

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 608 OF 2020

**EDITH MALIMA.....APPLICANT
(An Administrator of the Estate of)
(the Late Elson Malima)**

VERSUS

ISAYA CHAULA.....RESPONDENT

RULING

24/02/2021 & 25/03/2021

Masoud, J.

There was before me an application for, firstly, extension of time to apply for re-admission of Misc. Land Appeal No. 220 of 2019 dismissed on 28/2/2020 (as per Hon. Hamza, SRM Extended); and, secondly, once the time is so extended, re-admission of the dismissed appeal be granted so that the appeal is heard and determined on its merits.

The application was made under Order XXXIX, rule 19 of the Civil Procedure Code, cap. 33 R.E 2019. It was supported by an affidavit of Mr Hosea Chamba, learned counsel for the applicant. It was opposed by the respondent who filed a counter-affidavit in that respect. The

applicant also filed a reply to the counter affidavit in a bid to respond to matters raised by the respondent in the counter affidavit.

The affidavit made in support of the application detailed the circumstances that led to the filing of the present application, and hence the reasons as to why the extension of time and the re-admission of the dismissed application were sought and ought to be granted. On the other hand, the counter-affidavit disputed the reasons advanced in a bid to show this court that it was not in the circumstances justified to grant the extension and re-admission.

The application was conducted by filing written submissions in chief by the applicant, replying submissions by the respondent and a rejoinder by the applicant as per the order of this court providing for the filing schedule which was duly complied with by the parties. The submissions expounded on matters that were averred in the respective affidavits and counter affidavit of the parties. I undertake not to reproduce the averments and the submissions on the record in full, save to the extent necessary for determination of the application.

The main arguments and submissions by the applicant's counsel in support of the application was that there were sufficient reasons for

extension of time and granting of the re-admission of the dismissed application. The reasons could be summarized and presented as follow:

One, there were no summons issued and ready for collection in respect of the appeal prior to its dismissal. This failure was notwithstanding follow-ups made the applicant and her counsel made to the High Court (Land Division) on several occasions. Correspondingly, there were no summons issued and served to the respondent for the pending appeal prior to its dismissal. Two, the appeal case file was transferred to Kinondoni District Court before Hon. Hamza, SRM (Extended Jurisdiction) without the applicant being notified, only to learn at a later stage that it was so transferred. The applicant's subsequent follow-ups availed no record of the delivery of the appeal. Three, the applicant's condition at that moment was delicate due to her pregnancy although she attempted several follow-ups of no avail. Four, non-appearance at Kinondoni when the appeal was called for orders/hearing was due to the applicant's ignorance of the assignment and transfer of the appeal as the same were never notified to her. And five, the delay in filing the present application was due to the applicant's ignorance of the dismissal order of 28/02/2020; which delay was also caused by the applicant's complicated pregnancy, and the outbreak of coronavirus from March 2020.

It was contended that as the applicant was not served, she could not enter appearance as the appeal was assigned and transferred to another venue as above shown without notice and was, consequently, dismissed for want of prosecution. The respondent would not suffer prejudice since the respondent was equally not served and never entered appearance to defend the appeal. Attention was drawn to this court of an alleged illegality apparent on the face of the record to the effect that, firstly, no summons or notification was served to the parties, secondly, dismissal order violated Order XXXIX, rule 16(1) and 17(1) of the Civil Procedure Code (cap. 33 R.E 2019), and thirdly, there was no compliance with Order XXXIX, rule 13(1) and (2) of the said Code.

Opposing the application, the counter affidavit and submissions of the respondent insisted on the following. Firstly, she was not aware of the dismissed appeal. The record of proceedings was nevertheless ready for collection very early and would not have occasioned delay, had they been collected once it was ready. Secondly, the allegation of attending medical clinic was not supported by any reliable proof to justify extension. Thirdly, the record of appearance of the appellant was poor even before the dismissal of the appeal. And fourthly, there was no sufficient reasons disclosed to warrant extension of time.

Reliance was made on a number of authorities including, **Mwanza SACCOS Ltd vs Dorotea Robert**, Misc. Application No. 139 of 2018 (unreported); **Lyamuya Construction Co. Ltd vs Board of Trustees of the Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

The above authorities provided for conditions to be considered for extension of time. These are accounting for the period of delay, the delay should not be inordinate, showing of diligence by the applicant, and illegality of the decision. Indeed, the authorities reflect the settled position of the law on conditions in which extension of time may be granted.

In line with the above conditions, the court was shown that the period of delay from 28/2/2020 when the dismissal order was made to 22/10/2020 when the present application was filed was almost eight months. It was also submitted that the reasons in support of the application were contradictory. It was argued that the allegation of making close follow-ups did not correspond with the allegation that they were making close follow ups on the appeal. In this respect, it was submitted that the applicant and her advocate were not diligent enough. As to the allegation of illegality, it was alleged that it was not raised in the affidavit

in support of the application and could not therefore be raised in the submission in chief by the applicant's counsel.

By way of rejoinder, the applicant's counsel informed the court that the respondent's submissions did not oppose the prayer for the re-admission of the appeal, but the prayer for the extension of time. The applicant's counsel was seemingly saying that the court should only consider whether the applicant has made a case for extension as the prayer for re-admission is not opposed. In this respect, it was submitted that the counting of the period of delay should start from 28/4/2020, which was the first day of delay after the expiry of 60 days within which the application for re-admission of the appeal should have been filed. It was also shown that the dismissal order on the record was signed on 19/8/2020 and could not have therefore be collected earlier.

As to the argument on the illegality, the court was told that the illegality was clearly alleged in paragraph 6 and 7 of the applicant's affidavit where it was averred that there was no summons issued to the applicant in relation to the appeal. The other points of illegality, it was submitted, could not be specifically averred in the affidavit in so far as they were pure points of law. In so far as they are points of law, the court is not barred from considering them.

With regard to the dispute of the applicant's attending clinic on account of being pregnant, the court was shown that the respondent did not dispute that the applicant was pregnant. There was also no evidence shown that the applicant never attended clinic as alleged. Thus, the court was invited not to consider the argument by the respondent, but take note of the fact that the applicant's pregnancy was in relation to the delay as earlier argued was not disputed at all.

I have paid due regard to the affidavit in support of the application and the respondent's counter affidavit along with the rival submissions made by the counsel for the parties. It is evident that there was no counter argument advanced to challenge re-admission of the dismissed appeal other than the issue as to whether there were sufficient reasons for granting extension of time for applying for re-admission of the appeal. In this respect, I agree with the argument by the counsel for the applicant that the court has thus to only labour on the issue of extension.

One of the reasons advanced in support of the application for extension was that the dismissed appeal was assigned to Senior Resident Magistrate with extended jurisdiction who presided over the matter at Kinondoni District Court without notification to the parties about the assignment and the change of the venue. As a result, the applicant could

not enter appearance as she was not aware that the case was before the said magistrate and was being conducted in such capacity at the said court. Indeed, the affidavit in support of the application is accompanied with proceedings of the matter as entertained by the said Senior Resident Magistrate in the Resident Magistrates' Court of Dar es salaam at Kivukoni/Kinondoni (extended jurisdiction).

It is clear in the said proceedings that the dismissal order by the said Senior Resident Magistrate was made on 28/2/2020 in the absence of the parties and/or their counsel. It is to be noted also that the parties and or their counsel never appeared on 19/11/2019 when the initial order was made, and on the subsequent dates when the matter was mentioned before the said Senior Resident Magistrate (Ext Jurisdiction) (i.e 25/11/2019, 10/12/2019, and 20/2/2020).

I have examined the proceedings further. While on 20/2/2020, it was ordered that the parties were to be notified, on 28/2/2020 when the appeal was dismissed there was no record considered showing that the parties were indeed notified pursuant to the previous order of the court. It is to be noted that the orders that were made prior to 20/2/2020 also directed the parties to be notified. But there was nothing on the record

of proceedings that such notification was made be it to the applicant or to the respondent.

Consistent with the averment and submission by the counsel for the applicant was the averment by the respondent in her counter affidavit that she had no knowledge of the appeal. This confirms that there was indeed no notification issued about the appeal and about the change of the venue and the fact that the appeal was assigned to Hon. Hamza, SRM (Extended Jurisdiction). It was not surprising that the applicant kept on following up the matter at High Court (Land Division) while she was undisputedly pregnant without knowing that the matter was assigned to a Senior Resident Magistrate (Ext Jurisd.) sitting in the Resident Magistrates' Court of Dar es Salaam at Kivukoni/Kinondoni.

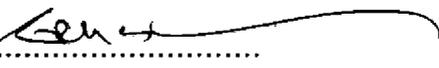
In my findings, I am content that the above reasons constitute sufficient reasons justifying granting of the extension and readmitting the appeal. I need not to labour on the other reasons advanced in support of the application for extension which were challenged by the respondent.

In the upshot, and for reasons discussed, the application is meritorious. It is hereby granted. Accordingly, an order for extension of time sought is granted as is an order for readmission of Misc. Land Appeal No. 220 of

2019 dismissed on 28/2/2020. In the circumstances, I will not make any order as to costs.

Dated at Dar es Salaam this 25th day of March 2021.




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B. S. Masoud
Judge