

UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOROGORO DISTRICT REGISTRY

AT MOROGORO

MISC. LAND APPLICATION NO. 47 OF 2023

(Originating from the decision in Land Case no. 37 of 2022 of Morogoro District Court)

ELIAS JOHN KIVAMBE APPLICANT

VERSUS

NGALIMILA VILLAGE COUNCIL 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

**EXECUTIVE DIRECTOR MLIMBA DISTRICT COUR 3RD
RESPONDENT**

RULING

Date of last order: 19/09/2023

Date of judgement: 13/10/2023

BEFORE: G. P. MALATA, J

This is an application for extension of time by Elias John Kivambe seeking extension of time within which to apply for leave to vacate the order delivered on 21st February 2023 which dismissed Land Case no. 37 of 2022 for want of prosecution. The application has been taken at the instance of the applicant and is supported by an affidavit sworn by the applicant.

The applicant filed Land case no. 37 of 2020. The suit was scheduled for mention on 3rd February 2023, on that day First Pre Trial-Conference was scheduled to be on 9th February 2023 at 14.00 hrs.

On 9th February, 2023 when the matter came First Pre Trial-Conference the suit was called on 13.00hrs instead of 14.00hrs as such he was recorded absent and the matter was scheduled for FPTC on 21st February, 2023. Paragraph 12 of the affidavit depict.

That while he was at judge's door, he met counsels for the respondents who told him that, the matter was adjourned to 21st March, 2023 instead of 21st February, 2023. Paragraph 14 of the affidavit depict.

On 21st March, 2023 the applicant appeared in court to be told by the court clerk that the suit was dismissed for want of prosecution on 21st February 2023. On 27th March 2023 the applicant wrote a letter requesting for a copy of dismissal order for purposes of filing an

application applying to vacate the order and restore suit, the copies were availed to him on 17th May 2023. However, there no letter endorsed by the court that he requested for the same and that he was called to collect said copy on the said date.

On 30th June, 2023 the applicant filed the present application being almost **four clear months** and **seven days** from the dismissal date.

The applicant stated that the reason for his non-appearance to be beyond his control and was not caused by his negligence but due to the reason stated which no human foresight could be able to anticipate.

When the application came for hearing both parties were represented, the applicant appeared through Mr. Paul Elias, learned counsel while the Respondent was represented by Ms. Elifrida Mutashobya, learned State Attorney.

Submitting in support of the application Mr. Elias stated that the application is for extension of time within which to apply for restoration of Land case no. 37 of 2022 which was dismissed for want of prosecution. He referred this court to the series of events as stated in the affidavit.

It was Mr. Elias submission that counting from 21/02/2023 to 21/03/2023, the applicant delay of 30 days was due to misinformation from Mr. Kulaba, State Attorney. From 27/03/2023 to 17/05/2023 the applicant was waiting to be availed with the copy of order. From 17/05/2023 to 30/06/2023 is lapse of 44 days which the applicant spent in preparation and filing of the present application.

Closing his submission, the learned counsel was of the view that, the application was not caused by negligence but rather the misinformation by State Attorney and the court which called the matter for First Pre Trial-Conference before the time scheduled that is 13.30 instead of 14.00 hours.

Replying in opposition of the application Ms. Mutashobya had this to say, the applicant's application is with no merits as the suit was dismissed at the First Pre Trial-Conference stage. Order VIII Rule 2 of the Civil Procedure Code, Cap 33 R.E 2019 provides that application of this nature has to be filed within 14 days from the date of the order. In this application the applicant failed to demonstrate the reason for his delay from 14 days provided by the Civil Procedure Code. Ms. Mutashobya further stated that the law requires the applicant to show reasons not complaint.

The law requires the applicant to account for each day of delay, in the present case, the applicant failed to account for the number of days delayed from the lapse of 14 days. The suit was struck out on 21/02/2023 up to date of filing this application on 30/06/2023, it is 113 days lapsed.

Assuming, the applicants received the information on 21/03/2023 and filed the present application on 30/06/2023 its delay is more than 101 days.

Further the allegation that the applicant applied to the court for the copies of order is lies as the letter addressed to the Deputy Registrar bears no court seal and no letter from the Deputy registrar calling for collection of the order.

The applicant stated that he received the order on 17/05/2023 there is no proof to that effect.

The law is settled that, in the application of this kind the applicant has to account for each day of delay, to nourish her submission the learned State Attorney cited the case of **Wambele Mtumwa Shahame vs. Mohamed Hamis**, Civil Application no. 138 of 2016 at page 15 and 16 **Sebastian Ndaula vs. Grace Rwamafa**, Civil Application no. 4 of 2014 at page 8 and 9 of the ruling.

That the applicant has alleged to have received information from Mr. Kulaba learned State Attorney, however, there is no proof whatsoever to that effect.

Ms. Mutashobya prayed for dismissal of the application with costs as the applicant was negligent.

By way of rejoinder Mr. Paul Elias had this to say, the reason for delay was well elucidated in the substantive submission. It is true that, the application was to be filled within 14 days as per Order VIII Rule 20.

It is true that the letter addressed to the registered has no court seal.

We did spend 44 days in preparing and filing the application for extension of time. He prayed for application to be granted.

Having considered the rival submissions by the counsel for the parties the only issue calling for my determination is whether the applicant has been able to advance good cause warranting this court exercise its discretionary mandate and extension of time. This application is premised under section 14 of The Law of Limitation Act, Cap 89. R.E 2019, which provides;

*"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.

What is gathered from the above provision is that the power of the Court to extend time is discretionary and that it can be exercised if the applicant demonstrates good cause for delay. This stance was emphasized in the case of **Kalunga & Company Advocates Ltd. vs. National Bank of Commerce Ltd**, [2006] TLR 235 where the Court stated that:

*"The Court has discretion to extend time but such extension in the words of Rule 8 [Now Rule 10] can only be done if "**sufficient reason has been shown**".*

Before the court exercising its discretionary mandate has to bear in mind numerous factors as settled by Court of appeal including in the case of **Elius Mwakalinga vs. Domina Kagaruki and 5 others**, Civil Application no. 120/12 of 2018 (unreported) where the court cemented for things to guide the court in an application of the kind. These are;

1. The length of the delay.
2. The reasons for the delay;

3. Whether there is an arguable case such as whether there is a point of law on the Illegality or otherwise of the decision sought to be challenged; and
4. The degree of prejudice to the defendant if the application is granted.

As for what constitutes "sufficient cause", it has not been explained in the Rules but in most cases, it depends on the circumstances of each case. Many attempts have been made to list such factors. For instance, in the case of **Attorney General vs. Tanzania Ports Authority & Another**, Civil Application No. 87 of 2016 at page 11 (unreported) the Court had observed as follows:

"What amounts to good cause includes whether the application has been brought promptly, absence of any invalid explanation for delay and negligence on the part of the applicant. The crucial issue to be determined by this Court is whether there is/are good cause(s) to warrant the Court exercise its discretion to grant extension of time to file a notice of appeal."

The crucial issue to be determined by this Court is whether there the applicant has advanced good cause(s) to warrant the Court exercise its discretion to grant extension of time.

Having examined the arguments by the parties, supporting affidavit it is on record that, **one**, the suit was dismissed on 21/02/2023, **two**, the applicant became aware of the dismissal of the suit on 21/03/2023, **three**, he prayed to be availed with the copies of the order on 27/03/2023, **four**, the copies were availed to him on 17/05/2023 and **five**, the present application was filed on 30/06/2023.

As to why non-appearance and delay, the applicant stated that; **one**, on 03/02/2023 the matter was scheduled for mention, he appeared, and the case was scheduled for First Pre-trial Conference on 09/02/2023 at 14.00hrs, **two**, on 09/02/2023 the case was called at 13.00hrs which is before the ordered time that is 14.00 hrs, thus he failed to appear, **three**, however, on 09/02/2023 at 14.00hrs he decided to go to the judge's door where he met counsel for the respondents one Mr. Gabriel Kulaba learned S State Attorney who informed the applicant that the matter was adjourned for FPTC to 21/03/2023, **four**, the applicant came to court on 21/03/2023 but was told that the case came for FPTC on 21/02/2023 and that due to non-appearance the same was dismissed,

five, the reasons for non-appearance is that; **first**, the court the called the case on 09/02/2023 at 13.00hrs instead of 14.00hrs and **second**, misinformation by Mr. Gabriel Kulaba that the matter was scheduled for FPTC on 21/03/2023 instead of 21/02/2023.

The applicant is therefore put to state if at all the narrated facts existed and whether the same constitute good cause for extension of time.

To start with, it is evident that, the matter was dismissed under Order VII Rule 20 (1) (a) of the Civil Procedure Code, Cap.33 R.E.2019. The Rule reads;

(1) Where at the time appointed for the pre-trial conference, one or more of the parties fails to attend, the court may;

(a) dismiss the suit or proceedings if a defaulting party is the plaintiff;

(b) strike out the defence or counter-claim if a defaulting party is a defendant;

(c) enter judgment; or

(d) make such other order as it considers fit.

*(2) An order made by the court in the absence of a party concerned or affected by the order **may be set aside by the court, on the application of that party within fourteen days***

from the date of the order, on such terms as it considers just.

*(3) Subsequent to the first adjournment, if all parties fail to attend the pre-trial conference, **the court shall dismiss the suit.***

In that regard, the application to vacate the dismissal order was to be made within fourteen (14) days. The present application was filed on 30/06/2023 whereas the dismissal order was on 21/02/2023 thus, was filed after lapse of 127 days. By subtracting the fourteen (14) days the application was delayed for 113 days of which the applicant has to account for each day of delay.

The legal obligation to account for number of delays is echoed in the case of **Elius Mwakalinga (supra)**, where the court of appeal held that;

"A delay of even a single day has to be accounted for otherwise there should be no point of having rules prescribing period within which certain steps have been taken."

This court gathered all the facts, reasons for non-appearance and reasons for delays. **First**, the applicant has failed to prove that, on 09/02/2023 the case was called at 13.00hrs instead of 14.00hrs, **second**, if as per paragraphs 12 and 13 applicant confirms that the case was called at 13.00hrs then why did not he appear upon hearing his case

been called, **third**, that, after adjournment on 09/02/2023 he was misinformed by Mr. Gabriel Kulaba learned State Attorney that the matter was scheduled for once again for FPTC on 21/03/2023 instead of 21/02/2023, however, there is no piece of evidence from Mr. Kulaba confirming the fact, this could have been done by Affidavit, otherwise it remains an accusation to Mr. Kulaba that he did misinform the applicant, if they really met and exchange such information, **four**, if the applicant was in court on 09/02/2023 then why did n't he liaise with court clerk, **five**, the applicant alleged to have applied for court order, but the attached letter bears no court seal to prove that, it was lodged and received by the court, **six**, applicant alleged that, he collected the order on 17/05/2023 however he failed attach any letter from the Deputy Registrar informing him that, the order was ready for collection, the applicant has delayed for 113 days, however he failed to account for each day of delay as required by law.

Reading the above stated reasons with sober mind, it is goes with saying that, the applicant has miserably failed to be honest as result decided to throw blames to the third party whom the applicant did not ask for affidavit confirming the facts to have been sourced therefrom. In other words, there was no evidence substantiating the facts, including from

the court clerk if at all called the case at 13.00hrs instead of 14.00hrs on 09/02/2023.

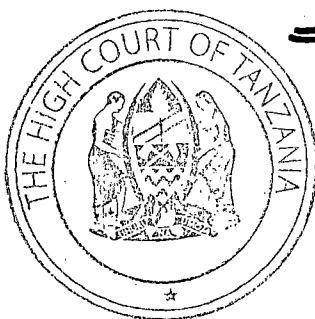
All said and done, it is with no malingering of doubt that, this court is satisfied beyond sane of doubt that, the applicant has failed to discharge his duty of adducing good cause and account for the number of days delayed as required by law. Thence, the judicial discretionary supremacies cannot be invoked in the circumstances for want of evidence and good cause to rely upon.

In the event therefore, I am inclined to agree with Ms. Elifrida Mutashobya learned State Attorney that, the application is with no good cause, while disagreeing with Mr. Paul Elias learned Counsel for the applicant based on the afore stated ration decidendi.

Consequently, as this court's hands are tied by law, then in the circumstances, the available remedy to this kind of application is to dismiss it for want of merits, as I hereby do. The application stand dismissed with costs.

IT IS SO ORDERED.

DATED at MOROGORO this 13th October 2023



G. P. MALATA

JUDGE

13/10/2023

Court: Ruling delivered at Morogoro in Chambers this 13th October, 2023 in the presence of Ms. Emma Ambonisye and Lightness Tarimo, State Attorneys an in the absence of Applicant.

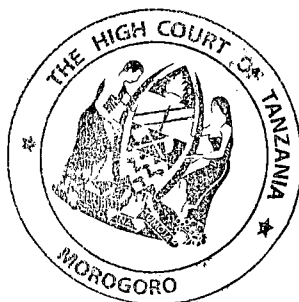
A handwritten signature in black ink, appearing to read "A. W. MMBANDO".

A. W. MMBANDO

DEPUTY REGISTRAR

13/10/2023

Court: Right to appeal to the Court of Appeal explained.



A. W. MMBANDO

DEPUTY REGISTRAR

13/10/2023