

TANZANIA / JUDGMENT

dan obambe iko vs public service social security fund another 2019 tzca 558 7 august 2019

COURT
TZCADECIDED
7 August 2019

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IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM CIVIL APPLICATION NO. 182 OF
2005 DAN O'BAMBE IKO (BY WILLIAM DAN IKO As Administrator of the
estate) APPLICANT VERSUS

1. PUBLIC SERVICE SOCIAL SECURITY FUND
2. TREASURY REGISTRAR RESPONDENTS (Application for
extension of time to lodge Notice of Appeal from the decision of the High Court of Tanzania,
at Dar es Salaam) (Orivo, J.1) dated the 22nd day of July, 2005 in Civil Case No. 420 of 2002

RULING

22nd July, & 13th August, 2019 KITIISI. J.A.: This application was called for hearing on 22nd July, 2019, seeking for extension of time within which the applicant may lodge a Notice of Appeal to challenge the decision of the High Court (Oriyo, J. as she then was) rendered on 22nd July, 2005, exactly 14 years ago. It is supported by an affidavit of William Dan Iko, the administrator of the estate of the late Dan O'Bambe Iko, the applicant. The respondents filed an affidavit in reply that had been taken by Angela Kotuhombya Lushagara, learned Principal State Attorney, who also argued the application on their behalf. The background of the matter is that the judgment rendered on 22nd July, 2005 was in respect of Civil Case No. 420 of 2002, High Court, Dar es Salaam District Registry in which the applicant lost. It was the applicant's contention that he was in Tarime District, away from Dar es Salaam, from 17th July, 2005 to 12th August, 2005 therefore he was unaware of that decision dated 22nd July, 2005, until he got back to Dar es Salaam. Aggrieved, he intended to appeal, but as the applicant was out of the statutory period for lodging a Notice of Appeal, he filed an application for extension of time within which to do so. That application was dismissed by Mihayo, J. on 17th November, 2005; hence this application. Mr. Wilson Ogunde who represented the applicant at the hearing, having adopted the Notice of Motion, contents of the affidavit and written submissions, stated that this is a second bite after dismissal of the initial application by the High Court. Mr. Ogunde submitted that the applicant was unaware of the outcome of Civil Case No. 420 of 2002 until when he visited the offices of

Maira & Company Advocates, his lawyer, on 12th August, 2005. He further rationalized the said advocate's failure to file Notice of Appeal within time, by submitting that the advocate could not have acted without prior instructions from the applicant. In a bid to demonstrate that the applicant was diligent, Mr. Ogunde submitted that upon dismissal of the application on 17th November, 2005, he immediately filed this application on 1st December, 2005. Lastly the learned counsel submitted that the applicant's absence from Dar es Salaam from 17th July, 2005 to 8th August, 2005 constitutes good cause for purposes of extension of time. The learned advocate thus prayed that the application be granted with costs. For the respondents, Ms. Lushagara opposed the application first by adopting the contents of the affidavit in reply. Then the learned Principal State Attorney submitted that the applicant has neither shown good cause for the delay as required by rule 10 of the Rules, nor accounted for each day of the delay. Elaborating, Ms. Lushagara pointed out that the contention that the applicant was away from Dar es Salaam has not been substantiated. She submitted further that the applicant's advocate had the duty of communicating to him the outcome of the case wherever he was. Pressing for each day of the delay to be accounted for, Ms. Lushagara submitted that the period from 12/8/2005 when the applicant became aware of the outcome of the case, to the date when the application was filed at the High Court, has not been accounted for. She cited the case of Wambele Mtumwa Shahame V. Mohamed Hamisi, Civil Reference No. 8 of 2016 (unreported) which emphasized on the legal requirement for the applicant to account for each day of the delay. As regards proof of the applicant's contention that he was away, the learned Principal State Attorney submitted that there was none, and referred to the case of Hamisi Minani V. National Bank of Commerce, Civil Application No. 52 of 2001 (unreported) in which an application for extension of time was dismissed because there was no proof of the applicant's whereabouts. In a short rejoinder, Mr. Ogunde submitted that the duty of the applicant's advocate in the case came to an end when the judgment was delivered, suggesting that he had no duty to take steps such as filing of the Notice of Appeal. I shall now put the competing arguments to scrutiny bearing in mind that in an application such as this, there is a long menu of factors to be considered as stated in many cases. For instance, in Paradise Holiday Resort Limited V. Theodore N. Lyimo, Civil Application No. 435/01 of 2018 (unreported) Ndika, J.A. referred to the established factors thus: - "...but the Court consistently considers factors such as the length of the delay, the reasons for the delay, the degree of prejudice the respondent stands to suffer if time is extended, whether the applicant was diligent, whether there is a point of law of sufficient importance such as the illegality of the decision sought to be challenged." In Elius Mwakaling V. Domina Kagaruki & 5 Others, Civil Application No. 120/17 of 2018 (unreported) Mussa, J.A. also reiterated this settled position. With respect to Ms. Lushagara, the case of Hamisi Minani V. National Bank of Commerce (supra) was decided on the ground that the application was time barred and that even then, the applicant had not established the fact that he had been receiving treatment from a traditional healer. Therefore, to begin with, that case is not of much assistance to the instant situation. I however agree with the learned Principal State Attorney that the applicant has a duty to account for every single day of the delay. [See the case of Bushiri Hassan V. Latifa Lukio Mashayo, Civil Application No. 3 of 2007 (unreported)]. And I need to add by borrowing an apt statement from Uitenhage Transitional Local Council V. South African Revenue Service, 2004 (1) SA 292 quoted in Ludger

Bernard Nyoni V. National Housing Corporation, Civil Application No. 372/01 of 2018 (unreported), to wit:- "Condonation is not to be had merely for the asking; a full detailed and accurate account of the causes of the delay and its effects must be furnished so as to enable the Court to understand dearly the reasons and to access the responsibility. " Let us see if there is that "accurate and detailed account" in this case. As rightly submitted by Ms. Lushagara, there is no detail, let alone accurate, as to when the first application was filed at the High Court after 12th August, 2005. There is also nothing to substantiate the applicant's contention that he had traveled away from Dar es Salaam neither is there any suggestion that he could not communicate with his advocate from wherever he was, in this era. It must also be observed that litigants are expected to keep an eye on the progress of their cases, even if they employ counsel. In this case nowhere does the applicant aver that he was not aware that Civil Case No. 420 of 2002 was set for judgment on 22nd July, 2005. One expects therefore, that the applicant would be interested to know the outcome of the case even if it meant using telephone communication. This was not done and the aloofness does not speak very well of the applicant. Lastly, in terms of the degree of prejudice that the respondents are likely to suffer if extension of time is granted, I find it a very compelling factor in this case given the fact that the application arises from a very old case. The applicant intends to file a Notice of Appeal in order to appeal against a decision rendered more than 14 years ago, a long period by any standards. The degree of prejudice to the respondents would, in my view, be proportionally high. For all those reasons, it is my conclusion that the application has no merits, and I dismiss it with no order as to costs. DATED at DAR ES SALAAM this 7th day of August, 2019 I. P. KITUSI JUSTICE OF APPEAL The ruling delivered this 13th day August 2019 in the presence of Sylevester Korosso holding brief for Mr. Ogunde, Counsel for the Applicant and Stanley Mahenge and Careen Masonda State Attorneys for the Respondent is hereby certified as a true copy of the original. 8

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