

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 180 OF 2023

PACIFIC DIAGNOSTIC LTD APPLICANT

VERSUS

CHIBANGO INVESTMENT CO. LTD 1ST RESPONDENT

YUSUPH ABDU LUGENDO 2ND RESPONDENT

IDDI HAMISI RAMADHANI 3RD RESPONDENT

RULING

Date of last Order: 17.05.2023

Date of Judgment: 18.05.2023

A.Z. MGEYEKWA, J.

I am called upon in this matter to decide whether this court should exercise its discretion under section 14 (1) of the Law of Limitation Act Cap. 89 [R.E 2019] to extend time within the applicant to lodge an application to set aside the dismissal order dated 6th October 2020. The application is supported by an affidavit deposed by Edward Gamaya Hoseah, the applicant's Advocate.

When the matter was called for hearing on 17th May 2023, the applicant had the legal service of Mr. Denis Mpwenku, and Ms. Carolyn Hoseah, learned counsels. The matter proceeded *ex parte* against the respondent. I am alive to the fact that the 2nd respondents was notified through publication dated 4th May 2023. However, on the date of hearing the Application, the respondents did not show appearance. Having regard to the entire circumstances of this case, I am of the considered view that the 2nd respondent was duly being served therefore, I grant the applicant's counsel prayer to proceed *ex parte* against them.

Mr. Denis urged this court to adopt the applicant's counsel affidavit to form part of his submission. Mr. Denis submitted that this Court dismissed Land Case No. 64 of 2019 and Joseph Kipeche, Advocate was appearing for the applicant. He stated that the matter was scheduled for the 1st Pre-Trial Conference on 17th August 2020 Mr. Kipeche however failed to appear in court. The learned counsel for the applicant continued to submit that on 27th February 2020, the learned counsel did not appear and had not informed or notified the Court, firm, or the clients that he was unwilling to proceed with the case and, hence he absconded and abandoned the matter without any writing at the detriment of the applicant.

Mr. Denis went on to submit that the firm took the initiative to conduct a perusal on 25th November 2022 it came to light that Mr. Joseph Kipeche, counsel was absent from 27th February 2020 leading the case to be dismissed at the detriment of the firm and client. To buttress his contention he referred this Court to annexure PDL2. He contended that the applicant should not suffer from the negligence of his counsel. Fortifying his submission he cited the case of **Felix Tumbo Kisima v TTCL and another**, CAT at DSM Civil Application No. 1997 (unreported), the Court of Appeal of Tanzania held that depending on circumstances when an extension of time is granted even where there is negligence of the applicant's advocate.

In conclusion, the learned counsel for the applicant urged this Court to grant the applicant's application to file an application to set aside the *ex parte* Order.

Having carefully considered the submission made by the learned counsel for the applicant in his oral submission and after I have examined the affidavit, the issue for our determination is *whether the application is meritorious*.

The position of the law is settled and clear that an application for an extension of time is entirely the discretion of the Court. But, that discretion

is judicial and so it must be exercised according to the rules of reason and justice as it was observed in the case of **Mbogo and Another v Shah** [1968] EALR 93.

Additionally, the Court will exercise its discretion in favour of an applicant only upon showing good cause for the delay. The term “good cause” having not been defined by the Rules, cannot be laid by any hard and fast rules but is dependent upon the facts obtained in each particular case. This stance has been taken by the Court of Appeal in a number of its decision, in the cases of **Regional Manager, TANROADS Kagera v Ruaha Concrete Company Ltd**, Civil Application No.96 of 2007, **Tanga Cement Company Ltd v Jumanne D. Massanga and another**, Civil Application No. 6 of 2001, **Vodacom Foundation v Commissioner General (TRA)**, Civil Application No. 107/20 of 2017 (all unreported). To mention a few.

I have keenly followed the application and the grounds deposed in the supporting applicant's affidavit, Mr. Denis has shown the path navigated by the applicant and the backing he has encountered in trying to reverse the Order issued by Hon. Opiyo, J in Land Case No. 64 of 2019. The applicant's Advocate in his submission and paragraphs 5 and 6 of the applicant's affidavit submitted in length that their fellow counsel one Kipeche was negligent for failure to attend their client's case without

informing them hence this Court dismissed the suit. To prove his assertion he referred this Court to order of this Court, annexure PDL1. It is my considered view that the applicant's counsel submission is from the bar because there is no any supporting affidavit sworn by the applicant, nor Joseph Kipeche who attended the matter before this Court on 6th October 2020. There is no proof that Joseph Kipeche was working with Hoseah and Company and whether the so called counsel was assigned to represent the applicant in the Land Case No.64 of 2019.

Moreover, the applicant's counsel has failed to account for the days of delay starting from 25th November, 2022, when they alleged they perused the Court file to the date when they lodged the instant application on 3rd April, 2023. Counting the days of delay, there is a delay of approximately 15 months and the said delay is not accounted for.

Assuming that the applicant's counsels were not aware that their fellow counsel absconded and abandoned their client's case. Then, I expected the applicant's counsel after becoming aware that the case was dismissed as stated in his submission and affidavit specifically paragraph 7, they could have lodged the instant application promptly. However, that was not the case. Counting from 25th November, 2022, when they alleged they perused the Court file to the date when they lodged the instant application

on 3rd April, 2023 is a lapse of 5 months, and the applicants have failed to account for the whole days of delay.

It is a trite law that if a delay is involved then the applicant is required to show good cause which includes the reasons for the delay and to account for each day of delay. The same was held in the case of **FINCA (T) Ltd and Another v Boniface Mwalukisa**, Civil Application No. 589/12 of 2018 Court of Appeal of Tanzania at Iringa, (unreported) which was delivered in May 2019 and the case of **Bushiri Hassan v Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported) which had held that:-

“Dismissal of an application is the consequence befalling an applicant seeking an extension of time who fails to account for every day of delay.”

Again, the Court of Appeal of Tanzania has set guidelines to be considered before granting an application for an extension as enumerated in the case of **Ngao Godwin Lusero v Julius Mwarabu**, Civil Application No. 10 of 2015, CAT at Dar es Salaam. The said guidelines are:-

- 1) That the applicant has not adduced any sufficient ground that warrant's grant for the sought extension of time*
- 2) The delay is ordinate*
- 3) The applicant has failed to account for the delay of each day.*

4) That there is no illegality at all in the Judgment of the District Land and Housing Tribunal

In the case at hand the applicant's delay is inordinate, he failed to adduce sufficient grounds to warrant this Court to grant for the sought extension of time, he has failed to account for the days of delay and there is no any illegality raised by the counsel for the applicant.

Applying the above authorities in the matter at hand, it is obvious that the appellant failed to account for each day of delay.

For the sake of clarity, I distinguish the case of **Felix Tumbo** (supra) from the case at hand. In the case at hand, the applicant did not show any diligence in pursuing his case, therefore, he cannot blame his Advocate. Worse enough after noting that the matter was dismissed, the counsel nor his client filed the instant Application after a lapse of 5 months without accounting for the days of delay. Therefore, the holding of the Court of Appeal of Tanzania with respect to the negligence of an Advocate cannot apply in the case at hand.

In sum, I hold that the applicant has not passed the legal threshold set for an extension of time. Accordingly, the application is hereby dismissed. No order as to costs.

Order accordingly.

Dated at Dar es Salaam this date 18th May 2023.

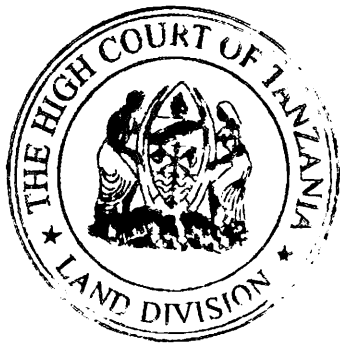



A.Z.MGEYEKWA

JUDGE

18.05.2023

Ruling delivered on 18th May 2023 in the presence of Mr. Denis Mpwenku,
learned counsel for the applicant.




A.Z.MGEYEKWA

JUDGE

18.05.2023