

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
MISC. CIVIL APPLICATION NO. 215 OF 2023**

CHANDRAKANT VRAJLAL KANABAR.....APPLICANT

VERSUS

RUPESH VRAJLAL KANABAR1ST RESPONDENT

AMAR VRAJLAL KANABAR.....2ND RESPONDENT

SAILESH SHANTILAL KONTECHA.....3RD RESPONDENT

Date of Last Order: 30/10/2023

Date of Ruling: 09/11/2023

RULING OF THE COURT

KAFANABO, J.:

Before this court is an application for extension of time within which to apply for setting aside dismissal order dated 25th July, 2022 issued by this court, (Hon. Massabo, J.). The application is made under section 14 of the **Law of Limitation Act, Cap. 89 R.E, 2019** and section 95 of the **Civil Procedure Code Cap. 33 R.E. 2019**. The application is also supported by affidavits of the applicant and that of advocate Cathbet Cornel Mbilingi. The application was filed in this court on 23rd May, 2023. The 3rd respondent resisted the application by filing counter affidavit on 6th September, 2023. The 1st and 2nd Respondents did not file counter affidavits.

The facts of the application are straightforward. The applicant herein filed Civil Case No. 94 of 2020 on 22nd July, 2020 against the Respondents herein claiming to be paid USD 216,000.00 for breach of 'agreement', and Tanzania Shillings 150,000,000/= being general damages. However, on 25/07/2022 the suit was dismissed under Order VIII, Rule 20(1) of the Civil Procedure Code, Cap. 33 R.E 2019. Then the applicant was aggrieved by the dismissal order, but was behind time and could not file an application to set aside the order. Hence, this application for extension of time.

On 30th October, 2023 this court ordered that the application be disposed of by way of written submissions. The applicant and the 3rd respondent complied with the schedule of filing submissions but the 1st and 2nd respondents did not. Since the said 1st and 2nd respondents were served by publication on 20th September, 2023 but failed to appear, and have also failed to file their written submissions, the hearing and determination of this application proceeds in their absence under Order IX Rule 8 of the Civil Procedure Code, Cap. 33 R.E. 2019.

In support of the application, the applicant submits that via the services of advocate Emily Laus Christant he instituted Civil Case No. 94 of 2020. It is averred in the applicant's affidavit, and restated in the submissions that the

said advocate did not appear in court on 25th July, 2020, nor informed the applicant to appear on that particular day. It is further stated in the applicant's affidavit, and it was submitted in support of the application that the applicant is a cancer patient and thus was allowed by his advocate not to attend in court whenever he was not feeling good. That time passed by, the applicant wanted to know status of his case, but his advocate was not cooperating.

It is the applicant's submission that on 24/11/2022 the applicant decided to go to court himself to inquire about the matter and he met advocate Cathbet Cornel Mbilingi who assisted him. Eventually, on 28th November, 2022 the applicant was able to get a copy of the ruling. It is when he realized that his case had been dismissed for nonappearance on 25th July, 2022 because the applicant and his advocate defaulted appearance for two consecutive times. It was the applicant's further submission that he filed a complaint in the Tanganyika Law Society for professional misconduct of the said advocate. The applicant further deponed in his affidavit, and submitted in his submissions, that he has no reliable source of funds and thus could not file the application for extension of time until 3rd May, 2023. The applicant cited the case of **Constantine Victor John vs Muhimbili National Hospital**

(Civil Application 214 of 2020) [2021] TZCA 77 (17 March 2021) in support of his submission.

It was also submitted that the dismissal was a result of advocate's fault. It was further added that the applicant's access to court has been barred by technical aspect of the law. Article 107A(2)(e) of the Constitution of the United Republic of Tanzania, 1977 regarding dispensing justice without undue regard to technicalities was referred to bolster submissions of the applicant. The case of **General Marketing Company Ltd v. A.A. Sharraf (1980) TLR 61** was also cited in support of the submission.

The 3rd Respondent, represented by learned counsel Othman Omary Othman, responded to the applicant's submissions by disagreeing with the applicant's arguments and argued that the application is without sufficient reason, highly misconceived and without merits. The 3rd respondent also adopted his counter affidavit to be part of his reply submissions.

It was further submitted by the 3rd respondent that there is no any proof regarding applicant's reasons that he became aware of the decision when he visited court in November, 2022 and that he cannot afford to pay an advocate due to financial constraints. It was submitted that the applicant has engaged several advocates to attend his cases. Further, it was submitted

that failure to engage an advocate or failure to obtain legal assistance is never a good ground for extension of time. The case of **Azizi Mohamed v. The Republic, Criminal Application No. 84/07 of 2019 (unreported)** was cited in support of the submission.

It was also submitted by the 3rd Respondent that the respondent has totally failed to account for the delay from the date of the dismissal order that is 25/07/2022. Further, the applicant never took any action from 28/11/2022 when the applicant allegedly became aware of the dismissal order to 18th May, 2023 when the application was filed. The case of **Sebastian Ndaula v. Grace Rwamafa, Civil Application No. 4 of 2014** was cited in support of the submission. It is the argument of the Respondent that the applicant failed to account for each day of the delay from the date of the dismissal to the date of filing this application.

Having reviewed and considered the parties' submissions, this court now determines whether the applicant has demonstrated sufficient cause for the court to extend time within which the applicant to apply for setting aside the impugned dismissal order.

From the applicant's submissions, there are two major reasons set forth by him for this court to consider. First, is that the advocate who was handling

the matter was not conveying any information to him on the progress of the dismissed case. The said advocate also allowed the applicant not to go to court whenever he was not feeling well because the applicant was, allegedly, sick. Second factor set forth was financial constraint on the side of the appellant which made him unable to hire advocates to represent him in court.

Given the facts above, it is important to consider timelines in this matter. It is not in dispute that the suit was dismissed on 25/07/2022 and the applicant became aware of the dismissal order on 28th November, 2022. This application to extend time was filed on 17th May, 2023. Therefore, the applicant is supposed to account for more than 280 days. From this, the court will analyse the actions of the applicant.

As regards the non-appearance of the advocate, and the applicant in himself. The applicant averred in his affidavit that the advocate who did not appear in court is the one he hired to prepare the plaint and represent him in court as per paragraph 2 of the affidavit which annexes the relevant plaint as annex '**A**'. However, the said annex A to the affidavit is a plaint prepared and filed by the applicant himself. Therefore, the issue of advocate who prepared the plaint does not arise

The applicant averred in paragraph 4 of the affidavit that he is a cancer patient and thus allowed by his advocate not to attend court in some occasions if he is not feeling well. He attached a medical report to prove his claim. However, the name of the patient in the purported medical report differs with that of the applicant and there is no explanation whatsoever. The name in the report is Chandu Kanabar which is not the name of the applicant herein. Second, the alleged report is dated 07/05/2013 which is more than 10 years ago and thus cannot be relied upon as a basis of inability to attend court in the past one year.

The second page of the alleged medical report is dated 26/08/2000, more than 23 years ago; it is also incomplete and thus has no evidential value to be relied upon by the court. Simply speaking, there is no, on record, a medical report prepared by a recognized and registered medical practitioner worthy of evidence to be relied upon by the court to prove applicant's alleged sickness. Hence the inability to attend court proceedings from 25/07/2022 to the date of filing this application remains baffling.

Also the two unrelated pages of the purported medical report do not belong to one and the same person, and they are 13 years apart, with neither layman no professional explanation as to why they are relevant now. Both

documents do not constitute a medical report worth of consideration in this matter for reasons explained herein above.

Moreover, paragraph 8 of the affidavit is about the alleged complaint against advocate Emily Laus Christant lodged with the Tanganyika Law Society. The court notes that even though the affidavit speaks of attaching a complaint, what has been, actually, attached is a letter/notice to the said advocate. The said letter, as submitted by the 3rd Respondent, does not contain any details relating to the dismissed case and thus not helpful and useful in determination of this application for extension of time.

The issue of financial constraint raised in paragraph 9 of the applicant's affidavit is extremely scanty to make sense for consideration of the extension of time. There is no any proof of the alleged constraint, there is no, even a mention that the applicant was on legal aid or that he attempted to secure legal aid but failed. Further, as submitted by the counsel for the 3rd Respondent, and as held in the case of **Azizi Mohamed v. The Republic, Criminal Application No. 84/07 of 2019 (unreported)**, the court of appeal held that:

'...failure to obtain a legal assistance has never been considered by the court to be a valid reason for the delay'.

Further, the affidavit of Cathbet Cornel Mbilingi also does not contain any useful information with a view to extend time in favour of the applicant in this matter.

Both affidavits supporting the application do not constitute facts showing sufficient cause to be relied upon with a view to extend time. The affidavits do not lay material facts to convince the court to condone more than 280 days of the delay. The case of **Constantine Victor John vs Muhimbili National Hospital (Civil Application 214 of 2020) [2021] TZCA 77 (17 March 2021)**, could only be useful if there are material facts relevant to the matter that may help the court determine matters according to law. In the present case, there is nothing worthwhile to be relied upon by the court. In the same case cited by the applicant it was held that:

'...financial constraints may not be a sufficient ground for extension of time. However, ... there are exceptional circumstances when it can be sufficient'

In the present application for extension of time, the applicant has failed to advance any good reason for extension of time, needless to consider exceptional circumstances.

Article 107A(2)(e) of the Constitution of the United Republic of Tanzania, 1977 as cited by the applicant is very key regarding dispensing justice without undue regard to technicalities. However, the same may only be invoked if the applicant would have laid bare the material relevant to the extension of time. The case of **General Marketing Company Ltd v. A.A. Sharrif (1980) TLR 61** was cited in support of the application, was also cited out of place because requirement to appear in court with a view to prosecute a case is vital and cannot be simply ignored as a mere procedure. It goes without saying that, in the circumstances of this case it is hard to find justification for extension of time, and is vividly clear that the applicant did not follow up his case with interest.

In the case of **Lim Han Yung & Another vs Lucy Treseas Kristensen (Civil Appeal 219 of 2019) [2022] TZCA 400 (28 June 2022)** it was held that:

'The appellants were aware of what was going on in court through their advocates and the finding by the High Court to that effect cannot be faulted. It is also our considered view that even if the appellants were truthful in their allegations against their erstwhile advocates' inaction, negligence or omission, which generally, does not amount to

good cause, they themselves share the blame. The appellants cannot throw the whole blame on their advocates. We think that a party to a case who engages the services of an advocate, has a duty to closely follow up the progress and status of his case. A party who dumps his case to an advocate and does not make any follow ups of his case, cannot be heard complaining that he did not know and was not informed by his advocate the progress and status of his case. Such a party cannot raise such complaints as a ground for setting aside an ex parte judgment passed against him.'

This court subscribes wholly to the above holding of the court of appeal as the applicant failed to explain why he was not aware of what was happening in court from July to November, 2022. It follows that, the issue of not being given a right to be heard, as averred in paragraph 10 of the applicant's affidavit, is simply a mascara complaint.

Therefore, this court agrees with the 3rd respondent that the applicant has failed to account for each and every day of the delay. The court finds that more than 280 days have not been accounted for by the applicant in his application for extension of time. The law requires an applicant to account for each day of the delay in order for the court to exercise its discretion to

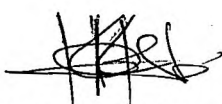
extend time. It has been so held in cases of **Board of Trustees of The Free Pentecostal Church of Tanzania vs Asha Selemani Chambada and Another (Civil Application 63 of 2023) [2023] TZCA 147 (28 March 2023), Sebastian Ndaula v. Grace Rwamafa, Civil Application No. 4 of 2014** (Unreported) and the decision of this Court in **VD Enterprises Limited and Others v. International Commercial Bank, Misc. Commercial Case No. 65 of 2014** (Unreported). Under the circumstances, the applicant has failed to convince this court to exercise its discretion to extend time.

Therefore, in the final analysis, the court finds that the application for extension of time with a view to set aside dismissal order of this court is unmeritorious, and thus hereby dismissed for want of sufficient cause.

Given circumstances of this case, the court grants no costs. Each party shall bear his own costs.

It is so ordered.




K. I. KAFANABO
JUDGE
09/11/2023

Ruling delivered in the presence of the application person, and in the absence of the respondent.



A handwritten signature in black ink, appearing to read "K. I. Kafanabo", is written over the printed name.

K. I. KAFANABO

JUDGE

09/11/2023