

**IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR ES SALAAM,**

**- MISCELLANEOUS COMMERCIAL CAUSE NO. 121 OF 201  
(Arising from Commercial Case No. 36 of 2015)**

**TOTAL TANZANIA LIMITED ..... APPLICANT  
VERSUS  
ZENON OIL AND GAS ..... RESPONDENT**

25<sup>th</sup> October & 30<sup>th</sup> November, 2016

**RULING**

**MWAMBEGELE, JR**

On 16.05.2016, this court struck out Miscellaneous Commercial Cause No. 219 of 2015 which was filed by the applicant Total Tanzania Limited seeking an extension of time within which to file a witness statement of one Jimmy Sikira. That application was struck out for being taken under wrong provisions of the law.

The applicant has again come to this court seeking for the same orders. She has preferred the application under section 95 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002. Like the previous one, it is supported by an affidavit taken by Ms. Asia Tokutoola, an officer of this court and courts subordinate hereto, save for the Primary Court.

When the application was called on for hearing on 25.10.2016, the respondent did not enter appearance. As Mr. Patrick Mtani, learned counsel for the respondent, was present on 29.09.2016 when the hearing date was slated, Ms. Maryam Semlangwa, the learned counsel who appeared for the applicant on date scheduled for hearing of the application, prayed and was granted leave to proceed with the hearing of the application *ex parte*.

The learned counsel for the applicant, having adopted the affidavit supporting the application and skeleton arguments earlier filed argued the application *ex parte*. The gist of the affidavit and skeleton arguments by the applicant is that the witness statement of Jimmy Sikira could not be filed in time because he was bereaved. That statement is found at para 3 of the affidavit. For easy reference the paragraph reads:

"That at the time when Jimmy Sikira was supposed to give his statement as a witness to the case, we were told that he was bereaved and therefore he was not available before the day set for filing the said witness statement."

Relying on ***Fortunatus Masha Vs William Shija & anor*** [1997] TLR 154, ***Benedict Mumello Vs Bank of Tanzania***, Civil Appeal No. 12 of 2002 (unreported) and ***Yusufu Same & another***, Civil appeal No. 1 of 2002 (unreported), the learned counsel submitted that the applicant has shown sufficient reasons to warrant the grant of the prayers sought.

I have anxiously considered the learned arguments of the learned counsel for the applicant argued *ex parte*. Having so done, I should now be in a position

to confront the relevant issue for determination in this ruling and this is: has the applicant shown sufficient reason for the delay to grant the orders sought? As rightly submitted by the learned counsel for the applicant, an application of this nature will only succeed upon supply by an applicant to the court sufficient material to exercise the discretion to grant an extension. There is a long line of authorities on this point. One such authority is ***Benedict Mumello***; a case cited by the learned counsel. Others are ***Michael Leseni Kweka Vs John Eliafe*** [1997] TLR 152, ***Jaluma General Supplies Limited Vs Stanbic Bank Limited***, Civil Application No. 48 of 2014 (unreported) and ***Daud s/o Haga Vs Renatha Abdon Machafu***, Civil Reference No. 19 of 2006 (unreported).

In ***Jaluma General Supplies***, for instance, it was stated:

"All the Applicant should be concerned is showing sufficient reason why he should be given more time and the most persuasive reason that he can show is that the delay has not been caused or contributed by the dilatory conduct on his part."

And in the case of ***Daud s/o Haga*** the court held:

"Where an extension of time is sought consequent to a delay the cardinal question is whether sufficient reason is shown for the delay"

The question which I pose again to myself at this juncture is: has applicant brought to the fore enough material on the strength of which court can exercise its discretion to grant an order for enlargement of within which to file the witness statement.

As can be gleaned in the affidavit and skeleton arguments in support of the application, the main reason ascribed to the delay to file the witnesses statement within seven days upon failure of mediation as provided for by rule 49 (2) of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 (hereinafter referred to as the Rules), is that a Mr. Jimmy Sikira whose evidence is sought to be introduced in the case was, at the material time, bereaved. I have given due consideration to this reason the cause of which the applicant claims to have failed to file the witness statement within the prescribed time. Respectfully, I do not find it as falling within the scope and purview of sufficient reasons to the test of any reasonable man. This is so because the reason leaves some questions unanswered. I shall demonstrate.

First, it is not shown in the affidavit when exactly was the said Jimmy Sikira bereaved so that this court would adequately evaluate the delay. The record of the main case shows that mediation failed on 16.06.2015 and the court advised the parties to observe the Rules in filing the witnesses' statements. Thus pursuant to rule 49 (2) of the Rules, the statements ought to have been filed by 23.06.2015. The affidavit in support of the application has not accounted for the delay from that date. It is silent as to when was the said Jimmy Sikira bereaved and when did he return to Dar es Salaam. And why the present application was filed on 15.06.2016; close to a year after the dead line. That is to say, the present application was filed on 15.06.2016 and that long delay has not been accounted for. I understand the applicant filed Miscellaneous Commercial Cause No. 219 of 2015 on 19.08.2015 which was struck out on 26.05.2016. Even assuming the applicant was prosecuting Miscellaneous Commercial Cause No. 219 of 2015, I expected to find such depositions in the affidavit respecting the delay from 23.06.2015 which was

the deadline for filing the statement to 19.08.2015; the date when the previous application was filed and later struck out on 26.05.2016. I also expected to find in the affidavit details on the delay from 26.05.2016 to 15.06.2016 when the present application was filed. Such important details are missing and the applicant cannot blame anybody but herself for such ailment.

In short, what the court puts emphasis on is that every day of delay has to, but has not been, accounted for. It is the law founded upon prudence in this jurisdiction that in applications of this nature, every day of delay must be accounted for to enable the court to adequately ascertain the delay. That this is the law was succinctly put by the Court of Appeal speaking through Kileo, J.A in *Bushiri Massan Vs Latifa Lukio Mashayo* Civil Application No. 3 of 2007 (unreported). The court of appeal stated:

"Delay, of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken".

In the case at hand, delays between the dates referred to above have not been accounted for; not even sufficiently so accounted for. What the deponent has brought to the fore is just a sweeping statement to the effect that "at the time when Jimmy Sikira was supposed to give his statement as a witness to the case, we were told that he was bereaved and therefore he was not available before the day set for filing the said witness statement" which to my mind is insufficient. This might have been caused by the applicant not injecting seriousness to the matter; the affidavit in support of the present application is a replica of the affidavit which supported the previous

application which was struck out. Save for the dates of swearing and verification as well as the jurat of attestation, nothing was updated in the present affidavit to cover the circumstances and new developments to cater for the present application. This kind of casual deposition of reasons for delay will not help an applicant in granting the orders sought.

Secondly, no documents have brought to the fore to reinforce the fact that the said Jimmy Sikira was indeed bereaved and travelled outside Dar es Salaam. No death certificate has been appended with the affidavit supporting application. No ticket or tickets have been produced to verify that he indeed travelled out of Dar es Salaam. Not even any document has been produced to strengthen the shaky statement of Ms. Asia Tokutoola; the deponent of the supporting affidavit, that Jimmy Sikira was bereaved and therefore could not be available the moment his statement (his evidence-in-chief) was needed for filing. What the court has been availed with is just a word from the deponent that they were told that he was bereaved. Without such supporting documents, Ms. Asia Tokutoola's deposition to this effect becomes too light a statement to grant the orders sought.

Thirdly, as an extension to the foregoing second point, the affidavit of Mr. Jimmy Sikira is lacking to verify what the deponent of the affidavit supporting the affidavit is deposing and no explanation has been disclosed why. In the absence of any document to verify what the deponent of the affidavit deposes on the unavailability of the witness whose statement is sought to be introduced as his evidence-in-chief, an affidavit of the said Jimmy Sikira would have been of paramount importance to give such deposition in the affidavit a helping hand. Jimmy Sikira's affidavit, in my considered view, would have elevated Ms. Asia Tokutoola's statement from a weak and shaky deposition to

a strong and reliable one. That has not been done and consequently the supporting affidavit falls short of sufficient reason to grant the orders sought.

In view of the foregoing, I find and hold that the applicant has not supplied the court with enough material upon which to exercise its discretion to grant the orders sought. As already stated above, an application of this nature stands or falls on sufficiency of reasons ascribed to the delay. For want of sufficient reason, the present application is bound to fail.

In the final analysis, I find this application wanting in merit and consequently dismiss it. As the application proceeded *ex parte*, I make no order as to costs.

Order accordingly.

DATED at DAR-ES SALAAM this 30<sup>th</sup> day of November, 2016.

J. C. M. MWAMBEGELE  
JUDGE

