

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DAR-ES-SALAAM SUB-REGISTRY)**

**AT DAR-ES-SALAAM**

**MISCELLANEOUS CIVIL APPLICATION NO. 252 OF 2023**

(Arising from Civil Appeal No. 212 of 2020)

**RANDA HOLDINGS COMPANY LIMITED ..... APPLICANT**

**VERSUS**

**ADAM MOHAMED MAKUHANI ..... RESPONDENT**

**RULING**

Date: 07/09/2023 & 25/03/2024

**NKWABI, J.:**

Under the provisions of section 14(1) of the Law of Limitation Act Cap. 89 R.E. 2019 and any other enabling provisions of the law, the applicant is moving this Court to grant her the below mentioned orders:

1. That this honourable Court be pleased to grant an order for extension of time within which to enable the applicant to file a bill of costs.
2. Costs of this application abides the course.
3. Any other relief this honourable Court deems just and fit to grant.

The chamber summons is supported by an affidavit of Hassan Salum Hassan, counsel for the applicant. The filing process of this application was completed on 24/05/2023 upon payment of filing fees.

The application is resisted by the respondent who filed a counter affidavit which was duly sworn by Ms. Diana Julius Fue, learned counsel for the respondent.

In the affidavit in support of the application, Mr. Hassan avowed that the judgment and proceedings in PC. Civil Appeal No. 212 of 2020 in which the appeal was allowed with costs to follow the event, were supplied to the applicant very late which caused the counsel for the applicant fail to lodge a bill of costs in time. He also averred that the delay in filing the bill of costs was not due to negligence.

In a counter-affidavit, the counsel for the respondent stated on oath that the delay was caused by negligence of the applicant and no proof as to follow-ups by failure to attach to the affidavit letters to that effect.

On 31/07/2023, advocates of both parties agreed to dispose of the application by way of written submissions. I granted the prayer to dispose of the application as such. Ms. Alice Frank Kilawe, learned counsel, drew and filed the written submission in chief. The reply submission in opposition of the application was drawn and lodged in this Court by Ms. Diana Julius Fue, also learned counsel. The rejoinder submission was eventually drawn and

filed by Ms. Alice Frank Kilawe, learned counsel. I owe gratitude to both counsel for their eloquent submissions.

In submission in chief, Ms. Kilawe elaborated that the applicant made many attempts to obtain a copy of the judgment to enable her to file the bill of costs in time but it was challenging. Every time she made follow-up was informed that the presiding judge had not yet typed and signed it. She received the same on 9<sup>th</sup> May 2023. The counsel for the applicant exemplified **Lyamuya Construction Company Ltd v. Board of the Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2/2010 CAT and **Philomena Mangéhe t/a Bukine Traders v. Gesbo Hebron Bajuta**, Civil Application No. 8 of 2016 CAT where it was stated that:

*"Taking into account the circumstance surrounding this case and the fact that applicant has not been sitting idle, I am of the considered view that good cause has been established."*

It is also added that there is a prospect of obtaining the relief sought against the other party. The counsel for the applicant stated that, if this application is granted, there is concrete evidence to prove every cost incurred by the applicant in prosecuting the said case, thus a high probability of success.



As a final observation, Ms. Kilawe contented that there will be no any prejudice to the respondent in case this application is granted. She prayed the application be granted.

In response, Ms. Fue contended that the applicant has to prove every single day of the delay to enable the Court to exercise its discretionary power citing **Daudi Haga v. Jenitha Abdan Machangu**, Civil Reference No. 19 of 2006 CAT. It is beefed up that discretionary powers must be exercised judiciously while backing that stance by **Wambura N. J. Waryuba v. The Principal Secretary, Ministry of Finance & Another**, Civil Application No. 320/01 of 2020, HC which ruled that:

*"It is essential to reiterate here that the Court's power for extending time ... is both wide ranging and discretionary but it is exercisable judiciously upon causes being shown."*

She explicated that no any letter which show that there was follow-up for the copy of the judgment annexed to the affidavit. She also made reference to the case of **Lyamuya** (supra). Additionally, Ms. Fue pointed out that the cases of **Mang'ena** (supra) and **Mwinyimkuu** (supra) are distinguishable to the present application. She pressed, since the application was filed after a year had lapsed, then it should be dismissed with costs.

In a rejoinder remarks, Ms. Kilawe belaboured that the reply submission has no basis. She impressed upon me that days from date of delivery of the judgment to the date the copy of judgment was certified and copy of decree was issued are excluded, so she had to explain the dates from when she was supplied with the copy of the judgment. She informed the Court that the copy of the judgment indicates the date it was pronounced and the date it was certified.

She too distinguished the case of **Haga** (supra) cited by her learned friend. She underscored that the case of **Waryuba** (supra) referred to by the learned counsel for the respondent supports her submissions. Ms. Kilawe added that the respondent's counsel did not submit that she would be prejudiced if the application is granted.

I have assiduously explored the rival submissions of the counsel of both parties. I have also watchfully examined the affidavit and the counter affidavit (the evidence) for and against this application respectively. I have come to the conclusion that this application has to fail. I will provide my reasons why I have come to that conclusion.

No party to this application will duel my view that this application calls me to evaluate the evidence on the record. Such evaluation will lead to my own conclusion or findings. My duty is not to repeat mindlessly what was submitted by the counsel of both parties. That being the position, I have to evaluate and determine who among the parties has a story which is cogent or truthful. In the premises, on my scrutiny of the affidavit in support of the application, I find that the same is tainted with grave falsehood. In the affidavit it is averred that the learned judge certified the judgement on the latter date. That is not true. The judgement bears that it was signed on the same date it was delivered. No wonder, the counsel for the applicant failed to attach any letter which was received by the Court in her so claimed follow-ups as correctly stated by the counsel for the respondent. It is vapid law that an affidavit tainted with falsehood cannot be used to determine anything. So, is the affidavit of the counsel for the applicant in support of this application. My slant finds cheer in **Ignazio Messina v. Willow Investment SPRL**, Civil Application No. 21 of 2001, CAT (unreported) where it was stated that:

*"An affidavit which is tainted with untruth statements is not an affidavit at all and cannot be relied upon to support an application."*

I am aware that in appropriate circumstances, a court of law may expunge the offensive paragraphs of an affidavit if the offensive paragraphs are inconsequential to the position held in **Jamal S. Mkumba & Another v. Attorney General**, Civil Application No. 240/01 of 2019, CAT (unreported) where it was stated that:

*"It is now settled that an offensive paragraph can be expunged or disregarded and the court can continue to determine the application based on the remaining paragraphs if the expunged is inconsequential."*

If that course is taken and the offensive paragraph is expunged, the remaining paragraphs have nothing to support this application. However, I hasten to say that as the offensive paragraph relate to evidence, and the witness told lies, the witness becomes unreliable hence the **Ignazio's** case (supra) comes into assistance of the respondent.



The above discussion disposes this application in favour of the respondent. However, I find compelled to discuss the rest of the points raised by the applicant. The counsel for the applicant is urging this Court to grant the application for the sake of a high chance of success. This ground too is destitute of merit. It occurs to me that the counsel for the applicant failed to see the position of the law that litigation has to come to an end and cannot be open ended as stated in **Stephen Masato Wasira v. Joseph Sindi Warioba & the Attorney General** [1999] T.L.R. 334. She also missed the stand of the law that when one sits on one's right for so long, a court of law would not come to his assistance as stated in **Zilaje v. Fembera** [1972] H.C.D. No. 3, Kisanga, Ag. J., as he then was, underscored that:

*"I am, therefore, of the view that the appellant sat on her rights for too long, and that she has not given any sufficient ground which would warrant interference by this Court and accordingly the appeal is dismissed."*

That being the position of the law, I cannot assist the applicant for she sat on her right for too long without assigning sufficient ground.

The next aspect that I need address, which the counsel for the respondent stood firm on, which I approve, is failure of the applicant to attach any letter



to show that she was in fact making the follow-ups. Unlike the counsel of the applicant, the counsel for the respondent is vindicated, in supporting an allegation by documentary proof, by **James Anthony Ifunda v. Hamis Alawi**, Civil Application No. 482/14 of 2019, (unreported) (CAT) where it was ruled that:

*"In addition, the alleged sickness is not supported by a medical report or medical chits which could be acted upon by the Court. In the circumstances, I am satisfied that the first reason for the delay advanced by the applicant is untenable."*

The application of the applicant too suffers from an oddity that it lacks affidavit(s) of a person or persons who was or were attending her at the Court's front desk in the follow-ups contrary to the vaunted law as enunciated in **Ramadhani J. Kihwani v. TAZARA**, Civil Application No. 401/18 of 2018, CAT (unreported):

*"In application for enlargement of time, like the present, all material persons must swear affidavits to trigger the Court exercise its discretion under rule 10 of the Rules – see: **Mary***

***Rugomora v. Rene Polete, Civil Application No. 2 of 1992***

*(unreported)."*

Lastly, in an attempt to salvage the ever-sinking application, the counsel for the applicant clamoured that the copy of the judgment indicates the date it was pronounced and the date it was certified. This claim is not borne by the affidavit. It is mere a statement from the bar which cannot be the basis of decision. That sentiment was taken in **Elfazi Nyatega & 3 Others v. Caspin Mining Ltd**, Civil Application No. 44/08 of 2017 CAT, (unreported) wherein it was stated that:

*"As to the reason relating to the death of the applicants' advocate, that fact is not contained in their affidavit and cannot therefore, be considered with a view of finding how it contributed to the delay."*

The above elucidation would clearly indicate that granting this application will prejudice the respondent for he had already taken that litigation had come to an end. The prospect of succeeding in the bill of costs is negated and cannot assist the applicant owing to the position in **Zilage's** case (supra) where sitting too long on one's rights was discouraged.

Predicated on the above deliberation, I am of the firm view that this application is wanting in merits, therefore, the application should disconsolately fail. Inevitably, I dismiss the application with costs.

It is so ordered.

**DATED** at **KIGOMA** this 25<sup>th</sup> day of March, 2024.



  
J. F. NKWABI

**JUDGE**