IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 133 OF 2019

(Originating from Commercial Case No 133 of 2019)

ESHE SHEBE HEMED.....APPLICANT

VERSUS

ASAC CARE UNIT LTD.....1ST RESPONDENT

AYOUB SALEHE CHAMSHAMA.....2ND RESPONDENT

SOUD AYOUB CHAMSHAMA.....3RD RESPONDENT

SOUD AYOUB SALEHE..... .....4TH RESPONDENT

NATIONAL BANK OF COMMERCE.....5TH RESPONDENT

CHARLES KAJALA SENGO(COURT BROKER)

T/A MWAFICA GROUP LIMITED.....6TH RESPODENT

RULING

B.K. PHILLIP, J

This application is made under the provisions of section 14(1) of the Law of Limitation Act, Cap 89, R.E 2002. The applicant prays for the following orders;

i. That this honourable court be pleased to grant extension of time to file an application for setting aside the ex-parte ruling of this court dated 14th September 2018.

ii. Costs of this application be provided.

iii. Any other relief the court may deem fit and just to order.

The application is supported by an affidavit sworn by the applicant, Mr Eshe Shebe Hemed, whereas the learned Advocate Seni Songwe Malimi of K & M Advocates, who appears for the 5th and 6th respondents, swore an affidavit opposing the application. The rest of the respondents are not contesting the application.The applicant is represented by the learned Advocate Richard Magaigwa.

A brief background to this matter is worth having it for ease of understanding the coming discussion. This application emanates from Commercial case No. 120 of 2012 whose judgment was delivered on 15th March 2013 in favour of the respondent. Thereafter the 5th respondent who is the decree holder started to move the wheels of execution into motion. Consequently, the applicant herein lodged in this court Misc Commercial application No. 319 of 2015, praying for following orders;

i. That this honourable court be pleased to grant an application for objection proceedings in respect of the Commercial Case No. 120 of 2012.

ii. Costs of this application be provided for.

iii. Any other relief the court may deem fit and just to order.

The above mentioned Misc Commercial Application No.319 of 2015 was adjourned *sine die.* However on 14th September 2018, Hon Judge Sehel, as she then was, dismissed the same under the provisions of Rule 47 of the High Court Commercial Division Procedure Rules,2012. Thereafter, the

5th respondent applied in court for continuation of the execution processes of the court decree in the aforementioned Commercial Case No. 120 of 2013. In their endeavours to halt the execution of the Court decree, the applicants herein and the 1st to 4th respondents applied for an order for stay of execution of the court decree vide Misc. Civil Application No. 66 of 2019.However, the same was dismissed for lack of merits.

In his affidavit in support of this application the applicant has deponed that he fell sick and was admitted at Lutindi Mental Hospital in Korogwe District that is why her application (Misc Civil Application No.319/2015) was adjourned *sine die*. That she did not know that her application was dismissed until when she learnt that the 5th respondent was continuing with the process for execution of the court decree in Commercial case No.120 of 2013. She contended that she has been denied the right to be heard.

On the other side, the counter affidavit in opposition of this application is to the effect that the applicant was not denied the right to be heard, the said Misc Civil Application No 319/2015 was dismissed by this court *suo motto* under the provisions of Rule 47 of the High Court Commercial Division Procedure Rules, 2012 and all parties were put on notice. Thus, the applicant's advocate ought to have known the dismissal order.

I ordered the hearing of this application to be done by way of written submissions. The learned Advocates Richard Magaigwa and Queen Allen of K &M, Advocates, filed the written submissions for the applicant and the 5th respondent.

Submitted in support of the application Mr. Magaigwa, submitted as follows; That the applicant has been suffering from mental illness and was admitted at Lutinda Mental Hospital in Korogwe. That the applicant had lodged in this court Misc. Civil application No 319 of 2015 and on 20th September 2017, she was ordered to appear in Court for her application afore mentioned. She complied with the court order but her condition was not good and the court decided to adjourn the application *sine die* pending the improvement of her mental health.

Furthermore, Mr. Magaigwa submitted that the applicant was not aware about the dismissal of her application. She came to know it when her application for stay of execution pending the determination of Misc Civil Application No.319 of 2015 was dismissed by this court on the ground that the said Misc Civil Application No.319 of 2015 was dismissed by this court way back in 2018. Mr. Magaigwa contended that the delay in filing this application is not intentional. The applicant was unable to file this application earlier due to reasons beyond her control and that she was never served with any summons to appear in court or any notice of dismissal of Misc Civil Application No.319 of 2015 contended Mr. Magaigwa.

In addition to the above Mr. Magaigwa submitted that the applicant has been serious suffering from mental illness for the period of five consecutive years, thus, for the whole duration of the case the applicant has been represented by an advocate. He contended that all information about the application (Misc Commercial Application No 319 /2015) were belatedly communicated to the applicant. She was not aware about all what happened to her application. Referring this court to the case of

Ghania J.Kimambi Vs Shedrack Ruben Ng'ambi, Misc application No. 692 of 2018, (HC) Labour Division, Mr. Magaigwa submitted that since the applicant's failure to set aside the dismissal order in Misc Civil Application No .319 of 2015 in time was due to failure of her advocate to give her the correct information at the right time, then, denying her the extension of time sought in this application will jeorpadize her right to be heard.

It is the contention of Mr. Magaigwa that the, since the applicant is still intending to challenge the disposition/sale of her matrimonial property , denying her the order for extension of time will bar her from prosecuting her application for objection proceedings , thus her constitutional right to be heard as enshrined under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania will be violated. To cement his arguments he cited the case of **Mbeya -Rukwa Autoparts and Transport V Jestina George Mwakyoma TLR (2003) 251**, in which the court held that ;

> *"..... the right of hearing is a fundamental constitutional right by virtue of article 13(6) (a) of the constitution.....the judge's decision to revoke the right of M/s. Kagera and the Appellant without affording them an opportunity to be heard was not only a violation of rules of natural justice but also a contravention of the constitution hence void of no effect"*

Mr. Magaigwa urged this court to allow this application.

In rebuttal, Ms. Queen Submitted that the position of law is that in an application for extension of time the applicant is supposed to account for

each day of delay. Relying on the case of **National Housing Corporation Vs Tahera Somji, Civil Application No. 344/17 of 2018**, (CA) (unreported) , Ms Queen submitted that the guidelines for consideration by the court when granting or refusing to grant an order for extension of time are as follows;

i. The Applicant must account for all the 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.

In the same line of argument , Ms queen cited the case of **Mashaka Juma Shabani and 42 others Vs The Attorney General , Civil Application No 279 / 2016** (CA) (unreported).

Ms. Queen proceeded to submit that the applicant has not accounted for each day of delay. She contended that the application was adjourned *sine die* at the instance of the applicant ,thus the applicant was obliged to inform the court about her condition before the expiry of six months. She contended that the provision of Rule 47 of the High Commercial Division under which the dismissal of the said Misc Application No 319/2015 was made provides that " *when the hearing of a suit has been adjourned generally the court shall if no application is made within six months of the last adjournment dismiss the suit".* So, she was of a view that the court was not required to summon the applicant to appear in court.

In addition to the above, Ms Queen, submitted that the fact that in her affidavit in support of this application, the applicant deponed that she was

not informed by her advocate about the status of her application, demonstrates negligence on part of the applicant's advocate. Ms Queen proceeded to submit that negligence or mistake committed by a counsel cannot not be a sufficient ground for granting an extension of time. To cement her arguments she cited a number of cases including the case of **Tanzania Ports Authority Vs M/s Pembe Floor Mills Ltd , Civil Application No 49/ 2009** (unreported) in which the court said that ignorance of law or mistake on part of a counsel cannot constitute sufficient cause for extension of time and the case **Paul Martin Vs Berth Anderson, Civil Application No.7 of 2005** (Unreported), in which the court said the following;

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

Ms. Queen insisted that this application has no merit, thus it should be dismissed with costs.

Having analyzed the submissions made by the learned advocates herein, I am of a settled opinion that the only issue that I am supposed to determine in this application is whether or not the applicant has adduced sufficient cause to move this court to grant the extension of time sought. As it has been correctly submitted by Ms. Queen, the position of the law is that in an application for extension of time like the one in hand, the applicant is required to account for each day of delay by giving sufficient

cause for the delay. There are no hard and fact rules on what amounts to "sufficient cause". The factors which are mostly used in determination whether or not sufficient causes have been established have been well stated in the case of **National Housing Corporation** (supra) **and Mashaka Juma Shabani and 42 others** (supra) to wit;

i. *The Applicant must account for all the 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.*
iv. *Degree of prejudice that the respondent may suffer if the application is granted.*
v. *If the court feels that there are sufficient reasons , such as the existence of a point of law of sufficient importance such as the illegality of the decision sought to be challenged.*

In this application the dismissal order the subject of this application was made on 14th September 2018.It is not in dispute that the same was made *suo motto* by the court in the absence of all parties. The applicant alleges that she was not aware about the order until when the respondent started the process for execution of the court decree in the said Commercial case No. 120 of 2013 and thereafter her application for stay of execution was dismissed. The applicant has not mentioned the exact date when she became aware that her application (Misc Commercial Application No.319/2015) was dismissed. However, going by what she has pleaded, by 4th September 2019, when the application for stay of execution was dismissed, she was aware that Misc Commercial Application No.319/2015

was dismissed on 14th August 2018. This application was filed on 31st October 2019. So, it took the applicant more than thirty (30) days to lodge this application after being aware that her application for objection proceedings was dismissed. The delay in taking any step after becoming aware of the dismissal of her application does not exhibit any diligence on part of the applicant.

The requirement for the applicant to take a speedy reaction to remedy his /her fault was expressed by court of Appeal in the case of **Tanzania Railway Corporation Vs Mrs Augusta Upendo Rweyemamu , Civil Application No.157 of 2004,** (unreported) in which His Lordship Ramadhani, J.A as he then was, said the following ;

> *" Even if, for the sake of argument, I accept that Matage is the cause of this situation, Mr. Kilindu has not demonstrated a speedy reaction to remedy the fault. He received the summons on 8/11/04 but the notice of motion for this application was signed two days later ,on 10/11/04 and it was lodged on 17/11/04, that is nine days later. Admittedly, Mr. Kilindu in his counter affidavit has said that the necessary fees were paid on 16/11/04 and has attached a photo copy of the GRR bearing that date. But one wonders why the fees were paid six days after the notice of motion was signed. Surely that does not send a message of a realization of a fault and a desire to rectify it. Because of the reasons I have given above, I dismiss this application with costs."*

At this juncture I wish to associate myself with the findings of Hon Samata JA as he then was, in the case of **Dr. Ally Shabhay vs Tanga Bohara Jamaat (1997) TLR 305**, in which he said the following;

> *"those who come to courts of law must not show unnecessary delay in doing so, they must show great diligence."*

In addition to the above the applicant has not attached any medical card to substantiate her assertion that she has been sick for five consecutive years as submitted by her advocate.

I have also noted that the applicant all the time has been represented. The application was dismissed more than two years from the last adjournment, whereby it was adjourned *sine die*. So, the failure to take the appropriate legal steps might have been caused by the negligence of her advocate, since the provision of the law under which the application was dismissed provides clearly that upon adjournment of a suit *sine die* if no application is made within six months of the last adjournment, then the court is supposed to dismiss the suit. However, even if my above stated assumption is correct, the mistake or negligence of the applicant's advocate, cannot be a sufficient cause for the delay. [see the case of **Mtokambali Masalaga V Edward Mogha, Civil Application , (CA) No.5 of 2005,** (unreported) and **Umoja Garage V National Bank of Commerce (1997) TLR 109** and **Calico Textile Industries Ltd V Pyaralieasmail Prenji 1983 TLR 28** (CA) (unreported)].

As regards the argument raised by Mr Magaigwa on applicant's right to be heard, I wish to point out that the right to be heard always goes hand

in hand with the party's responsibility to take appropriate legal steps timely and in accordance with the law, doing otherwise will bring chaos in the administration of justice.

In the upshot, this application is dismissed with costs.

Dated at Dar es Salaam this 10th day of June 2020.

B.K. PHILLIP

JUDGE