

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

MISCELLANEOUS CIVIL APPLICATION NO. 3333 OF 2024
(Arising from the Judgement of this Court in Civil Appeal No. 22 of 2016
(Hon. J.A. De-Mello, J – retired) dated 14th May 2020: Originating from the
Judgement of the District Court of Temeke in Civil Case No. 11 of 2014 (Hon
Mwambapa, RM) dated 18th December 2015)

AZIZ MUNGA MSILLAGI.....APPLICANT

VERSUS

DAVID GERVAS MBAWALA (*the Administrator of*
the Estates of the late **COSMAS GERVAS**).....**1ST RESPONDENT**

THABIT IDD MAKENYA.....2ND RESPONDENT

RULING

Date of last Order: 7th May 2024

Date of Ruling: 18th June 2024

MTEMBWA, J.:

This Application stems from the Judgement of this Court in **Civil Appeal No. 22 of 2016** dated 14th May 2020 where the Judgement and Decree of the District Court of Temeke in **Civil Case No. 11 of 2014** were reversed and set aside. In addition, this Court ordered trial *de novo* by

another learned Magistrate of competent jurisdiction within forty-five (45) days effectively from the day of Judgement.

It could appear, as per the records, the retrial as per the order was not conducted. It is for this reason the Applicant has filed this Application seeking an extension of time for a retrial by the trial Court. The Application was brought under ***section 14(1) of the Law of Limitation Act, Cap 89 RE 2019***, and ***section 95 of the Civil Procedure Code, Cap 33 RE 2019*** and is supported by an affidavit of the Applicant. The Respondents vigorously resisted the Application.

On 7th May 2024, when the matter came for orders before me, the Applicant appeared in person while the Respondents were represented by Mr. Benedict Muta holding briefs with instructions to proceed for Ms. Pendo Charles, the learned counsel. By consent, parties agreed to argue this Application by way of written submissions. I passed through the electronic records and noted that the parties adhered to the agreed schedule which I highly recommend.

For purposes of hearing of this Application by way of written submissions, **Mr. Mohamed Ibrahimu Manyanga**, the learned counsel,

argued for and on behalf of the Applicant while **Ms. Pendo Charles**, the learned counsel, argued for and on behalf of the Respondents.

Taking the podium, Mr. Manyanga submitted that on 14th May 2020, this Court ordered a retrial of the matter in the District Court of Temeke by another competent Magistrate within forty-five (45) days effective from the day of pronouncement of the Judgement. It was submitted further that the trial Court could not execute the said order effectively because the original file was yet to be remitted to it and the Applicant had no knowledge of how to request for the file transfer.

According to the learned counsel, having tiredly failed to proceed with the rehearing as per the order of this Court, the Applicant filed an Application before the trial Court seeking an extension of time where a preliminary objection was taken resulting in dismissing the matter with directions to file this Application. Mr. Manyanga, repeatedly, was of the view that the delay to commence hearing as per the order of this Court was not actuated by the Applicant but because the original file was not remitted to the trial Court for that purpose.

As such, Mr. Manyanga considered it to be a justifiable reason warranting the grant of an extension of time. He cited the cases of ***Indo African Estate Limited Vs. District Commissioner for Lindi District & 3 Others, Civil Application No. 12/07 of 2022, Court of Appeal at Mtwara, Tanzania Revenue Authority Vs. Tango Transport Company Limited, Civil Application No. 5 of 2006, Ally Salum Said Vs. Idd Athuman Ndaki, Civil Application No. 450/17 of 202*** and ***Attorney General Vs. Emmanuel Marangaki & 3 others, Civil Application No. 138 of 2019***. Lastly, the learned counsel implored this Court to grant the Application.

In response, Ms. Charles prefaced on what transpired before. She submitted that, in 2014, the Applicant filed Civil Case No. 11 of 2014 in the District Court of Temeke which was however dismissed. Dissatisfied, he successfully appealed to this Court where the decision of the lower Court was revised and set aside. In addition, an order of trial de novo within forty-five days was entered. The learned counsel complained that the Applicant failed to comply with such an order as the rehearing commenced after the

lapse of forty-five days, that is, approximately five months (on 8th October 2020).

The learned counsel for the Respondents further argued that enlarging time is within the discretion of this Court but it must be guided by the principles enunciated in the case of ***Chiku Hard Chionda Vs. Gertrude Mtinga (Administrator of the state of Yahane Claude Dugu) Civil Application No. 509 of 2018*** where the factors to be considered before granting an Application for extension of time were observed. These included; the length of delay, the reason for the delay, the degree of prejudice, whether the Applicant was diligent and whether there is a point of law of sufficient importance such as the illegality of the decision sought to be challenged.

In addition, Ms. Charles submitted that there is no evidence to support the assertion that the Applicant made a follow-up to his letters of request to transfer the file to the lower Court for retrial. That, in the absence of such materials to rely on, even if this Court has discretionary powers to grant the Application, it cannot move itself and have the Application granted. She added further that the Applicant was duty-bound to demonstrate and or

account for each day of delay. Further, letters requesting for the file transfer needed to be attached to the Application.

Ms. Charles insisted that the Applicant was supposed to move the trial Court within forty-five days after the pronouncement of the said Judgement to recommence the proceedings as per the order of this Court. She did not find it worth purchasing the idea that there is an illegality warranting the grant of this Application. She cited the case of ***Charles Richard Kombe Vs. Kidondoni Municipal Council, Civil Appeal No. 13 of 2019*** where the Court of Appeal observed that the words illegality and material irregularity do not cover either error of fact or law. They do not refer to the decision arrived at but to how it is reached. That, the errors contemplated must relate to the material defects of the procedure.

The learned counsel for the Respondents insisted that there have been no sufficient reasons advanced warranting an order of extension. She implored this Court to dismiss the Application with costs.

Essentially, in rejoinder, Mr. Manyanga had nothing of novel nature to offer. His submissions were a replica of what he submitted in submission in chief. Of importance is the fact that the delay was not actuated by himself

or the Court. He added further that the original file was remitted back to the trial Court on 8th October 2020, approximately five (5) months later after the Judgement of this Court and as such, the forty-five days as per order of this Court expired even before the original file could be dispatched to the trial Court. He beseeched this Court to grant this Application with costs.

I have dispassionately considered the rival urgings by the parties, the question before me is whether there are justifiable reasons warranting the grant of this Application. Counsels for both parties at least agree to each other that, for this Court to enlarge time, there must be "good cause" established. Conversely, the definition of the phrase "good cause" has not been explained in any rule or Act. That, it would appear, was not accidental. The respective power being purely discretionary and equitable, it cannot apply identically in all circumstances, and as such the categories of good cause are never closed.

In ***Masatu Mwizarabi Vs. Tanzania Fish Processing Ltd, Civil 5 Application No. 13 of 2010 (unreported)***, the Court observed that "good cause" is a relative one and is dependent upon the party seeking an extension of time to provide the relevant material for the Court to rely on.

Admittedly, case law has established some principles to be considered in determining the existence or non-existence of good cause (see also ***Tanga Cement Company Limited Vs. Jumanne D. Massanga and Amos A. Mwalwanda, Civil Application No. 6 of 2001(unreported)***).

I should however admit that this is one of the most peculiar cases I have ever seen in my entire experience. I have asked myself whether the Applicant was legally justified to file this Application seeking for an extension of time for the recommencement of his trial at the trial Court. For the reasons to be advanced hereinafter, as of now, I find the Application unnecessary in the circumstances.

Counsels for both parties are not in dispute to the very fact that this application originates from the Judgement of this Court in Civil Appeal No. 22 of 2016 (Hon. J.A. De-Mello, J - retired) dated 14th May 2020 where the Judgement and Decree of the District Court of Temeke (Hon. Mwambapa, RM) in Civil Case No. 11 of 2014 dated 18th December 2015 were revised and set aside. In addition, an order of trial *de novo* was entered with an order that the rehearing be conducted within forty-five (45) days effectively from the day of pronouncement of the Judgement.

According to facts which seem also to be not in dispute, the rehearing was not conducted as per the order owing to the delay in dispatching the original file to the trial Court. There is undisputed fact that the said file was remitted back to the trial Court on **8th October 2020**, approximately five (5) months later after the Judgement. It is my observation, that the forty-five (45) days as per order expired even before the original file could be dispatched to the trial Court. This seems to be the only lawful cause advanced by the Applicant for the delay. The Respondents' counsel as aforesaid resisted the Application insisting that there have been no justifiable reasons advanced warranting the grant of this Application.

The essence of an Application for an extension of time is to allow the litigant (Applicant) to exercise a particular right (say of an appeal) upon advancing lawful cause for not exercising such right within prescribed time. It is an equitable remedy resting on the discretionary powers of the Court. A litigant desiring for such an order must satisfy the Court as to what prevented him or her from exercising such right in time and within the dictate of the particular law.

In this case, the only genuine reason advanced for the delay is associated with the failure of this Court to remit the file to the trial Court for rehearing in compliance with the order of this Court. In my opinion, as I see it, the Applicant has no hand in it. I say this because, once an order of retrial (trial de novo) is entered, the appellate Court's officials must remit the original file administratively to the trial Court for recommencement of the hearing. A party has nothing to do nor has it been his duty to make follow-ups to that effect. It is for this reason I find that the Application was unnecessary.

Having found that the original file was remitted to it approximately five months from the day of Judgement and that an order of retrial has expired, the trial Court was duty bound to remit the file to the Honourable Judge in charge of this Court administratively explaining the inability to proceed with the hearing. The Honourable Judge in charge would then assign to a Judge or call the parties or issue appropriate orders as she deems fit for purposes of serving time and costs of the litigants. In the circumstances of this case, I think administrative steps involving the parties were appropriate for purposes of serving costs and time.

Having so arrived, the need for justice demands that this Application be granted with no order as to costs. The Respondents' counsel insisted that the Applicant was duty-bound to move this Court to remit the original file to the trial Court. With respect, I have failed to cherish such observation. The Applicant, who is not an officer of this Court, is not the one to blame in the circumstance of this case. As per the records, however, he was diligent as he was appearing before the trial Court although nothing could take off owing to the reason that the original file was yet to be remitted to it from this Court.

In the premises, this Application is hereby granted. Time is hereby extended for the trial Court to rehear the matter within forty-five (45) days effectively from the first appearance before the trial Magistrate of competent jurisdiction. For purposes of computation of the time so enlarged, the period between the pronouncement of this Ruling and the time before the first appearance before the presiding Magistrate is hereby excluded. Each party shall bear its costs.

It is so ordered.

Right of appeal explained.

DATED at DAR ES SALAAM this 18th June 2024.



A handwritten signature in blue ink, consisting of stylized letters and a long horizontal stroke.

**H.S. MTEMBWA
JUDGE**