IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS LAND CASE APPLICATION NO. 442 of 2018

(Originating from Land Appeal No. 103 of 2016)

EDGA MSOLA @ EDGAR JAPHET.....APPLICANT

VERSUS

DR. EDWARD WILSON NGWALE.....1ST RESPONDENT

PHILIP JAFET MANGULA.....2ND RESPONDENT

RULING

S.M MAGHIMBI-J

The applicant has moved this court under the provisions of Order XXXIX Rule 19 of the Civil Procedure code (cap 33 R.E 2002) for the following order.

1. That, the Honourable court be pleased to re-admit the applicant's Appeal No. 103 of 2016 which was dismissed for want of prosecution on 05th day July 2018 before Hon. Makuru J on the ground that the submission in support of grounds of appeal was filed out of time and contrary to court's order dated 17th April 2018.
2. That the Honourable Court be pleased to make such any other orders as it may deem fit and just to grant.

The Application is supported by an Affidavit sworn by the Applicant himself on the 17th day of July, 2018. When the application came for hearing, the Applicant was represented by learned Advocate Mutakyamirwa Philemon

while the Respondent was represented Mr. Melkior Saul Sanga, Advocate. The Application was disposed by way of written submissions.

In his submissions, Mr. Mutakyamirwa started by pointing out an objection from the respondent's counter affidavit. He submitted that the counter affidavit contains laws, prayers and arguments and thus it is not the counter affidavit in the eyes of law and the same should be expunged from the Court's records. He cited the case of **John David Kashekya v The Consolidated Holdings Corporation Limited, Civil Application No. 2 of 2012** (unreported) where the court held:

> *"Where an affidavit contains extraneous matters other than facts, such as arguments, prayers or conclusions; such affidavit offends the law and renders such affidavit defective"*

He submitted further that when it s ruled out that the respondent's affidavit is defective, that means the applicant's application goes un-opposed as it is as good as failure to file a counter affidavit.

In reply to Mr. Mutakyamirwa's objection, Mr. Sanga submitted that the cited Order XIX Rule 3(1) of the Civil Procedure Code, cap 33 R.E 2002 ("The CPC") restricts one to plead both the law and facts in the paragraph of an affidavit as affidavits are confined on matters of facts only. He argued that his counter affidavit has demarcation between point of law and facts and that there is no any paragraph the applicant pointed to have mixed law and facts, hence distinguishing the situation in this case and the cited case of **John David Kashekya** (Supra).

On my part, I am in agreement with Mr. Mutakyamirwa's objection that the respondent's counter affidavit contains laws, prayers and arguments contrary to the provision of Order XIX Rule 3(1) of the CPC. Even in his submissions, Mr. Sanga did not deny that fact, he only pointed out that the counter affidavit had two parts that is the matter deponed and the Preliminary objection. With due respect to Mr. Sanga, this is one and the same thing. The provisions of Order XIX Rule 3(1) are clear that:

> *"Affidavits **shall be confined to such facts** as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted:*
>
> *Provided that the grounds thereof are stated."*

Having gone through the respondents' counter affidavit, the same is defective as it contain laws in the form of point of objections and prayers thereon. This is contrary to the cited Order XIX Rule 3(1) of CPC. The remedy to such an incurably defective affidavit is to have it expunged from the records which I proceed to so do. The next question is the fate of the respondents' submissions in opposing the application. Mr. Mutakyamirwa's argument is that if the counteraffidavit is rendered defective, then the application goes unopposed. With due respect to the learned Counsel, this is not the position of the law. Unlike a failure to file a Written Statement of Defence which disqualifies the defendant from participating in the hearing of the matter, non-filing of the counteraffidavit does not necessarily render the application unopposed because submissions in support of the application is not evidence. They are just arguments to counter what the applicant has

submitted, the only predicament the respondent will face is that should there be any fact that was to be proved by affidavit, he will not be able to refer to his counter affidavit. That said, I will now proceed to determine the merits of the application.

On the substantive application as submitted by Mr. Mutakyamirwa, the applicant's main reason for the delay to file the submissions is the negligence of his former Advocate. That his former counsel was attending in court on time and throughout the prosecution of the said appeal they have never been accused of missing the court session save for the late filling of the submission in chief which led to the dismissal of the applicant's appeal. He argued that the applicant cannot be punished for the misdeeds committed by his counsel.

To cement his submissions, Mr. Mutakyamirwa cited different cases including the case of **CRDB Bank Limited V. NBC & Others 2002 TLR 429** where the court held that negligence of the advocate should not be rendered to refuse to exercise its discretion simply by negligence of the advocate. He argued that filing of the submissions was the time frame set by the court itself and it is not in dispute that on the particular date when the submissions were ordered to be filed, the applicant's advocate was not around. In conclusion, he submitted that justice demands that negligence of a counsel should not debar a party from pursuing his rights praying that the court invoke its discretionary powers to readmit the applicant's appeal which was dismissed for want of prosecution on the 05th day of July, 2018 so that the appeal can be heard on merits.

In reply Mr. Sanga submitted that the applicant admits that his former lawyer was negligent in pursuing the appeal. The case cited by the applicant is distinguished since the position has changed and it is settled principle that the negligence by counsel is not a good ground for seeking an order or re-admitting the appeal. On the cited the case of **CRDB BANK Limited VS NBC Holding Corporation & others,** (Supra) he argued that the same is distinguishable in our case for reasons he elaborated as follows. That first, in the cited case, the counsel after learning that he was out of time from filing his submissions, he opted and prayed for extension of time so as to file the documents and not filling the submissions out of time as in our case. Secondly, with development of our laws and decisions, the 2000 position has changed and it is a settled principle that, negligence by a counsel is not a good ground for seeking an order either extension of time or setting aside an order or re-admitting the appeal as in the present case. He cited the case of ***Senoil Limited Vs. Mwanza City council & Dolphin Tours and Safaris Limited, Civil Application No. 4 of 2016*** *(unreported)* whereby at page 8-9 of the ruling while citing the case of ***Paul Martin Vs. Bertha Anderson, Civil Application No. 7 of 2005*** had this to say:

> *"Negligence, as no doubt Messers Mkongwa and Stolla, learned counsel for both parties are aware, does not constitute sufficient reason to warrant the courts exercise of its discretion to grant extension for time"*

Further that at page 9 the court went on to say:

"If at all there was any mistake then the blame was upon the applicants counsel and such mistakes do not constitute sufficient reason for extending time."

He argued that from the above cited case of the Court of Appeal, it is a settled principle that negligence committed by a counsel as pointed out on para 10 does not constitute a sufficient ground warranting the court to exercise its discretion of either extending time or issuing any other order.

Mr. Sanga submitted further that looking at paragraph 5 of the affidavit by the applicant it clearly shows that, after instructing the previous law firm, he was told that his appearance was not necessary as the matter was before the court of law was on matters of law. He argued that this paragraph is a clear indication that, the applicant was not diligent enough to follow up his case and the contention on diligence is an aforethought. He prayed that the application is dismissed with costs.

In rejoinder, Mr. Mutakyamirwa submitted that there is introduction of overriding objective of the Court in the Written Laws (Misc. Amendments) No. 3 Act, 2018 Act No. 8 that the Court have been so liberal not to punish the party for misdeed committed by his /her counsel in preparing the court's documents. He cited the case of **Johan Harald Abrahson Vs. Exim Bank (T) Limited & Others, Civil Application No 224/16 of 2018** (unreported) to support his argument which with respect, is distinguishable with our case at hand because in that case the applicant was seeking extension of time and the court recognised the efforts to pursue his right which is not our case at hand.

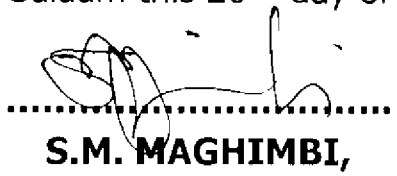
Having considered the submissions of parties on the substance of this application, on my part I am in agreement with argument advanced by Mr. Sanga while distinguishing the case **of CRDB Bank Limited Vs. NBC Bank Limited** (Supra) from the situation at hand; in the cited case, the counsel after learning that he was out of time from filing his submissions, he opted and prayed for extension of time so as to file the documents and not filling the submissions out of time as in our case. In the current case, the applicant took matters in his hands by extending time for himself suo moto and filed the submissions out of time, which amounted to non-appearace on the day of hearing, leading for the appeal to be dismissed for want of prosecution.

As for the reason of delay in filing the submissions, it is undisputed that the applicant had entrusted his case to an advocate whom at all times was representing him. I am in totally submit to the cited case of ***Senoii Limited*** (Supra) that negligence of the counsel is not sufficient reason. The fact that he had an advocate did not in any way exculpate him from making keen follow ups on his appeal. If the court were to excuse parties on inaction or a mere negligence of their advocates, then litigations would never come to an end, for instance if a party looses a case he could simply make a ground of appeal that the mistake was on his advocate on how he led the evidence in the case. Or in any delay, parties woud simply burden the delay in their advocates and the gist of setting time to file certain documents would completely be lost. That is why, in such applications, each case should be looked on in its own circusmtances and merits.

As for the current case, the reasons adduced for the delay to make the submissions on time leading to the dismissal of the appeal were not sufficient

to move this court to restore the appeal. That said, I find the application to be lacking merits and it is hereby dismissed with costs.

Dated at Dar es Salaam this 26th day of March, 2020



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S.M. MAGHIMBI,

JUDGE.