IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

MISC. CIVIL APPLICATION NO. 96 OF 20019

DINA ANYANGO ..... APPLICANT

VERSUS

BABUU GARENDE SAMSON ..... RESPONDENT

RULING

27th April, & 19th May, 2020

ISMAIL, J.

In this application, the Court is moved to exercise its discretion and grant an extension of time which will give the applicant a lifeline that will resurrect her journey to this Court by way of appeal. Two of her previous attempts fell through on account of a couple of fatal irregularities apparent on the pleadings that found the actions. Similar to her last attempt, the instant application is for enlargement of time which will enable the applicant to file an appeal out of time, against the decision of District Court of Nyamagana at Mwanza, in respect of DC Civil Case No. 11 of 2015, in which she emerged a loser.

The application has been preferred under the provisions of Section 14 (1) of the Law of Limitation Act, Cap. 89 R.E. 2002 and section 95 of the Civil Procedure Code, Cap. 33 R.E. 2002. Supporting the application is the affidavit of Dina Anyango, the applicant, setting out grounds on which the prayer for extension of time is based.

In her sworn deposition, the applicant took time to give an account of what transpired right from the inception of the trial proceedings up until 19th August, 2019, when she was supplied with a rectified copy of the impugned judgment. This allegedly followed an arduous process that rid the judgment of all errors which were the reason for striking out of the previous application for extension of time (Misc. Civil Application No. 150 of 2018), struck out on 30th April, 2019. Averring that the prospective appeal stands an overwhelming chance of success, the applicant submitted that the previous appeal, preferred as HC Civil Case No. 51 of 2016 was filed timeously, but it was nipped in the bud on account of the applicant's failure to attach a copy of the decree against which the said appeal arose.

The application has encountered a formidable opposition from the respondent. Vide a counter-affidavit sworn by Erick Mwemezi Kahangwa, the respondent imputed loathness on the part of the applicant in following up copies of the impugned judgment and decree, averring that copies

thereof were ready for collection as early as 16th June, 2016, and that the respondent's counsel collected them on 29th June, 2016. The respondent denied existence of any confusion on the case numbers or any other variance. He held the view that if such variance existed, the applicant ought to have applied for a review or move the trial court to rectify clerical errors that she contends existed in the decision. The respondent held the view that negligence of the applicant's erstwhile counsel cannot and should not be used as the basis for the extension of time. He denied that the appeal has any chances of success.

The parties' contending arguments were, pursuant to the Court's order, presented by way of written submissions in conformity with the revised scheduling order drawn on 27th April, 2020. While the applicant enjoyed the able services of Mr. Mathias Mashauri, learned advocate, the respondent enlisted the fabulous services of Mr. Eric Kahangwa, learned counsel.

Getting us under way was Mr. Mashauri for the applicant. Reiterating what was deposed in the supporting affidavit, the learned counsel asserted that the first appeal was withdrawn for lack of accompanying decree, while hearing of the application for extension of time filed subsequent thereto faced a truncation, owing to flaws which were exposed through a

preliminary objection raised by the respondent. Rectification of the flaws, the applicant contends, required moving the trial court to act and the latter's indulgence was enlisted through a couple of letters. The learned counsel contended that these efforts amounted to acts done in pursuit of the applicant's rights and they constitute a sufficient cause. To fortify his contention, Mr. Mashauri cited the case of ***Daud Haga v. Jenitha Abdon Machafu***, CAT-Civil Reference No. 19 of 2006 (Tabora-unreported). In the second limb of his arguments, Mr. Mashauri imputed illegality in the trial proceedings, contending that a mix up in case numbers and parties' positions, which are substantially to blame for the delayed action by the applicant, constituted an illegality which is a ground for enlargement of time if a party, as it is the case with the applicant, seeks to appeal against the trial court's decision. To support his contention, Mr. Mashauri referred this Court to the case of ***Paul Juma v. Diesel & Auto-electric Services Ltd & 2 Others***, CAT-Civil Application No. 54 of 2007 (DSM-unreported). The learned counsel prayed that the application be granted.

Mr. Kahangwa was resolute in defence of the trial court's decision and subsequent setbacks that the applicant suffered in this Court. Revisiting the journey taken by the applicant and the silly mistakes she committed, the learned counsel attributed the whole of that to negligence

committed by the previous counsel. He held that negligent act or lack of diligence by an advocate, manifested in the failure to attach a decree to the appeal and inability to locate the discrepancy in case numbers, cannot constitute a sufficient cause for extension of time. On this, he referred me to the Court of Appeal's decision in ***Yusuf Same & Another v. Hadija Yusuf***, CAT-Civil Appeal No. 1 of 2012 (DSM-unreported).

Reacting in respect of the discrepancy on numbers, Mr. Kahangwa labeled this as a broad daylight lie, because the judgment with proper numbers and parties was certified for the parties' collection on 16th June, 2016, and that the respondent collected his copy on 29th June, 2016. The learned counsel contended that such anomalies, if indeed they existed, they would better be dealt with by moving the trial court to have them remedied. In this case, the respondent's counsel was adamant that none of the cited errors existed. The learned counsel threw his last jab by contending that even after the striking out the application on 30th April, 2019, the applicant hibernated for several months before he resurfaced on 3rd September, 2019, with the instant application, without accounting for the four-month of inaction. The learned counsel read negligence on the part of the applicant. He prayed that the application be dismissed with costs for failure to demonstrate sufficient cause.

The applicant's rejoinder did not introduce anything new. The learned counsel simply reiterated what was stated in the submission in chief and prayed that the application be granted as prayed.

From these rival submissions, the Court is called upon to pronounce itself on whether a case has been made out to warrant exercise of its discretion and grant of an extension of time. I preface my analysis by addressing one or two nagging issues that have surfaced in the course of the parties' submissions. The first relates to the applicant's dilatoriness in taking action after the striking out of the Misc. Civil Application No. 150 of 2018. The uncontroverted fact is that the applicant took four months to institute the instant application, and the respondent's contention is that this delay has not been explained out. The applicant's argument is that she was following up the matter by engaging the trial court.

If the basis of contesting the application is the delay in filing the instant application, after the previous application had been struck out, then such contention is utterly flawed. The trite position is that, unlike all other applications for which no specific time has been provided but they ought to be filed within the sixty-day umbrella, applications for extension of time do not have such time prescription. This position was accentuated in

Tanzania Rent-a-Car Ltd v. Peter Kihumu, CAT-Civil Application No. 226/01 of 2017 (DSM-unreported) in which it was held:

> *"For reasons I have demonstrated above, I am of the view that the sixty days rule should apply in filing all other applications for which no time limit is prescribed except in applications for extension of time."*

The foregoing reasoning was inspired by superior Bench's own decision in ***Mustafa Mohamed Raze v. Mehboob Hassanali Versi***, CAT-Civil Application No. 1168 of 2014 (unreported). It was observed as follows:

> *".... it is my view that an application for extension of time may be brought at any time even after the expiration of the prescribed time."*

See also ***Arunaben Chaggan Mistry v. Naushad Mohamed & 3 Others***, CAT-Civil Application No. 6 of 2016 (unreported).

In view of the foregoing, it is my considered view that the contention that the applicant was late in preferring the instant application is, with respect, fallacious and untenable. The requirement of giving sufficient notice should be on the filing of the intended appeal and not the instant application.

Having settled this nascent issue, I now revert to the critical substance of the parties' contention. This relates to sufficiency or otherwise of the reason for the applicant's delay in filing an appeal to challenge the decision of the District Court of Nyamagana. As I tackle that, let it be clear that Civil Case No. 51 of 2016 which was filed in this Court on 15th July, 2016, and withdrawn on 5th September, 2018, was filed within the time prescription. It is also incontrovertible that after the withdrawal, any subsequent effort by the applicant had to have the blessing of this Court, through an application for enlargement of time, since the period of 90 days set out for appeals to the Court had elapsed. It is why she preferred the first application which, as submitted by both counsel, was pregnant with irregularities that rendered it untenable. The latest effort follows in the same footsteps.

It is worthy of note, that grant of an application for extension of time is in the discretion of the Court. Such discretion is exercised upon the applicant satisfying the Court by presenting a credible case. It also requires that the applicant should act in a manner that upholds equity. To fortify this position, the Supreme Court of Kenya came up with a persuasive position in ***Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others***, Sup. Ct. Application 16 of 2014. It was elucidated as follows:

"Extension of time being a creature of equity, one can only enjoy it if [one] acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that [one] was not at fault so as to let time lapse. Extension of time is not a right of a litigant against a Court, but a discretionary power of courts which litigants ***have to lay a basis [for], where they seek [grant of it].***"

More incisively, was the Court of Appeal of Tanzania that came up with key conditions that should guide a court, when considering to grant or not to grant an application for stay. This was in in the landmark case of ***Lyamuya Construction Company Limited v. Board of Trustees of YWCA***, CAT-Civil Application No. 2 of 2010 (unreported). Such conditions are:

"(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 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; such as illegality of the decision sought to be challenged.*"

See: ***Aviation & Allied Workers Union of Kenya v. Kenya Airways Ltd, Minister for Transport, Minister for Labour & Human Resource Development, Attorney General***, Application No. 50 of 2014 (Supreme Court of Kenya).

One key consideration in all of these propounded principles is that the applicant of the enlargement of time should not have his right of appeal impeded or scuppered, unless circumstances of his delay are inexcusable and his or her opponent was prejudiced by it (see ***Isadru v. Aroma & Others***, Civil Appeal No. 0033 of 2014 [2018] UGHCLD 3. Thus, as both counsel concur and, as the cited authorities confirm, the condition precedent for grant of extension of time is demonstration of reasonable or sufficient cause from which the Court will gauge the applicant's action. This is a sifting and control mechanism that is intended to ensure that a party who is at fault does not benefit from his own inaction. This reasoning is in sync with the holding in ***KIG Bar Grocery & Restaurant Ltd v. Gabaraki & Another*** (1972) E.A. 503 wherein it was held that ***"... no court will aid a man to drive from his own wrong."***

It is common knowledge that the term **sufficient cause** has no definite definition. However, Courts have come up with decisions that guide on what may be considered as sufficient cause. In ***The Registered Trustees of the Archdiocese of Dar es Salaam***, the Court of Appeal held thus:

> *"It is difficult to attempt to define the meaning of the words "sufficient cause". It is generally accepted however, that the words*

should receive liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bonafides, is imputable to the appellant."

The foregoing decision borrowed a leaf from the East African Court of Appeal's holding in ***Dephane Parry v. Murray Alexander Carson*** [1963] EA 546 in which the defunct Court held thus:

"Though the court should no doubt give a liberal interpretation to the words "sufficient cause", its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant."

See also: ***Henry Leonard Maeda and Another v. Ms. John Anael Mongi*** CAT-Civil Application No. 31/2013; ***Mang'ehe t/a Bukine Traders v. Bajuta*** (Civil Application No. 8 of 2016 [2016] TZCA 8; ***Gibson Petro v. Veneranda Bachuya***, HC. Civil Revision No. 10 of 2018 (unreported); and ***Idrisa Suleman v. Kresensia Athanas***, HC. Misc. Land Application No. 39 of 2017 (unreported).

Deducing from the parties' sworn depositions and counsel's submissions, it is clear that the contention revolves around two grounds that the applicant considers as sufficient cause for the delay in lodging the appeal. These are; a claim of illegality; and pursuit of the appeal and

application both of which were taken off the Court record on grounds of irregularity.

With respect to illegality, the law is quite clear. Illegality constitutes a ground for granting extension of time and the cases cited by the applicant i.e. ***Paul Juma*** (supra); and ***Lyamuya Construction Company Limited*** (supra) are a testimony. Whereas illegality is commonly held to be the basis for extension of time, the settled position is that the illegalities that shroud the impugned decision should be of a disturbing nature which, if not dealt with, have the potential of occasioning a miscarriage of justice to one or both of the parties to the proceedings. It, therefore, requires that the party's application should demonstrate peculiar circumstances under which such extension should be granted (see: ***John Tiiito Kisoka v. Aloyce Abdul Minja***, Civil Application No. 3 of 2008). In ***Lyamuya's case*** (supra), the Court of Appeal held, quite categorically, that degree of illegality must be of sufficient importance. It held:

> *"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in Valambia's case, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one.* ***The Court there emphasized that such point of law must be that of sufficient importance and, I would add that it***

must also be apparent on the face of record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process."

Riding on the wisdom sprinkled from the cited decisions, the next point for determination is whether the application from which this appeal arises reveals any illegality and, if so, whether such illegality was of grave importance. My hastened reaction to this question is in the negative. An error in the numbering of the case and a wrong arrangement of the parties can never be said to be an illegality, let alone the fact that it is not of any sufficient importance. It is merely a clerical error whose rectification can be effected effortlessly and without any formal process as was done by the applicant. It doesn't turn the decision or any part thereof illegal to constitute a ground of appeal which would be taken to an appellate court. Thus, even if we assume that such errors occurred and had a hand in delaying the filing of the appeal, such errors would never, by any stretch of imagination, be in the realm of what is considered to be an illegality. They would still be what they are *i.e.* errors. In my unflustered view, circumstances of this case do not call for application of illegality as a ground for extension of time.

This leaves me to determine the other limb of the applicant's contention. This is in respect of delays caused by the applicant's pursuit of the appeal and the application, both of which were adjudged anomalous. The view taken by the respondent's counsel is that preference of such matters exhibited gross negligence committed by the applicant's counsel and that such negligence should not be used to benefit the applicant.

The settled position of the law is that delays that arise as a result of pursuit, by the applicant, of a matter which turns out to be defective or untenable are excusable. They are acceptable delays, and are referred, in legal parlance, as technical delays, and they constitute a sufficient cause for enlargement of time within which to institute an appeal. This principle was accentuated in ***Fortunatus Masha v. William Shija*** [1997] TLR 154, and was fortified in subsequent decisions of the Court of Appeal, including ***Amani Girls Home v. Isack Charles Kanela***, CAT-Civil Application No. 325/08 of 2019 (Mwanza – unreported), in which diligent pursuit of the appeal through unsuccessful applications was deemed to be sufficient to warrant extension of time. Circumstances of the instant appeal mirror what transpired in the ***Amani Girls Home*** (supra). Errors committed by the applicant through her counsel do not have the effect of slamming a door on her and deny her yet another opportunity to challenge

the decision of the trial court. I draw a conviction and hold that the applicant has not exhibited any sense of loathness in dealing with this matter and that the delay was justified.

In the upshot, I hold that the applicant has passed the legal threshold set for extension of time. Accordingly, the application is granted. Costs to be in the cause.

Order accordingly.

DATED at **MWANZA** this 19th day of May, 2020.

M.K. ISMAIL

JUDGE

Date: 19/05/2020

Coram: Hon. M. K. Ismail, J

Applicant: Present online – Mob. No. 0755 456122

Respondent: Present online – Mob. No. 0654 966852

B/C: B. France.

Court:

In view of the COVID 19 pandemic, parties are present online; the application is heard by way of Audio Teleconference.

Sgd: M. K. Ismail
JUDGE
19.05.2020

Court:

Ruling delivered in chamber, in the virtual attendance of Messrs Mathias Mashauri, learned Counsel for the applicant and Erick Kahangwa, learned advocate for the respondent, and in the presence of Ms. Beatrice B/C, this 19th day of May, 2020

M. K. Ismail
JUDGE

At Mwanza
19th May, 2020