May, 2021 when he was served with a copy of the *ex parte* judgment. The impression is from the applicant's averment in paragraph 4 of his affidavit-



*"4. That I was not aware that **there was still a case against me pending** at the High Court of Tanzania at Mwanza."*  
*(Emphasis is added)*

I find that the applicant served with a notice to appear, thus, he knew that there was a suit instituted against him. This was also the position of trial judge as reflected in proceedings on the 14<sup>th</sup> day of April, 2020.

**Did sickness prevent the applicant from taking necessary step?**

The applicant averred and his advocate submitted that the applicant could not apply to set aside the *ex parte* judgment as he fell sick immediately after he was served with a copy of the judgment. It is undisputed fact if person falls sick and due to sickness is unable to take legal action that amounts to a good cause for delay. The applicant must prove that he was sick and that because of sickness he could not take the required legal step. To prove that he was sick, one must tender a medical chit or any other reliable evidence. The applicant tendered a letter, which was addressed to whom it may.

The Medical Officer in charge issued the letter on the 29/6/2021 to explain that the applicant was attended on 20<sup>th</sup> May, 2021. It is not in the normal course of business doctors to issue letters to patients after treatment. The Medical Officer must have hidden purpose to issue the letter or else the applicant requested for the letter. This was an afterthought. Proof of ill health is producing medical chit excusing the applicant from duties as held by the Court of Appeal in **K.V. Construction Limited v. Mwanachi Engineering Limited &**

**Constructions**, Civil Application No. 50/2004 (CAT Unreported). The Court Appeal held that-

*"...in the absence of medical chits showing that the advocate was excused from duty because of illness then no sufficient reasons had been shown."*

It is not disputed that upon proof, illness is ground of extending time. In **Leonard Magesa v. MIS Olam (T) Ltd**, Civil Appeal No. 117 of 2014 (unreported), the appellant failed to file his written submission on ground of ill health and the Court of Appeal considered it to be a good cause and gave extension of time to account for the delay.

In the instant case, the applicant alleged that ill health prevented him from taking action from 21<sup>st</sup> May, 2021 to 4<sup>th</sup> June, 2021. He averred that he was being treated at Geita- Nzera District Hospital. Unfortunately, a letter attached to the affidavit shows that the applicant was attended at Geita- Nzera District Hospital and admitted for three days from 20<sup>th</sup> May, 2021. It implies that a copy of the judgment was served on him while he was on the hospital bed. The attached evidence contradicts the applicant's averment that he fell sick and received treatment from the 21<sup>st</sup> May to 4<sup>th</sup> June, 2021. Not only that but also the letter shows that the applicant was admitted for three days from 20<sup>th</sup> May, 2021 thus, discharged on the 23<sup>rd</sup> May and 2021. He had three days off duty, that is from 23<sup>rd</sup> to 27<sup>th</sup> May, 2021 or say the applicant had to perform light duties. The applicant assigned no reason why he did not take any action from 28<sup>th</sup> May to 4<sup>th</sup> June 2021.

The applicant's failure to take action from 28<sup>th</sup> May to 4<sup>th</sup> June 2021 was due negligence or inaction. It is settled that inordinate delay

caused by negligence is not excusable even if is one day. See **Maulid Hussein v Abdallah Juma** Civ Application No. 20/1998 and **Tanzania Bureau of Standards v. Anitha Kaveva Maro**, Civil Application No. 60/18 of 2017 (CAT unreported). I find that the applicant's delay from 21<sup>st</sup> May to 4<sup>th</sup> June 2021 was not caused by ill-health.

The applicant failed prove that he was admitted or unable to pursue his case from 21<sup>st</sup> May to 4<sup>th</sup> June 2021. He only tendered unreliable evidence to prove that he was admitted for three days and given light duty for three days. He failed to give explanation for rest of the days let alone convincing explanation for not taking action from 28<sup>th</sup> May to 4<sup>th</sup> June 2021. It is settled that a person applying for extension of time must provide sufficient cause which accounts for every day of his delay. There cases without number in support of the above stance few to mention are **TRA v Dawson Ishengoma (supra)**, and **Hassan Bushiri v. Latifa Iukio Mashayo**, CAT Civil Application No. 3 of 2007 (unreported) . In the latter case the Court of Appeal held that-

*"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."*

I find without hesitation that the applicant was not prevented by sickness from taking action from 21<sup>st</sup> May to 4<sup>th</sup> June 2021 as alleged.

**Was the applicant's act of negotiating for legal representation good cause for delay?**

The applicant averred that from 5<sup>th</sup> June to 10<sup>th</sup> July 2021, that is over one month, was negotiating for legal representation. The applicant's advocate submitted that the applicant was sick and he was

not being paid salary so he had to spend time to negotiate for legal representation.

The fact that the applicant took more than a month to negotiate for legal representation as he was not being paid salary, was a submission from the bar. It was not evidence as it was not in the applicant's affidavit. That submission proved nothing. In **Registered Trustees of the Arch Dioceses of Dsm vs. The Chairman Bunju Government and Others**, Civil Case No. 147 of 2006, the Court of Appeal held that-

*"reasons for delay must be reflected in the affidavit. Submissions are not evidence but explanations on the evidence already tendered."*

Even if, the applicant indicated that the he was prevented by financial difficult to obtain legal services timely, still, that would not be a good cause for delay. It is trite law that lack of financial means is not a sufficient cause as observed by the Court of Appeal in **Zebitisi Kawuku V. A. Karim (1938) 5 ECCA 37** and **Halima Athuman V. Hamadi Masudi** PC Cr App. No. 50/92 Masanche, J. (Unreported). It was held in the former case that-

*"Ignorance of law, old age and lack of means are not good grounds for allowing an appeal out of time. **Halima Athuman V. Hamadi Masudi** PC Cr App. No. 50/92 Masanche (Unreported)*

In addition, Rustomji **On Limitation**, Eight Ed. 2001 at page 27 had this to say-



*"After the prescribed period has elapsed, the door of justice is closed and no plea of poverty, distress, ignorance or mistake can be of any avail. **The general rule is that even a hand cash should not be allowed to disturb the law.** The rule must be enforced even at risk of hardship to a particular party. The Judge cannot on equitable grounds enlarge time allowed by the law, postpone its operation, or introduce exception not recognized by it. Whatever sympathy a Judge may feel for litigation and however dishonest and immoral the conduct of his opponent might have been in pleading the bar of limitation, the courts are warranted in introducing saving or exceptions which are not in the statute."*

In the upshot, I find that the applicant's act of negotiating for legal representation from 5<sup>th</sup> June to 10<sup>th</sup> July 2021 not a sufficient reason delay.

**Was the applicant bound to account for delay from 11<sup>th</sup> to 27<sup>th</sup> July,2021?**

The applicant gave explanation that he negotiated for legal representation from 5<sup>th</sup> June to 10<sup>th</sup> July 2021. He filed the current application on the 27<sup>th</sup> July,2021. The respondent's advocate submitted that the applicant did not account for the period from the date he finished negotiating for legal representation until the period he filed the instant application.

It is undeniable fact that the applicant did not give an account why he did not take legal step from 11<sup>th</sup> to 27<sup>th</sup> July,2021. I will not dwell on this issue. I have demonstrated above that an applicant for extension of time is bound to account for everyday of delay. The applicant was not

diligent in pursuing his case. He did not account for the period of delay from 11<sup>th</sup> to 27<sup>th</sup> July, 2021. He left it to this court to guess what delayed him. He relinquished his duty.

It is trite law that lapses, inaction, or negligence on the part of the applicant seeking extension of time, does not constitute sufficient cause to warrant extension of time under Section 14(1) of the Law of Limitation Act, [Cap. 89 R.E. 2019]. See the decision of the Court of Appeal of Tanzania in the **Alison Xerox Sila Vs. Tanzania Harbours Authority**, Misc. Civil Reference No. 14 of 1998 (CAT-unreported) cited in **Walter Kiwoli Vs. International Commercial Bank (T) Ltd**, Miscellaneous Application No. 267 of 2019 (HCT - Unreported).

Eventually, having answered all sub issues negatively, I find that the applicant has failed to adduce sufficient reason(s) for delay to apply to this Court to set aside its *ex parte* judgment. Consequently, I dismiss the application in its entirety with costs.

I so order.

**J. R. Kahyoza**

**JUDGE**

**24/3/2022**

**Court:** Ruling delivered in the presence of the applicant and Mr. Steven Makwega advocate for the respondent. B/C Ms. Jackline (RMA) Present.



A handwritten signature in blue ink, appearing to read "J. R. Kahyoza", is written over a horizontal line.

**J. R. Kahyoza**

**JUDGE**

**24/3/2022**