

IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 26623 OF 2023

(Originating from Ruling and Drawn Order in the Resident Magistrate Court of Dar es Salaam at Kisutu in Miscellaneous Civil Application No. 58/2021 dated 21st February 2023 before E, N Kyaruzi PRM.

GABRIEL GASPER MWEJURA..... APPLICANT

VERSUS

BE FORWARD TANZANIA CO. LTD..... RESPONDENT

RULING

28th & May & 18th June 2024

MWANGA, J.

The applicant is seeking an extension to appeal against the ruling and order of the Resident Magistrate Court of Dar es Salaam at Kisutu in Miscellaneous Civil Application No. 58 of 2021, delivered on 21st February 2023. This request 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 supported by an affidavit affirmed by Ms Pendo

Charles, the applicant's advocate, further strengthening the legal basis for this request.

Despite the initial dismissal of the case, the applicant has demonstrated a steadfast commitment to pursuing justice. He was the plaintiff in Miscellaneous Civil Case No. 100 Of 2019 at Kisumu Dar es Salaam, seeking the release of his two motor vehicles allegedly unreasonably and unjustifiably withheld by the Respondent. The case was dismissed on 8th February 2021 due to the plaintiff's failure to attend mediation without good cause. However, the applicant's determination remained unshaken.

Undeterred by the previous dismissal, the applicant applied Miscellaneous Civil Application No. 28 of 2021 to set aside the dismissal order. However, this application was also dismissed with costs on 30th July 2021. The reasons for this dismissal were that the application was filed under a law that was no longer in effect, citing the wrong provision, and being out of time. According to the trial court, the application for setting aside the dismissal order should have been filed within seven days. Therefore, the applicant is now seeking leave for an extension of time before preferring an application for restoration. This clearly outlines the sequence of events leading to the current application for extension.

The applicant applied for an extension of time to apply, setting aside the dismissal order in Miscellaneous Civil Application No. 158 of 2021. The same was dismissed for insufficient reasons warranting an extension of time. He was supplied with the Ruling and drawn order on 2nd May 2023 and 7th August 2023, respectively. Subsequently, he preferred an application for an extension of time to this court, but the same was withdrawn before his lordship, Kakolaki J, with leave to refile.

In his counter affidavit, the respondent contends that the application to set aside the dismissal order was dismissed because it was brought out of the specified time and had no merits. In essence, no good cause is shown to warrant granting this application.

In his submission, the applicant stated that the dismissal order dated 8/2/2021 was strained by serious illegality and the ruling of Misc. Civil Application No. 28 of 2021 has serious irregularities. He argued that the dismissal of the applicant's case was made under non-existent permission of law (Order VII, Rule 29 of CPC), and that has caused them to fail to apply on time. He counts that the proper order was Order VIII, Rule 29 of CPC.

On the point of illegality, he supports his argument with the case of **Principal Secretary Ministry of Defence vs. Devram Valambia**

(1992) TLR and Andrew Athuman Ntandu and another vs. Dustan Peter Rima (as administrate of the Estate of the late PETER JOSEPH RIMA), Civil Application No. 55/01 of 2019 (unreported). The illegality is to dismiss the suit on non-existing provision, that is, Order VII, Rule 29, which, on the face of the record, constitutes sufficient reasons to extend the time and delay in supplying the dismissal order to the applicant. He also cited the case of **Republic vs. Yona Kaponde & 9 others (1985) TLR 84**, in which the court insisted that the surrounding circumstances weighed in and influenced the issues involved.

The applicant also noted that he has diligently pursued his appeal. He cited the case of **Elibariki Asseri Nhiko V Shifaya Mushi Ewanga Kinando** (1998) TLR page 81. He insisted that the time spent in court has to be considered.

Per contra, the respondent agrees that illegality is a good reason to grant an extension of time. However, he says not every point of law constitutes illegality. Again, there is no indication that the applicant expressed his intention to seek an appeal any time before the date he was supplied with a copy of the judgment or ruling.

He added that no rule requires copies of proceedings and drawn orders to be attached or annexed to the application for an extension of

time. For his arguments, he cited the cases of **Chiku Haro Chionde v Getruda Nguge Mtinga (Administrator of Estate of Yohana Chande Dugu**, Civil Application No. 509 of 2018 (CAT) that before the granting extension of time, the court shall consider lengthy of delay, reasons for the delay, the degree of prejudice to the respondent stand to suffer if time I extended.

Whether the applicant was diligent, whether there is a point of law such as the illegality of the decision sought to be challenged, and the overall importance of complying with the prescribed timelessness.

Also, in the case of **Charles Richard Kombe Vs. Kinondoni Municipal Council**, Civil Appeal No. 13 of 2019 (CAT), where it was held that the words illegality and material irregularity do not cover either error of fact or law. They do not refer to the decision reached but to how it is reached. The errors contemplated relate to material defects of procedures and not errors of either law or fact after the formalities prescribed by law have been complied with.

I have reviewed the respective parties' depositions and considered the submissions of the learned counsels. Although the court has the discretion to extend time, it must exercise this power cautiously and follow the rules of reason and justice. See the case of **Heritage Insurance**

Company Ltd vs Sabians Mchau & 2 Others, Civil Application No. 284/09 of 2019(CAT-Unreported).

As correctly stated by the learned counsels, for the applicant to be granted an extension of time, she must have demonstrated sufficient reasons. Though sufficient reasons are not defined, in several cases, the apex court has developed some factors to be considered as constituting good cause for the extension of time. That includes timeliness of taking action, the length of the delay, illegality, and delay in being supplied with the necessary documents. See cases of **Moses Muchunguzi vs. Tanzania Cigarette Co. Ltd**, Civil Reference No. 3 of 2018, and **Tanga Cement Company Limited v. Jumanne D. Massanga and Another**, Civil Application No. 6 of 2001 (CAT-All unreported).

Nevertheless, the reason for the delay is a question of facts that differs depending on the circumstances of each case. The applicant's affidavit shows that the impugned decision was delivered on 8 February 2021 to dismiss the plaintiff's suit in Miscellaneous Civil Case No. 100 Of 2019 at Kisumu Dar es Salaam after the court was moved under order VII, Rule 29 (a) of the CPC.

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order. However, this application was also dismissed with costs on 30th July 2021. The reasons for this dismissal were that the application was filed under a law that was no longer in effect, citing the wrong provision, and being out of time. According to the trial court, the application for setting aside the dismissal order should have been filed within seven days. Therefore, the applicant is now seeking leave for an extension of time before preferring an application for restoration.

The applicant applied for an extension of time to apply, setting aside the dismissal order in Miscellaneous Civil Application No. 158 of 2021. The same was also dismissed for insufficient reasons warranting an extension of time. He was supplied with the Ruling and drawn order on 2nd May 2023 and 7th August 2023, respectively. He appealed to this court without seeking an extension; hence, the application was withdrawn before Kakolaki J.

After a week, he filed this application seeking an extension of time. In my view, that application was brought without delay. In the case of **African Banking Corporation (T)Limited Versus George Williamson Limited**, Civil Application No 349, 01 of 2018) [2019] TZCA 641 (17 May 2019), the court held that the applicant must exercise some diligence on the matter. This means the application ought to be brought

promptly, or at least the court must be persuaded that the applicant took severe steps or made an effort to take action regarding the matter.

That said and done, the applicant's exercise of due diligence and the case circumstances dictate that this is the fit application possessing the materials to enable this court to exercise its discretion and grant an extension of time. Therefore, it is granted as prayed for.

In the end, I have considered the circumstances of the case; each party is to bear its costs.

Order accordingly.



H. R. MWANGA

JUDGE

18/06/2024