

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM SUB REGISTRY)
AT DAR ES SALAAM**

MISC. CIVIL APPLICATION NO. 385 OF 2023

(Arising from Misc. Civil Application No. 520 of 2020)

OSMAN GAO HOZA..... APPLICANT

VERSUS

MOHAMED SHABANI..... 1ST RESPONDENT

RICHARD GODFREY..... 2ND RESPONDENT

MR. JOSEPH SABINUS

MWAJUMA SHABANI SALUM (*as administrator*

of Estate of the late Mwajuma Salum) 3RD RESPONDENT

G & B TRADERS CO. LTD..... 4TH RESPONDENT

RULING

S. M. MAGHIMBI, J:

The application beforehand was lodged under the provisions of Section 14 (1) 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 applicant is moving the court for orders of extending time within which the applicant may apply for restoration of Misc. Civil Application No. 520 of 2020 which application was dismissed by this court (Hon. Rwizile, J) on the 24th February, 2021. The applicant also prays for costs to be provided for and any other order(s) and/or relief(s) that the court may deem just and fit to grant.

Before I embark into the merit of this application, a brief background of the matter as gathered from the records is narrated. The applicant had lodged before this court a Miscellaneous Civil Application No. 520 of 2020 which was set for hearing on the 24th February 2021 before Hon. Rwizile, J. For reasons that the applicant intends to move the court with, should this application be granted, the application was dismissed for want of prosecution. On the 08th March, 2021, the applicant filed before this court a Misc. Application No. 106 of 2021 which was dismissed by this court on the 18th July, 2023 for having been incompetent. Since the applicant is out of time and still in desire to pursue his right, he has lodged this application seeking to extend time to apply for restoration of Misc. Civil Application No. 520/2020.

Hearing of the application was by way of written submissions. The applicant's submissions were drawn and filed by Mr. Willson Ogunde, learned advocate while the respondent's submissions were drawn and filed by Florian Frances learned advocate for the 1st respondent, Mr. Nuhu Mkumbukwa, learned advocate for 2nd respondent and Mr. Magusu Mugoka. I must point out at the onset that in both his affidavit in support of the application and the submission in support thereto, the applicant had taken time to explain his reasons for non-appearance when the Misc. Civil Application No. 520 of 2020 was dismissed. I will not consider the

submissions because before me, the applicant is only required to establish his reasons for the delay in applying for restoration of the dismissed application and not reasons for non-appearance on the day of its dismissal because that forum is currently out of time.

On the reasons for the delay, Mr. Ogunde submitted that the delay was caused by a pending Miscellaneous Civil Application No. 106 of 2021 which was struck out on 18th July, 2023. That the previous application No. 106/2021 was filed within time and when it was struck out, time within which to file application for restoration of Misc. Civil application No. 520 of 2020 had lapsed. That to enable the applicant start the process afresh an application for extension of time was inevitable hence this present application which was filed on line on 25/07/2023 at 16.06 hours. That the applicant acted within 7 days from the day Misc. Civil Application No. 106 was struck out on 18/07/2023.

Mr. Ogunde then submitted that extension of time is a discretion of the Court which must be exercised judiciously he stated the prayer for extension of time is supported by his affidavit and he prays for leave to adopt the contents of the said affidavit. He cited the case of **Lyamuya Construction Company Limited vs Board of Registered Trustees of Young Women' Christian Association of Tanzania, Civil Application No. 2 of 2010** held that:

- a) The applicant must account for all the period of delay*
- b) The delay should be inordinate*
- c) The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take*
- d) If the Court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance: such as the illegality of the decision sought to be challenged.*

Mr. Ogunde concluded his submission averring that, in the present case there is what is called perceived delay because Misc. Civil Application No. 106 of 2021 was timely filed but for being incompetent the same was struck out. Therefore, between the 8th March, 2021 when Misc. Civil Application No. 106 of 2021 was filed to 18th July 2023 when the same was struck out time was lost and this is a technical delay hence constitutes sufficient reason for extension of time as it was well stated in the case of **Fortunatus Masha vs William Shija (1997) TLR 154.**

In reply to the application the Mr. Frances first prayed that they adopt contents of their affidavit. He then submitted that, in an application like this one the applicant must demonstrate sufficient reason, account for each day of delay and must show diligence and not apathy, negligence or sloppiness. He acceded to the decision of the Court of Appeal in the

Case of *Lyamuya Construction*, however he argued that what amounts to sufficient cause has not been defined but the Court of Appeal in the case of *Lyamuya Construction* has established tests/factors that will be looked upon in establishing sufficient cause.

It was the 1st respondent's submission that, the applicant has relied mainly on one ground of technical delay as the Misc. Civil Application No. 106 of 2021 was struck out for being filed by an unqualified person. He argued that the law is clear under section 39 (1)(b) and 41 (1) of Advocates Act [Cap.341 R. E 2002], that persons without practicing certificate in force and unqualified persons are prohibited to act as advocates. That the law treats the application as it never exists hence it has no legal effect it is as if it never happened. In arguing this concept, the 1st respondent cited the case of **Edson Edward Mbogoro Vs Dr. Emmanuel John Nchimbi and Another, (Civil Appeal No. 140 of 2006) [2007] TZ CA 15 (20 September 2007)** From the above, he submitted, technical delay does not stand under the circumstance because the original application had no effect.

It was also Mr. Frances' submission that the applicant cannot hide behind technical delay to defeat statutes which require only qualified advocate should be the ones appearing and preparing documents. That by filing an application by an unqualified Advocate, the applicant exhibited

negligence, sloppiness and lack of diligence arguing that the Case of **Fortunata Masha** (*supra*) in this circumstance is distinguishable for the application was not filed by an unqualified advocate. Moreover, Mr. Franes' informed this Court that the applicant has not pleaded illegality or identified any kind of illegality. That looking at paragraph 1 to 13 illegality has no trace hence the ground on illegality fails.

Concluding the submission, he submitted that since technical delay does not apply where the original application has no legal effect, then clearly the applicant has not been able to account for delay as a period from 18th to 26th July has not been accounted for. There is a letter attached showing that the applicant prayed for records before the Court but the same does not show to have been received in Court emphasizing that even a single day has to be accounted for and the applicant has not done that, making the application meritless.

On his part, Mr. Mkumbukwa submitted that it is trite law for an application of time to be granted the applicant has to show sufficient reasons of delay. The Court has held sufficient includes accounting for the days of delay, existence of illegalities apparent on the face of records to the impugned decision, sickness of the applicant, diligence as opposed to laxity and absence of negligence and technical delay. He went on submitting that reading the affidavit in support of this application the

applicant has pleaded technical delay as the sole ground for the Court to grant this application this was pleaded in the affidavit and amplified in the submission in chief and in support of the case of **Fortunata Masha Vs. William Shija** which was cited by the applicant.

He submitted further that this application has no merits since the applicant has miserably failed to show sufficient reasons or grounds as to why the Court should grant this application. That the applicant has failed to account for each day of delay as required as the time used to prosecuting Misc. Civil Application No. 106 of 2021 cannot be cured by technical delay as the advocate was negligent in preparing and filing the same while being aware that he was not allowed to practice as an advocate. He also argued that grant of an extension of time is discretionary and has to be exercised judiciously according to the rules and reason of justice. A reference was made to the case of **Ally Salum Said** (*Administrator of the Estate of the late Antar Said Kleb*) vs **Idd Athumani Ndaki, Civil Application No. 450/17 of 2021.**

Mr. Mkumbukwa continued to submit that on accounting the days of delay, the applicant has not accounted for the 8 days of delay as required by law that each day has to be accounted for. He pointed out that the ruling in Misc. Civil Application No. 106 of 2021 was delivered on 18/07/2023 while this application was filed 26/07/2023 there is a total of

8 days which has not been accounted for in the affidavit. On the issue of technical delay, it was his submission that the applicant has placed technical delay as a sole ground for this Court to grant this application as can be seen in the affidavit. On his part he was of the view that the technical delay is not sufficient to the fact that the applicant, through his advocate, acted negligently when he prepared and filed incompetent Misc. Civil Application No. 106 of 2021 knowing that he has not renewed his certificate; an issue which was also stated in the ruling of Misc. Civil Application No. 106 of 2021.

It was still the respondent's argument that the act of the advocate was negligent and the case of **William Shija and Another vs Fortunata Mwasha [1997] TLR 213**; when presided by three justices of appeal set aside the decision of a single Justice in **Fortunatus Masha vs William Shija and Another [1997] TLR 154** where they held that:-

"The negligence of an advocate in adopting a correct procedure could not constitute a sufficient reason for the exercise of the Court's discretion."

He then argued that the case **Fortunatus Masha** decided by a single justice is not good as it was set aside and hence is distinguishable. In totality the respondents prayed for the dismissal of the application with costs.

In a brief rejoinder Mr. Ogunde submitted that the application before this Court is for extension of time hence, they do not agree with the submission of the respondents' Counsel that this application should be nullified for the reason that Misc. Civil Application No. 106 of 2021 was filed on negligence of the applicant. He argued that when this application was filed, the applicant had already renewed his certificate. He admitted that the applicant never raised the issue of illegality, however, technical delay was a sufficient ground as the decision on technical delay was never reversed by the Court of appeal, it is still a reason that is observed by the Court.

Having gone through the submission by both parties to this application, the main issue before me is to determine whether the applicant has adduce sufficient reasons to warrant this court to extend time. At the onset of my determination, I must make it clear that contrary to what the respondents have tried to convince the court, technical delay is and remains a ground for extending time. By technical delay it means that delay not necessarily caused by the applicant's sloppiness, inactiveness or negligence, but rather a series of misfortune in matters of procedures and competence of the previously timely filed application/applications. In such cases, the previous application or appeal having been strike out, the time used cannot be used against the applicant

to fault it as a delay that is inexcusable.

In the decision of the Court of Appeal in the case of **Bank M T. Ltd vs Enock Mwakyusa (Civil Application 520 of 2017) [2018] TZCA 291 (22 October 2018)** while citing with approval the single Judge decision in the case of Fortunatus Masha (Supra), His Lordship Justice Mwambegele held:

"I subscribe to the view taken by the Court in the above cases. The applicant Bank, having been duly penalized by having Civil Appeal No. 109 of 2012 struck out by the Court and the High Court (Labour Division) dismissing Miscellaneous Application No. 133 of 2017, the same cannot be used yet again to determine the timeousness of applying for filing the fresh Notice of Appeal in a bid to file a fresh appeal. On the authority of the decisions of the Court cited, that was an excusable technical delay on the part of the applicant which constitutes good cause under rule 10 of the Rules, under which the notice of motion has, inter alia, been taken out, to grant the order sought. The applicant was also prompt enough to apply for this second bite immediately after she was supplied with the Ruling which dismissed his first attempt to apply for enlargement of time to file a Notice of Appeal."

On the above note and precedent, having considered the records before me, I need not be detained much by this application. It is on record that the initial application to set aside the dismissal order was timely lodged in this court vide Misc. Application No. 106 of 2021. The previous application was struck out for reasons that it was filed by a person who was not qualified as an advocate. The question is, should this burden of the advocate not renewing his licence be thrown on the applicant? If he hired an advocate and unfortunately the advocate had not renewed his licence, how could the applicant have known about the advocate's negligence? Therefore the applicant cannot be punished for the wrongs that were done by his advocate which he could not have had knowledge of. That being the case, since the application for setting aside the dismissal order was filed within time, only that it was struck on the advocate's non-renewal of licence; and this application having been filed immediately after the said application was struck out; it is to my satisfaction that the applicant has established good and sufficient grounds for the delay to warrant this court's discretion to extend time. The eight days difference cannot be termed such a delay not to warrant the discretion of this court to extend time.

For the above reasons, this application is allowed. Time is extended for the applicant to file an application to set aside dismissal order in Misc.

Civil Application No. 520/2020. The said application shall be filed in this court within thirty (30) days of the date of this ruling. Given the nature of what I have deliberated, costs shall follow cause in the outcome of the intended application.

Dated at Dar es Salaam this 12th Day of March, 2024.



A handwritten signature in black ink, appearing to be "S. M. Magimbi", is written over a horizontal dotted line.

S. M. MAGIMBI

JUDGE