

TANZANIA / JUDGMENT

NETIS JUDGMENT

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22 April 2024

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IN THE HIGH COURT OF TANZANIA (MWANZA SUB-REGISTRY) AT MWANZA MISCELLANEOUS
CIVIL APPLICATION NO. 142 OF 2023 NETIS TANZANIA
LIMITED.....APPLICANT VERSUS MRC MOTORS (T)
LTD.....1ST RESPONDENT MAHESH CHOUDHARY BAWTARAM T/A
MRC AUTO PARTS.....2ND RESPONDENT

RULING

4th & 22nd April, 2024 KAMANA, J. In this application, the applicant seeks an extension of time within which to file an application for setting aside an ex parte order dated 8 th June, 2023 in Civil Case No. 30 of 2021. She further craves the order of this Court that set aside the ex parte order. The application is supported by an affidavit deposed by Ms. Jacqueline Manaseh Ndanshau, the applicant's Human Resources and Legal Affairs Manager. It is further supported by an affidavit whose affiant is Ms. Angelista Daudi Nashon, learned Counsel, who was instructed to act on behalf of the applicant. The application was opposed 1 by a counter-affidavit deposed by Mr. Godfrey Basasingoye, learned Counsel for the respondents. The application was disposed of by way of oral submissions. Ms. Coletha Mamboya, learned Counsel represented the applicant and Mr. Basasingoye appeared for the respondents. Concerning an application for an extension of time, Ms. Mamboya prefaced by contending that in determining an application for an extension of time, a court must consider the reason for the delay, the length of the delay, whether the applicant was diligent, and the degree of prejudice to the respondent. On the reason for the delay, Ms. Mamboya expounded that the applicant's previous advocate failed to enter an appearance which led the Court to strike out the written statement of defence that was coupled with a counterclaim. She further attributed the delay to the applicant's previous advocate's failure to update her on the status of the case. While attributing the delay to the previous advocate's conduct, the learned Counsel was quick to admit that an advocate's negligence is not a good reason for extending time. However, Ms. Mamboya held the view that there are circumstances in which an advocate's negligence is negligible. In strengthening the argument, the learned Counsel cited the 2 case of Yusuph Same and Another v. Hadija Yusuph, Civil Appeal No. 1 of 2002-CAT (Unreported) where the Court of Appeal had this to state: Generally speaking, an error made by an advocate through negligence or lack of diligence is not sufficient cause for extension of time..... But there are times, depending on the overall circumstances surrounding the case, where extension of time may be granted even where there is some element of negligence by the

applicant's advocate....' Arguing further, Ms. Mamboya contended that the applicant was diligent as she made follow-ups in respect of her case. To her, the applicant's endeavor is also a good reason for extension of time. The learned Counsel cemented her argument by citing the case of Johan Harald Christer Abrahamsson v. Exim Bank (T) Ltd and Others, Civil Application No. 224/16 of 2018-CAT (Unreported) where it was held: 'Since the applicant was not idle but all along have been in this Court pursuing an incompetent application, that by itself constitutes good cause.' On the length of the delay, Ms. Mamboya argued that the delay was not inordinate as this application was filed barely two months after 3 the ex parte order. She contended that the applicant became aware of the impugned order on 14th August, 2023 after perusing the Court file and immediately she started to react by sacking the previous advocate and engaging a new one on 16th August, 2023. She explained further that on 17th August, 2023 a new advocate appeared before the Court and prayed orally to restore the struck-out pleadings. Following the prayer, she contended that on 24th August, 2023 the Court ordered that the applicant should file a formal application for setting aside an ex parte order and for restoration of the written statement of defence and counterclaim. As regards diligence, Ms. Mamboya observed that her client was diligent in making follow-ups regarding his case despite the fact that she had engaged an advocate. The learned Counsel invited the Court to consider several correspondences made by the applicant to the Court in a bid to ascertain the status of her case. Concerning the degree of prejudice, the learned Counsel held the view that the applicant stands to be prejudiced for the following reasons. One, it is the applicant who stands to lose more as she will be condemned unheard. Two, there is a counterclaim together with a written statement of defence which was struck out and this can lead to a multiplicity of suits should the applicant institute a separate suit based 4 on the counterclaim. Three, the main case is at the stage of tendering witness statements, therefore, if the application is allowed the applicant can be served with the said witness statements and proceed with cross-examination. Four, both parties have already incurred costs pursuing their rights. Ms. Mamboya summed up her arguments by urging the Court to exercise its discretion in a manner that ensures that there is a fair hearing of the suit. She bolstered the argument by citing the case of University of Dar es Salaam v. Dorothy Phumbwe, Miscellaneous Labour Application No. 348 of 2020. In his reply, Mr. Basasingoye prefaced by contending that for an application for an extension of time to be granted, the Court must be satisfied with the following. One, that the applicant has accounted for each day of delay. Two, the delay must not be inordinate. Third, the applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action he wants to take. Fourth, if the Court feels that there are other 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 buttressing his argument, the learned Counsel cited the case of Lyamuya Construction Company Limited v. Board of 5 Registered Trustees of Young Women Christian Association of Tanzania, Civil Application No.2 of 2010-CAT (Unreported). Concerning accounting for each day of delay, Mr. Basasingoye held the view that the applicant failed to account for each day of delay between 8th June, 2023 when the ex parte order was issued and 14th August, 2023 when the applicant alleged that she became aware of the ex parte order. He added further that the applicant has failed to account for each day between 14th August, 2023 (when she became aware of the ex parte order after the perusal done by Mr. Yona Masapa) and 10th October, 2023

when she filed this application. He augmented that since the perusal was done by Mr. Masapa, it was mandatory for Mr. Masapa to swear an affidavit to prove that he is the one who perused the Court file on 14th August, 2023. The learned Counsel went on to argue that the applicant was supposed to attach a letter requesting perusal of the Court file as proof that the Court file was perused on that day. He asserted that in the absence of such proof, the applicant has failed to prove that the Court file was perused on that day. He substantiated his argument by citing the case of Salome Kahamba

- v. Siril Augustine Mallya, Misc. Civil Application No. 557 of 2021 where this Court through Kisanya, J stated: 6 ‘Reading from the supporting affidavit, I am of the considered view that the submission that the applicant became aware of the dismissal order on 16th October, 2021 is not supported by evidence. In terms of paragraph 14 of the supporting affidavit, 16th October, 2021 is the date when the applicant instructed Legal Base Associates to prepare the application for restoration of the appeal. On the other hand, paragraphs 10, 11 and 12 of the supporting affidavit show that the information as to the dismissal order was conveyed to the applicant—by the newly engaged advocate one, Onesmo Kivumo before 16th October, 2021. She deposed on oath that, the said Onesmo Kivumo was engaged upon learning that the respondent was executing the decree of the District Court of Kinondoni. In the circumstances, it is clear that the affidavit of Onesmo Kivumo ought to have been appended to the chamber summons. As a result, it is not known as to when the applicant became aware of the dismissal order.’ Mr. Basasingoye contended further that the applicant has considerably failed to account for each day of delay between 16th August, 2023 when the new advocate was engaged to 10th October, 7 2023 when this application was filed. He added that the applicant had also failed to account for each day of delay between 17th August, 2023 when the oral application was made to 10th October, 2023 when the application was instituted. Concerning negligence on the part of the applicant’s previous advocate, Mr. Basasingoye contended that as a matter of principle, lack of knowledge about the status of the case or poor communication between the party to the case and his advocate is not a sufficient cause for an extension of time. Buttressing his argument, the learned Counsel cited the case of Salome Kahamba (Supra). He amplified that a failure to make a follow-up on the status of the case exhibits negligence on the party to the case. In this regard, the learned Counsel cited the case of Lim Han Yung and Another v. Lucy Treseas Kristensen, Civil Appeal No. 219 of 2019-CAT (Unreported) in which the Court of Appeal held that: ‘The appellants cannot throw the whole blame on their advocates. We think that a party to a case who engages the services of an advocate, has a duty to closely follow up the progress and status of his case. A party who dumps his case to an advocate and does not make any follow-ups of his case, cannot be heard complaining that he did not 8 know and was not informed by his advocate the progress and status of his case. Such a party cannot raise such complaints as a ground for setting aside an ex parte judgment passed against him.’ As regards diligence, Mr. Basasingoye contended that the applicant failed to demonstrate diligence in handling her case. He amplified that even though she alleged to know about the existence of the ex parte order on 14th August, 2023, the applicant did not file this

application up to 10th October, 2023. Concerning the cases cited by the learned Counsel for the applicant, Mr. Basasingoye distinguished them as inapplicable in the circumstances of this matter. Having heard the rival arguments and gone through the cited authorities, the issue is whether the application is meritorious or otherwise. Before examining the merits of this application, I think it relevant to go through the principles governing applications for extension of time. The current position of law is that Courts enjoy powers to grant or refuse an application for an extension of time within which to take some judicial steps. Such powers are discretionary and are exercised judiciously. The discretion entails the Court must make decisions that are logically sound, tracing their basis from the rules of law. This position was stated in the case of *Nicholaus Mwaipya v. The Registered Trustees of Little Sisters of Jesus of Tanzania*, CAT-Civil Application No. 535/8 of 2019 (Unreported). The Superior Court of the land stated: 'The power to extend time given under this provision is discretionary, but such discretion must be exercised judicially, meaning the making of a logically sound decision based on rules of the law. That requires the attention of the court to all the relevant factors and materials surrounding any particular case. These factors include the length of the delay, the reason for the delay, and whether or not there is an arguable case, among others.' In the case of *Mbogo v. Shah* [1968] EA 93 it was held as follows: 'All relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reason for the delay, whether there is an arguable case on the appeal and the degree of prejudice to the defendant if time is extended.'¹⁰ In the celebrated case of *Lyamuya Construction Company Limited v. Board of Trustees of YWCA*, CAT-Civil Application No. 2 of 2010 (unreported), the Court of Appeal of Tanzania illustrated key conditions upon which grant of extension of time should be based, and these conditions are as follows:

- (a) The applicant must account for all the period of delay; (b) The delay should not be inordinate; (c) The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action he intends to take; (d) If the Court feels that there are other 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. It is undisputed that on 8th June, 2023 when the suit was called on for the final pre-trial conference, neither the applicant nor her advocate entered an appearance. This moved the Court to strike out the applicant's written statement of defence and a counterclaim under the provisions of Order VIII Rule 20 of the Civil Procedure Code, Cap. 33 [RE.2019]. According to the said Order, an application for setting aside an ex parte order issued in such circumstances ought to be filed within 11 fourteen days from the date when the order was issued. In that case, the applicant was supposed to make an application for setting aside the ex parte order that struck out her written statement of defence and counterclaim no later than 22nd June, 2023. Ms. Mamboya has clarified in detail why her client failed to file an application for setting the ex parte order in question. To a large extent, the applicant has pointed a finger at her previous advocate. Assuming the advocate was sloppy and the applicant was diligent in pursuing the matter as Ms. Mamboya wanted this Court to believe, still I am of the view that the application for an

extension of time is bound to fail. As stated, an applicant for an extension of time is duty-bound to account for each day of delay. Assuming that the applicant was not aware of the ex parte order issued on 8th June, 2023 and she became aware of the same on 14th August, 2023, a prudent person would ask why the applicant failed to file an application for an extension of time when she became aware of the order and before 10th October, 2023. Again, Ms. Mamboya had a good story to justify the delay. She recounted that after the applicant became aware of the ex parte order on 14th August, 2023 had to fire her previous advocate and engage a new one on 16th August, 2023. She amplified that the new advocate on 17th August, 2023 appeared before Itemba, J, and made an oral application for setting aside the ex parte order. The ruling on the application was delivered on 24th August, 2023 when it was decided that the applicant should make a formal application. From 24th August 2023 to 3rd October, 2023 when the Chamber Summons was presented to the Court there are forty-one days. Further, from 24th August, 2023 to 27th September, 2023 when the two affidavits were deposed there are 34 days. These days were unaccounted for by the applicant as both affidavits are silent as to what was going on those days. In her reply to the counter affidavit, Ms. Nashon stated that the Court when issued its Ruling on 24th August, 2023 did not specify the time frame within which a formal application for an extension of time was to be made and that the applicant exercised diligence in filing the formal application before the case was called for necessary orders on 29th September, 2023. Amplifying, Ms. Mamboya asserted that since the time was not stated by the Court in its Ruling, the time limitation was sixty days as per paragraph 21 of Part III of the Schedule to the Law of Limitation Act, Cap. 89 [RE.2019]. It is my considered view that is a lame excuse. When the Court grants a permission to file an application, such permission does not override the existing laws particularly those relating to limitation of actions. It was incumbent for the applicant to justify the delay from 13 when the ex parte order was issued up to the time of filing the instant application. Though I assumed that the period from 8th June, 2023 when the ex parte order was issued to 24th September, 2023 when the Court issued a Ruling that the applicant should make a formal application was accounted for, I am neither impressed nor convinced by the applicant's assertion that the matter was filed on 10th October, 2023 as the Court did not specify the time within which to file a formal application. Such kind of argument demonstrates how the applicant was not diligent in pursuing the matter. It is untenable in my mind for a serious litigant who is out of time to spend more than forty days preparing an application for an extension of time. Based on those findings, the application for extension of time is dismissed with costs. Consequently, the application for setting aside ex parte order crumbles. Order accordingly. DATED at MWANZA this 22nd day of April, 2024. KS KAMANA JUDGE 14

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Prepared on 13 October 2026 · Esheria