

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM**

**MISCELLANEOUS COMMERCIAL APPLICATION NO. 32
OF 2020**

(Originating from Commercial Case No. 74 of 2014)

**KS BUILDERS LIMITEDAPPLICANT
VERSUS**

**PERMANENT SECRETARY MINISTRY
OF JUSTICE AND LEGAL AFFAIRS.....1stRESPONDENT
HON. ATTORNEY GENERAL.....2nd RESPONDENT**

RULING

Date of Last order: 21/10/2020

Delivery of Ruling: 04/12/2020

NANGELA, J:.,

This is an application for extension of time. The Application is brought under section 14 (1) of the Law of Limitation Act, Cap.89 [R.E. 2019]. The application is made by way of a Chamber Summons which is supported by an affidavit deposed by Kose Paschal Kasenene filed on 20th

March 2020. In the Chamber Summons the Applicant is seeking for the following orders:

- 1. That, this Court be pleased to grant an extension of time within which to file a Bill of Costs for Taxation.*
- 2. The Costs of the Application abide the outcome of the Application.*
- 3. Any other order this honourable Court deems fit to grant.*

On the 1st of September 2020, the Respondents filed a joint counter affidavit in opposition to the Application. The parties also filed their skeleton arguments pursuant to section 64 of the procedural rules governing the conduct of cases in this Court. On the 21st October, 2020, the parties appeared before me for hearing of the application. On the material date, the Applicant was represented by Mr Pascal Kamala, learned Advocate while Ms Grace Lupondo, learned State Attorney, represented the Respondents.

From his part, Mr Kamala commenced his submission by adopting the contents in the affidavits (including the

Affidavit i reply) of Mr Kose Kasenene to form part of his submissions. He also prayed to adopt his skeleton arguments filed in this Court on 19th October 2020. In his submissions, Mr Kamala pointed out Paragraphs 8, 9 and 10 of the Affidavit supporting the Application contain the reasons for the Applicant's delay to file the application for Bill of Costs. He submitted that, the main reasons are sickness of the Applicant's brother.

It was contended that, immediately after an Appeal (*Civil Appeal No. 177 of 2016*) which was preferred by the Applicant at the Court of Appeal against the judgement of this Court (Songoro J, (as he then was) in *Commercial Case No. 74 of 2014* got struck out, Mr Kose, the Principal Director of the Applicant, travelled to Bukoba to nurse his sick brother and, for that reason, Mr Kose could not be available in Dar-es-Salaam to sign the relevant documents. He contended that, his advocate had to dispatch them to Bukoba for signing and they were returned by Courier to

Dar-es- Salaam where they were received on 18th March 2020.

Mr Kamala submitted that, the documents were delivered on 19th March 2020 and lodged in this Court on 20th March 2020. Mr Kamala referred to this Court Courier documents annexed to the affidavit of Mr Kose and in the affidavit in reply as Annex A-1 and A-3. Mr Kamala submitted that, each day of the delay has been accounted for, from the time the matter got struck out until the filing of this Application.

Mr Kamala submitted that, the Appeal which was preferred by the Applicant herein was struck out on 18th February 2020. As such, the Applicant was supposed to have filed the Application immediately but the same could not be filed because the Applicant travelled to Bukoba to attend a sick brother.

He contended that, as demonstrated in the affidavit in support of the application, the said brother of Mr Kose died on 20th August 2020 and that is the reason why Mr Kose was

unable to file a reply to the Counter Affidavit but authorised his Advocate (Mr Kamala) to swear an affidavit on his behalf. In view of that, Mr Kamala was contented that, having accounted for the delay, the prayers sought in the Chamber Summons should be granted.

For her part, Ms Lupondo opposed the granting of the prayers sought in the Chamber Summons. Apart from adopting, with the leave of the Court, the Counter Affidavit filed in opposition to the Application, she also adopted the skeleton arguments filed by the Respondents.

Ms Lupondo was of the view that, looking at the affidavits (both the Main and in reply) the Applicant has advanced three reasons for the delay to act timely. The three reasons she pointed out are: (i) the striking out of the Appeal; (ii) The sickness of Mr Kose's brother and (iii) Mr Kose's failure to travel to Dar-es-Salaam.

Referring this Court to the Case of **Lyamuya Construction Company Ltd v Board of Registered Trustees of Young Women's Christian Association of**

Tanzania, Civil Application No.2 of 2010, CAT (DSM)
(unreported), and that of **Yusufu Seme & Hawa Dada v**
Hadija Yusufu, Civil Appeal No. 1 of 2002, CAT, DSM
(unreported), the learned State Attorney submitted that,
the above listed reasons by the Applicant are inadequate to
warrant the granting of the prayers sought.

She submitted that, the inadequacy is mainly based on
the fact that, the Appeal was struck out on the 18th February
2020 to 20th May 2020 (as per the Affidavit) the number of
days are more than 90 days. She argued that, all these are
unaccounted for and, that, as per the earlier cited cases of
Lyamuya (supra) and **Yusufu Seme (supra)**, each day
of delay must be accounted for.

In addition to the above, Ms Luondo submitted that,
the three paragraphs relied upon from Mr Kose's Affidavit,
(i.e., paragraphs 8, 9 and 10) do not provide any proof that
his brother whom he claims to have gone to Bukoba to
attend was sick, who was that brother of his and when he
started to fall sick from the 18th February 2020 when the

Civil Appeal No. 177 of 2016 was struck out. It was Ms Lupondo's further submission that, the issue of sickness of Mr Kose's brother has not been fully supported and cannot, therefore, be relied upon.

Ms Lupondo submitted further that, the affidavit of Mr Kose is silent regarding when he was advised to sign the documents sent to him by his advocate, and when exactly the documents were sent to him for signature. She argued that, even if the Courier documents show that the documents dispatched were received at Dar-es-Salaam on 18th March 2020 and filed in Court on 20th March 2020, the filing was already outside the 60 days rule hence lately filed and the 60days are not fully accounted for.

Citing the Court of Appeal decision in the case of **Finca (T) Limited and Another v Boniface Mwalukisa, Civil Application No.289/12 of 2018, CAT (at Iringa), (unreported)**, Ms Lupondo emphasized that, delay, even of a single day must be accounted for.

In view of the above submission, Ms Luondo urged this Court to make a finding that the Application has not been accompanied with sufficient reasons for the delay by the Applicant and should, hence, be dismissed with costs.

In a brief rejoinder, Mr Kamala submitted that the Application should be granted. He rejoined, concerning the issue of the time when the Application was filed, that, the same was deemed to have been filed when the fees were paid, and this was March 20th, 2020. He contended that, although the documents embodying the Application were endorsed by the Deputy Registrar of this Court on 20th May 2020, the fact is that, the Application was filed on 20th March 2020. I think this is clear fact and has nothing disputable.

As regards proof of Mr Kose's brother being sick, Mr Kamala referred this Court to Paragraph 9 of the affidavit of Mr Kose. He argued that, according to that paragraph, the patient was treated with traditional medicine and that Mr Kose was the one taking care of him. He also referred this Court to paragraph 2 of the Reply Affidavit where the name

of the respective patient is mentioned and that he passed away on 28th August 2020 in Bukoba and Mr Kose had to attend funeral rituals.

Mr Kamala rejoined further that, the date when Mr Kose's late brother fell sick is mentioned under paragraph 9 of the affidavit. He contended that, even before the coming to attend the hearing of the *Civil Appeal No. 177 of 2016*, already Mr Kose's brother was in an ailing condition. He argued that, the summoning of Mr Kose from Bukoba to sign the requisite documents used to institute the Application was an act done immediately after the *Civil Appeal No. 177 of 2016* got truck out, and that, Mr Kose being in Bukoba was unable to come sign them here at Dar-es-Salaam.

Mr Kamala argued that, the striking out of the *Civil Appeal No. 177 of 2016* was not due to the lack of diligence on the part of the Applicant but it was due to technical reasons. He referred to this Court the case of **Fortunatus Masha v William Shija [1997] TLR 154** on technical delay as being one of the good causes for which an

application for extension of time may be granted. He emphasised that, the Applicant has accounted for each of the days delayed until the time when the current application was filed and, for that matter, requested this Court to grant the prayers sought in the Chambers Summons.

As it may be noted herein, the application at hand is one file to seek for extension of time within which to do a legal act. The granting or refusal to grant such kind of an application, is, as a matter of principle, entirely in the judicial discretion of the Court, exercised in accordance with the rules of reason and justice. (**See Ngao Godwin Losero v Julius Mwarabu, Civil Appl. No.10 of 2015 (CAT-Arusha, (Unreported))**).

Similarly, in **CARITAS Kigoma v KG Dewsi Ltd [2003] TLR 420** the Court of Appeal held, at 421 that, "*in an Application for extension of time, the question to be considered is whether sufficient cause has been shown by the Applicant for the delay in applying to set aside the ex parte judgment.*"

I have considered the rival submissions of the learned counsel for the parties and the guiding principles regarding exercise of this Court's discretion in granting or refusing this application. There is only one issue for determination by this Court, namely whether the Applicant has shown sufficient cause to move this court to grant extension of time for her to appeal. The main ground advanced by the Applicant is that Mr Kose, the Managing Director of the Applicant, had failed to sign the relevant documents because he was attending a sick brother who later passed away.

In Pastory J. Bunonga v Pius Tofiri, Miscellaneous Land Application No. 12 of 2019 (unreported), this Court, Rumanyika, J. stated as follows, with regard to a situation where sickness is relied upon as a reason for ones' delay to act:

"Where it was on the balance of probabilities proved, sickness has been good and sufficient ground for extension of time yes. But with all fairness the fact cannot be founded on mere allegations. There always must be proof by the

applicant that he fell sick and for the reason of sickness he was reasonably prevented from taking the necessary step within the prescribed time."

In this application the issue of sickness of Mr Kose's brother has been stated to be a factor which contributed to the delay as Mr Kose was made to travel away from Dar-es-Salaam to attend his brother, and who later on passed away on 28th August 2020. In his submission, Mr Kamala submitted the patient was not hospitalised but was rather attended by traditional herbalists.

Be that as it may, I am not fully convinced by that submission since there must have been evidence to support such an averment which was not even disclosed in the affidavit in support or in reply. That argument is therefore weak and unsubstantiated. The issue of sickness, though relevant in some cases, cannot be a ground to consider or be relied upon in this case because, as stated in the case of **Pastory J. Bunonga v Pius Tofiri (supra)**, whenever one wants to rely on sickness as a reason for his/her delay to

take the necessary steps within the prescribed time, there always must be sufficient or rather convincing proof to that effect.

Notwithstanding that fact, I am also alive to other considerations since the issue of sickness is not the only reason advanced in this application which warranted a delay of the filing of the intended application for the Bill of Costs. In his affidavit, Mr Kose has also averred that, the delay was aggravated by the appeal which was preferred in the Court of Appeal. The Appeal was later struck out on 18th February 2020.

Immediately afterwards, the 60 days rule within which he should have filed the application commenced. However, the affidavit shows that, when the decision of the Court of Appeal was delivered, the Principal Director of the Applicant was not within reach and the documents prepared for filing in Court had to be couriered to Bukoba. Evidence to that effect was availed in the form of the Courier invoice.

It was submitted further that, after the documents Couriered were delivered on the 18th March 2020 and received on 19th March 2020, they were lodged in this Court on 20th March 2020. This means that the Applicant was not negligent or lacked diligence.

I have considered the cases cited by the Applicant, in particular the case of **Lyamuya Construction Company Ltd v Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No.2 of 2010, CAT (DSM) (unreported)**, and that of **Fortunatus Masha v William Shija [1997] TLR 154.**

Considering the circumstances of this case, am inclined to grant the Application. However I make no orders as to costs.

Order accordingly.



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**DEO JOHN NANGELA
JUDGE,**

**High Court of the United Republic of Tanzania
(Commercial Division)
04 / 12 / 2020**

Ruling delivered on this 04th *day of December 2020*, in the presence of Mr Alex Felician, Advocate for the Applicant and Ms Kause Kilonzo, State Attorney, for the Respondent.



A handwritten signature in blue ink, appearing to read "Deo John Nangela".

**DEO JOHN NANGELA
JUDGE,**

**High Court of the United Republic of Tanzania
(Commercial Division)
04 / 12 / 2020**