

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISCELLANEOUS APPLICATION NO 58 OF 2022**

**(Arising from Commercial Case No 107 of 2020)**

**BETWEEN**

**WELL WORTH HOTELS AND LODGES LIMITED..... APPLICANT**

**VERSUS**

**EAST AFRICAN CONVAS COMPANY LIMITED ..... 1<sup>st</sup> RESPONDENT**

**STIRLING ARVING HORSEFLY ..... 2<sup>ND</sup> RESPONDENT**

**ROBERT JAMES FLOWERS..... 3<sup>rd</sup> RESPONDENT**

**GARY MCINTYRE..... 4<sup>th</sup> RESPONDENT**

**ECO-STEEL AFRICA LIMITED ..... 5<sup>th</sup> RESPONDENT**

**RULING**

Date of last order: 01/07/2022

Date of ruling: 05/07/2022

**NDUNGURU, J.**

By Chamber Summons, the applicant through the service of IMMMA ADVOCATES lodged an application on 29<sup>th</sup> April, 2022 seeking for the following orders:

- (i) That the honourable court be pleased to extend time within which the applicant may file an application for setting aside the order of this honourable court dated 30 March 2022 striking out the applicant's defence in Commercial Case No. 107 of 2020.
- (ii) Subject of granting extension of time, the honourable court be pleased to set aside the orders made on 30 March 2022 by Hon. Nangela, J. in Commercial Case No. 107 2020 and restore the Applicant's written statement of defence.
- (iii) Costs for this application be in the cause.
- (iv) Any other reliefs that the honourable court may deem fit and just to grant in favour of the Applicant.

This application is made under section 14 (1) of the Law of Limitation Act (Cap 89 R.E 2019) and the Rule 31 (2) of the High Court (Commercial Division) Procedure Rules, 2012 as amended by the High Court (Commercial Division) Procedure (Amendment) Rules, 2019 and Section 3A and 3B (1) (a) (b) (c) of the Civil Procedure Code, (Cap 33 R.E 2019). The application is supported by affidavit sworn by one Jonathan Wangubo advocate duly authorized by the applicant.

The background of this matter has its genesis in the Commercial Case No 107 of 2020. In the above mentioned case the applicant defaulted attendance when the case was scheduled for final pre- trial conference. As a result the applicant's written statement of defence was struck out. Thus the struck out order gave rise to this application.

When this application was called upon for hearing Mr. Gasper Nyika learned advocate appeared for the applicant while the respondents enjoyed services of Mr. HerielMunisi learned counsel. Prior to his submission Mr. Nyika advocate prayed to adopt the affidavit sworn by one Jonathan Wangubo as part of his submission in support of the application.

Submitting for application Mr. Nyika was told the court that the reasons for extension of time are contained in paragraph 10, 11, 12 and 13 of the affidavit. He was of the contention that the law on extension of time is trite. He said for such application to succeed, the applicant must demonstrate sufficient reasons for delay. He said the reasons stated in the affidavit are sufficient for the court to allow the application.

The counsel for the applicant submitted that the reasons for failure to appear in court when the case was scheduled for final pre-trial conference are contained at paragraph 14, 15, 16 and 17 of the affidavit. He

said the main reason was the confusion which cropped up as a result of change of instruction from the former Attorneys to them. He argued that, the deponent believed that Stallion Attorney would have appeared.

The counsel went further submitting that allowing this application will grant the applicants their rights to be heard at the same time will not prejudice the respondents in any way. He said the record is quite clear that the applicant has no habit of absconding the court process. Mr. Nyika urged the applicant be given right to be heard in line with section 3A and 3B (1), (a), (b) (c) of the Civil Procedure Code (Cap33 R.E 2019) The counsel fortified his argument by referring the case of **Mount Meru Flowers Tanzania Limited Vs. Box Board Tanzania Limited**, Civil Appeal No 260 of 2018 CAT (unreported)

Mr. Nyika was of the further submission that this is a fit case for the order to be granted. He said in case the court finds the respondents have been prejudiced in terms of the delay of the case the court has jurisdiction to remedy them by awarding costs.

Responding to the submission Mr. Heriel Munis was of the contention that the applicant has not advanced sufficient reasons for the court to grant the orders prayed in the chamber summons. The counsel told the court that

looking at the reasons stated at para 10-13 of the affidavit it is typically the negligence. He said, there is no proof that the applicant became aware of the order of the court on 7/4/2022.

He went further submitting that at para 11 the deponent stated that on the date the case was scheduled he was at Mafinga attending labour arbitration. To prove the assertion the counsel ought to attach either proceedings of the said arbitration or summons. He further said the air tickets attached is not a proof that he had travelled. The deponent ought to have attached boarding pass.

Mr. Munis was of the further submission that the deponent even after knowing that that the defence has been struck out never bothered to file application on time instead went for holiday. He said, for him filing application was not a priority. He said the Firm has more than ten advocates thus any of them could intervene.

The counsel was of the contention that though granting the application is the discretion of court but the same must be exercised judiciously. He said the case of **Lyamuya Construction Co Ltd vs. Board of Registered Trustees of Young Christian Association**, Civil Application No.2 of 2010 (unreported) has laid down guidelines to be considered. Among

others is counting for each day of delay. Regarding confusion alleged by the counsel for the applicant, Mr. Munis argued that the same has no legal weight. He said the deponent was present in court when the case was scheduled for final pre- trial conference.

Regarding the overriding principle, the counsel submitted that such a principle cannot apply in such scenario where the deponent opted to go for holiday while knowing that he was supposed to file application for restoration of the struck away defence. The counsel urged the court to dismiss the application for the ground that the applicant has failed to adduce sufficient reasons for delay. He also prayed for the costs.

In his rejoinder Mr. Nyika reiterated his submission in chief. He added that affidavit is the evidence as such it has to be countered by evidence. He said there is no counter evidence that the deponent was not at Mafinga on the stated date. Further, there is no evidence that the Firm IMMMA ADVOCATES has ten or more than ten advocates. That as regards holiday, he said the counsel misconceived it is not that the deponent went for holiday. It is that the dated fell on holiday; Good Friday, Saturday Sunday and Easter Monday those were not working days. He said the days have counted fully. He said the fact that there was confusion counter affidavit

has not challenged it. He said each case has to be looked on its own circumstances. He thus prayed the application be granted. He said if the court so wishes may award costs to the respondents for delay as submitted by the learned counsel.

Having heard both parties and as rightly pointed out herein above, this application is an attempt by the applicants to seek the indulgence of the court to open the audience for the applicant to be heard in the Commercial case No. 107 of 2020. I am aware that right to be heard is one of the cardinal and unalienable principles of natural justice. The applicant is praying for extension of time to file application for setting aside order of this court of striking out the defence and restoration of the statement of defence in the above mentioned case.

To be honest as submitted by Mr. Munis that grating or refusing to grant extension of time is the discretion of this court. There is no gainsaying that that this court is conferred with unlimited discretion to extend time. The applicant is duty bound to satisfy the integrity of the judge with sufficient reasons for that delay, must account for each days of delay, must show or prove that the delay is not inordinate, must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to

take and that the court must feel that there is existence of points of law sufficient importance such as illegality of the decision sought to be challenged. The same stance was well stated in the case of **Lyamuya Construction Company Limited Vs Board of Registered Trustees of YWCAT (supra)**

Further, the court must act judiciously when exercising the discretionary powers. The powers of this court may similarly be probed on seven (7) ranges as stated in the case of **Esso (T) LTD Vs. Deusdedit Rwebandiza Kayage [1990] TLR 102**. On this, the Court provided seven grounds namely:- Misinterpretation or misappropriation of the applicable law or statute; Ultra vires exercise of powers; Non formation of the opinion in the exercise of such discretionary powers; Absence of reasonable decision between the facts and circumstances taken into account in forming the opinion, Consideration of extraneous matters or non-consideration of relevant materials in decision making; Arbitrary exercise of powers; and Malafide use of powers, use of powers for a purpose other than one for which the power is conferred.

What can be gleaned from the above principle is that the court must always be conscious on exercising its discretion. Therefore, the overwhelming discretionary powers of this court must always be exercised



judiciously. As rightly pointed out in the case of **Moses Mchunguzi Vs. Tanzania Cigarette Co Ltd, Civil Reference No 3 of 2018, CAT at Bukoba (unreported) where** the court held:-

*"it is therefore clear that the law does not laid exactly any principle to be followed by the court in exercising the discretion except that the applicant has to amply demonstrate that good cause exists to be entitled for consideration for extension of time"*

What constitutes good cause cannot be laid down by any hard and fast rules. Good cause is therefore dependent on the circumstances of each case. Thus, it is up to the party seeking extension of time to provide the relevant material to convince and move the court to exercise its discretion. The same stance was also stated in the case of **Regional Manager Tanroads Kagera Vs Ruaha Concrete Company Limited, Civil Application No 96 of 2007, CAT (unreported)** and **Oswald Masatua Mwizarubi Vs Tanzania Fish Processors Ltd, Civil Application No 130 of 2010 CAT (unreported)**

The Court of Appeal has therefore formulated some essential factors which can be considered to constitute good case, these are the promptness of

taking action, the length of the delay, illegality and delay to be supplied with the necessary documents (see **Moses Mchunguzi Vs. Tanzania Cigarette Co Ltd (supra) at page 8 of the typed judgment.** I am alive that in exercising such powers, it must be based on principle that the discretion has to be exercised judiciously. The applicant must be aware of the time limit before taking action, when the time starts to run.

Having rested at this position of the law, I now wish to consider whether the application filed has merit? Before getting down into the merits of the application, I find it prudent to adopt what has been disseminated in the case of **Shah Hemraj Bharmal and Brothers Vs. Santash Kumari W/o J.N Bhola [1961] E.A 679 at page 685** where the court held:-

*"The matter is one of discretion and we do not wish to lay down an invariable rule, but rules are made to be observed and where there has apparently been excessive delay, the court requires to be satisfied that there is an adequate excuse for the delay or that the interests of justice are such as to require the indulgence of the court upon such terms as the court considers just".*

The relevant question is how do those precedents apply in this application at hand? The applicant in his affidavit have narrated several difficulties

come upon in appearing to the court when the case was scheduled for final pre-trial conference and the filing of application promptly. On the Counter affidavit of the Respondent has strongly resisted all grounds of the applicant on one strong reason that the deponent not the applicant was negligent. The issue is whether the applicant should suffer the consequence of the negligence of the advocate. The answer is no. See **Belinda Murai & Another Vs Amos Wainaina (1978) LLR 2782** where it was stated that a door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better.

Having so scrutinized the contents of affidavits and the counter affidavit filed, I find prudent to consider reasonable grounds upon which this court may grant extension of time. As I have stated inter-lia that there is no hard and fast rule which may be followed in considering to grant extension of time, but each case must be decided according to material facts and the prevailing circumstances. This position was also considered in the Court of Appeal in **Moses Mchunguzi Vs. Tanzania Cigarette Co Ltd (supra)**

In the applicant's affidavit the applicant has stated categorically that the applicant had formerly engaged Stallion Attorneys later the IMMMA by then the file was still in the hands of Stallion it was in dilemma as it was joint prosecution or not that made the deponent to believe that Stallion would

have appeared. Further when the written statement of defence was struck out the deponent was on safari. To me what is more important is that there is no inordinate delay, the applicant has shown due diligence and has shown his interest to exercise his right to be heard.

Having made references in various precedents related to sufficient reasons for extension of time, I am satisfied that the applicant has advanced sufficient reasons for this court to invoke its discretionary powers to extend time upon which to file application as per prayer No.1 and further that this court having heard the application, has set aside the orders of this court made on 30<sup>th</sup> March 2022 and the applicant's written statement of defence has been restored. I make no order as to costs

It is so ordered



  
**D.B NDUNGURU**

**JUDGE**

**20/05/2020**