

IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR ES SALAAM

COMMERCIAL CASE NO. 34 OF 2002

VITA FOAM (T) LTD.....PLAINTIFF/APPLICANT  
VERSUS  
LUMUMBA STREET GODORO STORE.....DEFENDANT/RESPONDENT  
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RULING

KALEGEYA, J:

On 11/2/2004, the Plaintiff's suit was dismissed for lack of prosecution, in that, on that very date when it was set for hearing neither the Plaintiff's Principal Officer nor their Advocate, Mr. Malamsha, made appearance. Mr. Malamsha is now again before this Court armed with a chamber summons supported by his own affidavit and that of one Shah praying for an order that "*the Order/Decree passed on 11<sup>th</sup> February, 2004...be set aside*". The application is resisted by Mr. Mkongwa, Advocate, for the Respondent/Defendants. To his aid he has his own counter- affidavit.

As to why no appearance was made paragraph 4 of Shah's affidavit paints it all thus,

*"...the Legal Officer from our office attended Court as directed however on recording the date set for hearing he mistook it and recorded 11<sup>th</sup> March, 2004 instead of 11<sup>th</sup> February, 2004"*.

In his supporting submissions, Mr. Malamsha reiterated the above quoted, adding that this is not negligence but normal human error which constitutes good cause.

On the other hand, apart from insisting that that can never be good cause, Mr. Mkongwa, added that on that same date, in the morning, he met Mr. Malamsha at Kinondoni District Court who upon being informed of the scheduled date, did not take him seriously but insisted instead that the schedule was as per appearance in his diary.

What is obvious from the above is that Mr. Malamsha cannot escape from being pasted with negligence. A Party/Counsel who mishears what transpires in Court proceedings and who records what was not uttered or which did not take place cannot say that he is free from the general pool of negligence. Full attention of the proceedings and not less is what is expected of such Party/Counsel. The opposite would be negligence, pure and simple. And, in this situation it is even compounded further by Mr. Mkongwa's revelation (and conceded to by Mr. Malamsha in his rejoinder submission) that in the very morning of same date he reminded the said Malamsha of the schedule who however took no heed save argumentatively challenging the said schedule.

Now, to the issue before us.

Of course, the one who finally stands to suffer if the order sought is not secured is the Defendant himself and not his Counsel. The question is

whether the advocate's negligence is sufficient a reason for issuance of an order in favour of his client: that is, what is the legal stand regarding errors of a Counsel in taking an essential legal step which results in an injury to the client? Can they or can they not constitute a sufficient cause for the Court to set aside or vacate its order. To answer this question I will quote at length my observations in (HC) CIVIL CASE NO. 39 of 1994, NICHOLAS PERKINS vs CAR & GENERAL (T) LTD (DSM Registry), unreported. In that case I concluded:-

*“Where a party cannot in anyway be blamed for the failure to take an essential legal step in the process save the negligence of his advocate (as is the case here) the latter can constitute a good cause in an application to expand time within which to take the step in the process”*

In my view, the same stand holds true in a situation where the Advocate's negligence results in passing of any order, including entering an exparte judgment or a dismissal of a suit as is the case here.

**In Nicholas case** I reached that conclusion after evaluating various decisions and the full text is as follows:

*“The question then is whether a party should be penalized for the negligence of his advocate. In the case of Ally Mohamed vs Sarah Hona Mganga, Civil appeal No. 38 of 1992 (HC) DSM Registry (Unreported) and the Institute of Finance Management vs Simon Manyaki (CA) Civil Application No. 13 of 1987 (unreported) it was*

*held that delay in instituting an appeal and seeking extension of time in which to take the necessary step which is caused by advocate's negligence can never be a sufficient reason to extend time. In Manyaki case, Kisanga, JA, observed as follows:*

*"...Counsel was not all diligent in handling this matter. She was obviously inactive too and here were inordinate delays in performance of her duty. In some cases she gave lame or unacceptable explanation for failing to do what she ought to have done, and, in others none at all...I find Counsel's lapses here to be of a fundamental nature as would not warrant the exercise of this court's discretion in favour of granting extension of time sought." The application was refused.*

*In Civil Application No. 57 of 1994 (CA), (Unreported – Dsm Registry)- Godwin Ndewesi and Kalori Ishengoma vs Tanzania Audit Corporation the same view was held, and cited a persuasive authority of Ratnam vs Curasamy and another, 3 (1964) ALL ER at 935, with approval wherein it is stated,*

*"The Rules of Court must prima facie be obeyed and, in order to justify a court in extending time during which some step in procedure requires to be taken there must be some material on which the court can exercise its discretion. If the law were otherwise any party in breach would have an unqualified right of extension of time*

*which would defeat the purpose of the rule which is to provide a time table for the conduct of litigation.”*

*In the past however, the HC had held the contrary view regarding the question of extension of time to lodge an appeal. In South India Corp (T) Limited v H.J. Stanly and Sons Ltd [1968] HCD336, among others, it had been held that “mistakes of a Legal Advisor may amount to sufficient reasons”. The same view was held in Abass G. Essaji vs Gordk han Dewji Solanki [1967] HCD 279 where Georges, C.J. (as he then was held),*

*“Justice will best served by not barring the Appellant’s application for extension of time because of Counsel’s error.”*

*In the latest decision of the court of appeal, similar stand (what I may call the liberal approach) was reiterated. In Civil Application No. 1 of 1997, Felix Tumbo Kissima vs TTC and another (CA), Dsm Registry, unreported, Mfalila, JA, in an application for leave to file the appeal out of time considered and discussed the effect of an advocate’s negligence in taking the necessary action for pursuing his client’s case. The advocate’s negligence in that case was described as “appalling”.*

*His lordship held that “this constituted sufficient reasons for delaying in lodging the Appeal”.*

*I am in full agreement with the other side of the proposition pronounced in Ratnam case and approved by the Court of Appeal in Godwin Ndewesi case but rules should not be employed too technically if they are to serve justice, and, as I had an occasion to observe in (HC) Civil Appeal No. 38 of 1996, Yusuf Same and Hawa Dada vs Hadija Yusuf (unreported), in my view,*


*“The term ‘sufficient reason’ should not be narrowly interpreted. It should encompass all reasons which are outside the Applicant’s power to control or influence resulting in delay in taking any essential step. An advocate’s in – action should clearly fall in that category because once one retains an advocate he or she stays back, rest assured, that the one he/she has fronted would rightly and properly fight the battle on his/her behalf and in a professional manner. If such advocate acts negligently or even recklessly the retainer should surely be able to tell the court of what happened and the latter should exercise the discretion in his favour for the interest of justice without undue regard to technicalities. I see no difference here of “mistakes” or “errors” by Counsel and “negligence”. I should add or “recklessness”.*

As already indicated, Malamsha’s negligence has brought us to the situation we are in. Plaintiff as such is not blame and yet is the one to

shoulder the negative consequences if the dismissal order is kept intact. For reasons discussed above, I am satisfied that sufficient reasons have aptly been established which entitles the Court to exercise its discretion in favour of the Applicant as I hereby do. The dismissal Order of 11/2/2004 is hereby set aside. However, Mr. Malamsha's blatant negligence deserve reprimand. Costs in respect of this application, shouldered by Defendants, to be met by Mr. Malamsha, advocate, in person.

**L.B. KALEGEYA**  
**JUDGE**

Delivered in the presence of Mr. Malamsha.

  
**L.B. KALEGEYA**  
**JUDGE**  
**20/7/2004**

**Order:**

: Hearing on 4/8/2004.

: Mr. Mkongwa to be notified.

**L.B. KALEGEYA**  
**JUDGE**  
**20/7/2004**