

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

AT DAR-ES-SALAAM

MISC. APPLICATION NO. 342 OF 2023

MOHAMED KHAN APPLICANT

VERSUS

ANDREW WANZAGI ESMAIL

(Administrator of the estate of Mary Andrew Mmbuji)RESPONDENT

RULING

26th September & 12th December, 2023

MHINA, J.

By a chamber summons taken under Order IX Rule 3 and 9 and ***Section 95 of the Civil Procedure Code, Cap 33 R: E 2019 ("the CPC"), and section 14(1) of The Law of Limitation Act, Cap 89 [R.E 2019]***. The applicant, Mohamed Khan, instituted this application against the respondent. The applicant, *inter-alia*, is seeking the following orders: -

(a) That Honourable court may be pleased to grant an order for an extension of time to file an application to set aside the dismissal Order made by Hon A. Z. Mgeyekwa on the 1st of April 2022 and

allow the Applicant's Miscellaneous Land Application No. 362 of 2021 to proceed.

(b) Costs of this application be provided for by the court

(c) Any other relief this honourable court may deem it fit just to grant.

The grounds for the application were expounded in the affidavit, which Mohamed Khan, the applicant, swore in support of the application. Responding to the application, the respondents countered it through counter affidavit sworn by both respondents.

By the consent of this court, the application was argued by way of written submissions, whereas the applicant filed his submission in chief through Mr Hassan Tarimba Abasi, a learned advocate, while the Defendant filled his submission through David A. Ntonge, also a learned Advocate.

To support his submission, Mr. Tarimba stated that on the material date, i.e., 1 April 2022, the Advocate for the Applicant did not attend the hearing but, instead, asked Advocate Mushumbusi to hold his brief who entered an appearance on the material date but did not have the mandate to proceed with the suit as he was not instructed to do so.

The Applicant filed an application to set aside an ex parte order of 1 April 2022, registered as Miscellaneous Land Application No. 218 of 2022. Where upon filling the Application, the Applicant tried to reach his Advocate (Martin Rwehumbiza), who was only available through phone conversation but never made an effort to meet with the Applicant nor to follow up on the Miscellaneous Land /Application No. 218 of 2022. As a result, the said application was struck out.

He further submitted that it was hard for the Applicant, due to his health condition and old age, to get hold of the advocate (Martin Rwehimbiza), and being a layman, he was not aware of what remedy was available to him.

Mr. Tarimba submitted that since the day the said application was Struck out, The Applicant put effort into reaching his Advocate to find a remedy available for him without any success and upon failure to do so, he reached him and tried and saw a way out in which the current application was filed. Taking into consideration the health condition of the applicant for the entire period

In response, the respondent submitted that the applicant's application was filed without attaching the order which he intends this honourable court

to set aside. It is a prerequisite requirement that the applicant must attach the ruling/order which he wants the court to consider. The court cannot consider and grant the prayer without seeing the disputed ruling/order.

He further submitted that granting an extension of time is the court's discretion. In exercising its discretion in granting or refusing the application, the court has to address itself that the applicant has fulfilled the following grounds: -

- a) the applicant must account for all the period of delay.*
- b) The delay should not be inordinate.*
- c) The applicant must show diligence and not apathy negligence or sloppiness in the prosecution of the action that he intends to take.*
- d) If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance.*

The applicant has failed to meet any of those four grounds laid down radically by the courts of this land to justify this court to exercise its discretion judiciously as required by the law.

He further submitted that the applicant must account for the whole period of delay without leaving even a single day.

However, in this application, the applicant failed to account for each day of his delay from the 1st day of April 2022 until the 8th of May 2023 when he filed this application. He referred this court to the case of ***Mathias Charles Kaselele Vs the Registered Trustees of the Archdiocese of Mwanza Roman Catholic***, Civil Application No. 6/08/ of 2016 (unreported), ***MZA RTC Trading Company Limited Vs Export Trading Company Limited***, Civil Application No. 12 of 2015, (Unreported) and also ***Dawi Akko Vs Petro Ingi & Others***, Misc Civil Application No. 31 of 2018 (Unreported) (page 5), where it was held that;

"In my opinion therefore, the period of time between 31.7.2017 when the applicant discovered that his appeal had been dismissed and 18.04.2018 when the instant application was filed, has not been accounted for. There is therefore not sufficient materials on the basis of which I can grant the application. For those reason therefore, the application is bound to fail and it is accordingly dismissed with costs."

He further submitted that, as portrayed by the above-cited case, the account for delay is essential for the court to determine the issue and exercise its discretion in granting or refusing the application. From 1st April 2022, when the application was dismissed by this court, up to 8th May 2023, when this disputed application was filed, more than a year had elapsed.

This is an inordinate delay, and the applicant has never given any explanation for such an inordinate delay in his affidavit. His affidavit is plain on this issue, and the court cannot speculate.

He further submitted that the applicant had just laid an excuse for his delay and that he could not find his advocate anymore. His failure to find his advocate was not true at all. Even if it is true, the fact we disputed still could be cured by the way he has done by finding another advocate within the prescribed time for taking steps and not otherwise.

In his further urging, Mr Ntonge alluded that even if it was true that the applicant was sick, the fact which they dispute still, his sickness was not continuous from 1st April 2022, when the application was struck out, up to 8th May 2023, when he filed this disputed application.

Having considered the chamber summons and its supporting affidavit, the affidavit in reply, and the submission made by the learned counsel for the parties, I find out that the grounds for delay made by the applicant based on two grounds;

One, is sickness

Two, difficulties in finding his advocate

Flowing from above, there is only one issue calling for this court determination; that is, whether the applicant has shown sufficient cause to trigger this court to exercise its discretion to grant an extension of time to file an application to set aside dismissal order made by on the 1st of April 2022 and allow the Applicant's Miscellaneous Land Application No. 362 of 2021 to proceed.

The entry point is the decision of The Court of Appeal of Tanzania in ***Sebastian Ndaula vs. Grace Rwamafa*** (Legal Personal Representative of Joshua Rwamafa), Civil Application No. 4 of 2014 (Unreported), where the Court put it succinctly that in an application for extension of time, good cause to extend must be shown.

As to what may constitute a good case, again, the Court of Appeal in ***Hamis Babu Ally vs. The Judicial Officers Ethics Committee and three others***, Civil Application No 130/01 of 2020 (Tanzlii), pointed out the following factors: -

- i. To account for all period of delay*
- ii. The delay should not be inordinate.*
- iii. The applicant must show diligence and not apathy, negligence, or sloppiness in the prosecution of the action that he intends to take and*

- iv. *The existence of a point of law of sufficient importance, such as the illegality of the decision sought to be appealed against.*

Therefore, this court has to consider and test if the applicant passes the test by showing a good or sufficient cause.

To start with the first ground for this application, the issue of sickness raised by the applicant as a factor to be considered a good cause for the extension of time.

On this, my determination will go through ***Juto Ally v. Lucas Komba & Another***, Civil Application No. 484/17 of 2017 (Unreported), where the Court of Appeal held that: -

"Where the applicant's cause of delay is due to illness, must show that illness contributed to the delay as opposed to a general statement."

Having gone through paragraphs 5, 11, and 12 of the applicant's affidavit and the submission, the applicant urged that he was sick. However, he did not attach medical chit to his affidavit to support that allegation. Instead, he attached a medical chit in the submission.

It is a trite law that parties are bound by their own pleadings. At any standard, written submission and its annexures are not part of pleadings.

Further, the same are not intended to submit new facts or evidence but only to elaborate on the facts and/or evidence already indicated in the pleadings.

Even if we take into consideration the medical report (Patient Discharge Report) issued by Regency Medical Centre Ltd attached to the written submissions, it is still of "***no help***". This is because it indicates that the patient was admitted on 23 December 2021 and discharged on 25 December 2021; therefore, he was admitted for only two days.

Therefore, the ground of illness lacks merits.

Coming to the second ground, which, in my view, should not detain me long. In his submission, Mr. Abasi submitted that the applicant only reached his former advocate, Mr. Martin Rwehumbiza, by phone conversations. Therefore, in my opinion, there were no difficulties for the applicant in communicating with his advocate. In this modern era of technological advancement, one cannot term phone conversations as difficult communication.

Therefore, the second ground also lacks merits.

Flowing from above, I have the following,

One, it is trite that granting or refusing an extension of time is a matter of the court 's discretion, and the leading reason is sufficient reason (s). In ***Benect Mumello vs. Bank of Tanzania***, Civil Appeal No. 12 of 2002, the Court of Appeal of Tanzanian held that:

"It is trite law that an application for extension of time is entirely in the discretion of the court to grant or refuse it, and that the extension of time may only be granted where it has been sufficiently established that the delay was with sufficient cause."

Two, it is trite that delay even of a single day should be accounted for. The Court of Appeal in ***Hassan Bushiri v. Latifa Lukio Mashayo***, Civil Application No. 3 of 2007 (unreported), insisted that an applicant should account for each day of delay. Therefore, in that case, it was held that;

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


In this matter, it is quite clear that the applicant did not give any sufficient reason for his delay from 1 April 2022, the day application No. 362 of 2021 was dismissed, until 09 May 2023, when this application was filed.

Further, he failed to account for each day of delay from 1 April 2022, when application No. 362 of 2021 was dismissed, until 09 May 2023, when this application was filed.

From the above discussion, the application has no merits as the applicant failed to advance good and sufficient cause to warrant this court to exercise its discretion in granting an extension of time. Consequently, the application is dismissed with costs.

It is so ordered.




K. D. MHINA
JUDGE
12/12/2023